Capital Defense Journal

Volume 9 | Issue 1 Article 7

Fall 9-1-1996

FELKER v. TURPIN 116 S. Ct. 2333 (1996) United States Supreme Court

III. Impact in Virginia

Because of the imposition of the new federal *habeas* rules under the Antiterrorism and Effective Death Penalty Act,[31] it is not clear what impact, if any, this decision will have on *habeas* cases litigated under the new regime. The Act puts such strict time limits on the filing of *habeas corpus* petitions that future petitioners will almost certainly be unable to replicate the actions of Lonchar.[32] The holding of the case may prove useful, however, to counsel who, in other contexts, are facing the dismissal of their case on supposedly "equitable" grounds.

Summary and analysis by:
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31 Pub. L. 104-132, 110 Stat. 1214 (1996).

32 For an in-depth discussion of the ramifications of the new law, *see* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

FELKER v. TURPIN

116 S. Ct. 2333 (1996)
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FACTS

On November 23, 1981, Ellis Wayne Felker met Joy Ludlam, a cocktail waitress. He induced her to visit him the next day by offering her a job at a business he claimed to own. Ms. Ludlam was found dead in a creek some two weeks later. The medical examiner reported she had been beaten, raped, sodomized, and then strangled. Hair and other incriminating fiber evidence linked the victim to Felker. In addition, a witness placed the victim's car at Felker's home the day she disappeared.[1]

Felker, who was on parole for rape at the time of the murder, was convicted of capital murder, rape, aggravated sodomy, and false imprisonment and was sentenced to death on the capital murder charge. His conviction and death sentence were affirmed on direct appeal by the Supreme Court of Georgia,[2] and the United States Supreme Court denied his petition for *certiorari*.[3] The state trial court denied collateral relief, the Supreme Court of Georgia refused to issue a certificate of probable cause to appeal the denial, and the United States Supreme Court again denied *certiorari*.[4]

Felker then filed his first federal *habeas* petition, alleging five substantive claims,[5] but the district court denied the petition and the Eleventh Circuit Court of Appeals affirmed the denial.[6] Felker then filed a second state petition a few days before his scheduled execution, which was denied. On May 2, 1996, the week of his scheduled execution, Felker filed for a stay of execution and a motion for leave to file a second federal *habeas* petition. He sought to raise two new claims: the first that the *voir dire* and jury instructions had been constitutionally invalid, and the second that new forensic evidence "so discredited the State's testimony at trial that petitioner had a colorable claim of factual innocence."[7]

Between Felker's first and second federal *habeas* petitions the Antiterrorism and Effective Death Penalty Act of 1996 (ATEDA)[8] had been signed into law. The court of appeals thereafter held that Felker's second petition did not meet the requirements of the Act, nor would it have met pre-Act requirements. The court of appeals therefore denied both motions.[9] Felker then filed what he styled a "Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution."[10] The Supreme Court granted the stay and *certiorari*, limiting briefing to three issues: (1) the extent to which the provisions of ATEDA apply to an original petition for *habeas corpus* filed in the Supreme Court, (2) whether application of ATEDA suspended the writ of *habeas corpus* in this case, and (3) whether Title I of ATEDA, especially § 106(b)(3)(E), constitutes an unconstitutional restriction on the jurisdiction of the Supreme Court.[11]

HOLDING

The United States Supreme Court held, first, that although Title I does impose new restrictions on the Supreme Court's authority to grant relief, it did not repeal their authority to entertain **original** *habeas* petitions.[12] Second, the Court held that Section 106(b)'s "gatekeeping"

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1 *Felker v. State*, 314 S.E.2d 621, 627-628 (Ga. 1984).

2 *Id.* at 649.

3 *Felker v. Georgia*, 469 U.S. 873 (1984).

4 *Felker v. Zant*, 502 U.S. 1064 (1992).

5 Felker's claims were: (1) that the state's evidence was insufficient to convict him; (2) that the state withheld exculpatory evidence; (3) that there was ineffective assistance of counsel at sentencing; (4) that the state improperly used hypnosis to refresh a witness' memory; and (5) that the state violated the double jeopardy clause by using Felker's 1976 conviction as evidence at trial. *Felker v. Turpin*, 116 S. Ct. 2333, 2336 (1996).

6 *Felker v. Thomas*, 52 F.3d 907 (1995).

7 *Felker v. Turpin*, 116 S. Ct. at 2337.

8 Pub. L. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244, 2253-54, 2261-66).

9 *Felker v. Turpin*, 83 F.3d 1303 (11th Cir. 1996).

10 *Felker v. Turpin*, 116 S. Ct. at 2337.

11 *Id.*

12 *Id.*

function applies only to those petitions filed in district court.[13] Third, the Court held that the writ had not been suspended in violation of the U.S. Constitution, Article I, § 9, clause 2,[14] and fourth, that, applying the new law to Felker, his petition did not warrant relief.[15] The petition for an original writ of *habeas corpus* was denied, while the petition for *certiorari* was dismissed for want of jurisdiction.[16]

ANALYSIS/ APPLICATION IN VIRGINIA

I. ATEDA

This case was the first to discuss the new *habeas corpus* restrictions under the Antiterrorism and Effective Death Penalty Act of 1996 (ATEDA).[17] Consequently, a brief overview of the provisions of the Act implicated in this case is necessary to its understanding:[18] Subsections 106(b)(1) and (b)(2) apply to the dismissal of second or successive petitions, such as Felker's, while subsection 106(b)(3) serves a "gatekeeping" function.[19] In order to file a second or successive petition in **district court**, the petitioner must first convince a three-judge panel of the court of appeals (the "gatekeepers") that his petition makes a *prima facie* showing of compliance with subsections 106(b)(1) and (b)(2). If the motion for leave is denied at this stage, it is not appealable to any court, including the Supreme Court. Should the motion be granted, the petitioner may then file his *habeas* petition in district court, which will again scrutinize it for compliance with 106(b)(1) and (b)(2) before looking to the substantive claims.

Subsection 106(b)(1) states that a claim that was presented in a prior application must be dismissed. Subsection (b)(2), on the other hand, provides that a new claim must either (A) rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,[20] that was previously unavailable" or (B) present evidence of **factual innocence**[21] which could not have been discovered previously by the exercise of due diligence. It should be remembered that this is the standard just to avoid dismissal, not to succeed on the actual claim.

II. ATEDA Does Not Preclude the Filing of an Original Writ

The Court first turned to the question of whether ATEDA precluded the Court from considering an original writ of *habeas corpus*.[22] The Court found the question was controlled by a Reconstruction-era case, *Ex parte Yerger*.[23] In *Yerger*, Congress had revoked the appellate jurisdic-

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[13] *Id.* at 2339.

[14] *Id.* at 2340. The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, cl. 2.

[15] *Felker*, 116 S. Ct. at 2340.

[16] *Id.* at 2341.

[17] Pub. L. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244, 2253-54, 2261-66).

[18] For an in-depth look at ATEDA and its implications, *see* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under The Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

[19] *Felker*, 116 S. Ct. at 2337. Subsection 106(b)(1), (b)(2) and (b)(3) amended 28 U.S.C. § 2244(b) to read:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
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> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
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> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
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> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
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> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
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> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
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> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

[20] The Court left undecided a number of issues implicit in the text of 106(b)(1) and (2). Subsection (b)(2)(A), for example, is an obvious reference to the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *See also* the case summary of *O'Dell v. Netherland*, Capital Defense Journal, this issue.

What if the applicant shows that the claim does **not** rely on a new rule? It is often unclear whether a case is a new rule or merely a reinterpretation of an old rule. Indeed, what if the new claim relied upon has been held, after the first petition, not to be a new rule by the United States Supreme Court? These and other issues raised by the sloppy drafting of ATEDA may provide counsel with access to federal court. Expert assistance on these matters is available from the Virginia Capital Resource Center in Richmond, Virginia.

[21] Another undecided question is whether this language eliminates the "innocent of the death penalty" grounds for appeal, which had previously been approved as a basis permitting a successive petition. Under this defense, relief will be granted if the defendant can demonstrate by clear and convincing evidence that but for constitutional error, no reasonable juror would have found him eligible for the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992).

[22] As opposed to the appellate review of a second petition, which could be foreclosed by the "gatekeeper" provision of the Act, subsection 106(b)(3). (*But see* discussion of concurring opinions, *infra*).

[23] 75 U.S. 85 (1869).

tion of the Court to consider certain state *habeas* petitions. The *Yerger* court declined to find by implication that Congress had revoked the Court's power to entertain original *habeas* petitions. Likewise, the Court in *Felker* could find no mention in the Act of the Supreme Court's authority to entertain original petitions; therefore it declined to find the power repealed by implication.[24]

The Court then proceeded to delineate which parts of subsection 106 applied to original petitions for *habeas* filed in the Supreme Court. Because the language of 106(b)(3), the "gatekeeping" provision, specifies that it applies only to applications "in the district court," the Court reasoned that the gatekeeping provision would not apply to original petitions. "There is no such limitation, however, on the restrictions on repetitive and new claims imposed by subsections 106(b)(1) and (2)."[25] The Court declined to rule, however, on whether it was bound by these provisions, saying only that "they certainly inform our consideration of original *habeas* petitions."[26] Thus, it appears likely that the Supreme Court will apply the 106(b)(1) and (2) restrictions to writs filed with the Court as original petitions.

The Court also addressed the issue of whether ATEDA deprived the Court of appellate jurisdiction in violation of Article III, § 2 of the Constitution. That section provides that, except for those few areas in which the Supreme Court has original jurisdiction, it shall have "[i]n all other Cases . . . appellate Jurisdiction."[27] The Court recognized that the gatekeeping provisions of the Act did indeed diminish the Court's appellate jurisdiction, but found that Congress had the right to do so under the very language of Article III, § 2: "the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."

Although the retention by the Supreme Court of the power to grant original *habeas* petitions salvages some remnants of the writ, the requirements for actually being granted review are so difficult to meet that the victory for petitioners may prove to be a hollow one.

III. The Act Does Not Suspend the Writ of *Habeas Corpus*

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended."[28] Felker argued that the provisions of the Act effectively suspended the writ. The Court disagreed.

The Court first pointed out that the writ historically was much more restricted in scope than it has been in the latter half of this century. The Court then opined that the "gatekeeping" requirement "simply transfers from the district court to the court of appeals a screening function" which already existed.[29] As for the restrictions on successive petitions in 106(b)(1) and (2), the Court characterized them as within the scope of the evolving "abuse of the writ" doctrine, and therefore not a suspension of the writ. The Court did not explain exactly why being within the scope of an evolving statutory doctrine prevented a statute from violating the United States Constitution. The driving force, however, seems to be deference to Congress: "we have long recognized that . . . judgments about the proper scope of the writ are normally for Congress to make."[30] Further, having decided that its original jurisdiction was untouched by the Act, and having recognized the Article III power of Congress to restrict its appellate jurisdiction, the Court's conclusion that the writ was not suspended was not surprising.

IV. Grant of an Original Writ Only in Exceptional Circumstances

The Court quickly dispensed with Felker's claims, despite the fact that he was claiming that new evidence would prove his factual innocence. The Court quoted Supreme Court Rule 20.4(a), which reads in part, "To justify the granting of a writ of *habeas corpus*, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted." Without going into any analysis of Felker's claims, the Court ruled that he had not met these requirements and denied his petition for an original writ.

This does not bode well for future petitioners to the Court via original writs. Felker's claim of factual innocence seems to at least arguably fulfill the requirements for a successive petition under subsection 106(b)(2)(B) of the Act, yet did not even warrant a cursory review of its merits by the Court. One wonders if any petitioner will be able to show "exceptional circumstances" sufficient to move the Court to a serious review of his claim.

V. The Concurrences

There were two three-justice concurrences in this case, one written by Justice Stevens, the other by Justice Souter. Each contains some hints that there might be a way to circumvent the "gatekeeping" provisions of the Act in an appropriate case.

First, Justice Stevens, joined by Justices Souter and Breyer, argued that pursuant to its power of interlocutory review, the Supreme Court could review proposed dispositions referred to them by a court of appeals. Second, according to Stevens, the Supreme Court retains jurisdiction to directly review gatekeeping orders pursuant to the All Writs Act.[31] Finally, he argued that the retention of the original writ gives the Court "the functional equivalent of direct review."[32]

Justice Souter, joined by Justice Stevens and Justice Breyer, recited a similar list of possible exercises of appellate jurisdiction, then suggested that just because the Act does not violate the Exceptions Clause on its face or in this application, does not foreclose the possibility that it might be found unconstitutional in other circumstances. Justice Souter thought that "[t]he question could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard."[33]

Although the concurrences only offer a glimmer of hope for appellate review, these opportunities should be exploited in the proper circumstances, such as if the Circuits adopt widely divergent standards in implementing section 106. *Felker* is only the beginning of litigation over the restrictive provisions of ATEDA. Attorneys seeking post-conviction relief must stay abreast of developments as they unfold.

Summary and analysis by:
Daryl L. Rice

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24 *Felker*, 116 S. Ct. at 2337.
25 *Id.* at 2339.
26 *Id.*
27 U.S. Const. art. III, § 2.
28 U.S. Const. art. I, § 9, cl. 2.
29 *Felker*, 116 S. Ct. at 2340.
30 *Id.* (citations omitted).
31 28 U.S.C.A. § 1651. The All Writs Act reads in part: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a).
32 *Felker*, 116 S. Ct. at 2341.
33 *Id.* at 2342.