

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-50227  
Summary Calendar

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MACK HARVEY COLEMAN,

Petitioner-Appellant,

VERSUS

RODNEY TAYLOR,

Respondent-Appellee.

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Appeal from the United States District Court  
For the Western District of Texas

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(92-CV-315)

(March 3, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Petitioner-Appellant Mack Harvey Coleman ("Coleman") was convicted by a jury of delivery of cocaine and sentenced to fifteen years imprisonment. He appeals the district court's decision denying his petition for a writ of habeas corpus. We affirm the district court's decision to deny the writ.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## FACTS AND PROCEDURAL HISTORY

In 1990, a jury in the 27th District Court of Midland County, Texas found Coleman guilty of delivery of cocaine, and the state trial court sentenced him to fifteen years imprisonment. His conviction was affirmed on direct appeal by the Third Court of Appeals of Texas. Coleman filed a state habeas petition, which the state trial court dismissed on the merits. The Texas Court of Criminal Appeals denied his application without written opinion.

Coleman filed a petition for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Texas, Waco Division, raising the same four issues as in his state habeas petition. The magistrate judge recommended dismissing the petition on its merits. After reviewing Coleman's objections and the record, the district court adopted the magistrate judge's report and recommendation, and denied the writ. After Coleman filed a notice of appeal, the district court granted a Certificate of Probable Cause for an appeal.

## STANDARD OF REVIEW

In considering a federal habeas corpus petition presented by a petitioner in state custody, we review the federal district court's findings of fact for clear error, but decide any issues of

law *de novo*. Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 990 (1993).

I. Is the sufficiency of Coleman's state indictment reviewable by this court?

Coleman argues that the indictment leading to his conviction was insufficient because it was not properly certified or authenticated. However, when the highest court of a state has held, expressly or implicitly, that the indictment was sufficient under state law, the inquiry on federal habeas review is at an end. Alexander v. McCotter, 775 F.2d 595, 598-99 (5th Cir. 1985). Coleman presented the defective indictment issue to the state court through his state habeas petition. The state trial court rejected the claim on the merits. Because the Texas Court of Criminal Appeals implicitly affirmed this finding by denying Coleman's application for habeas relief without written order, we do not review such decision.

II. Are Coleman's Fourth Amendment claims reviewable by this court?

Coleman argues that his arrest was illegal because the indictment did not contain probable cause supported by an oath or affirmation. This argument, however, is foreclosed by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), which held that a Fourth Amendment claim may not be litigated in federal habeas corpus proceedings if there has been an opportunity

to present the issue fully and fairly in state court proceedings, id. at 494. The opportunity to present a Fourth Amendment claim to the state trial and appellate courts, whether or not that opportunity is exercised or proves successful, constitutes an opportunity under Stone absent an allegation that the state process is "routinely or systematically applied in such a way as to prevent the actual litigation of [F]ourth [A]mendment claims on their merits." Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980). The petitioner bears the burden of pleading and proving the denial of the opportunity for a full and fair hearing. Davis v. Blackburn, 803 F.2d 1371, 1372 (5th Cir. 1986).

Coleman raised his claim of an illegal arrest on state habeas review. He has not suggested to us that the State has not provided an opportunity for a full and fair litigation of his claim. We need not consider Coleman's Fourth Amendment claim because he has failed to show that he has not been provided a full and fair opportunity to litigate the issue in state court.

III. Did the participation of military personnel in the police investigation violate the Posse Comitatus Act?

Coleman argues that the police violated the Posse Comitatus Act, 18 U.S.C. § 1385 (the "Act"), by using military personnel in their investigation. The Act provides:

[W]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise, to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385. Even if the activities in the instant case violated the Act, the extraordinary remedy of granting habeas relief is not warranted. In U.S. v. Wolffs, 594 F.2d 77 (5th Cir. 1979), we held that, although use of Army personnel in a criminal investigation may have violated the Act, the application of an exclusionary rule was unnecessary because there was no "widespread and repeated violations" of the Act, id. at 85. Although Coleman argues that he is not asking for an exclusion of evidence, he has not specifically stated his desired remedy. Since evidence obtained from a violation of the Act can be used to secure a lawful conviction, it defies logic to afford habeas relief on the basis of such a violation.

IV. Does the Texas Controlled Substances Act violate Article I of the U.S. Constitution?

Coleman argues that his confinement is illegal because the Texas Controlled Substances Act, Tex. Health & Safety Code Ann. §§ 481.001-481.205 (West 1992 & Supp. 1994), violates Article I of the U.S. Constitution. In the district court, Coleman argued that the Texas Legislature unconstitutionally delegated power to the Health Commissioner to define and enhance penalties under the Act, in violation of the U.S. Constitution's requirement of separation of powers. This argument is without merit. By its own terms, Article I of the U.S. Constitution mandating separation of powers does not apply to the states. See Whalen v. U.S., 445 U.S. 684, 689 n.4, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

## CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of Coleman's petition for a writ of habeas corpus.<sup>1</sup>

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<sup>1</sup>Coleman, by way of a pleading entitled "Petition for Protection Order", also challenges the legality of a detention for a parole violation and seeks "protection" therefrom. This issue was not raised in the district court and we do not address it. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).