

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAR 14 2005

PATRICK FISHER
Clerk

JIMMIE RAY SLAUGHTER,

Petitioner,

v.

MIKE MULLIN, Warden,
Oklahoma State Penitentiary,

Respondent.

No. 05-6049

THE INNOCENCE PROJECT,

Amicus Curiae.

ORDER

Before **KELLY, HENRY** and **MURPHY**, Circuit Judges.

This matter is before the court on Jimmie Ray Slaughter's Emergency Application for Leave to File a Second Habeas Corpus Petition¹ and accompanying Emergency Application for a Stay of Execution.² Because Slaughter has not made

¹See 28 U.S.C. § 2244(b)(3)(A), (B) (providing that a second or successive habeas petition cannot be filed in the district court without an order of authorization from a three-judge panel of this court).

²See 28 U.S.C. § 1651 (providing that federal courts "may issue all writs
(continued...)

“a prima facie showing that [his] application satisfies the requirements of” 28 U.S.C. § 2244(b)(2)(B), this court **denies** his request for permission to file a second habeas petition. 28 U.S.C. § 2244(b)(3)(C). Having denied Slaughter’s request to file a second habeas petition, this court **dismisses** his request for a stay of execution as moot.

Slaughter was convicted in Oklahoma state court of two counts of first-degree malice murder for killing Melody and Jessica Wuertz. *Slaughter v. Mullin*, 68 Fed. Appx. 141, 143 (10th Cir. 2003). After exhausting his remedies in state court, Slaughter filed a 28 U.S.C. § 2254 petition in federal district court. This court affirmed the district court’s denial of habeas relief on June 6, 2003. *Id.* at 156. Slaughter is scheduled to be executed by the state of Oklahoma on March 15, 2005. Slaughter asks this court to stay his execution and grant him permission to file a second habeas petition.

In his request for permission to file a second habeas petition, Slaughter asserts that he is “factually innocent” and that “[n]ew evidence testing, scientific

²(...continued)
 necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”). Slaughter asserts that a stay of execution pursuant to § 1651 is appropriate because he is likely to prevail before this court on his request to file a second habeas petition, because he is likely to prevail before the district court on the merits of his second habeas petition, and because absent such a stay Oklahoma will proceed with the scheduled execution despite his entitlement to federal habeas relief. In these circumstances, Slaughter asserts that a stay pursuant to § 1651 is necessary to preserve the jurisdiction of the federal courts to grant habeas relief.

developments, and revisions in FBI laboratory processes show that the evidence used against Mr. Slaughter at trial was false and misleading.” Proposed Second Petition for a Writ of Habeas Corpus at 1. According to Slaughter, both bullet-comparison and hair-comparison evidence used at trial to connect him to the crime have now been discredited and a new scientific process called “brain fingerprinting” demonstrates that he did not know certain salient details of the murders. With this as background, Slaughter asserts that in light of this newly discovered evidence, no reasonable juror could have found him guilty beyond a reasonable doubt under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), that his appellate counsel was ineffective in failing to obtain DNA testing of the hair while his case was pending on direct appeal, and that Oklahoma’s post-convictions procedures are unconstitutional to the extent that they do not allow merits review of evidence demonstrating a death-sentenced inmate is actually innocent.

The AEDPA strictly limits the filing of second or successive § 2254 habeas petitions. According to § 2244(b),

(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.

(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—

(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

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(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.

28 U.S.C. § 2244(b)(1), (2). This court may authorize the filing of a second or successive § 2254 petition “only if [we] determine[] that the application makes a prima facie showing that the application satisfies the requirements of” § 2244(b).

28 U.S.C. § 2244(b)(3)(C). Because none of the claims Slaughter seeks permission to raise in a second habeas corpus petition are based on a new rule of constitutional law, his request for permission to file a second § 2254 petition must be denied unless Slaughter makes a prima facie showing that his proposed petition satisfies the requirements of § 2244(b)(2)(B).

There is a serious question whether all of the evidence upon which Slaughter relies was unavailable at the time he filed his first § 2254 petition. See *id.* § 2244(b)(2)(B)(i). In particular, as Slaughter admits in his proposed second § 2254 petition, mitochondrial DNA testing was available as early as 1996. Slaughter did not, however, assert in his first § 2254 proceeding that his counsel was ineffective in failing to request DNA testing when the matter was on direct appeal to the Oklahoma Court of Criminal Appeals. Nor did he seek to have such

testing performed in his first § 2254 proceeding. Thus, it is far from clear whether Slaughter has made out a prima facie case that his petition satisfies the requirements of § 2244(b)(2)(B)(i) with regard to the DNA evidence and his ineffective assistance of counsel claim related thereto.

There is also a serious question whether Slaughter's proposed second § 2254 petition actually identifies a constitutional violation. *See id.* § 2244(b)(2)(B)(ii) (requiring applicant to clearly and convincingly demonstrate that but for constitutional error no reasonable factfinder would have found him guilty of the underlying offense). At its base, Slaughter's petition simply asserts that if a jury were to have considered the newly discovered evidence it could not have found him guilty beyond a reasonable doubt. As this court has made clear on numerous occasions, however, "an assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus." *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001); *see also Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). The Supreme Court has likewise made clear that the Constitution does not impose an obligation on the states to entertain claims of newly discovered evidence years after a conviction has become final.

Herrera, 506 U.S. at 411 (holding that the due process clause did not require Texas to consider newly discovered evidence eight years after a conviction became final and noting that, instead, such claims have traditionally been understood as a proper basis for a request of clemency).

Ultimately, however, it is unnecessary to decide whether Slaughter has satisfied the predicates set out above for obtaining relief under § 2244(b)(2)(B). Even assuming Slaughter's new evidence could not have been previously discovered and that Slaughter's claims set out a constitutional violation, it is clear that Slaughter has failed to make a prima facie showing, under the clear and convincing evidence standard, that if the hair- and bullet-comparison evidence were excised from the trial he would have been acquitted. Although Slaughter contends otherwise, the evidence of his involvement in the murders was overwhelming. See *Slaughter*, 68 Fed. Appx. at 143-47, 149-50 (recounting evidence of Slaughter's guilt). The "circumstantial evidence of Slaughter's guilt was extensive," and included, *inter alia*, bullet evidence independent of the metallurgical tests at issue here strongly linking Slaughter to the crime. *Id.* at 149, 145. Furthermore, two eyewitness saw Slaughter in the neighborhood at the time of the murder; the testimony of the eyewitnesses was corroborated by

Slaughter's cell mate. *Id.* at 144-45. Upon review of the entire record, it is clear that Slaughter has not satisfied his burden under § 2244(b)(2)(B)(ii).³

The Innocence Project's Emergency Motion For Leave to File Amicus Curiae Brief in Support of Jimmie Ray Slaughter's Emergency Application for Leave to file a Second Habeas Corpus Petition is **GRANTED** and the brief is accepted. Slaughter's Emergency Motion for Leave to Submit a Supplemental Reply is **GRANTED** and the brief attached to that motion is considered filed. For those reasons set out above, this court **DENIES** Slaughter's application to file a

³It is likewise clear that even setting aside § 2244(b)(2)(B)(ii) and considering Slaughter's claim under the general *Jackson* standard, he has failed to demonstrate that no rational juror could convict him of the murders if the hair- and bullet-comparison evidence were factored out of the trial and the brain- fingerprinting evidence were factored into the trial. Thus, it is unnecessary to address the following question left unanswered in *Herrera*: Can a federal court step in to set aside a death penalty where the petitioner has made "a truly persuasive demonstration of actual innocence." 506 U.S. at 427 (O'Connor, J., concurring) (noting that it was unnecessary to answer that question because the majority had assumed that such relief was available); *see also id.* at 429 (White, J., concurring in the judgment) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of the petitioner. To be entitled to relief, however, petitioner would at the very least be required to show that based on the proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" (quoting *Jackson*, 443 U.S. at 324)). It is likewise unnecessary to address whether a stand-alone challenge to the propriety of a death sentence is even cognizable under § 2244(b)(2)(B)(ii) and, if not, how § 2244(b)(2)(B)(ii) affects the question left unanswered in *Herrera*. *See LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001).

second habeas petition. Having done so, we **DISMISS** his request for a stay of execution as moot.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge