FILED
United States Court of Appeals
Tenth Circuit

November 1, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:

PATRICK MURPHY,

Movant.

No. 12-7055
(D.C. No. 6:12-CV-191-RAW-KEW)
(E.D. Okla.)

ORDER

Before **KELLY**, **EBEL**, and **GORSUCH**, Circuit Judges.

Movant Patrick Murphy, an Oklahoma prisoner convicted of murder and sentenced to death in 2000, initiated this proceeding in the district court by filing an application for habeas relief under 28 U.S.C. § 2254. Alleging that he is mentally retarded, he claims that his death sentence is unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), and that the Oklahoma Court of Criminal Appeals (OCCA) impermissibly denied him a jury trial on the issue based on his failure to satisfy the threshold criteria set out in Okla. Stat. Ann. tit. 21, § 701.10b. As he had previously sought habeas relief with respect to the underlying conviction, the district court deemed his application "second or successive" under 28 U.S.C. § 2244(b) and transferred it to this court. Mr. Murphy disagrees with that characterization and has filed a motion to remand the matter for disposition on the merits. Alternatively, in the event we also conclude that the application is second or successive, he seeks authorization to proceed under § 2244(b)(3). At the court's request, the State filed a

response in opposition to the motion, to which Mr. Murphy has now filed a reply. For reasons explained below, we grant the motion to remand on the recently accrued challenge to the denial of a jury trial under § 701.10b, deny the motion to remand on the substantive *Atkins* claim, and deny authorization under § 2244(b)(3) for the latter as well.

I. PERTINENT PROCEDURAL HISTORY

The order of certain events is critical to an understanding of the procedural issues raised by the motion for remand. In 2002-2003, Mr. Murphy pursued state post-conviction relief based in part on a claim that he is mentally retarded and thus not constitutionally subject to the death penalty under *Atkins*. That claim was denied following an evidentiary hearing, when the state courts held that he failed to present sufficient evidence to warrant a jury trial on mental retardation. *See Murphy v. State*, 66 P.3d 456, 458, 461 (Okla. Crim. App. 2003).

He then filed his first habeas application, challenging the Oklahoma courts' treatment of his *Atkins* claim, particularly the denial of a jury trial. He also commenced another state post-conviction proceeding that alleged his equal protection rights were violated because other Oklahoma death penalty prisoners received jury trials on their *Atkins* claims. The federal district court hearing the habeas application notified him that it contained both exhausted and unexhausted claims and gave him an opportunity to dismiss the entire petition or dismiss only the unexhausted claims and proceed with the remainder of the application while he completed exhausting his

state remedies. But the district court denied his request that it stay the habeas action to await the result of the state proceedings. Significantly, Mr. Murphy then elected to dismiss all of his allegations relating to *Atkins* and proceeded with several exhausted claims. Eventually, the district court denied habeas relief and Mr. Murphy appealed to this court. That appeal (No. 07-7068) remains pending but abated by orders issued by this court on November 16, 2007, and May 7, 2012.[1]

In the meantime, the OCCA reversed course and ordered that Mr. Murphy be afforded a jury trial on his *Atkins* claim. *See Murphy v. State*, 124 P.3d 1198, 1209 (Okla. Crim. App. 2005). In September 2009, a jury found him not mentally retarded, but a new trial was ordered due to mishandling of peremptory challenges. Before it was held, however, the state trial court terminated the proceeding based on § 701.10b(C), which sets out procedures for determining mental retardation in death penalty cases and provides in pertinent part that "in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally

[1] One aspect of the appeal is procedurally related to the motion currently under review: the district court's decision refusing to stay proceedings in the first habeas action. Had the stay been granted, it would have obviated the second-or-successive complications raised by the need for Mr. Murphy to file a second habeas application after exhausting the rest of his claims in state court. Thus it is at least possible that he may obtain relief on appeal beyond that which we may consider here, and our disposition of the instant motion is not intended to presume or constrain the merits panel's resolution of the stay issue or any other matter before it on Mr. Murphy's appeal from the denial of his first habeas application.

retarded." Two tests reflecting intelligence quotient (IQ) scores over seventy-six had been admitted in the aborted jury trial. The OCCA affirmed the termination of the *Atkins* proceeding under § 701.10b(C), upholding the statute and its application to Mr. Murphy against various state and federal challenges. *See Murphy v. State*, 281 P.3d 1283 (Okla. Crim. App. 2012).

Mr. Murphy returned to federal district court with a second habeas application, asserting that *Atkins* barred his execution and that the termination of his state *Atkins* proceeding without a jury determination of mental retardation was unconstitutional. That is the application the district court deemed second or successive and transferred here for consideration in the first instance by this court.

II. MOTION FOR REMAND

Mr. Murphy contends that his habeas application was erroneously transferred because it is not "second or successive" within the meaning of § 2244(b), despite its nominal designation as a second application. To properly understand the strengths and weaknesses of his position, a brief review of relevant case law is necessary.

The Supreme Court "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). Thus, the limitations in § 2244(b) do not apply to a claim omitted from a prior application if the claim was not ripe at the time, *see id.* at 945 (holding § 2244(b) did not apply to

"a *Ford*-based incompetency claim[2] filed as soon as that claim is ripe"), or if the claim is new in the sense that it relates to a new judgment of conviction or sentence issued after an initial habeas application was pursued with respect to the original judgment (even if the second judgment is to the same effect and the claim asserts an error in the second state proceeding that was committed in the first as well), *see Magwood v. Patterson*, 130 S. Ct. 2788, 2791-92, 2796, 2801 (2010); *see also United States v. Scott*, 124 F.3d 1328, 1328-30 (10th Cir. 1997). But, such circumstances must be distinguished from the situation where a claim is either omitted or withdrawn from a first habeas application simply because of exhaustion concerns and raised in a later application following further state court proceedings. In that case, the claim is second or successive and must satisfy the conditions in § 2244(b) before it may be heard on the merits by the district court. *See Burton v. Stewart*, 549 U.S. 147, 154-56 (2007); *Tapia v. Lemaster*, 172 F.3d 1193, 1195-96 (10th Cir. 1999).

Mr. Murphy insists the ripeness and new-claim principles noted above apply to the substantive and procedural *Atkins* claims raised in his second habeas application.[3]

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[2] *See Ford v. Wainwright*, 477 U.S. 399 (1986).

[3] We use the terms "substantive" and "procedural" here to mark a commonsense distinction between two different types of claims relating to *Atkins*: (1) a claim that a prisoner "is mentally retarded and [hence] his execution would violate *Atkins*," and (2) a claim that "procedural irregularities made his *Atkins* trial fundamentally unfair," respectively. *Hooks v. Workman*, 689 F.3d 1148, 1162 (10th Cir. 2012); *see Ochoa v. Workman*, 669 F.3d 1130, 1141 (10th Cir. 2012) (holding "procedural irregularity claims [relating to state *Atkins* proceedings] are proper *Atkins* claims"), *cert. denied*, 2012 WL 2931319 (U.S. Oct. 1, 2012) (Nos. 11A1055, 12-5282).

We agree that his procedural challenge to the termination of his state *Atkins* proceeding without a jury trial based on the categorical IQ-test condition imposed by § 701.10b(C), is a new claim. While he could have objected (and did object) to the Oklahoma courts' prior denial of a jury trial under an earlier mental-retardation scheme, that decision was abrogated when the OCCA ordered that he receive a jury trial on the basis of his facial evidentiary showing of mental retardation in 2005. To be sure, the OCCA subsequently reversed course again in 2012 when it ruled that his entitlement to a jury trial was undercut by § 701.1b(C), but that entirely new ground of decision could not have been challenged in his first habeas application (indeed, the operative statutory provision was not enacted until years later). This procedural *Atkins* claim falls within the compass of the *Magwood* decision and hence is not second or successive. We remand the claim for determination on the merits.

We reach a contrary conclusion with respect to the substantive *Atkins* claim. That claim—which challenges the propriety of the death sentence imposed in 2000 (reaffirmed after *Atkins* in 2003)—did not newly arise out of his recent unsuccessful effort to obtain relief from the state courts. Nor does it relate to a new sentence of death imposed by a subsequent judgment. Thus, *Magwood* is not controlling.

Mr. Murphy attempts to invoke the *Panetti* ripeness principle, but some of the relevant procedural facts undercut this effort. The substantive *Atkins* claim was clearly ripe when he filed his first habeas application, at which point he had been sentenced to death despite his alleged mental retardation. Indeed, the claim was even

exhausted by virtue of the OCCA's denial of relief under *Atkins* in 2003. Yet when the district court notified Mr. Murphy that some of his claims were unexhausted, he elected to dismiss all of his claims relating to *Atkins*, without drawing any distinction between procedural claims that were not exhausted and a substantive claim that was. Under the *Burton/Tapia* cases, the (re)assertion of a substantive *Atkins* claim would now trigger the second or successive bar in § 2244(b).[4]

But there is a complication, alluded to in Mr. Murphy's briefing, which requires closer consideration of the line between the *Burton*/*Tapia* rule applying the § 2244(b) bar to claims omitted or withdrawn from a prior habeas application and the *Panetti* rule excepting from the § 2244(b) bar claims that ripened after a prior habeas application. As noted above, in 2005 the OCCA ordered that Mr. Murphy receive a jury trial on his *Atkins* claim, initiating a new round of state proceedings that did not finally come to an end until its termination under § 701.10b(C) this year. Although this temporary extension of state court relief was only procedural in nature and ultimately had no substantive impact on the initial denial of relief under *Atkins*, during the pendency of this new round of proceedings the previously ripe substantive

[4] The parties actually dispute whether a substantive *Atkins* claim was included in the first habeas application—which focused, rather, on the procedural denial of a jury trial and, for relief, sought only a remand to the state courts for a jury determination, without an alternative request for federal review of the mental retardation issue itself in the event the jury-trial objection failed and no remand was ordered. We need not resolve this collateral dispute, as a substantive *Atkins* claim would now be second or successive whether it was omitted from the first habeas application (*Burton* scenario) or included and subsequently withdrawn with the unexhausted procedural claims (*Tapia* scenario).

Atkins claim may well have become unripe, at least as a prudential matter. That is, comity would have counseled postponement of federal review until it was clear that the second state proceedings would not affect the prior denial of *Atkins* relief. This unusual circumstance raises the question whether a claim omitted/withdrawn and hence lost to the § 2244(b) bar under *Burton*/*Tapia* is rescued by *Panetti* if it later becomes unripe for a period of time before a second habeas application is filed. We hold that it does not. *Panetti*, and its antecedent, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), dealt with incompetency-to-be-executed claims that were inherently unripe until after initial habeas relief had been sought and denied and an imminent execution set. To apply its exceptional rule to the present situation, where the claim at issue could have been pursued in the initial habeas application but was omitted or withdrawn before the ripeness complication even arose, would expand the rule beyond its unique justification and concomitantly limit countervailing precedent otherwise clearly applicable to the facts.

III. AUTHORIZATION UNDER § 2244(b)

Given our conclusion that the substantive *Atkins* claim is second or successive, we must consider Mr. Murphy's conditional request that we authorize his pursuit of the claim under § 2244(b)(2)(A). To do so we must find, as a prima facie matter, that he "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* But *Atkins* was plainly available to Mr. Murphy when he filed his first habeas application. He seeks

to avoid the consequence of this fact by arguing that, in the event we authorize a second or successive application on his procedural *Atkins* claim, we should follow the Fourth and Ninth Circuits in holding that appellate authorization of one claim under § 2244(b) serves to authorize the filing of the entire habeas application, leaving it to the district court to sort out the claims that satisfy the criteria in § 2244(b) from those that do not. *See Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996); *see also United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003) (following *Nevius* approach in authorizing second or successive § 2255 motion). These courts rely on the statutory language referring to our power to authorize "a second or successive *application*," not second or successive *claims*. 28 U.S.C. § 2244(b)(3)(A) – (E) (emphasis added). We need not decide whether to follow this approach, because Mr. Murphy has not presented *any* claim that satisfies the authorization requirements in § 2244(b). Rather, we have held (1) that his procedural *Atkins* claim was wrongly deemed second or successive and should not have been transferred to this court for authorization, and (2) that his substantive *Atkins* claim is second or successive and does not satisfy the authorization requirements in § 2244(b). In short, we have not found grounds for authorizing a second or successive claim, let alone a second or successive application.

Accordingly, we GRANT the motion to remand with respect to the procedural *Atkins* claim asserted in the habeas application, and DENY the motion to remand with respect to the substantive *Atkins* claim. We also DENY the motion insofar as it

requests authorization under § 2244(b)(3) to proceed with the substantive *Atkins* claim. Pursuant to § 2244(b)(3)(E), the denial of authorization is not subject to further review by rehearing, appeal, or writ of certiorari.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk