Supreme Court, U.S.
FILED
JUN 29 2004
CLERK

0311092

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

IN RE DAVID RAY HARRIS,
Petitioner

ORIGINAL PETITION FOR WRIT OF *HABEAS CORPUS*

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THIS IS A CAPITAL CASE.
PETITIONER IS SCHEDULED TO BE EXECUTED ON JUNE 30, 2004.

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the split among the circuits regarding the ongoing vitality of *Sawyer v. Whitley* after the amendments to section 2244 may be resolved only by original writ.

2. Whether Mr. Harris's death sentence lacks a "high degree of reliability" as required by the Eighth Amendment because it was based on the unreliable testimony of a psychiatric expert.

3. Whether executing Mr. Harris, after 18 years on death row and three prior execution dates, violates the Eighth Amendment's prohibition against cruel and unusual punishment?

ORIGINAL PETITION FOR WRIT OF *HABEAS CORPUS*

Petitioner David Ray Harris respectfully asks that this Court entertain his original petition for writ of *habeas corpus* and grant relief from his unconstitutional sentence of death.

OPINIONS BELOW

The June 22, 2004 order of the Texas Court of Criminal Appeals dismissing Mr. Harris's subsequent *habeas* application is unreported. *Ex Parte Harris*, No. 20,983-05. A copy of that order is attached as Appendix 1.

The June 29, 2004 order of the United States Court of Appeals for the Fifth Circuit denying Mr. Harris's motion for authorization to file a successive petition for writ of *habeas corpus* is unreported. A copy of that order is attached as Appendix 2.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this original petition pursuant to 28 U.S.C. §§ 2241(a) and 2241(c)(3). *See also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

Pursuant to 28 U.S.C. § 2242, Petitioner states that he did not make application to the district court of the district in which he is held because the United States Court of Appeals for the Fifth Circuit denied his application to file a successive petition for writ of *habeas corpus*.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented involve the following provisions of the United States Constitution:

AMEND VIII: . . . [N]or [shall] cruel and unusual punishment [be] inflicted.

AMEND XIV: . . . [N]or shall any state deprive any person or life, liberty, or property, without due process of law . . . .

ARTICLE I, § 9, Clause 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.

STATUTORY PROVISIONS AT ISSUE

28 U.S.C. § 2241(a)

28 U.S.C. § 2244(b)(2)

STATEMENT OF THE CASE

Mr. Harris was convicted of capital murder and sentenced to death in April 1986. The Texas Court of Criminal Appeals decided his direct appeal on September 13, 1989. *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert. denied*, 494 U.S. 1090 (1990).

On September 12, 1990, Mr. Harris filed an application for post-conviction *habeas* relief in state court. That application was resolved against Mr. Harris on December 18, 1991. *Ex parte Harris*, 825 S.W.2d 120 (Tex. Crim. App. 1991).

On April 28, 1992, Mr. Harris filed an application for post-conviction relief in federal court. The United States Magistrate Judge recommended that Mr. Harris be granted relief because he was denied the effective assistance of counsel at the sentencing phase of his trial. On September 24, 2001, United States District Judge William Wayne Justice adopted the Magistrate's recommendation that Mr. Harris be granted relief on this basis and further found that Mr. Harris was entitled to relief on an additional ground. Judge Justice issued a conditional writ of *habeas corpus* requiring that Mr. Harris either be sentenced to life, given a new sentencing hearing or released from custody.

The State of Texas appealed to the United States Court of Appeals for the Fifth Circuit. On November 18, 2002, the Fifth Circuit reversed the judgment of the district court and effectively reinstated Mr. Harris's death sentence. *Harris v. Cockrell*, 313 F.3d 238 (5th Cir. 2002).

Mr. Harris petitioned this Court for a writ of *certiorari*. His petition for *certiorari* was denied on March 1, 2004.

Mr. Harris is currently scheduled to be executed by lethal injection on June 30, 2004.

In the United States Court of Appeals for the Fifth Circuit

U.S. COURT OF APPEALS
FILED
JUN 29 2004
CHARLES R. FULBRUGE III
CLERK

Nº 04-40781
Consolidated with Nº 04-40795
Consolidated with Nº 04-70027

IN RE:
DAVID RAY HARRIS,

Movant.

Motions for an Order Authorizing
the United States District Court for the Eastern District of Texas
To Consider a Successive 28 U.S.C. § 2254 Application

Before SMITH, DENNIS, AND CLEMENT, Circuit Judges.

PER CURIAM:

In cause No. 04-40781, David Harris seeks authorization to file a successive application for a writ of habeas corpus, and he seeks a stay of his execution scheduled for June 30, 2004. Consolidated with that action is No. 04-40795, a FED. R. CIV. P. 60(b) motion Harris filed in the district court, seeking relief from the judgment in his first habeas corpus proceeding and requesting a stay of execution. In No. 04-40795, the district court construed Harris's rule 60(b) motion as an application to file a successive habeas petition and transferred it to this court.[1] In No. 04-70027, Harris advances the substantive arguments made in the rule 60(b) motion, but does so through an appeal premised on the argument that the

[1] *See Fierro v. Johnson*, 197 F.3d 147, 151 (5th Cir. 1999); *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002), *cert. denied*, 124 S. Ct. 48 (2003); *cf.* 28 U.S.C. § 1631; *In re Smith*, 142 F.3d 832, 834 (5th Cir. 1998).

district court improperly transferred his motion to this court, and he moves again for a stay of execution.[2] We hereby consolidate the three proceedings for all purposes and treat the transferred action in No. 04-40795 as a motion for leave to file a successive habeas petition. Accordingly, we dismiss the appeal in No. 04-70027, because the district court did not issue an appealable final order, but instead properly transferred the case to this court.

Concluding that Harris has not made a *prima facie* showing that his first successive petition complies with 28 U.S.C. § 2244(b)-(2)(B),[3] we deny him leave to file a successive application for habeas relief. We also deny the motions for stay of execution.

I.

Harris contends that a recently conducted study undermines the reliability of certain expert testimony introduced at the sentencing phase of his trial; that this study forms the basis of an Eighth Amendment challenge to the introduction of that evidence; and that but for the expert testimony, no reasonable juror would have found him eligible for the death penalty.[4] Thus, Harris does not even remotely contend that the new evidence would show him actually innocent of the offense for which he was convicted—the 1985 murder of Mark Mays. That is significant, because to satisfy the relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.*, and to obtain permission to file his successive petition, Harris must make a *prima facie* showing of his ability to prove "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii), (3)(C).

Citing *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992), Harris contends that he is nevertheless entitled to file a successive habeas petition, because the new evidence attacks the aggravating factors that rendered him eligible for the death penalty. He argues, therefore, that the survey forming the basis for his proffered successive petition constitutes evidence of his actual innocence of any offense for which the death penalty could have been imposed and thus satisfies § 2244(b)(2)(B).

Several of our sister courts of appeals have held that under AEDPA—which is more specific in its reference to innocence of "the un-

[2] By appealing the transfer order as an effective denial of his request for rule 60(b) relief, Harris seeks to ensure that his argument against the validity of the transfer order does not deprive this court of jurisdiction to review his underlying claims. That is to say, whether we review No. 04-40795 directly as a case properly transferred to this court, or review No. 04-70027 on appeal, we will have an opportunity to consider the substantive arguments raised in his rule 60(b) motion. Of significant practical consequence for Harris in pursuing this strategy is the fact that appellate review of his rule 60(b) motion would not require our reliance on the restrictive standards of 28 U.S.C. § 2244(b).

[3] Harris does not profess reliance on a new rule of constitutional law made retroactive to cases on collateral review. *Cf.* 28 U.S.C. § 2244(b)(2)(A).

[4] Harris made a similar claim in his first federal habeas petition, contending that the same testimony deprived him of a fair trial. Nevertheless, the state does not ask us to bar the petition under 28 U.S.C. § 2244(b)(1). We therefore assume, for purposes of this petition only, that there is enough difference between the two arguments to render them separate claims within the meaning of § 2244(b)(1).

derlying offense" than was the previous incarnation of § 2244 interpreted in *Sawyer*—a successive petition cannot be brought under § 2244(b)(2)(B) if it challenges only the sentence imposed and does not raise a claim of guilt or innocence of the "underlying offense" as that term is ordinarily used.[5] As Judge Posner explained for the Seventh Circuit:

> The "actual innocence" exception of the prior law was judge-made, and so its contours were appropriately judge- fashioned and permissibly judge-expanded. The exception in the new law is graven in statutory language that could not be any clearer. When we consider how limited the review of sentencing traditionally was, how strongly Congress evidently disfavors successive rounds of collateral attacks on duly reviewed convictions such as that of Hope, how doubtful it is that any violation of the sentencing guidelines rises to the level necessary to justify collateral relief even under the standards of the old law, *Scott v. United States*, 997 F.2d 340 (7th Cir.1993), and the absence of any indication in the legislative history that "offense" was being used in some special sense different from its ordinary meaning, we think it highly unlikely that Congress intended the word to bear a special meaning.

Hope, 108 F.3d at 120. The state urges us to adopt that position as well.

We need not decide that question, however, because Harris's application fails for an independent reason. He cannot make a *prima facie* showing that the factual predicate for his claim could not have been discovered earlier through the exercise of due diligence. *See* 28 U.S.C. § 2244(b)(2)(B)(i).

Harris's claim is that the state introduced unreliable and unscientific expert testimony that could not have reliably proven what it purported to establish: that he posed a high risk of committing future violent acts. Assuming *arguendo* that that claim can be bolstered by the newly-released study on which Harris relies, its factual predicate has been available since 1992, when Harris first filed a habeas petition.[6]

So long as psychiatrists continue to study this issue, there will always be new evidence of one sort or another that was previously unavailable to a petitioner, and his claims might become marginally stronger as a result. That does not mean that those claims were previously factually unavailable to him—a reality to which the existence of older studies reaching similar conclusions attests. Whatever the probative value of the study that Harris cites, it is not uniquely applicable to his case, and he has made no showing that similarly persuasive evidence could not have been uncovered through the exercise of due diligence when he

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[5] *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997). *See also Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (denying leave to file 28 U.S.C. § 2255 petition).

[6] *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 898-901 & n.7 (1983) (rejecting similar claim that relied on the opinion of the American Psychiatric Association and other professional studies), *overruled on other grounds, as recognized in Styron v. Johnson*, 262 F.3d 438 (5th Cir. 2001). Indeed, Harris made the same factual claim in his earlier petition, arguing only that those facts made out a violation of a different constitutional right from the one relied on here.

filed his initial habeas petition.[7] As a result, Harris has failed to make a *prima facie* showing of compliance with § 2244's requirements for the filing of a successive petition.

II.

Harris's rule 60(b) motion in what is now No. 04-40795 urges the district court to reconsider its rejection of a claim presented in his first habeas petition—namely, that the Texas special issues provide an inadequate vehicle for presenting the jury with evidence of his alcohol abuse. *Cf. Penry v. Lynaugh*, 492 U.S. 302 (1989).

We construe Harris's motion as one for leave to file a successive habeas petition, because the claim directly attacks the basis for his sentence. *Fierro*, 197 F.3d at 151. Although this court has no *per se* rule requiring all rule 60(b) motions in habeas cases to be treated as successive petitions, *Hess v. Cockrell*, 281 F.3d 212, 214-15 (5th Cir. 2002), the district court properly viewed Harris's motion in that light, because he seeks to have the district court reconsider his *Penry* claim on the merits. Such a claim is at the core of habeas, *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998), and must be dismissed, because it was presented in Harris's first federal habeas petition, *see* 28 U.S.C. § 2244(b)(1).[8]

Even if we were to construe Harris's motion as one to reopen his earlier habeas proceeding, *see Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998), and even if his petition presented some basis for granting that request,[9] Harris would still not be entitled to relief. Harris contends that *Tennard v. Dretke*, 542 U.S. __, 2004 U.S. LEXIS 4575 (U.S. June 24, 2004), undermines the basis for the district court's rejection of his *Penry* claim. In *Tennard*, the Court overturned this court's reliance on a "screening test" that rejected *Penry* claims at the outset unless they concerned mitigating evidence that possessed "constitutional relevance." *Id.* at *17-*23.

Tennard provides no occasion to second-guess the judgment denying Harris's first federal habeas petition. In the district court, the screening test was not applied to Harris's *Penry* claim. To the contrary, his claim was rejected on the basis of *James v. Collins*, 987 F.2d 1116, 1121 (5th Cir. 1993), holding that the Texas special issues provided a constitutionally adequate vehicle for jurors to consider and give effect to mitigating evidence of alcohol abuse.[10]

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[7] *See In re McGinn*, 213 F.3d 884, 885 (5th Cir. 2000) (per curiam) (holding that evidence of improvements in the state of DNA testing did not satisfy § 2244(b)(2)(B)(i) where there was no showing that the improved methods were unavailable at the time of the first habeas petition).

[8] For the same reasons, we dismiss the appeal in No. 04-70027. Because the district court properly viewed Harris's rule 60(b) motion as one seeking leave to file a successive habeas petition (continued...)

[8](...continued)
(a motion that must be filed with the court of appeals in the first instance), the transfer to cure jurisdiction under § 1631 was proper. *Robinson*, 313 F.3d at 139.

[9] Unlike the petitioner in *Martinez-Villareal*, 523 U.S. at 644-45, Harris had his claims adjudicated on the merits in his first habeas proceeding.

[10] The district court's memorandum opinion disposed of this claim by explaining that "Harris' alcoholism, intoxication, cooperation with authorities and remorse did not have relevance beyond the scope of the 'deliberateness' and 'future dan- (continued...)

In affirming that judgment, this court relied on the screening test to determine that "neither evidence of alcoholism nor evidence of intoxication at the time of the offense constitutes *Penry* evidence." *Harris v. Cockrell*, 313 F.3d 238, 241-42 (5th Cir. 2002), *cert. denied*, 124 S. Ct. 1503 (2004). Under *Tennard*, that conclusion was in error.

Nevertheless, *Tennard* does not provide a basis for questioning the result in our prior proceeding, because Harris's claim was decided on an alternative ground that remains viable. Specifically, we held:

> The jury was able to give mitigating effect to the evidence of Harris's alcoholism through its answers to the first and second special issues. Evidence of intoxication can be fully considered under the first special issue, which asked the jury to evaluate the deliberateness of Harris's conduct. Furthermore, to the extent that "alcoholism has independent mitigating weight apart from intoxication at the time of a crime," *James*, 987 F.2d at 1121 n.6, the second special issue, which relates to future dangerousness, provided a means for giving mitigating effect to Harris's evidence that he is an alcoholic. *See id.* at 1121.
>
> Trial counsel presented testimony at the sentencing phase that Harris's history of violent conduct stemmed from his alcoholism, which could be brought under control. The jury reasonably could have considered this testimony when evaluating whether Harris was a continuing danger to society. *See id.* Therefore, the district court was correct in rejecting Harris's *Penry* claims based on his mitigating evidence related to alcoholism and intoxication.

Id. at 242 (footnotes omitted). Despite our initial reliance on the screening test that was rejected in *Tennard*, this court gave full consideration to Harris's claims and determined that the Texas special issues placed the mitigating evidence within the effective reach of the jury. Because *Tennard* does not undermine *James*, 987 F.2d at 1121, it does not call into question our reliance on *James* in dismissing Harris's *Penry* claim.

The requests in Nos. 04-40781 and 04-40795 for leave to file one or more successive habeas petitions are DENIED. The attempted appeal in No. 04-70027 is DISMISSED. All motions for stay of execution are DENIED.

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[10](...continued)
gerousness' special issues." Although the court did not cite any cases to support that view, it adopted the magistrate judge's recommendation, which reached the same conclusion in open reliance on *James*, 987 F.2d at 1121. In context, we do not read the district court's opinion as resorting to the "constitutional relevance" analysis disapproved of in *Tennard*—a doctrine that the district court does not cite even once in its memorandum. Instead, it holds that the jury was able to give Harris's mitigating evidence full effect in the course of considering whether he acted deliberately and whether he posed a future danger to society.