[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 14, 2011
JOHN LEY
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No. 10-13168
Non-Argument Calendar

D. C. Docket No. 1:10-cv-00067-CG-C

PATRICK JOSEPH CHAREST,

Petitioner-Appellant,

versus

BILLY MITCHEM,

Respondent-Appellee,

Appeal from the United States District Court
for the Southern District of Alabama

(April 14, 2011)

Before TJOFLAT, MARTIN and ANDERSON, Circuit Judges.

PER CURIAM:

Patrick Joseph Charest, proceeding pro se, appeals the district court's dismissal for lack of jurisdiction of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied Charest's petition after concluding that it was successive and that Charest had failed to obtain the requisite authorization from a panel of this Court prior to filing. See 28 U.S.C. § 2244(b)(3)(A). We granted a Certificate of Appealability ("COA") on the following issue: "Whether Charest's 2005 resentencing constituted a new and final judgment and, if so, whether the district court erred in finding that Charest's 28 U.S.C. § 2254 habeas petition was second and successive." After thorough review, we conclude that, because the district court failed to address Charest's argument that his 2005 re-sentencing constituted a new and final judgment, this case must be remanded to the district court. Accordingly, we vacate and remand to the district court for further consideration of Charest's § 2254 petition.

I.

"When examining a district court's denial of a § 2254 habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error." Gonzales v. Sec'y, Fla. Dep't Corrs., 629 F.3d 1219, 1220 (11th Cir. 2011) (quotation marks omitted). Under that standard, we must affirm a district court's findings of fact unless "the record lacks substantial evidence" to

support them. Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1558 (11th Cir. 1995) (quotation marks omitted).

II.

Charest argues that the district court erred in finding that his § 2254 petition was second and successive.[1] Specifically, Charest argues that his petition was not successive because it related to a new judgment, a 2005 order in which Charest was resentenced. The district court, which adopted as its opinion the magistrate judge's report and recommendation, neither recognized nor resolved this issue. Rather, the magistrate judge relied on this Court's February 24, 2010, denial of Charest's application under § 2244(b) for leave to file a successive § 2254 petition in concluding that it lacked jurisdiction over Charest's instant § 2254 petition. The magistrate judge reasoned that Charest had failed to obtain the requisite approval from an Eleventh Circuit panel prior to filing his § 2254 petition in the district court. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

[1] "[A]ppellate review is limited to the issues specified in the COA." Murray v. United States, 145 F.3d 1249, 1251 (11th Cir. 1998). We therefore address only Charest's arguments that relate to the question presented in the COA.

Several months after this Court denied Charest's § 2244(b) application, the Supreme Court reversed this Court, in a separate case, for treating a § 2254 petition as successive when the petitioner had been resentenced prior to filing his second habeas petition. Magwood v. Patterson, --- U.S. ---, 130 S. Ct. 2788 (2010). The Supreme Court held that where "there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive at all." Magwood, 130 S. Ct. at 2802 (quotation marks and citation omitted). The Court reasoned that "[a]lthough Congress did not define the phrase 'second or successive,' as used to modify 'habeas corpus application under section 2254,' §§ 2241(b)(1)-(2), it is well settled that the phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'" Id. at 2796 (quoting Panetti v. Quarterman, 551 U.S. 930, 994, 127 S. Ct. 2842, 2853 (2007) (alteration in original)). Rather, "both § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged." Id. at 2797.

In this case, Charest obtained certain relief with respect to the relevant sentence pursuant to an August 12, 2005, order of the Circuit Court of Baldwin County, Alabama, which order read in relevant part as follows:

> "2. The sentence in Count 2 is amended to run CONCURRENT with the sentence in count 1."

See Order attached as Exh. 7 to Docket 13 ("Traverse to State's Answer to Charest's 'New Habeas Corpus' Resulting from a Re-sentencing 'Judgment.'"). The effect of this August 12, 2005, order was to provide that the two consecutive life sentences which had previously been imposed with respect to counts 1 and 2 were amended so that the two life sentences would run concurrently.[2]

Charest argued in the court below that the August 12, 2005, order constituted a new sentence, resulting in a new judgment. Although noting the argument, the court below declined to address it, see Document 10 at 3, note 1, and proceeded to dismiss the instant habeas corpus petition for lack of jurisdiction as a second or successive petition, relying upon the February 24, 2010, order of this court rejecting Charest's application for leave to file a second or successive petition. The problem arises because, after this court's February 24, 2010, order, the Supreme Court issued its opinion in Magwood v. Patterson, ___ U.S. ___, 130

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[2] The entirety of the August 12, 2005, order can be summarized as follows:

> (1) it vacated Charest's sentence under count 3 and dismissed that count for lack of subject matter jurisdiction; (2) it amended Charest's life sentence on count 2 to run concurrent with his life sentence under count 1; and (3) it expressly granted Charest permission to continue to pursue his claim that "Alabama did not have jurisdiction to prosecute counts 1 and 2 in that the events made the basis of the charges occurred in the State of Florida." The order also noted that Charest had agreed to dismissal of all of his other pending claims.

S.Ct. 2788 (2010). As noted above, the Court in Magwood held that where there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive at all. In this case, it is clear that Charest's initial federal habeas corpus petition challenged his original sentence, without consideration of the August 12, 2005, amendment thereto. Although Charest presented to the district court the basics of the argument to which Magwood has relevance, the district court did not address the argument.

We prefer for the district court to address in the first instance the significance for this case of the Supreme Court's decision in Magwood. On remand, the district court should address, inter alia, the following issues: (1) whether the August 12, 2005, Order of the Circuit Court of Baldwin County, Alabama, constitutes a "new judgment" as contemplated by the Supreme Court in Magwood; (2) if so, whether Charest is entitled to assert in the instant habeas not only challenges to his sentence, but also challenges to his underlying conviction; and (3) if there is no bar to Charest's challenge to his underlying conviction pursuant to 28 U.S.C. §2244(b), is there nevertheless a bar pursuant to the abuse

of the writ doctrine.[3] The second issue was expressly not addressed by the Supreme Court in Magwood. See id. at 2802-03. But see Johnson v. United States, 623 F.3d 41 (2d Cir. 2010). Also, the third issue was apparently also left open by Magwood. See Magwood, 130 S.Ct. at 2803 (Breyer, J., concurring).

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion. We recommend that the district court appoint counsel to assist Charest.

VACATED and REMANDED.

[3] On remand, the district court should also address any relevant time bars or procedural bars.