Capital Case

Case No. __________

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE QUISI BRYAN, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

No. 18-3557

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: QUISI BRYAN, Movant.	))))))	O R D E R

Before: SILER, ROGERS, and DONALD, Circuit Judges.

Quisi Bryan, an Ohio death-row prisoner represented by counsel, moves this court to grant him permission to file a second or successive petition under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b). He also moves to remand his case to the district court or to grant him additional briefing to show that his case should be remanded. Bryan seeks to return to the district court to argue that it was unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016), for the Ohio Supreme Court to have used independent reweighing to cure the penalty-phase prosecutorial misconduct in his case. We **DENY** the motions.

A jury convicted Bryan of aggravated murder, attempted murder, carrying a concealed weapon, carrying a firearm while under disability, and tampering with evidence. The trial court sentenced him to prison and death. Bryan directly appealed to the Ohio Supreme Court, which denied relief. One of the claims advanced was that the prosecutor had committed several acts of misconduct in penalty-phase closing argument. The court held that Bryan had forfeited all but plain-error review for most of those acts, although the court conceded that some of the prosecutor's statements, from both the preserved and unpreserved categories, were improper. Even so, the court held the unpreserved errors not plain and the rest harmless. *State v. Bryan*, 804 N.E.2d 433, 463-65, ¶¶ 175-87 (Ohio 2004). The court added this alternative analysis: "Moreover, our independent assessment of the sentence has cured any lingering impact from the prosecutor's comments." *Id.* at 464, ¶ 182. The court later independently reweighed the aggravating circumstances and mitigating factors before finding the death sentence appropriate. *Id.* at 469-71, ¶¶ 215-27. Bryan tried but failed to reopen the appeal and failed to obtain relief in state postconviction proceedings. He timely filed his first federal habeas corpus petition in 2011. The district court granted relief on one claim (not at issue now), but denied all the others. We reversed the grant of relief and affirmed the denial. *Bryan v. Bobby*, 843 F.3d 1099 (6th Cir. 2016).

In 2017, Bryan returned to the Ohio Supreme Court and there filed a motion for relief pursuant to Ohio Supreme Court Rule of Practice 4.01 raising the *Hurst* claim. The court denied the motion in what Bryan argues was presumptively a merits review. In 2018, Bryan returned to the district court and raised the *Hurst* claim in a new federal habeas corpus petition. The district court transferred the petition here for permission to be filed.

Bryan does not meet the filing requirements. *See* § 2244(b). Filing a second or successive § 2254 petition is generally prohibited, with two exceptions. Bryan admits not relying on newly discovered evidence. § 2244(b)(2)(B). That leaves one exception: 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." § 2244(b)(2)(A). Bryan's proposed claim does rely on *Hurst*, but the Supreme Court has not made it retroactive. *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017). In short, the claim cannot survive § 2244(b).

Bryan argues it does not need to. His proposed petition is second in time, he contends, but not "second or successive" in the § 2244 sense, because the claim it raises was previously unripe. The petition therefore falls outside § 2244's ambit, needs no permission to be filed, and should simply be remanded to the district court.

This argument depends mainly upon Bryan's understanding of what makes a claim "ripe." He argues that it ripens, for federal habeas purposes, "when the petitioner could first litigate his claim in a state forum and exhaust the claim prior to timely invoking the federal court's jurisdiction under § 2254." He further argues that certain unexplained rulings by the

Ohio Supreme Court in a different case opened the door to Bryan's raising his *Hurst* claim in state court, thus starting the ripening of the claim, and then the denial of his claim on the merits completed that ripening. This last was important for additional reasons. Bryan argues that the Constitution requires federal courts to review state-court resolutions of constitutional issues. Thus, by deciding Bryan's *Hurst* claim on the merits, the state court triggered both federal court jurisdiction over the claim and a constitutional duty to review it.

Whether or not Bryan has correctly interpreted both *Hurst* and the Ohio Supreme Court's unexplained rulings, his argument still fails.

"It's true that not all second-in-time petitions are 'second or successive.' " *Id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). It is also true that a second-in-time petition is not successive when it raises a claim that could not have been adjudicated in the first petition because the claim was not yet ripe. *Id.* (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)).

But Bryan misunderstands ripeness. "Ripeness requires that the 'injury in fact be certainly impending.' " *NRA v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). Under Bryan's theory, he was injured when the Ohio Supreme Court independently reweighed aggravation and mitigation. That occurred in 2004, some seven years before he first reached federal court. Thus, recent ripeness does not remove Bryan's claim from § 2244's control, because it is not recently ripe.

Bryan argues that it is unconstitutional to interpret § 2244 in such a way as to bar federal court review of the claim. But even if it is true that the Constitution requires some federal court to review the claim, it does not follow that the district court must. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Congress, in § 2244(b), chose to limit the jurisdiction of district courts when dealing with second or successive petitions. It did not try to comparably limit the jurisdiction of the Supreme Court. If Bryan wishes, he may try bringing his *Hurst* claim there, in an original habeas corpus petition. *See Felker v. Turpin*, 518 U.S. 651, 654, 658, 660-62 (1996). But he may not bring it in district court without satisfying § 2244(b).

Citing *Dickerson v. United States*, 530 U.S. 428 (2000), Bryan argues that *Hurst* is a decision interpreting and applying the Constitution and, therefore, Congress may not abrogate or supersede it. But Congress did nothing of the sort. *Hurst* claims may still be brought in a first habeas petition or directly to the Supreme Court.

Bryan argues that Congress did not intend to deprive federal courts of habeas corpus jurisdiction or to diminish it. But Congress obviously intended to do just that in § 2244(b) for district courts dealing with second or successive petitions. He cites no Supreme Court case that holds otherwise.

On a related note, he argues that § 2244(b) should not be interpreted so as to abrogate § 2254(d). But § 2244(b) does not abrogate § 2254(d). It does nothing to § 2254(d)'s control of claims brought in a first petition. It merely limits the claims that may be brought in a second or successive petition. "[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 664 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

Bryan's final attempt to escape § 2244(b) is to argue that applying it here would effectively suspend the writ of habeas corpus. U.S. Const. art. I, § 9, cl. 2. Enforcing § 2244(b) "does no such thing." *In re Coley*, 871 F.3d at 458 (citing *Felker*, 518 U.S. at 664).

Accordingly, we **DENY** Bryan's request to remand this case to the district court, **DENY** him additional briefing, and **DENY** his application for permission to file a second or successive habeas corpus petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

2018 WL 2932342
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Western Division.

Quisi BRYAN, Petitioner
v.
Tim SHOOP, Warden, Respondent

Case No. 1:18CV591
|
Filed: 06/12/2018

Attorneys and Law Firms

Lori B. Riga, Vicki R.A. Werneke, Alan C. Rossman, Office of the Federal Public Defender, Cleveland, Ohio, for Petitioner.

Brenda S. Leikala, Charles L. Wille, Office of the Ohio Attorney General, Columbus, Ohio, for Respondent.

ORDER

James G. Carr, Sr. U.S. District Judge

***1** This is a capital habeas case under 28 U.S.C. § 2254 in which the petitioner, Quisi Bryan, has filed a second-in-time petition. The question is whether it is a "second or successive" petition that Bryan cannot file without first obtaining permission from the U.S. Court of Appeals for the Sixth Circuit. 28 U.S.C. § 2244(b); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Bryan first petitioned the court for a writ of habeas corpus in 2011. I concluded that relief was warranted on his *Batson* claim. *Bryan v. Bobby*, 114 F.Supp.3d 467 (N.D. Ohio 2015). The Circuit disagreed and reversed. *Bryan v. Bobby*, 843 F.3d 1099 (6th Cir. 2016), *cert. denied* —— U.S. ——, 138 S.Ct. 179, 199 L.Ed.2d 106 (2017) (mem.)

Bryan's second petition raises a claim under *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

In *Hurst*, the Supreme Court held that Florida's capital-sentencing scheme violated the defendant's Sixth Amendment jury-trial right. Under the Florida law, the jury made only an advisory recommendation that the defendant receive a death sentence. It was the trial judge who made the critical determination "whether sufficient aggravating circumstances existed to justify imposing the death penalty." *Id.* at 619. That was unconstitutional, the Court said, because the Sixth Amendment—and its fourteen-year-old decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)—require that a jury find the facts necessary to make a defendant eligible for a death sentence. *Id.* at 621, 122 S.Ct. 2428.

Bryan contends that *Hurst* invalidates his death sentence. (Doc. 1–2 at 14–23). This is so, not because the judge found the facts making Bryan eligible for death (the jury unanimously found him death-eligible), but because *Hurst* purportedly "invalidated appellate reweighing procedures used to uphold jury death verdicts in cases where trial errors undermined or called into question juror fact-finding specific to deciding whether aggravating circumstances outweigh mitigating factors." (Doc. 1–2 at 14).

In Bryan's case, the Ohio Supreme Court held that the prosecutor's misconduct during penalty-phase closing statements was not prejudicial, given "the proven aggravating circumstances and the lack of significant mitigating evidence." *State v. Bryan*, 101 Ohio St. 3d 272, 299, 804 N.E.2d 433 (2004). The court also held, in the alternative, that its "independent assessment of the sentence has cured any lingering impact from the prosecutor's comments." *Id.*

According to *Bryan*, "Ohio's reweighing practice is indistinguishable from the Florida scheme's act of substituting the fact-finding of twelve jurors with that of a sentencing judge." (Doc. 1–2 at 16).

Bryan contends that he could not raise this claim earlier because it did not become ripe until the Supreme Court decided *Hurst* and he returned to the Ohio courts to pursue this claim. (Doc. 11 at 6). For that reason, Bryan argues, his petition is not "second or successive," and I have subject-matter jurisdiction to adjudicate it.

District courts lack subject-matter jurisdiction to adjudicate a "second or successive" habeas petition. I do have jurisdiction, however, to decide if a petition is "second or successive." *In re Smith*, 690 F.3d 809, 809 (6th Cir. 2012).

***2** As the Circuit has explained, "not all second-in-time petitions are 'second or successive.' " *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017).

"But this not-second-or-successive exception is generally restricted to two scenarios. The first is where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition. The second is where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never passed on the merits." *Id.* (internal citations and quotation marks omitted).

Bryan's argument that his claim was not ripe until the Supreme Court decided *Hurst* lacks merit.

"[W]hat makes a claim unripe, at least for purposes of the exception to the bar on second or successive [petitions], is that the factual predicate has not matured, not that the law was unsettled or has changed." *Petaway v. U.S.*, 104 F.Supp.3d 855 857 (N.D. Ohio) (internal citations and quotation marks omitted).

Here, the facts underlying Bryan's *Hurst* claim matured no later than his direct appeal in 2004, when the state supreme court engaged in the allegedly unconstitutional reweighing. The only arguable change that has occurred is a change in the law. But the Circuit has rejected the contention that "a petition is not second or successive when it relies on a rule that did not exist when the petitioner filed his first petition." *Coley, supra*, 871 F.3d at 457.

Bryan responds that *Coley* is distinguishable because the petitioner in that case had not exhausted his *Hurst* claim, whereas Bryan already presented this claim to the Ohio courts. (Doc. 11 at 9, 11). But *Coley* did not turn on whether the *Hurst* claim was exhausted. The case depended, rather, on the court's holding that a new rule of constitutional law does not constitute a new factual predicate that, in turn, gives rise to a new claim for relief. *Coley, supra*, 871 F.3d at 457–58.

Finally, my conclusion that *Coley* controls—and that Bryan's petition is "second or successive"—is consistent with that of my colleagues throughout the Northern and Southern Districts of Ohio. *E.g., Henness v. Jenkins*, 2018 WL 1100876, *5 (S.D. Ohio) (*Hurst* claim in second habeas petition was improper "second or successive" application); *Sheppard v. Jenkins*, 2017 WL 4585262, *2 (S.D. Ohio) ("a claim depending on *Hurst* cannot escape classification as second-or-successive because *Hurst* was not decided while [the petitioner's] first habeas case was pending"); *Sneed v. Jenkins*, 2017 WL 564821, *4 (N.D. Ohio) (rejecting petitioner's argument that petitioner's *Hurst* claim became ripe only after first round of habeas review ended, given that *Hurst* was a straightforward application of *Ring v. Arizona*).

Conclusion

It is, therefore,

ORDERED THAT:

1. Respondent's motion to transfer (Doc. 7) be, and the same hereby is, granted; and

2. The clerk shall forthwith transfer this case to the United States Court of Appeals for the Sixth Circuit.

So ordered.

All Citations

Slip Copy, 2018 WL 2932342

End of Document