

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**FILED**  
United States Court of Appeals  
Tenth Circuit

APR 19 1990

KEARY J. KIMBLE,  
Petitioner-Appellant,  
v.  
WL KAUTZKY and ATTORNEY GENERAL  
FOR THE STATE OF COLORADO,  
Respondents-Appellees.

ROBERT L. HOECKER  
Clerk

No. 89-1297  
(D. Colorado)  
(D.C. No. 88-B-1468)

KEARY J. KIMBLE,  
Petitioner-Appellant,  
v.  
WL KAUTZKY and DUANE L.  
WOODARD, Attorney General,  
Respondents-Appellees.

No. 89-1298  
(D. Colorado)  
(D.C. No. 89-B-0138)

ORDER AND JUDGMENT\*

Before MCKAY, ANDERSON and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Keary J. Kimble, appearing pro se, appeals the denial of two separate petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We affirm in part and vacate in part.

I.

The first petition, filed on September 14, 1988 (No. 89-1297 in this court), alleges that Mr. Kimble's speedy trial rights under the United States Constitution were violated when the state of Colorado failed to bring him to trial in 1982 within the ninety day period prescribed by Colo. Rev. Stat. §§ 16-14-1012-108 (1978), the Uniform Mandatory Disposition of Detainers Act (the "UMDDA"). The state trial court found that Mr. Kimble did make a written request on February 26, 1982, that he be brought to trial within the ninety days prescribed by the state statute. The court then ruled that Mr. Kimble waived his demand when he appeared in court, with counsel, on March 8, 1982, and allowed his jury trial to be set for July 6 or 7, 1982, without objection. R. Vol. I, Tab 7, Ex. A at 30-31. The court held that a further waiver occurred when Mr. Kimble allowed his case to go to trial in July without objection. The court of appeals affirmed. People v. Kimble, 692 P.2d 1142 (Colo. App. 1984), cert. dismissed, 701 P.2d 17 (Colo. 1985).

We affirm the district court's denial of this petition substantially for the reasons stated in the opinion of the district court, and the recommendation of the United States Magistrate. This state statute conferred no federal constitutional rights per se; and, more importantly, the state

courts, construing the state's own statute, have ruled that the statute was not violated in this case. We will not second guess that finding. Federal habeas corpus review of state convictions is limited to correcting errors of federal constitutional dimension. Mabry v. Johnson, 467 U.S. 504, 507 (1984). It is not available to review allegedly erroneous applications of state law. See Tucker v. Makowski, 883 F.2d 877, 881 (10th Cir. 1989); Hopkinson v. Shillinger, 866 F.2d 1185, 1200 (10th Cir.), adhered to on reh'g en banc, 888 F.2d 1286 (10th Cir. 1989).

Despite Mr. Kimble's allegations that he was prejudiced simply by being forced to go to trial, that the lapse of four or five months was presumptively prejudicial, and that his trial under these circumstances constituted an actual miscarriage of justice which should shock the conscience of the court, nothing in this record supports a claim that Mr. Kimble's Sixth Amendment rights to a speedy trial were violated. No allegations are made which would satisfy the requirements of Barker v. Wingo, 407 U.S. 514 (1972). See United States v. Padilla, 819 F.2d 952, 963 (10th Cir. 1987); United States v. Martinez, 776 F.2d 1481, 1483 (10th Cir. 1985).

Mr. Kimble also contends that the district court was without jurisdiction to rule on the magistrate's recommendation because Judge Babcock served on the state appellate court panel which reviewed Mr. Kimble's state court appeal. Mr. Kimble argues that the bias and prejudice provisions of 28 U.S.C. § 144 apply, so Judge Babcock was prohibited from proceeding. We disagree. We accept the state's position that Judge Babcock cannot be

considered biased or prejudiced simply because of information he received in a judicial capacity, United States v. Bond, 847 F.2d 1233, 1241 (7th Cir. 1988), or because he had previously participated in a ruling adverse to petitioner, United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976); see also United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979). Furthermore, the federal constitutional questions posed by the petition in this case are substantially different from the questions addressed by the Colorado Court of Appeals.

## II.

On January 25, 1989, Mr. Kimble filed a second habeas corpus action (No. 89-1298 in this court) which challenged the constitutionality of Colorado's sentencing laws. He acknowledged in the petition that he had not exhausted state remedies on that issue. On June 30, 1989, the United States Magistrate recommended that the petition be dismissed because of a failure to exhaust state remedies. On August 1, 1989, Mr. Kimble requested that the district court dismiss his petition without prejudice to refile it after he had exhausted his state remedies. The district court granted his motion that same day. R. Vol. I, Tab 5. On August 21, 1989, however, the district court entered a combined order on both of Mr. Kimble's petitions, denying relief and dismissing both petitions with prejudice. The only question on appeal in this case is whether the court erred in dismissing the second petition with prejudice in the order of August 21, 1989. The state argues that the order of August 21, 1989, was a conscious modification by

the district court of its August 1, 1989, order dismissing the petition without prejudice. The rationale for such a modification, and for dismissal with prejudice, is asserted by the state to be that the second petition could not be refiled in the future in any event without violating the abuse of the writ doctrine. See Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986); Rose v. Lundy, 455 U.S. 509, 520-21 (1982); Sanders v. United States, 373 U.S. 1, 17-19 (1963). While that reasoning may be correct (we do not pass on the point), we are unwilling to read it into the bare dismissal language contained in the district court's order of August 21, 1989. The petition was already dismissed, pursuant to the court's August 1, 1989, order and was technically no longer before the district court. Under the circumstances, the question of improper successive writs will have to be addressed at some future time, if Mr. Kimble chooses to attempt to pursue the subject of the unconstitutionality of Colorado's sentencing law in a later section 2254 proceeding.

Based on the foregoing, that portion of the district court's August 21, 1989, order dismissing the petition in No. 89-B-0138, relating to the appeal in No. 89-1298 in this court, is vacated insofar as it dismisses that action with prejudice.

### III.

For the reasons stated, the judgment of the district court in No. 89-1297 is AFFIRMED, and the judgment of the district court in No. 89-1298 is VACATED insofar as it dismisses with prejudice the

petition filed in No. 89-B-0138 in the district court. The prior dismissal of that petition without prejudice stands. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephen H. Anderson  
Circuit Judge