No. 0210760

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In re

KEVIN COOPER,

Petitioner.

PETITION FOR RELIEF BY WAY OF WRIT OF *HABEAS CORPUS*, RELIEF UNDER THE ALL WRITS ACT, OR BY WAY OF MANDAMUS BY A PRISONER IN STATE CUSTODY

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Capital Case

QUESTIONS PRESENTED

1. Whether a circuit court can hold an application to file a second petition for habeas corpus in abeyance despite 28 US.C. section 2244(b)(3)(D) and await resolution of timely prosecuted state litigation that would affect the substance of the proposed federal petition.

2. Whether a circuit court reviewing an application to file a second petition for a writ of habeas corpus raising issues of trial error may examine the merits of the petition to determine if the petitioner can establish actual innocence or is limited by statute to a cursory examination of the claims under 28 U.S.C. section 2244(b)(3)(C)'s prima facie evidence requirement.

3. Whether a circuit court reviewing an application to file a second petition for a writ of habeas corpus may consider as dispositive evidence of post-trial DNA testing offered by the state that has not been subject to any examination by way of cross-examination or at a hearing, and use those results to hold that a petitioner cannot establish his innocence despite the fact that state court proceedings to examine the value of those DNA results are pending.

4. Whether the state's suppression of a police report for nearly 15 years that is evidence of a violation of *Arizona v. Youngblood*'s proscription against the intentional destruction of material evidence satisfies the requirement of 28 U.S.C. section 2244(b)(2)(B) that a habeas petitioner make a prima facie case relating to his innocence, or requires the circuit court to re-open the original habeas proceeding and consider anew petitioner's original *Youngblood* claim.

5. Whether newly discovered claims that trial counsel failed to investigate and present evidence of an alternative suspect, and evidence that hairs inconsistent with petitioner were found in all four victims' hands, satisfies the prima facie requirements of AEDPA's successor petition provisions.

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 4

A. Statement of Relevant Facts 9

B. Post-judgment Investigation 13

REASONS FOR GRANTING THE REQUESTED RELIEF 16

A. The Ninth Circuit's Order Denying Cooper's Application to File a Second Petition Was Premature and the Court Should Hold that the Comity Concerns of AEDPA Apply to Successor Applications When a Petitioner Has Diligently Pursued Newly-Enacted State Statutory Relief 16

B. The Court Should Address the Issue Left Unresolved in *Felker* as to the Standard for a *Prima Facie* Showing Under AEDPA's Successor Provisions and Vacate the Circuit's Merits Denial of Cooper's Application Based on the Untested and Incomplete *Post Hoc* DNA Results 20

C. The Court Should Consider Under What Circumstances a Successor Claim Allows a Federal Court to Re-Open a Previously Decided Claim, and Should Either Grant Relief on Petitioner's *Brady/Youngblood* Claim or Remand for Further Proceedings . . 24

1. Facts 24

2. Claims for Relief 27

D. Cooper's Claim That His Trial Counsel Rendered Ineffective Assistance by Failing to Present Evidence That Each of the Murder Victims Had Hair in Their Hands That Was Not Petitioner's Is Newly Discovered Evidence That He Is Innocent. 31

1. Facts 31

INDEX TO PETITIONER'S APPENDICIES

APPENDIX	DESCRIPTION
A.	Order denying Motion to File Second Habeas Corpus Petition, Ninth Circuit Court of Appeals case no. 99-71430, February 14, 2003.
B.	Order requesting further briefing, Ninth Circuit Court of Appeals case no. 99-71430, March 3, 2003.
C.	Order denying Cooper's Petition for Rehearing and Suggestion for Rehearing En Banc; Motion to Vacate Order or for Reconsideration or Further Clarification, Ninth Circuit Court of Appeals case no. 99-71430, April 7, 2003.
D.	Order Setting Hearing, Superior Court of California, County of San Diego, April 22, 2003.
E.	Table of Contents, Petition for Writ of Habeas Corpus, *In re Cooper,* California Supreme Court case no. S075527.
F.	Table of Contents, Petition for Writ of Habeas Corpus, *In re Cooper,* California Supreme Court case no. S0077408.
G.	Order denying Petition for Writ of Habeas Corpus, *In re Cooper,* California Supreme Court case no. S075527, April 14, 1999.
H.	Order denying Petition for Writ of Habeas Corpus, *In re Cooper,* California Supreme Court case no. S0077408, April 14, 1999.
I.	Motion to File Second *Habeas Corpus* Petition Under 28 U.S.C. §2244(b)(3)(A), Ninth Circuit Court of Appeals case no. 99-71430.
J.	[Proposed] Petition for Writ of Habeas Corpus, United States District Court for the Southern District of California.
K.	Declaration of Diana Roper dated November 21, 1998; attachments 1-3.

APPENDIX	DESCRIPTION
L.	Declaration of Karee Kellison dated November 15, 1998
M.	Declaration of Nichol Giberson dated November 21, 1998
N.	Declaration of Marjorie Gatlin dated November 21, 1998; attachment 1
O.	Declaration of Paul Ingels dated February 17, 1999.
P.	San Bernardino Sheriff's Department "Disposition Report" dated December 1, 1983.
Q.	Declaration of William M. McGuigan dated December 15, 1998.
R.	Declaration of William McGuigan dated October 26, 1999
S.	Declaration of David L. Bernstein dated December 20, 1998.

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To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner KEVIN COOPER, by and through his counsel, respectfully petitions this Court for a writ of *habeas corpus* pursuant to 28 U.S.C. sections 2241 and 2254 et seq., for relief under the All Writs Act in aid of appellate jurisdiction pursuant to 28 U.S.C. section 1651, and/or for a writ of mandamus under rule 20.3, to review and reverse the order of the Ninth Circuit Court of Appeals denying his application to file a second petition for writ of habeas corpus and directing that court to vacate its order and hold the application in abeyance, to remand the matter to the district court pursuant to 28 U.S.C. section 2241(b)

for a determination as to whether petitioner meets the requirements to file such a petition, to direct the Warden of California State Prison at San Quentin, Jeanne Woodford, to release petitioner from custody, or to grant any other relief as is appropriate and just.

OPINIONS BELOW

This petition seeks review of an Order denying Motion to File Second Habeas Corpus Petition by the Ninth Circuit Court of Appeals case no. 99-71430, February 14, 2003. Petitioner's Appendix [hereafter Pet.'s App.] A. Petitioner's Request for Rehearing, Suggestion for Rehearing *En Banc*; Motion to Vacate, Modify or Reconsider was denied on April 7, 2003. Pet.'s App. C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1651; 28 U.S.C. sections 2241 and 2254, *et seq.*, and Supreme Court Rule 20.3. *See Felker v. Turpin*, 518 U.S. 651 (1996)(majority and concurring opinions).

STATUTES AND CONSTITUTIONAL PROVISIONS

Articles and Amendments to the United States Constitution

Article I, § 9, cl. 2

The 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.

Article III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to

granted a hearing on whether or not to conduct further DNA testing. Pet. App. D.

A. Statement of Relevant Facts

10. The crimes resulting in petitioner's conviction and sentence of death were the killing of three members of the Ryen family: Douglas Ryen, his wife Peggy Ryen and the couple's ten year-old daughter, Jessica Ryen. Also killed at the same time was an eleven year-old overnight houseguest, Christopher Hughes. The Ryen's eight year-old son, Joshua, was attacked, but survived. The victims died from numerous chopping and stabbing injuries: Doug Ryen had at least 37 separate wounds, Peggy 32, Jessica 46, and Chris 25. The chopping wounds were inflicted by a sharp heavy object such as a hatchet or axe, the stabbing wounds by a weapon such as a knife. Jessica also had some chest wounds, probably inflicted after death by a pointed instrument such as an ice pick. Josh had fewer injuries, including wounds to the head possibly caused by a hatchet and a stab wound in the throat. The Ryen vehicle was missing.

11. The Ryen-Hughes homicides occurred late in the evening of June 4, 1983, or early in the morning of June 5, 1983. Petitioner, a minimum security inmate at the California Institution for Men in Chino (hereafter "CIM"), had walked away from the institution at about 3:00 p.m. on June 2, 1983. The prison was located about two miles from the Ryen home where the homicides took place. Petitioner was immediately the prime suspect. He was charged with the murders on June 9, 1983, and was arrested in Santa Barbara, California on July 31, 1983.

12. The prosecution's theory was that petitioner was the sole perpetrator of the killings. The prosecution presented a circumstantial case against petitioner.