FILED
United States Court of Appeals
Tenth Circuit

April 12, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GARRY THOMAS ALLEN,

Petitioner-Appellee,

v.

RANDALL G. WORKMAN, Warden, Oklahoma State Penitentiary,

Respondent-Appellant.

No. 12-6094
(D.C. No. 5:12-cv-00140-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY**, **HARTZ**, and **O'BRIEN**, Circuit Judges.

Petitioner Garry Thomas Allen brought this habeas corpus proceeding challenging his impending execution under *Ford v. Wainwright*, 477 U.S. 421 (1986), on the ground that he is incompetent to be executed. He also challenged the constitutional adequacy of the state statutory procedure under which the respondent, Warden Randall G. Workman, concluded that a judicial hearing and

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

determination of Allen's current competency was not warranted.[1] *See* Okla. Stat. tit. 22, § 1005. Following the Oklahoma Court of Criminal Appeal's denial of Allen's petition for a writ of mandamus directing the Warden to initiate the judicial hearing process, the district court entered a stay of Allen's execution pending determination of his habeas petition. The Warden promptly appealed. We exercise jurisdiction under 28 U.S.C. § 1292(a)(1), *see Hamilton v. Jones*, 472 F.3d 814, 815 (10th Cir. 2007), and reverse.

The Warden argues that the district court erred in failing to address the factors that typically govern stay matters and that on those factors, in particular the requisite "showing of a significant possibility of success on the merits," *Pavatt v. Jones*, 627 F.3d 1336, 1338 (10th Cir. 2010) (internal quotation marks omitted), Allen's stay request falters. Allen argues that the Warden looks to the wrong precedent. The standard invoked by the Warden has typically been used in cases challenging execution procedures under 42 U.S.C. § 1983. *See, e.g.*, *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Pavatt*, 627 F.3d at 1338; *Hamilton*, 472 F.3d at 815. Allen notes the Supreme Court has indicated that stays of execution requested in conjunction with first-time habeas petitions have a unique status and are to be treated differently. As the Court explained in *Lonchar v. Thomas*, 517

[1] We note that Allen was previously found competent, following a hearing in 2008, in anticipation of a then-imminent execution that was ultimately postponed. While he advances some procedural objections to that proceeding, his present claim is that his condition has deteriorated to the point that, whatever his competency in 2008, he is now incompetent to be executed.

U.S. 314, 320 (1996), "[i]f the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Thus, a request for stay associated with a first-time habeas petition may be denied only in conjunction with the outright dismissal of the petition--a course open to the district court "when it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Id.* (internal quotation marks omitted).

We are not convinced *Lonchar* controls in the present circumstances. The importance of the first-time habeas petition rests on the fact that it is typically the petitioner's only effective opportunity to challenge his conviction and sentence--an opportunity the Court has been reluctant to hold is lost on grounds collateral to the merits of the petitioner's substantive claims. Here, Allen has had--and fully exercised--that opportunity. *See Allen v. Mullin*, 368 F.3d 1220 (10th Cir. 2004). While the instant habeas petition is not deemed second or successive, because *Ford* claims do not become ripe until execution is imminent, *see Panetti v. Quarterman*, 551 U.S. 930, 947 (2007), it clearly is not a petition, much less a first petition, challenging the validity of Allen's conviction or sentence. In this, it is much more akin to the execution-procedure challenges that are properly considered under the traditional stay analysis.

In any event, we would reach the same result here under either the *Lonchar* approach or the more traditional stay analysis. In our view, it plainly appears from the face of the habeas petition and associated materials that Allen is not entitled to relief on his claims and, therefore, (1) the petition should have been summarily dismissed and no stay of execution should have been granted per *Lonchar*, or (2) the stay of execution should have been denied due to the lack of any reasonable possibility of success on the merits.

Although the proceedings were protracted, a jury in October1987 determined Allen to be competent to be tried and rejected his insanity defense. (Nine years later the Supreme Court determined the procedures under which his sanity was determined were constitutionally flawed. Meanwhile, he had pled guilty). He was twice sentenced to death. He availed himself of all direct appeal and post-conviction rights under Oklahoma law, which finally ended in July 1998 when the death sentence was upheld. After that he enjoyed a full round of habeas review, which ended on February 22, 2005, when the Supreme Court denied certiorari with respect to our decision upholding the denial of habeas relief. In the spring of 2008 he then initiated a new round of competency proceedings. After some delay, that issue was presented to a jury under Oklahoma law. In mid 2008 a jury determined he was sane and under state and federal standards could be executed. He immediately sought review. That round of appeals finally ended on December 8, 2011, when the OCCA rejected his appeal. In February 2012 he

initiated another round of proceedings aimed at obtaining another jury trial on whether or not he could be executed. When that failed he again turned to the federal courts. He has twice been denied clemency by two Oklahoma governors. He has had abundant process. If this stay is affirmed it will not be a further delay of only a couple of months. If a hearing is held this proceeding will go on for many months in the district court and it will be followed by another appeal and request for stay. Enough is enough.[2]

Allen's experts presented essentially the same opinions the jury rejected in 2008. While conceding that Allen has mental problems the state presented the testimony of several witnesses from the jail who testified to repeated instances in

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[2] Justice O'Connor's words in her partial concurrence and partial dissent in *Ford v Wainwright* are both prophetic and instructive:

I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. *Meachum v. Fano*, *supra*, 427 U.S., at 224, 96 S.Ct., at 2538. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. *Nobles v. Georgia*, 168 U.S. 398, 405-406, 18 S.Ct. 87, 90, 42 L.Ed. 515 (1897). This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. Hazard & Louisell, Death, the State and the Insane: Stay of Execution, 9 UCLA L.Rev. 381, 399-400 (1962). These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process Clause imposes few requirements on the States in this context.

477 U.S. at 429.

which Allen demonstrated his understanding that is to be executed for killing his wife and his rough understanding as to when. His only argument of possible merit is that he may not, moments before death, because of illness, stress and/or the effects of medication, fully appreciate his present circumstances even though he did hours or perhaps minutes before.[3] While federal law prevents the execution of one who does not understand he is being executed and why, no case of which we are aware slices the onion as thin as his arguments require. But if it is such a temporally minute determination that is required, it properly is left to the Warden in a case such as this where the litigation history reveals close and repeated attention has been given to his insanity claims.

The order of the district court staying the execution of Garry Thomas Allen is VACATED.[4] This order and judgment is, however, STAYED until 9:30 p.m. CDT to allow Allen to seek relief in the United States Supreme Court.

Entered for the Court
Per Curiam

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[3] We note that a primary thrust of the habeas petition was that petitioner might suffer a seizure and become temporarily incompetent immediately prior to or during the execution. But there is only speculation that this might happen. And, in any event, the Warden has affirmed that he would not carry out the execution if this were to occur.

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HARTZ, Circuit Judge, dissenting:

I respectfully dissent. It is unfortunate that this matter returned to the federal district court only two days before the scheduled execution. But Mr. Allen has proceeded promptly in his challenges to his competency to be executed and cannot be faulted for causing delay.

In the limited time available to consider the matter, I have concluded that the federal district court properly stayed the execution under the authority of the Supreme Court decision in *Lonchar v. Thomas*, 517 U.S. 314 (1996). As I understand that decision, a federal district court must stay an execution to give it sufficient time to consider an application under 28 U.S.C. § 2254. As the Court wrote: "If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. That is, if the district court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying a stay." *Id.* at 320. Consequently, granting the stay would be an abuse of discretion only if the district court was obligated to dismiss Mr. Allen's § 2254 application before the scheduled execution. In my view, the district court had no such obligation. Even if the district court was skeptical of the merits of the application, it would be proper to provide adequate time for briefing the issues. To be sure, Rule 4 of the

Rules Governing Section 2254 Cases provides: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . . ." But I do not believe that the requirements of that Rule were satisfied.