

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL C. SKAKEL
Petitioner

: CIVIL NO. 3:07 CV 1625 (PCD)

:

:

v.

:

:

PETER J. MURPHY
Respondent

:

: JANUARY 7, 2009

**PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 7(d) of the Local Rules of Civil Procedure, the Petitioner, Michael C. Skakel, hereby submits this Reply Brief in response to the Respondent's Memorandum in Support of Motion for Summary Judgment.

I. THE PETITIONER'S CLAIMS ARE NOT PROCEDURALLY DEFAULTED

The Respondent argues that several of the Petitioner's claims are procedurally defaulted. For example, the Respondent argues that the Petitioner's *ex post facto* claim was never raised in his original briefing to the Connecticut Supreme Court. State's Br. at 12-17. The Respondent further argues that the Petitioner's claim regarding the suppression of the profile reports is procedurally defaulted because it was not raised until 2 ½ months after the Motion for New Trial deadline. State's Br. at 32-36. Finally, the Respondent also argues that the Petitioner did not properly present his juvenile transfer claim in state court and, therefore, it is unexhausted. State's Br. at 40-41. For the reasons that follow, the Petitioner's claims are properly exhausted.

A. The Petitioner's *Ex Post Facto* Claim Was Properly Exhausted

The Respondent argues that because the Petitioner did not raise the *ex post facto* issue in his original briefs to the Connecticut Supreme Court, the issue has not been properly exhausted. State's Br. at 12-17. Effectively, the Respondent expects the Petitioner to have been clairvoyant. A habeas corpus petitioner should not be required to argue against constitutional violations that have not yet occurred or to raise constitutional arguments as to rulings that have not yet been issued in order for issues to be considered properly exhausted. In this case, the Petitioner should not be required to have predicted that the Connecticut Supreme Court would overrule two binding precedents that had been in force for 20 years at the time of his briefing to the state supreme court.

In his briefing to the Connecticut Supreme Court, the Petitioner raised various constitutional challenges to issues or problems ***that had already arisen***; he did ***not*** raise constitutional challenges to various hypothetical situations that may or may not have taken place in the future. The *ex post facto* violation in this case did not occur until the Connecticut Supreme Court issued its ruling on January 24, 2006. Therefore, the Petitioner's raising of this issue in his Motion For Reconsideration, To Reargue, And For Reconsideration And Reargument En Banc, dated February 14, 2006 was the first appropriate time to challenge this constitutional violation. Prior to the Connecticut Supreme Court's 2006 ruling, ***no ex post facto violation even existed***.

B. The Petitioner's Juvenile Transfer Claim Is Properly Exhausted

The federal constitutional claim regarding the juvenile transfer argument was presented to the Connecticut Supreme Court in the Petitioner's Motion for Reconsideration, To Reargue, And For Reconsideration And Rehearing En Banc, dated February 14, 2006. The Connecticut Supreme Court issued a decision denying this motion on March 14, 2006. Therefore, the Connecticut Supreme Court considered the Petitioner's federal constitutional claim relating to the juvenile transfer issue on the merits, and it is properly exhausted.

II. EVEN IF THIS COURT WERE TO FIND THAT THE PETITIONER'S CLAIMS ARE PROCEDURALLY DEFAULTED, THEY MAY STILL BE CONSIDERED

Even if this Court were to find that the Petitioner did not properly present his *ex post facto*, profile reports and juvenile transfer issues to the state court, the Petitioner's procedural default may be excused. Ordinarily, before a federal court may consider the merits of a state' prisoner's habeas petition, the prisoner generally must first exhaust his available state court remedies. 28 U.S.C. § 2254(b); see also Rose v. Lundy, 455 U.S. 509, 515 (1982). If a petitioner fails to present his claim to the highest state court, and if he is procedurally barred from presenting those claims to the appropriate state court at the time of filing his federal habeas petition, the petitioner's claims are normally considered procedurally defaulted for purposes of federal habeas review. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999).

The Supreme Court has stated that “[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.” Coleman v. Thompson, 501 U.S. 722, 732 (1991). In cases where a petitioner did not properly exhaust state remedies and “the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,” the petitioner’s claim is procedurally defaulted. Id. at 735 n.1. Because in the present case the Petitioner would be procedurally barred from returning to the Connecticut Supreme Court to assert these claims, the relevant question is whether the Petitioner’s procedural default can be excused, not whether his failure to exhaust can be excused. Smith v. Baldwin, 510 F.3d 1127, 1139 (9th Cir. 2007). “Therefore, the exceptions to the exhaustion requirement set forth in § 2254(b) are irrelevant to [the] petition. Rather, [it] must [be] determine[d] whether [the] procedural default [may be excused] under the applicable exception to that rule.” Id.

A petitioner can overcome procedural default and obtain federal habeas review of the merits of his claim in one of two ways. First, a petitioner overcomes procedural default if he presents sufficient evidence to “demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” Coleman v. Thompson, 501 U.S. at 750. To make this showing, a petitioner’s case must fall within the “narrow class of cases ... [involving] extraordinary instances when a constitutional violation probably

has caused the conviction of one innocent of the crime.” McCleskey v. Zant, 499 U.S. 467, 494 (1991). Second, a petitioner may overcome procedural default by making “an adequate showing of cause and prejudice” for his failure to exhaust state court remedies. Strickler v. Greene, 527 U.S. 263, 282 (1999).

A. The Petitioner Can Establish Cause And Prejudice For His *Ex Post Facto* Claim

The United States Supreme Court has repeatedly stated that “federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner’s contention that his constitutional rights have been violated.” Reed v. Ross, 468 U.S. 1, 9 (1984) (citing Francis v. Henderson, 425 U.S. 536, 538 (1976); Fay v. Noia, 372 U.S. 391, 398-99 (1963)). Even if this court were to determine that the Petitioner failed to exhaust his claim below, which is not conceded, the claim may still be reviewed. When a procedural default bars litigation of a constitutional claim in state court, a state prisoner may obtain federal habeas relief if a showing of cause and actual prejudice is made. Id. at 11. In order to establish “cause” for a procedural default, a petitioner must demonstrate that the default is due to an external objective factor that “cannot fairly be attributed to him.” Coleman v. Thompson, 501 U.S. at 753.

In Reed v. Ross, 468 U.S. 1, the petitioner’s counsel did not raise on direct appeal a constitutional challenge to a jury instruction that was given at trial because state decisional law had held for over a century that the instructions given by the state

trial court in North Carolina were proper.¹ Id. at 7. A few years later, the United States Supreme Court issued a decision in which invalidated that law in North Carolina and held that the new law should have retroactive application. Id. at 6 (citing Hankerson v. North Carolina, 432 U.S. 233 (1977)).

After the decision in Hankerson, the Reed petitioner's counsel challenged the constitutionality of the jury instructions in a petition for postconviction relief filed in the state court, which was summarily rejected at both the trial and appellate levels. Reed v. Ross, 468 U.S. at 7. The petitioner then brought a federal writ of habeas corpus, and the district court held that habeas relief was barred because the petitioner failed to raise the issue on appeal as required by North Carolina law. Id. at 7-8. The Fourth Circuit dismissed the appeal. Id. at 8. On the petitioner's first petition for certiorari to the United States Supreme Court, the Court vacated the judgment of the Fourth Circuit and remanded the case for further consideration of the "cause and prejudice" standard. Id.

¹ The petitioner had been charged with murder. Reed v. Ross, 468 U.S. at 6. The trial court had instructed the jury in 1969 that if the defendant were arguing that the killing was not done with malice, then the defendant had the burden of proof to show that there was no malice. Id. at 6-7. In 1970, the U.S. Supreme Court decided In re Winship, 397 U.S. 358 (1970), in which the Court held that criminal guilt must be established beyond a reasonable doubt. Five years later, the Court applied that principle to the related question of allocating burdens of proof in a criminal case in Mullaney v. Wilbur, 421 U.S. 684 (1975). Mullaney struck down the requirement that the defendant bear the burden of proving lack of malice. Two years later, the Court decided Hankerson v. North Carolina, 432 U.S. 233 (1977), in which the Court held that Mullaney was to have retroactive application.

On remand, the Fourth Circuit reversed, holding that the petitioner's claim met the "cause and prejudice" requirements and that the district court had thus erred in denying his petition. Id. at 9. The Fourth Circuit found the "cause" element was satisfied because the issue underlying the jury instruction was so novel at the time of the petitioner's direct appeal that his attorney could not reasonably have been expected to have raised it. Id. The United States Supreme Court again granted certiorari, and affirmed. Id.

In its ruling, the United States Supreme Court noted that the Fourth Circuit held there was cause for the petitioner's failure to raise the Mullaney issue on appeal because of the "novelty" of the issue at the time. Id. at 12-13. At the time of the petitioner's direct appeal, "there was merely '[a] hint here and there voiced in other contexts,' which did not 'offe[r] a reasonable basis for a challenge to frequently approved jury instructions which had been used in North Carolina, and many other states, for over a century.'" Id. at 13 (quoting Fourth Circuit opinion).

The Supreme Court ruled that the "novelty" of a constitutional issue gives rise to cause for defense counsel's failure to raise an issue in accordance with applicable state procedures. Id. The Court noted that:

the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met. If counsel has no reasonable basis upon which to

formulate a constitutional question ... it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort. Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State procedural bar.

Id. at 14-15.

In the present case, defense counsel had no reasonable basis upon which to raise an *ex post facto* claim before the Connecticut Supreme Court. At the time of Petitioner's briefing to the state supreme court, State v. Paradise, 189 Conn. 346 (1983), had been the law of the State of Connecticut for 20 years. Further, of even greater significance, the Connecticut Supreme Court had recently reaffirmed the logic and holding of State v. Paradise in 1994, in State v. Crowell, 228 Conn. 393 (1994). Because this law had been so firmly entrenched in our state's jurisprudence, no reasonable basis existed for defense counsel to anticipate that the Connecticut Supreme Court would overrule these two binding precedents and retroactively apply the amendment to the statute of limitations to the Petitioner, thus occasioning an *ex post facto* violation. Therefore, cause exists to excuse the procedural default of failure to exhaust.

Further, the Petitioner has been actually prejudiced by the Court's violation of the *ex post facto* clause as he has been prosecuted for and convicted of a crime for which the statute of limitations had expired, and he is currently serving a jail sentence of 20

years to life as a result. Additionally, the Petitioner will be further prejudiced if his *ex post facto* argument is not considered by this Court. This is the Petitioner's last chance to have his *ex post facto* argument heard. This argument was already rejected by the Connecticut Supreme Court in its decision on Petitioner's Motion For Reconsideration, To Reargue, And For Reconsideration And Reargument En Banc, and the United States Supreme Court declined to grant certiorari on this issue in response to the Petitioner's Petition for Certiorari to that Court. In effect, the Connecticut Supreme Court's ruling, applying the statute of limitations retroactively to the Petitioner after years of firmly held jurisprudence indicating that the statute is not retroactive, will go unchecked by any other court.

Therefore, even if the Petitioner's claim is deemed procedurally defaulted due to a failure to exhaust, the claim should still be considered because the Petitioner has satisfied the cause and prejudice standard.

B. The Petitioner Can Make The Requisite Showing Of Actual Innocence For His Claims Regarding The Profile Reports And Juvenile Transfer

In order to establish a claim of actual innocence, a petitioner must show that, in light of all available evidence, it is more likely than not that no reasonable juror would convict him of the relevant crime. See House v. Bell, 547 U.S. 518, 536-37 (2006). In the present case, the following evidence is germane to this consideration:

- There was no physical evidence tying the Petitioner to the crime.

- There were no witnesses to the crime.
- The Petitioner had an alibi that was supported by several witnesses.
- The Petitioner had a credible claim of third-party culpability.
- A sketch of a person seen near the scene of the crime at about the time of the crime did **not** resemble the Petitioner.
- Police suspected for many years that either Kenneth Littleton or Thomas Skakel had committed the crime, and authored reports setting forth their conclusions in which they stated that the Petitioner's alibi had been "clearly established." In fact, police went so far as to prepare an arrest warrant affidavit for Thomas Skakel.
- Several years after the Petitioner's conviction, new witness Tony Bryant came forward and credibly implicated his two friends, Burt Tinsley and Adolph Hasbrouck, in the crime.
- It was discovered after the Petitioner's conviction that the lead investigator for the State, Frank Garr, had strong-armed, intimidated and threatened witnesses into testifying. It was also learned that Garr had a book deal with an author named Len Levitt prior to the conclusion of the trial for which he was paid, which caused Garr to be biased in his investigation. Finally, it was learned that Garr did whatever was necessary in order to procure the testimony of the State's "star" witness, the now-deceased heroin addict Gregory Coleman, such as giving him money and taking him to the hospital to be treated for withdrawal symptoms.
- It was learned after the Petitioner's criminal trial that Gregory Coleman, who the State claimed at trial was the recipient of the Petitioner's many "confessions" to the crime, could not have been truthful in his accounts of the Petitioner's "confessions." The other young men whom Coleman had testified were present during the Petitioner's various "confessions" refuted all of Coleman's claims.²

² During his probable cause testimony, Coleman said that a fellow Elan classmate was present when the Petitioner allegedly confessed – either "Everette" James, John Simpson or Cliff "Reubin." Neither the State nor the Petitioner's trial counsel was able to contact any of these three witnesses prior to trial, despite reasonable efforts to do so.

Coleman is the **only** witness who testified **without equivocation** at the Petitioner's criminal trial that the Petitioner confessed to the crime. These "confessions" were the linchpin of the State's case at trial as there was no other evidence linking the Petitioner to the crime.

- Recently it was learned by the Petitioner's present counsel that a former Greenwich resident, Andrew Wilson, had implicated another Greenwich resident, Dirk Peters, in the killing of Martha Moxley in 1993.³ Although Andrew Wilson alleged that Dirk Peters committed the murder of Martha Moxley, it is just as

After the Petitioner was convicted, his present counsel located all three individuals with extraordinary efforts. These witnesses, *Alton* Everette James, John Simpson and Cliff *Grubin*, exposed the lie told by Coleman: the Petitioner **never** confessed to murder.

All three witnesses directly contradict Coleman's allegation that the Petitioner confessed to killing Martha Moxley in their presence. Simpson recalled that he did guard the Petitioner with Coleman on the stage at Elan. While guarding the Petitioner with Coleman, Simpson recalled that "all of a sudden Greg just went, 'I can't believe it,' to which Simpson said 'What?'" According to Simpson, Coleman then said that the Petitioner "just admitted that he killed this girl." Simpson looked at the Petitioner and asked him if he just told Coleman that he killed this girl, and the Petitioner responded, "No." Simpson then said to Coleman, "Greg, what are you talking about. He just said that he didn't say that he killed this girl." Coleman responded that the Petitioner "did answer yes or no" but that he had "this shit-eating grin on his face." Simpson replied, "How could you say, yes, he just admitted it?", to which Coleman said "Well, it was his reaction, the fact he didn't say no." While guarding the Petitioner on the stage with Coleman, Simpson testified that he never heard the Petitioner make any of the specific statements claimed by Coleman. James testified that he recalled guarding the Petitioner on more than one occasion but the Petitioner never confessed to murdering Martha Moxley, nor did he ever hear the Petitioner confess to murdering Moxley at any point. Grubin testified that he knew both the Petitioner and Coleman at Elan, and did not recall ever guarding the Petitioner with Coleman after a general meeting. When Grubin lived with Coleman toward the ends of his time at Elan, Coleman told him that he (Coleman) was a very good liar. Grubin testified that he never heard the Petitioner confess to committing murder while at Elan; however, he did recall that the Petitioner expressed concern that one of his brothers may have been involved.

³ Although the Greenwich Police Department possessed this information in 1993, it was never turned over to the Petitioner's counsel at any point before, during or after the Petitioner's criminal trial.

possible that Andrew Wilson was the perpetrator or was involved in some way. Andrew Wilson was a resident of Greenwich at the time of the murder, had been involved in drugs, had a history of having an explosive temper, had an extremely large build and could have been capable of inflicting the types of injuries that were inflicted upon Martha Moxley.

- Recently, the Petitioner's present counsel learned of information possessed by the former attorney for the State's "star" witness, Gregory Coleman, John M. Regan, Jr. As indicated above, Coleman provided the testimony that formed the linchpin of the State's case: that the Petitioner confessed to murdering Martha Moxley. Some time in 1998, Attorney Regan received a call from a man who identified himself as a prosecutor in Connecticut. This man was seeking Coleman's contact information. Attorney Regan, fearing that Coleman was being investigated for a crime, inquired as the purpose of the inquiry. The man responded that he was going to use Coleman in a grand jury proceeding seeking to charge Michael Skakel with the murder of Martha Moxley. Attorney Regan was incredulous, and stated to the man that he hoped that the prosecutor was not serious about using Coleman's testimony to accuse someone of murder. The man responded by telling Attorney Regan not to worry, that they had plenty of evidence, and that they were going to "get this guy." Attorney Regan later became aware that Mr. Skakel had been convicted of the crime, and he was disturbed to see that Coleman's role as a witness had been prominent. Attorney Regan had assumed there must have been a lot of other solid evidence. Attorney Regan later learned from reading an article written by Robert F. Kennedy, Jr. in the Atlantic Monthly that there had been little other evidence.

All of this evidence was not considered by the jury that convicted the Petitioner as much of it came to light after the Petitioner's criminal trial. If any jury had considered all of this evidence, it is more likely than not that no reasonable juror would convict the Petitioner of the murder of Martha Moxley. See House v. Bell, 547 U.S. 518, 536-37 (2006). Therefore, the Petitioner has presented a requisite showing of actual innocence, which enables him to overcome the procedural default of failing to present his federal constitutional claims relating to the profile reports and juvenile transfer in

state court. For this reason, the Petitioner's claims should be considered by this Court even if it is found that the Petitioner failed to exhaust the claims in the Connecticut Supreme Court.

III. THE PETITIONER'S *EX POST FACTO* CLAIM IS BASED ON CLEARLY ESTABLISHED FEDERAL LAW

A. The Petitioner's Claim Is Properly Based On Federal Law

The State misses the point in its first argument, in arguing that the trial court's decision was based on state law and did not implicate the Petitioner's rights under the federal constitution. State's Br. at 10-12. As discussed at length above, the *ex post facto* violation cited by the Petitioner arose as a result of the conduct of the Connecticut Supreme Court, regardless of what the trial court had previously ruled. The United States Code indicates that habeas corpus relief is warranted where there is a state court decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law...." 28 U.S.C. § 22554(d). In the present matter, the Connecticut Supreme Court's decision, in overruling two well-established precedents, was "contrary to, or involved an unreasonable application of, clearly established Federal law," independent of any prior decision of the criminal trial court of this case. See id. As discussed at length, supra, the federal constitutional violation complained of did not arise until the Connecticut Supreme Court issued its decision in 2006.

Therefore, the State's reliance on the state trial court's decision as being the "last reasoned decision" on the issue of whether the 1975 statute of limitations barred the Petitioner's prosecution and the State's argument that the trial court's decision was based entirely on state law, precluding federal habeas review, completely misses the point.

B. The Petitioner's Claim Is Based Upon "Clearly Established" Federal Law

The Respondent argues that the Petitioner's *ex post facto* claim is not based upon "clearly established" federal law because the Petitioner relies on two Supreme Court cases rather than one. State's Br. at 17-23. However, the Respondent cites no law standing for the proposition that a habeas petitioner's claim *must* be based on one and only one established Supreme Court case. The Respondent merely cites cases which hold that in order to be "clearly established," a rule must be "compelled by existing precedent." State's Br. at 20 (citing Hogan v. Hanks, 97 F.3d 189, 192 (7th Cir. 1996)). However, the Respondent failed to cite any cases which requires that "existing precedent" must be set forth entirely and exclusively in one case.

To the contrary, other courts have noted that "clearly established" law may be gleaned from more than one source. Frye v. Warden, 2007 WL 4365581, at *2 (E.D. Cal. 2007) ("As noted by the magistrate judge, however, there is no clearly established law, either in a single case **or derived from multiple cases**, that petitioner may bring a

conditions of confinement challenge in his habeas corpus petition, which challenges only the legality of the confinement itself.”) (emphasis added). The court’s use of the phrase “***derived*** from multiple cases” indicates that the court was not merely referencing a line of several cases that all stand for the same proposition; rather, “clearly established” law may be “derived” or pieced together from the various holdings of several cases. Therefore, the fact that the Petitioner’s claim in this matter is grounded in two Supreme Court decisions, Stogner v. California, 539 U.S. 607 (2003) and Bouie v. City of Columbia, 378 U.S. 347 (1963), is not fatal to his case.

IV. THE PETITIONER’S JUVENILE TRANSFER CLAIM IS BASED ON FEDERAL LAW AND IS PROPERLY BEFORE THIS COURT

The Respondent also argues that the Petitioner’s juvenile transfer claim is based entirely on state law and is not cognizable in a federal habeas claim. State’s Br. at 41-44. Although the Petitioner’s juvenile transfer claim has components of state law, the Respondent fails to recognize that the claim is grounded in federal due process. A state cannot apply its own laws in a way that infringes a criminal defendant’s federal due process rights under the United States Constitution. See, e.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). What the Petitioner complains of is not an error in state law; rather, it is the unconstitutional manner in which the State has applied its law. Therefore, even if the genesis of this claim is state statutes and regulations, the fact that the Connecticut Supreme Court’s conduct constituted a federal due process violation in

applying those statutes and regulations brings this claim under the umbrella of federal law, and it is an appropriate claim in a federal habeas corpus action.

V. THE PETITIONER DEMONSTRATED IN HIS BRIEF-IN-CHIEF THAT THE CONNECTICUT SUPREME COURT ENGAGED IN AN UNREASONABLE APPLICATION OF PREVAILING SUPREME COURT PRECEDENT IN RELATION TO HIS CLAIM OF PROSECUTORIAL MISCONDUCT

The Respondent argues that the Petitioner failed to show that the Connecticut Supreme Court did not reasonably apply the holding in Darden v. Wainwright, 477 U.S. 168 (1986). State's Br. at 65-68. Contrary to the Respondent's argument, the Petitioner identified the correct legal standard in his Brief-in-Chief and provided a lengthy and detailed argument regarding how the Connecticut Supreme Court misapplied that standard. See Pet'r's Br.-in-Chief, at 122-124. The Petitioner pointed out that the appropriate standard was whether the misconduct was so flagrant so as to amount to a denial of due process. Id. at 122. The Petitioner then analyzed the four factors under that due process standard that were set forth in Bates v. Bell, 402 F.3d 635, 646 (6th Cir.), cert. denied, 546 U.S. 865 (2005). Pet'r's Br.-in-Chief, at 122-124.

Because the Petitioner identified the appropriate legal standard and set forth how the Connecticut Supreme Court failed to apply that standard properly, habeas corpus relief is warranted.

VI. CONCLUSION

Wherefore, for the foregoing reasons, and for the reasons set forth in the Petitioner's Brief-In-Chief, federal habeas relief should be granted.

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CERTIFICATION

I hereby certify that on January 7, 2009, a copy of the foregoing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail on anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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