

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10603

JOE USSERY,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director, Texas Department
of Criminal Justice, Institutional Division

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(4:93-CV-781-A)

(May 4, 1995)

Before DAVIS and JONES, Circuit Judges, and COBB¹, District Judge.

PER CURIAM:²

Joe Ussery was convicted of robbery in Texas state court. The jury assessed punishment at ninety-nine years imprisonment and a \$3,000 fine. There was no direct appeal. Ussery filed two state habeas corpus petitions, both of which were denied without written opinion. Ussery then filed a habeas corpus petition in the district court. The district court denied relief on the basis that

¹ District Judge of the Eastern District of Texas, sitting by designation.

² 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ussery failed to show prejudice. This court granted a certificate of probable cause.

Ussery contends that he received ineffective assistance of counsel which effectively denied him his right to take a direct appeal. Specifically, Ussery alleges that he asked his trial counsel to take an appeal and that counsel did not file an appeal and also did not discuss the benefits of an appeal with him.

Ussery has shifted the factual ground on which he relies for relief. In his first state writ, Ussery alleged in his petition that he was denied effective assistance of counsel because counsel wrongly advised him that there were no meritorious issues on which to appeal:

Petitioner contends that he was incompetently advised by his counsel of record regarding the petitioner's request to appeal the judgment, sentence in this cause. Counsel stated to the layman petitioner that he shouldn't appeal, because there was nothing to appeal on, since petitioner's incarceration with help and assistance of the Daniel Unit law library and assistance of inmate jailhouse lawyers, he has since learned of all the errors herein complained of.

Ex parte Ussery, Application No. 23,375-01 at 7.³ Ussery's allegations in his federal habeas petition that his counsel failed to advise him of the benefits of an appeal and to file an appeal per Ussery's request contradicts his allegations in his first state

³ In his second state writ, Ussery sought to alter his factual basis for relief by making allegations similar to those he makes in his federal habeas petition:

At the conclusion of the trial, applicant informed his attorney . . . that he wanted to appeal. Said Counsel not only failed to give timely notice of appeal but said counsel also failed to counsel or discuss the benefits of an appeal with applicant. It was applicants earnest [sic] desire to appeal and he made this known to Attorney Creighton.

Ex parte Ussery, No.23,375-02 at 9.

habeas petition that he had discussed the merits of an appeal with his attorney, that his attorney told him that there were no meritorious issues to appeal, and, implicitly, that, based on this allegedly improper advice, he was persuaded not to pursue an appeal.

A defendant seeking habeas corpus relief cannot willy-nilly change his factual assertions to match his current claim for relief. Ussery is bound by his initial allegations in his state habeas petition in which he described the contents of his conversation with his attorney. Under that version of the facts, Ussery failed to state a claim and we decline to entertain an altered version of these facts in this federal habeas proceeding.

AFFIRMED.