

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7436
Summary Calendar

HERMAN BARNES,

Petitioner-Appellant,

v.

**EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,**

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-H-88-0223(P))

(April 15, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Appellant Herman Barnes sought federal habeas relief from his consecutive life sentences imposed for committing two capital murders in the course of an armed robbery. On appeal, he asserts that his convictions were based on a confession that followed an illegal arrest; that his uncounselled confession was involuntary; and that the state delayed unreasonably by keeping him in custody for over 80 hours before he was delivered to a magistrate for an

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

initial appearance. The district court adopted the magistrate judge's report that characterized appellant's issues as Fourth Amendment challenges precluded from federal review by Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037 (1976), and the court denied the petition. We affirm in part and vacate and remand for further proceedings in part.

We agree with the district court's ruling that Barnes had an ample opportunity to litigate and did in fact litigate in state court the Fourth Amendment issues embodied in the contentions noted above. Consequently, Stone v. Powell bars him from re-asserting those issues on collateral federal review. This portion of the trial court's disposition is affirmed.

More difficult are the questions of the voluntariness of Barnes's uncounselled confession when measured by the Fifth, Sixth and Fourteenth Amendments. In his pro se application for habeas relief, he asserted that he was held in a prolonged 80-hour detention "in-communicado" in order to "conduct[] custodial interrogations to solicit possible incriminating statements." Construing his petition liberally, as we are required to do, Barnes alleged facts sufficient to put the court on notice that he was challenging the voluntariness of his confession. Neither the magistrate judge nor the district judge considered issues raised by these allegations apart from their Fourth Amendment ramification, and on appeal, the state alleges that Barnes has not exhausted his state remedies concerning these issues. We are unable to resolve the possibility of exhaustion on the materials before us.

Consequently, we must vacate and remand for further proceedings in which the district court can determine whether the voluntariness issues here have been exhausted; and if so, the court can analyze those constitutional claims. Stone does not bar such issues in federal court. Withrow v. Williams, ___ U.S. ____, 113 S. Ct. 1745 (1993).

For these reasons, the judgment of the district court is **AFFIRMED** in part, and **VACATED** and **REMANDED** in part for further proceedings consistent with this opinion.