IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-70002

United States Court of Appeals
Fifth Circuit
FILED
February 1, 2018
Lyle W. Cayce
Clerk

JOHN DAVID BATTAGLIA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-1687

Before HIGGINBOTHAM, DENNIS, and GRAVES, Circuit Judges.

PER CURIAM:*

This case involves a question of competence to be executed. On January 2, 2018, John Battaglia filed a motion in the district court for funding of investigatory services and a motion for stay of execution. The district court denied the motions, stating that "any grant of funding for such an investigator would appear to be a misallocation of federal funds." We affirm.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

Having been convicted and sentenced to death for killing his two daughters,[1] John Battaglia now attacks his competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure.

Battaglia first raised the competency issue in February 2016, when he filed a motion in state trial court for appointment of counsel to investigate, prepare, and file a competency claim.[2] The motion was summarily denied.[3] Battaglia next filed a motion in federal court, requesting the appointment of counsel under 18 U.S.C. § 3599 and a stay of execution.[4] The district court denied the motion.[5]

On March 30, 2016, we reversed the district court, appointed new counsel, and granted Battaglia a stay of execution "to make [his] right to counsel meaningful."[6] In our opinion, we stated "[i]t is the present counsel's responsibility now appointed to take the case he has—and that may be developed during the time gained—to state court."[7]

On June 21, 2016, Battaglia filed in federal district court a motion for leave to proceed *ex parte* and an *ex parte* motion to request investigative and expert funding.[8] The funding motion requested $19,500 to retain forensic psychologist Dr. Diane Mosnik and $15,000 for investigative assistance from Nicole VanToorn, a mitigation specialist.[9] On June 22, 2016, the district court

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[1] *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, at *1 (Tex. Crim. App. Sept. 20, 2017).

[2] *Id.* at 4.

[3] *Id.*

[4] *Battaglia v. Stephens*, No. 3:16-cv-00687-B, 2016 WL 7852338 (N.D. Tex. Mar. 18, 2016).

[5] *Id.*

[6] *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

[7] *Id.* at 476.

[8] *Battaglia v. State*, No.3:16-CV-1687-B, 2018 WL 550518, at *1 (N.D. Tex. Jan. 24, 2018)

[9] *Id.* at *1.

denied leave to proceed *ex parte* because of issues with service, but "included guidance on the procedures required to proceed *ex parte* and on what would be required to make the showing that funding for the sought services was reasonably necessary to the representation of Battaglia before the state court."[10] Battaglia made no further requests for funding from the federal district court at that time.

On July 21, 2016, Battaglia filed motions in state trial court seeking funding for the same mental health expert and mitigation specialist.[11] Battaglia represented that Dr. Mosnik was necessary to "assist [counsel] in developing evidence about Mr. Battaglia's current mental health" and to "form an expert opinion about whether [Battaglia] is competent" to be executed. He claimed that VanToorn was needed to "(1) obtain and review voluminous records from TDCJ and Battaglia's medical records . . . ; (2) collect information about Battaglia's background, including environmental and genetic risk-factors; and (3) present understanding of his death sentence by interviewing collateral sources, including Battaglia's family members and others with whom Battaglia communicates." Battaglia stated that "[i]f [the state] court decides it cannot fully fund the necessary experts, [he would] need to return to federal court for his funding before returning to file his [Article 46.05] motion."

On July 29, 2016, the state trial court granted $12,000 for the expert assistance of Dr. Mosnik and denied funding for mitigation specialist VanToorn. Despite his claim that he would need to return to federal court for funding before filing his motion, Battaglia did not do so.[12] In August 2016, the state court set Battaglia's execution date for December 7, 2016.[13]

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[10] *Id.* *1.

[11] *Id.* at *2.

[12] Battaglia now contends that he did not return to federal court at least in part because he would not have had time to use that funding to develop his claims.

[13] *Battaglia*, 2018 WL 550518, at *2.

On October 19, 2016, Battaglia filed a motion under Article 46.05 challenging his competence to be executed. Four mental health experts examined Battaglia: the State's expert Dr. Timothy Proctor; two court-appointed experts, Dr. Thomas Allen and Dr. James Womack; and the Defense's expert, Dr. Diane Mosnik. After a two-day evidentiary hearing, the state court ruled that Battaglia had not shown he was incompetent to be executed.[14]

On December 2, 2016, the Texas Court of Criminal Appeals ("CCA") granted a stay of execution to review the competency determination. On September 20, 2017, the CCA affirmed the state trial court's order.[15] On December 13, 2017, Battaglia filed a petition for a writ of certiorari with the Supreme Court, which is still pending.[16] The state then set a new execution date of February 1, 2018.[17]

On January 2, 2018, Battaglia returned to federal court seeking funding for mitigation expert VanToorn's services and a stay of execution. On January 24, 2018, the district court denied both motions.[18] Battaglia appeals.

II.

While the procedural history of this case is lengthy, the question before us today is simple: whether the federal district court erred in denying Battaglia federal funding for a "mitigation specialist" to prepare a federal habeas challenge to a state competency determination. Under § 3599(f), a court "*may* authorize" defense attorneys to obtain "investigative, expert, or other services

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[14] *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, at *4 (Tex. Crim. App. Sept. 20, 2017).

[15] *Id.* at *30.

[16] *Battaglia v. State*, No. AP-77,069, 2017 WL 4168595, *petition for cert. filed* (U.S. Dec. 13, 2017) (No. 17-7165).

[17] *Battaglia*, 2018 WL 550518, at *2.

[18] *Id.* at *10.

[that] are reasonably necessary for the representation of the defendant."[19] We review a denial of such funding for abuse of discretion.[20]

We have held that "[a] denial of funding will be upheld when it would only support a meritless claim, when it would only supplement prior evidence, or when the constitutional claim is procedurally barred."[21] Battaglia contends that this is an exhaustive list, that "none of these factors exist here," and thus the district court erred in denying him § 3599 funding.

A.

Battaglia contends that VanToorn's services were reasonably necessary to "obtain and review voluminous . . . records, . . . collect information about Battaglia's background, . . . [and] interview[] . . . Battaglia's family members and others." In his state funding request, Battaglia admits that counsel could undertake much of this work, but states that counsel would be less "cost effective" and lack "experience and training to conduct [sensitive] interviews." Much of this information sought about Battaglia's past would likely have had little sway on the determination of his present competence to be executed.

That is not the point. Battaglia's current request for funding comes on the eve of his execution, after the CCA has already affirmed the state trial court's finding based on a full hearing that Battaglia is competent to be executed. As the district court correctly noted, Battaglia's current funding request "comes too late to have any impact on the expert evaluations that were made and the testimony that was presented" in the state competency proceedings.[22]

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[19] 18 U.S.C. § 3599(f) (emphasis added).

[20] *See Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

[21] *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (internal citations omitted); *see also Smith*, 433 F.3d at 288.

[22] *Battaglia*, 2018 WL 550518, at *5.

At this stage, Battaglia seeks funding for investigatory services to pursue his claims in federal court. Yet because a state court has already adjudicated Battaglia's claim on the merits, "review under § 2254(d)(1) is limited to the record that was before the state court" during the competency hearing.[23] The district court correctly noted that this limitation on habeas review "indirectly limits the availability of funds for investigative assistance."[24] Even if Battaglia received the requested funding and the mitigation specialist "collect[ed] information about Battaglia's . . . present rational understanding of his death sentence," such information would be barred from consideration by the federal courts. It is not an abuse of discretion to deny a motion for funding that would produce only unreviewable evidence.

B.

To escape this reality, Battaglia argues that the limitations set by § 2254(d) are "a form of issue preclusion" and should not apply "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." Battaglia contends that this is just such a case, since the state court's denial of funding for a mitigation expert meant that he could not adequately develop his arguments and thus did not have a *meaningful* opportunity to be heard. While he concedes that a competency hearing "may be less formal than a trial," he asserts that it still requires process that allows a defendant to "present[]

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[23] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); *cf. Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011) ("*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254(d).").

[24] *See Battaglia*, 2018 WL 550518, at *4; *see also Devoe v. Davis*, No. 16-70026, 2018 WL 341755, at *9-10 (5th Cir. Jan. 9, 2018) (concluding that it was not an abuse of discretion to deny funding where § 2254(d) bars the consideration of any new evidence).

critical evidence" and contends that the lack of funding prevented him from uncovering and presenting such evidence. Battaglia cites no authority holding that § 2254(d) is a form of issue preclusion that violates due process, and like the district court, we are not aware of any such case.

In *Valdez*, we held that "a full and fair hearing is not a prerequisite to the operation of 28 U.S.C. § 2254's deferential scheme."[25] That said, the Supreme Court has stated that "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness."[26] If a state court fails to provide the "minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim,"[27] that failure would constitute an unreasonable application of clearly established Supreme Court precedent and the state court's competency finding would not be entitled to deference under § 2254(d)(1).

Battaglia has made no such showing here. States have "'substantial leeway to determine what process best balances the various interests at stake' once [they have] met the 'basic requirements' required by due process," which include "an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert evidence that may differ from the State's own psychiatric examination.'"[28] In *Green v. Thaler*, we upheld a competency proceeding where the defendant "received counsel, expert services, and the opportunity to present evidence and argument at a live hearing, including the

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[25] *Valdez v. Cockrell*, 274 F.3d 941, 942, 950 (5th Cir. 2001) ("The term 'adjudication on the merits[]' . . . refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. It does not speak to the quality of the process.") (internal citations omitted).

[26] *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring)).

[27] *Id.*

[28] *Id.* at 949-50 (quoting *Ford*, 447 U.S. at 427) (Powell, J., concurring)).

admission of medical records."[29] The defendant contended that his due process rights were violated because the court did not permit him to present certain fact witnesses who could corroborate the expert's diagnosis.[30] We rejected that argument and found that the defendant received sufficient process because he was "able to hire an expert who submitted a report and testified, and could respond directly to the State's evidence."[31]

Here, the state court conducted a two-day hearing into Battaglia's competency to be executed. He was represented by counsel and the state provided $12,000 of funding to hire a forensic psychologist, Dr. Mosnik, as a mental health expert. Battaglia was also evaluated by two court-appointed experts in addition to the State's expert. We see no evidence that the state court violated the procedural requirements set out by *Panetti*. Thus, any habeas petition challenging the state court's competency finding would have to be cabined to the record that was before the state court, obviating the need for additional investigatory services.

III.

Battaglia's motion for a stay of execution is in large part premised on his funding request. Battaglia also urges this court to stay his execution pending the Supreme Court's decision in *Ayestas v. Davis*,[32] which involves a challenge to a denial of § 3599 funding. The question presented in *Ayestas* is:

> Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence

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[29] 699 F.3d 404, 412 (5th Cir. 2012).
[30] *Id.* at 411-12.
[31] *Id.* at 413.
[32] 137 S. Ct. 1433, 1434 (2017).

> does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.

Ayestas is of no moment here. We need not evaluate the strength of Battaglia's underlying claim to decide whether he is entitled to the funding he belatedly seeks. Any additional evidence gained from an investigation by a mitigation specialist—whose assistance he seeks not because counsel cannot investigate but because a mitigation specialist would cost less—cannot be introduced for the first time in a federal court on collateral review.[33]

IV.

We hold that the federal district court did not abuse its discretion in denying funding for a mitigation specialist where any resultant evidence could do no meaningful work. We AFFIRM the district court's denial of Battaglia's motion for funding of a mitigation specialist and DENY his motion to stay his execution.

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[33] *See Devoe*, 2018 WL 341755, at *10.