No. 00-6106

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

FILED
SEP 12 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In re GEORGE B. HARRIS

Petitioner,

v.

ALLEN D. LUEBBERS,

Respondent

PETITIONER GEORGE B. HARRIS'S PETITION FOR WRIT OF HABEAS CORPUS

This is a capital case. Execution is set for September 13, 2000 at 12:01 a.m.

QUESTION PRESENTED FOR REVIEW

Whether it is a violation of the Fifth, Sixth, and Fourteenth Amendments to execute a person who is actually innocent of the crime charged where the lower courts have failed to apply the correct standard of review to his claim to have been deprived of the effective assistance of counsel.

COMES NOW petitioner George B. Harris, by and through his attorneys of record, and submits the following petition for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a). This court has jurisdiction pursuant to 28 U.S.C. § 2254.

1. Petitioner George B. Harris is being held at the Potosi Correctional Center, Mineral Point, Missouri, a Missouri penal institution of which respondent Allen D. Luebbers is superintendent.

2. Petitioner is being held under a sentence of death following his conviction of first degree murder in Jackson County, Missouri Circuit Court; true copies of the Amended Judgment and Amended Death Warrant dated July 30, 1990 are attached as Exhibits A and B.

3. Petitioner is being held in violation of the United States Constitution, in that his conviction followed a trial in which he was deprived of the effective assistance of counsel.

4. The lower courts hearing petitioner's post-conviction claims have failed to properly apply the constitutional standard for effective assistance of counsel under the Sixth Amendment.

5. The United States has recently reaffirmed, in Williams v. Taylor, 529 U.S. ____, 120 S. Ct. 1495 (2000), that Strickland v. Washington, 468 U.S. 668 (1984), sets forth the controlling legal standards for reviewing ineffective assistance of counsel claims, and is "clearly established by Federal law." 120 S. Ct. at 1512.

6. The Missouri supreme court failed to apply this court's precedent where the Missouri supreme court considered four points of error relating to petitioner's claims of ineffective assistance of counsel, but failed to consider the totality of errors made by petitioner's trial counsel. State v. Harris, 870 S.W.2d 798 (Mo. 1994).

7. The Court of Appeals for the Eighth Circuit failed to apply this Court's precedent where the it only gave a certificate of appeal on a single claim of ineffective assistance of counsel instead of considering the totality of the evidence regarding ineffective assistance of counsel.

8. The lower courts' rejection of petitioner's ineffective assistance of counsel claims were "contrary to" and "an unreasonable application of, clearly established Federal law," in that they failed to consider the "totality of the evidence" as required by Strickland v. Washington, when they reviewed petitioner's Sixth Amendment claim ineffective assistance of counsel. 28 U.S.C. § 2254(d)(1); Strickland v. Washington, 466 U.S. 697, 104 S. Ct. 2052, 2069 (1984).

9. Petitioner is entitled to relief under 28 U.S.C. § 2254(d), because the lower courts' rejection of petitioner's ineffective assistance of counsel claims under the Sixth Amendment were "contrary to," and "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

10. The misapplication of clearly established Federal law has deprived petitioner of his Sixth Amendment right to effective assistance of counsel and his right to not be deprived of his life without due process of law under the Fifth and Fourteenth Amendments.

11. Petitioner hereby requests leave to file an expanded motion for habeas corpus after a stay of execution is granted.

No. 00-A228

IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

GEORGE B. HARRIS,

Petitioner,

v.

ALLEN D. LUEBBERS,

Respondent.

TO: THE HONORABLE CLARENCE THOMAS
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER GEORGE B. HARRIS'S
APPLICATION FOR EMERGENCY STAY OF EXECUTION

Petitioner George Harris, by and through his attorneys, submits this Application for Emergency Stay of Execution of the sentence of death to permit the filing and consideration of an Original Petition for Habeas Corpus to the United States Supreme Court. Petitioner is currently scheduled to be executed tomorrow night, September 13, 2000, at 12:01 a.m. This Court has jurisdiction to enter a stay pending habeas corpus proceedings pursuant to 28 U.S.C. § 2251.

In support of this motion, petitioner Harris incorporates his Original Petition for Habeas Corpus, lodged with this court at approximately (10:00 p.m. Eastern Time). Petitioner has exhausted

all other forms of appeal from state and lower federal courts. Accordingly, petitioner respectfully requests that the Court enter an emergency stay pending the filing and consideration of an Original Petition for Habeas Corpus to the United States Supreme Court.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

Gardiner B. Davis

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Kansas City, Missouri 64106
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was transmitted via facsimile and United States mail, first class postage prepaid, this 11th day of September, 2000 to:

Cassandra K. Dolgin, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
573-751-3825
ATTORNEY FOR RESPONDENT

All persons required to be served have been served.

Gardiner B. Davis

ATTORNEY FOR PETITIONER

IN THE UNITED STATES SUPRME COURT

GEORGE B. HARRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 00-6106
	)	
ALLEN D. LUEBBERS,	)	
	)	
Respondent.	)	

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SUGGESTIONS IN OPPOSITION TO PETITIONER'S "PETITION FOR WRIT OF HABEAS CORPUS" AND "APPLICATION FOR EMERGENCY STAY OF EXECUTION"

Comes now Respondent, by and through counsel, and in opposition to petitioner's "Petition For Writ Of Habeas Corpus" (hereinafter "Petition") and "Application For Emergency Stay Of Execution" (hereinafter "Application"), states as follows:

Background

1. Petitioner, George B. Harris, was convicted on February 10, 1990, of the offenses of first degree murder, in violation of § 565.020.1, RSMo (1986), and armed criminal action, in violation of § 571.015, RSMo (1986).

2. On July 30, 1990, upon the jury's recommendation, the circuit court pronounced the sentence as death for the murder conviction and a term of imprisonment of five hundred years for armed criminal action. The trial court also found petitioner to be a prior and persistent offender. Petitioner filed a direct appeal to Missouri Supreme Court. The facts relating to petitioner's offense

are summarized in the opinion of the Missouri Supreme Court affirming petitioner's conviction and sentence. State v. Harris, 870 S.W.2d 798 (Mo. banc), cert. denied, 513 U.S. 953 (1994).

3. Petitioner sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on October 28, 1994, cause number 94-1028-CV-W-2. Petitioner filed an amended petition on February 10, 1995. Petitioner raised approximately thirty-three grounds for relief, including subparts. The district court denied the petition for writ of habeas corpus on November 6, 1996.

4. On March 16, 1998, the Eighth Circuit issued its Order granting petitioner's application for certificate of appealability on the following issues: the depravity of mind aggravating circumstance; the reasonable doubt instruction issue; admissibility of evidence concerning Harris' alleged plans to conduct a drive-by shooting and his going to a night club for the alleged purpose of killing another person; and ineffective assistance of counsel for failing to identify, locate, and present testimony from a witness described as "Ben."

5. On July 13, 1999, the United States Court of Appeals for the Eighth Circuit issued its opinion affirming the district court's denial of the writ. Harris v. Bowersox, 184 F.3d 744 (8th Cir. 1999), cert. denied, 120 S.Ct. 840 (2000).

Motion for Stay of Execution

1. Petitioner requests a stay of execution pending filing and consideration of an original petition for writ of habeas corpus. Application, at 2.

2. Review of petitioner's motion is governed by the standard set forth in Bowersox v. Williams, 517 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996):

> "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.' " *Delo v. Stokes*, 495 U.S. 320, 321, 110 S.Ct. 1880, 1881, 109 L.Ed.2d 325 (1990) (*per curiam*) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983)). Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is " 'particularly egregious' " to enter a stay absent substantial grounds for relief. *Delo v. Blair*, 509 U.S. 823, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (citation omitted).

Id., 517 U.S. at 346, 116 S.Ct. at 1312, 134 L.Ed.2d 494. As discussed infra, at 3-4, petitioner is not entitled to relief pursuant to 28 U.S.C. § 2254. Accordingly, petitioner is unable to demonstrate that there are substantial grounds upon which relief might be granted, and thus a stay of execution is not proper under the circumstances.

Petition For Writ Of Habeas Corpus

1. Petitioner contends that both the Missouri Supreme Court and the United States Court of Appeals for the Eighth Circuit applied the wrong legal standard in consideration of petitioner's claims of ineffective assistance of trial counsel and that it accordingly is a violation of his constitutional rights to execute "a person who is actually innocent." Petition, "Question Presented For Review."

2. Though purportedly an original petition for writ of habeas corpus, review of the petition clearly reflects that petitioner seeks review of the decisions of the Missouri Supreme Court and Eighth Circuit Court of Appeals. Time for seeking such review as provided by Rule 10 of the United States Supreme Court Rules has long expired.

3. Moreover, regarding petitioner's claim of actual innocence, petitioner fails to present "newly discovered evidence" as required under Schlup v. Delo, 513 U.S. 298, 316 (1995). In

addition, petitioner fails to acknowledge that his actual innocence claim rests upon his assertion that he killed Stanley "Hank" Willoughby in self-defense; a claim of legal, rather than factual innocence. See Respondent's Opposition Exhibit 1, at 2.[1]

4. Finally, rather than challenging an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), petitioner in actuality argues that the courts below failed to retroactively apply a new rule of constitutional error -- i.e., that cumulative attorney conduct gave rise to ineffective assistance of counsel. Petitioner cites no authority for such a proposition, and application of such a new rule of constitutional law is contrary to Teague v. Lane, 489 U.S. 288, 310 (1989).

Wherefore, based upon the foregoing reasons, Respondent prays the Court deny petitioner's "Petition For Writ Of Habeas Corpus" and "Application For Emergency Stay Of Execution."

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[1]Petitioner's "actual innocence" argument to the United States Court of Appeals for the Eighth Circuit also relied upon his assertion of self-defense. In his application to file a successive petition for writ of habeas corpus, petitioner, almost as an afterthought, did argue that the newly presented information would negate the element of "premediation" because the petitioner did not know the victim. Respondent's Opposition Exhibit 2, at 3. Missouri law requires a finding of "deliberation" in order to find a defendant guilty of murder in the first degree under state law. § 565.020.1, RSMo (1986). Petitioner's newly presented evidence would not have negated the element of deliberation. See Harris, 870 S.W.2d at 804-805.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RECEIVED
MISSOURI
ATTORNEY GENERAL

GEORGE B. HARRIS,	)	
	)	
Movant,	)	
	)	Docket No. _____
v.	)	
	)	THIS IS A DEATH PENALTY CASE
ALLEN D. LUEBBERS,	)	Execution set for September 13, 2000
	)	at 12:01 a.m.
Respondent.	)	

BRIEF IN SUPPORT OF MOTION TO RECALL MANDATE AND FOR LEAVE TO FILE SUCCESSIVE PETITION

The writ of habeas corpus serves as the last guardian against the execution of the innocent. George Harris faces exactly this scenario. Had movant been represented by constitutionally effective counsel at trial, evidence would have been presented on his behalf establishing his actual innocence of the crime of first degree murder. Because his conviction resulted from counsel's failure to conduct an adequate investigation and to present an adequate defense, and because these failures resulted in the conviction of a person who is actually innocent of the crime charged, this Court should allow movant to present his claim for appropriate consideration in the District Court.

The United States Supreme Court has held that a second or successive petition for habeas corpus should be adjudicated on the merits in situations where a constitutional violation "has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 321 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). This case presents such a situation.

The Sixth Amendment guarantees every accused the right to be effectively represented by counsel in presenting a defense to any criminal charge. The effective performance of defense counsel

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No. _____
Respondent's Opposition Exhibit No. 2.

is essential to the proper functioning of our system of justice. As Justice Stephens wrote for a unanimous Court:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly.

United States v. Cronic, 466 U.S. 648, 653-54 (1984) (footnotes omitted). It has long been held that the right to the assistance of counsel is the right to the effective assistance of counsel. *Id.* at 654. Any failure to provide an accused with the effective assistance of counsel is a fundamental constitutional error that undermines the entire adversary process. *See Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir. 1976).

Movant's trial counsel failed to undertake an adequate investigation of this case. Even though his defense was based on movant's having acted in self defense to protect himself from a man he feared, counsel undertook no investigation to determine whether any witnesses other than George Harris were available to support this theory. Had he simply contacted Willoughby's common-law wife, Kendra Remmer, she would willingly have provided compelling testimony in support of movant's claim. As set forth in her Affidavit of August 23, 2000, Ms. Remmer would have told the jury that Stanley Willoughby was a strong man with a reputation for violence. Affidavit of Kendra Remmer (attached as Exhibit A). She would have corroborated movant's testimony that Willoughby carried a gun. *Id.* She further would have testified that the site of the shooting was a crack house operated by Willoughby and by Michael Taylor, the State's leading witness. *Id.* None of this

testimony reached the jury, however, for the simple reason that counsel never bothered to contact Willoughby's spouse prior to trial.

If Kendra Remmer's testimony had been elicited at trial, it would have cast doubt upon a critical element of the state's case: the element of premeditation. Under Missouri law, premeditation is an essential element of the crime of first degree murder. Kendra Remmer not only would have supported movant's theory of self defense, but she would have negated the element of premeditation by her testimony that movant did not even know the victim. Exhibit A. This evidence would have established that movant was actually innocent of the crime of first degree murder and consequently ineligible for the death penalty under Missouri law. The failure to conduct an investigation sufficient to discover this witness deprived movant of the effective assistance of counsel guaranteed by the Sixth Amendment.

Furthermore, the constitutional violation suffered by movant has resulted in the conviction of someone who is actually innocent of the crime charged. As a result, under the doctrine of *Murray v. Carrier*, 477 U.S. 478, 496 (1986), this Court should allow the filing of movant's successive petition, notwithstanding any procedural default. *Schlup v. Delo*, 513 U.S. 298, 321 (1995). The ends of justice demand that movant's constitutional claims be considered on their merits.

For the foregoing reasons, movant respectfully submits that his Motion to Recall Mandate and for Leave to File Successive Petition should be granted.