Capital Defense Journal

Volume 11 | Issue 1 Article 7

Fall 9-1-1998

Calderon v. Thompson 118 S. Ct. 1489 (1998)

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I. Facts

The Supreme Court of the United States made its ruling on facts summarized as follows: Ginger Fleischli ("Fleischli") carried on a sexual relationship with David Leitch ("David") in 1981, sharing his Laguna Beach studio. In August of that year Fleischli moved in with David's ex-wife, Tracey Leitch ("Tracey"), and defendant, Thomas Thompson ("Thompson"), moved in with David. On September 11, 1981, Fleischli and Tracy encountered Thompson and David in a restaurant, where Fleischli told Tracey that if left alone with Thompson, she feared he would kill her. The foursome proceeded to a bar, but soon split up, with Fleischli and Thompson remaining at the bar.[1]

The couple were joined by a third man, Afshin Kashini ("Kashini"), who drank with them and smoked hashish with Thompson. At 1:00 a.m. the trio went to Thompson's apartment. At 2:00 a.m. Fleischli left to buy some soda and soon after Kashini departed. Kashini returned to retrieve a pack of cigarettes he had left in the apartment, but was not allowed in by Thompson, who handed him the cigarettes through the open door. Fleischli was not seen alive again.[2]

On September 14, 1981, police found the buried body of Fleischli in a field outside of Laguna Beach, California. Fleischli had been stabbed five times near the right ear. In addition to the stab wounds, bruising was evident on Fleischli's ankles, palms and left wrist. Fleischli's right wrist had been crushed. At the time her body was found, Fleischli was wearing a shirt and bra, which had been cut in front and pulled down to her elbows, and jeans. An autopsy provided no evidence of vaginal tearing or bruising, but did reveal the presence of semen. Fleischli's body was wrapped in a blanket, sleeping bag and rope; her head was further wrapped with two towels, a sheet, her jacket and duct tape.[3]

The police found evidence linking Fleischli's body to the Laguna Beach studio apartment, David Leitch's car and the persons of David Leitch and Thomas Thompson. This evidence included fibers on the body of Fleischli which matched those found at the apartment, semen found on the body of the victim matching the blood type of the defendant, footprints matching shoes worn by David Leitch, and blood stains on the floor of the Laguna Beach apartment matching the victim's blood type.[4]

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1. Calderon v. Thompson, 118 S. Ct. 1489, 1494 (1998).
2. *Thompson*, 118 S. Ct. at 1494.
3. *Id.* at 1495.
4. *Id.*

On September 26, 1981, Thompson was arrested in Mexico.[5] On November 4, 1983, an Orange County Superior Court jury convicted Thompson of murder and recommended the death penalty, available under California law by the "special circumstance" finding that a murder occurred during the commission of a rape.[6]

The death sentence was affirmed on direct appeal.[7] Before exhausting his state habeas options, Thompson filed a federal habeas petition with a principal claim of ineffective assistance of counsel.[8] The United States District Court for the Central District of California granted relief as to the rape conviction and death sentence.[9] The Court of Appeals for the Ninth Circuit reversed the district court's grant and the United States Supreme Court denied Thompson's petition for writ of certiorari.[10] In a successive state habeas petition, permitted under California law,[11] Thompson alleged new evidence invalidating the rape conviction, claiming consensual sex with Fleischli. The California Supreme Court denied this petition on July 16, 1997.[12]

Thereafter, Thompson moved the Ninth Circuit to recall its mandate denying habeas relief.[13] After advising the full court of the motion, and hearing no requests for en banc consultation, the three judge panel denied the motion on behalf of the Ninth Circuit on July 28, 1997.[14] During this process, Thompson also filed a Rule 60(b) motion, citing new consensual sex evidence he had also raised in one of his successive state habeas petitions.[15] The district court denied Thompson's Rule 60(b) motion on July 25, 1997.[16] On July 30, 1997, the Ninth Circuit voted to consider en banc whether to recall the mandate it earlier issued denying habeas relief and scheduled oral arguments for August 1.[17] Meanwhile, California had conducted a clemency review, denied clemency, and set an execu-

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5. *Id.*

6. *Thompson*, 118 S. Ct. at 1495. Virginia law is similar, but not identical to California law when a murder is accompanied by a rape. Section 18.2-31(5) of the Virginia code states that the following offense constitutes capital murder: "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape . . ." VA. CODE ANN. § 18.2-31(5) (Michie Supp. 1998). Virginia law requires a further finding of vileness or future dangerousness for death sentence eligibility. VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 1998).

7. *Thompson*, 118 S. Ct. at 1495.

8. *Id.* at 1495-96.

9. *Id.* at 1496.

10. *Id.*

11. Virginia allows only one state habeas petition and the petition must include all of the petitioner's claims. The habeas petition is to be filed no more than six months after habeas counsel is appointed. Habeas counsel is to be appointed no more than thirty days after the defendant has exhausted trial appellate issues.

12. *Thompson*, 118 S. Ct. at 1496.

13. *Id.*

14. *Id.* at 1496-97.

15. *Id.* at 1496.

16. *Thompson*, 118 S. Ct. at 1496.

17. *Id.* at 1497.

tion date.[18] Two days before Thompson was to be executed, the Ninth Circuit recalled its mandate and granted habeas relief to Thompson, citing *en banc* procedural difficulties in its internal notification process.[19] The United States Supreme Court granted California's certiorari petition and later ordered the mandate denying relief to be reinstated.[20]

II. Holding

In a five to four ruling, the United States Supreme Court held that a United States Court of Appeals has an inherent power to recall its mandates, subject only to review for an abuse of discretion.[21] The Supreme Court held that the Ninth Circuit committed an abuse of discretion when it recalled its mandate denying federal habeas corpus relief to Thompson.[22] The Court stated that the Ninth Circuit had not acted to avoid a miscarriage of justice because the record failed to show actual innocence of the crime or innocence of the death penalty.[23]

III. Analysis/Application in Virginia

A. AEDPA's Bar on Successive or Second Federal Habeas Applications

In evaluating the Rule 60(b) motion containing new evidence allegations, the United States Supreme Court decided whether the bar on successive federal habeas petitions found in the Antiterrorism and Effective Death Penalty Act ("AEDPA") invalidated the Ninth Circuit's action. Section 2244(b)(1) provides that "[a] claim presented in a second or subsequent habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."[24] Section 2244(b)(2) provides that "[a] claim presented in a second or successive application under section 2254 that was not presented in a prior application shall be dismissed."[25]

The Court held that a petitioner's motion to recall a mandate should be regarded as a second or successive application with respect to 28 U.S.C.A. § 2244(b).[26] By granting such a motion, a circuit court's action had to conform

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18. *Id.*

19. *Id.* at 1497. The court cited two reasons for recalling the earlier mandate: (1) certain procedural misunderstandings prevented the court from calling en banc review of the underlying decision before issuing the mandate denying relief, and (2) the decision of the original panel would lead to a miscarriage of justice. *Id.*

20. *Thompson*, 118 S. Ct. at 1498.

21. *Id.* When reviewing on the basis of an abuse of discretion, the reviewing court should afford the lower court the greatest level of deference with regard to the lower court's findings. *Id.*

22. *Id.* at 1506.

23. *Id.* at 1505-06.

24. 28 U.S.C. § 2244(b)(1) (Supp. 1997). Section 2254 outlines the federal court remedies for persons seeking habeas relief while in state custody.

25. 28 U.S.C. § 2244(b)(2) (Supp. 1997).

26. *Thompson*, 118 S. Ct. at 1500.

with section 2244(b)(1) if the motion was based on old claims or section 2244(b)(2) if the motion was based on new claims.[27] The Supreme Court distinguished the position, found in Thompson's case, where the court recalled the motion on its own initiative. Nevertheless, the Court held that recalling the mandate could still be barred if "the court consider[ed] new claims or evidence presented in successive application for habeas relief."[28]

In *Thompson*, the United States Supreme Court found that the Ninth Circuit had been careful to state that its recall action stemmed exclusively from Thompson's first habeas petition, not the new evidence allegations found in his Rule 60(b) motion or motion to recall the mandate.[29] In light of this finding, the Court held that the Ninth Circuit's recall did not violate the AEDPA provision barring second or successive habeas corpus applications.[30]

B. The Power to Recall a Mandate and the Propriety of the Ninth Circuit's Action

The United States Supreme Court then held that circuit courts have an inherent power to recall their mandates, subject only to review on an abuse of discretion standard.[31] However, the Court then stated that a "court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."[32] This holding brought back into consideration the issue of Thompson's new evidence attacking the rape conviction. This resulted because the Court's habeas jurisprudence limits "miscarriage of justice" to cases where a prisoner can demonstrate either innocence of the offense or innocence (absence of eligibility) of the death penalty.[33]

The Supreme Court's explanation of its jurisprudence on this issue provides Virginia attorneys with important information when new evidence is discovered suggesting innocence with respect to either the capital murder offense or the sentence of death (death penalty eligibility). The AEDPA text on successive petitions recognizes only innocence of the offense as an exception to the bar of second or successive federal habeas corpus petitions.[34] Section 2244(b)(2)(B) provides that:

> [a] claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed unless--. . . (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

27. *Id.*

28. *Id.* A court's sua sponte action cannot subvert section 2244(b)(2), which bars claims presented in second or successive habeas applications.

29. *Id.*

30. *Thompson*, 118 S. Ct. at 1500.

31. *Id.* at 1498.

32. *Id.* at 1501-02.

33. *Id.* at 1502-03.

34. *Thompson*, 118 S. Ct. at 1502.

> evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty *of the underlying offense.*[35]

The innocence of the death penalty exception does not appear in the text of AEDPA.

Nevertheless, the United States Supreme Court recognized both innocence of the underlying offense and innocence of the death penalty doctrines when it held Thompson ineligible for relief under his new evidence allegation, finding that he had not proved either.[36] The Court's utilization of both standards is an important federal habeas corpus jurisprudence development.[37]

C. Future Implications of Calderon v. Thompson

The Supreme Court's miscarriage of justice standard allowing second or successive habeas applications stems from two cases decided in the '90s. *Schlup v. Delo*[38] provided the standard required to be met when the prisoner claims innocence of an underlying offense. The petitioner must demonstrate through reliable evidence that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[39] *Sawyer v. Whitley*[40] set the standard of proof when the petitioner claims innocence of the death penalty: "'by clear and convincing evidence' that no reasonable juror would have found [the petitioner] eligible for the death penalty in light of the new evidence."[41]

Ambiguity exists, as the Supreme Court noted, when the new evidence indicates the defendant's innocence of the death eligibility predicate factor.[42] Thompson had been convicted of the offenses of murder and rape and the jury had also found the rape as a special circumstance, making him eligible for a sentence of death.[43] This circumstance raises both the question of innocence of

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35. 28 U.S.C. 2244(b)(2) (Supp. 1997)(emphasis added). Congress used language from two standards found in the Court's jurisprudence when formulating this section of AEDPA. Congress used the test formulated in *Sawyer v. Whitley*, 505 U.S. 333 (1992), of clear and convincing evidence for the standard of actual innocence of the underlying offense found in *Schlup v. Delo*, 513 U.S. 298 (1995).

36. *Thompson*, 118 S. Ct. at 1506. The Court analyzed the second innocence exception (innocent of the death penalty) as part of a determination of whether the Ninth Circuit abused its discretion, rather than in the context of a successive habeas petition. As a practical matter, however, such analysis would be meaningless if the court had concluded that the exception had been completely eliminated by its omission from AEDPA. Therefore, Virginia lawyers have both innocence doctrines at their disposal.

37. *Id.* Federal habeas counsel traditionally have greater resources at their disposal than state habeas counsel. Therefore, it is more likely that counsel at this level will uncover new evidence suggesting their client's innocence of the offense or innocence of the death penalty.

38. 513 U.S. 298 (1995).

39. Schlup v. Delo, 513 U.S. 298, 326-27 (1995).

40. 505 U.S. 333 (1992).

41. *Thompson*, 118 S. Ct. at 1503 (quoting Sawyer v. Whitley, 505 U.S. 327, 348 (1992)).

42. *Id.* at 1503.

43. *Id.* at 1495.

an underlying offense and eligibility for a death sentence. Finding that Thompson's claim failed under both approaches, the Court left open the question of what standard, the *Schlup* "more likely than not" or the *Sawyer* "clear and convincing," would be appropriate in this case.[44]

While the Supreme Court holding interpreted and dealt with California capital murder law, Virginia's statutes are similar. In fact, the argument that the *Schlup* standard should apply in a situation like Thompson's should be stronger in Virginia. That is because rape is a component of the "underlying offense" of capital murder under Virginia law.

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44. *Id.* at 1503.