

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JAN 22 1991

JOHN MICHAEL HOOKER,
Petitioner-Appellant,

v.

JAMES SAFFLE, Warden, and
ROBERT H. HENRY, Attorney General
of the State of Oklahoma,
Respondents-Appellees.

ROBERT L. HOECKER
Clerk

No. 90-6222
(D.C. No. CIV-90-366-P)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, 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. Therefore, the case is ordered submitted without oral argument.

Petitioner-appellant John Michael Hooker is an Oklahoma state prisoner who appears pro se and in forma pauperis seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. In his petition for writ of habeas corpus, petitioner attacks his convictions in Case Nos. CRF-71-396 and CRF-71-398 in the District Court of Oklahoma County. He was sentenced on June 7, 1971 to

* 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.

forty years' imprisonment for each conviction, with the sentences to run concurrently. On February 1, 1980, the then-governor of Oklahoma commuted petitioner's sentences to twenty-five years' imprisonment. On January 27, 1981, a state trial judge granted petitioner's application for post-conviction relief. His sentence in Case No. CRF-71-396 was modified to twenty years' imprisonment. Petitioner was also given credit on that sentence for five years' imprisonment he had previously served on another sentence that was ordered vacated.

In response to this habeas petition, respondents-appellees James Saffle and Robert Henry filed a motion to dismiss, alleging petitioner did not meet the "in custody" requirement as to the convictions he is now attacking. Respondents argued a court cannot assume jurisdiction over a habeas petition unless the petitioner is in custody under the conviction he challenges. 28 U.S.C. §§ 2241(c)(3), 2254(b); Rule 1(a)(1), Rules Governing Section 2254 Cases. They noted petitioner is presently in custody for his conviction in Case No. CRF-88-1939 in the District Court of Oklahoma County. He received a sentence of death for this first degree murder conviction. Respondents argued the district court cannot consider this petition because petitioner has completely discharged the sentences he now attacks.

The district court granted the motion to dismiss on June 7, 1990. Before reaching the merits of this appeal, we must determine whether a certificate of probable cause should be granted. After carefully reviewing the record, we conclude petitioner has made a "substantial showing of the denial of a

federal right" necessary for the issuance of a certificate of probable cause. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

On appeal, petitioner argues he is in fact in custody for the convictions in Case Nos. CRF-71-396 and CRF-71-398 because these convictions were used for enhancement of the sentence he received on his present conviction. In sentencing petitioner for his conviction in Case No. CRF-88-1939, the jury found four aggravating circumstances warranting the imposition of the death penalty: (1) petitioner was previously convicted of a felony involving the use or threat of violence to the person (the convictions now challenged in the habeas petition); (2) petitioner knowingly created a great risk of death to more than one person; (3) the murder was especially heinous, atrocious, or cruel; and (4) the existence of a probability petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

In the recent decision Maleng v. Cook, 109 S. Ct. 1923, 1926 (1989) (per curiam), the Supreme Court held that when a sentence has fully expired, the possibility that that conviction will be used to enhance the sentences imposed for any subsequent crimes is not sufficient to render a petitioner "in custody" for purposes of a habeas petition. The Court, however, left open the question of to what extent a petitioner may challenge an expired conviction in an attack on a conviction for which the petitioner is in custody, when the latter conviction has been enhanced by the prior one. Id. at 1927.

This court held in Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir.), cert. denied, 111 S. Ct. 212 (1990), that although a petitioner cannot directly attack an expired conviction, he may direct his attack toward the sentence under which he is in custody, arguing it has been enhanced by a prior, unconstitutional conviction. See also Clark v. Pennsylvania, 892 F.2d 1142, 1145 (3d Cir. 1989), cert. denied sub nom. Castille v. Clark, 110 S. Ct. 3229 (1990); Taylor v. Armontrout, 877 F.2d 726, 727 (8th Cir. 1989). The court in Gamble further noted a pro se litigant's petition challenging an expired conviction "should be read as asserting a challenge to his present sentence to the extent that it has been enhanced by the allegedly invalid prior conviction." 898 F.2d at 118 (citing Maleng, 109 S. Ct. at 1927); see also Feldman v. Perrill, 902 F.2d 1445, 1448-49 (9th Cir. 1990).

We agree, however, with the district court's conclusion that this petition should not be construed in this manner. That court properly noted that "rendering this petition as an attack upon Petitioner's later conviction [in Case No. CRF-88-1939] might have the effect of barring Petitioner from presenting other objections to the latter conviction that were not included in this petition. Rule 9(b), Rules Governing Section 2254 Cases."¹ Rule 9(b) requires a petitioner to assert all his federal challenges to his

¹ Rule 9(b), Rules Governing Section 2254 Cases, states:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted abuse of the writ.

conviction in one petition. Certainly petitioner does not intend this to be his sole federal attack on his death sentence and it would not be to his benefit to do so. All of petitioner's federal attacks against this conviction should be considered in one habeas petition. See Sanders v. United States, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation"); Jacks v. Duckworth, 857 F.2d 394, 398-99 (7th Cir. 1988), cert. denied, 489 U.S. 1017 (1989) (law disfavors successive habeas petitions). We therefore conclude the district court did not err in concluding petitioner is not in custody under the convictions attacked in this case and thus it did not have jurisdiction to consider the petition. We agree with the district court that "[t]his dismissal does not prevent the Petitioner from filing an appropriate petition attacking his current conviction."

Petitioner also contends the district court erred by permitting respondents to file a motion to dismiss rather than a formal answer to his habeas petition. We find this assertion to be without merit. We thus **AFFIRM** the rulings of the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge