McPeters v. Brown, et al Doc. 255

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD AVERY McPETERS, Petitioner, **v.** **KEVIN CHAPPELL, as Acting Warden of California State Prison at San Quentin,** Respondent.	**Case No. 1:95-cv-5108 LJO** **DEATH PENALTY CASE** **STATUS REPORT PER THIS COURT'S ORDER OF JANUARY 29, 2013**

In accordance with the Court's order of January 29, 2013, the Attorney General has contacted and conferred with the District Attorney of Fresno County respecting the latter's "position on settlement." We have concluded those discussions, and it is the District Attorney's position, as well as the Attorney General's, that no authority exists under state law for any state official, including a District Attorney, to "settle" a proceeding initiated under 28 U.S.C. § 2254 by agreement with the petitioner to alter the terms of a criminal judgment from those reflected in the decision of a state appellate court affirming that judgment. We emphasize the narrow scope

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of the matter addressed here: the authority on the state's behalf to "settle" federal habeas litigation by agreeing to alter the terms of an affirmed judgment.[1]

State prosecutorial authority in California is vested in both the Attorney General and the several counties' elected District Attorneys. Cal. Const. art. 4, § 13; *id*., art. 11, § 1; Cal. Gov. Code §§ 12511-12512, 26500-26501. With exceptions not relevant to the instant discussion, the state's interests in criminal litigation are ordinarily represented at the trial level by the District Attorney, and in subsequent proceedings (including direct appeals and state and federal habeas corpus actions) by the Attorney General. Cal. Gov. Code §§ 26500-26501; *id*. §§ 12511-12512. The relationship between the Attorney General and the District Attorneys in all matters of common state interest is cooperative and collaborative, although the Attorney General, as the state's Chief Law Officer, has supervisory authority over the District Attorneys, as well as ultimate charge of all criminal law matters. Cal. Gov. Code §§ 12511, 12550.

It follows from the foregoing that whatever authority there might be to "settle" federal habeas corpus litigation on behalf of the state, such authority certainly would not be vested in the District Attorney *to the exclusion of the Attorney General*. And, as we shall next explain, not even the Attorney General alone has such authority.

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[1] The court is correct that "the Warden does not have settlement authority in federal cases reviewing state convictions." (Doc. 253 at 11.) The warden's role in federal habeas corpus litigation is nominal only. Indeed, that role amounts to a "fiction," for habeas actions "are effectively suits against *the state[]*" in whose name the judgment of conviction under attack was prosecuted and secured. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 178 n.61 (1996). Wardens are named the "respondent" in habeas action for one reason only: They have " 'the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.' " *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (emphasis by Court) (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885); accord *Nadworny v. Fair*, 872 F.2d 1092, 1095 (1st Cir. 1989) (although correctional officials are the nominal respondents in federal habeas corpus actions, the real party in interest is the state); *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004) ("In this suit against Director Dretke, the real party in interest is the State of Texas") (citing *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986) ("A suit against a state officer in his official capacity is, of course, a suit against the State")); *Brennan v. Stewart*, 834 F.2d 1252 n.6 (5th Cir. 1988) cited in *Seminole Tribe*, 517 U.S. at 178 n.61; *see also Harris v. Nelson*, 394 U.S. 286, 296 (1969) (the warden has no "personal knowledge" relating to petitioner's arrest and trial and is not an "adversary party" contemplated under discovery rules). Wardens, who do not secure criminal judgments of conviction on behalf of the state, have no actual role in defending those judgments against direct or collateral attacks, nor do they have any authority to modify, or agree to have modified, the terms of those judgments, by "settlement" or otherwise.

Under California law, no judgment may be upset unless the proceedings leading to that judgment "resulted in a miscarriage of justice." Cal. Const. art. 6, § 13. Whether that condition is satisfied is ordinarily determined by a court, although the state, in its capacity as party to a criminal proceeding, certainly has the authority—indeed, the duty—to confess error and prejudice when it determines the same to have occurred. If the relief were conferred on appeal, it would take the form of a reversal or modification of the judgment. It is conceivable, however, that relief might be conferred before judgment is even entered (in which event it might take the form of an order granting a new trial) or after a judgment has been affirmed on direct appeal (in which event it would typically take the form of an order granting a writ of habeas corpus). But in order for relief to be conferred at any stage pursuant to the state's "stipulation," the state must first satisfy itself that a miscarriage of justice has occurred, and the court, in turn, must concur with the state's assessment. We are aware of no other provision of state law that authorizes any state executive officer to "stipulate," in effect, to modification of a criminal judgment under any other circumstances.

State officials believe we have no wider latitude to facilitate modifications to state judgments during the course of federal proceedings than we have during state proceedings. Indeed, as a practical matter, we commonly will have far less: By the time a state prisoner typically resorts to federal habeas corpus, the judgment will already have been affirmed by the state courts. And, assuming the petitioner had observed the exhaustion requirement, the particular grounds on which the judgment is attacked on federal habeas corpus will have been considered and rejected by the state court. Although it is not impossible that the state officials might discern a miscarriage of justice to have occurred where the state court found it had not, we think such an event would be highly unlikely.

We recognize, however, that the circumstance relating to this proceeding that has triggered the Court's suggestion that the state explore "settlement" is unrelated to any particular claim that petitioner has advanced for upsetting the terms of his state judgment. Instead, that circumstance concerns petitioner's competence to assist his counsel with the prosecution of his pending federal petition. As the Court has noted, the state has already stipulated that petitioner is incompetent to

assist his counsel. Under the prevailing Ninth Circuit law at that time, the court stayed petitioner's federal habeas corpus proceedings until his competence could be restored, but it did not disturb the underlying state judgment. Now, of course, we know that unless there is a likelihood that petitioner's competence can be restored in the foreseeable future, he is not entitled to the stay that has frustrated the state's attempt to defend his presumptively valid judgment. *Ryan v. Gonzales*, ____U.S.___, 133 S.Ct. 696, 709 (2013).

Yet, as the Court has also suggested, regardless of the outcome of these proceedings, the long-term prospect that petitioner will be competent to be executed may be no better than the prospect that his competence to assist counsel will be restored. And, even if this Court were to grant petitioner relief, questions regarding his competence to stand for re-trial would likely cause him to endure a protracted, possibly indefinite period of confinement. Under these circumstances, the Court has suggested that the most prudent course for all concerned would be to explore "settlement."

We have described the general limitations of the state's ability to "settle" these proceedings. But even if the state was able and inclined to "settle" by, for example, agreeing to substitute petitioner's death sentence with one for life without possibility of parole in exchange for petitioner's voluntary dismissal with prejudice of all pending federal habeas claims—we find it difficult to envision how the agreement could be consummated, for the same questions surrounding petitioner's competence—his competence to assist counsel, to stand trial, and to be executed—loom over the prospect that he could knowingly and intelligently enter into any settlement agreement.

We fully share the Court's concerns for promoting judicial economy and avoiding pointless litigation, and we understand, in principle, how those interests could well be served by "settlement." Notwithstanding the limitations and other considerations outlined above, we remain committed to exploring the possibility of "settlement," mindful that we have perhaps misapprehended either the Court's expectations in that regard, petitioner's capacity to co-

participate in that effort, or the full range of options that might be available to state officials under the particular circumstances prevailing here.

Dated: February 26, 2013

Respectfully submitted,

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