Does Federal Anti-Terror Act Infringe On Court Independence?

By Mark M. Baker[1]

After exhausting all state remedies with respect to federal constitutional issues arising out of a New York judgment of conviction, you are now preparing a timely petition for a federal writ of *habeas corpus*, citing "spot-on" Second Circuit law which you believe will surely result in vindication. Reality check: It is not going to happen!

As seasoned *habeas* practitioners well know, precedential or persuasive rulings of circuit and district courts are unavailing under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[1] Rather, if the Supreme Court has not yet determined a particular question, or if a state ruling does not present an "unreasonable" application of a Supreme Court holding, there is absolutely no basis for *habeas* relief. This article addresses serious issues that have been recently raised concerning whether this ironclad congressional enactment violates the separation of powers by unconstitutionally encroaching upon an Article III court's process of judicial reasoning.

AEDPA Restrictions

Under AEDPA, *habeas corpus* applications are required to overcome a "high degree of deference"[2] which the federal courts must afford their state counterparts. A petition must therefore demonstrate, by clear and convincing evidence, that a federal constitutional

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[1] Mark M. Baker is of Counsel to the Manhattan white collar defense firm of Brafman and Associates, P.C., concentrating in motion and appellate litigation in the state and federal courts, as well as federal *habeas* corpus litigation.

claim, adjudicated on the merits in state court, "resulted in a decision that was either contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*"[3]

AEDPA's specific invocation of rulings by the Supreme Court means just that: a petition which merely challenges a state court ruling that is only contrary to, or involves an unreasonable application of, a *court of appeals* or a *district court* holding will not warrant relief.[4] Further, clearly established federal law includes only holdings of Supreme Court decisions and not dicta.[5]

Carey v. Musladen

If, following AEDPA's enactment, there had been any flexibility with these restrictions, thereby allowing for interpretation by circuit courts of existing Supreme Court law, that is certainly no longer the case. In Carey v. Musladen,[6] the Supreme Court, recalling its holding in Williams v. Taylor,[7] reiterated that federal *habeas* relief "may be granted here only if the California Court of Appeals' decision was contrary to or involved an unreasonable application of *this Court's* applicable holdings."[8] The underlying issue was whether, in that homicide prosecution, certain members of the victim's family had undermined the petitioner's right to a fair trial by wearing buttons bearing his photograph.

Following unsuccessful appellate litigation challenging the resulting judgment of conviction in the California courts, the Ninth Circuit reversed the district court's denial and granted *habeas* relief. Upon considering Supreme Court rulings in Estelle v. Williams,[9] and Holbrook v. Flynn,[10] the Court of Appeals, "cit[ing] its own precedent in support of its

conclusion that Williams and Flynn clearly established the test for inherent prejudice applicable to spectators' courtroom conduct...[citation omitted]...[,] held that the state court's application of a test for inherent prejudice that differed from the one stated in Williams and Flynn 'was contrary to clearly established federal law and constituted an unreasonable application of that law.'"[11]

Distinguishing its decisions in Williams and Flynn, the Supreme Court later determined that those cases had only dealt with "government-sponsored practices." Yet, "[i]n contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence."[12] Accordingly, the Supreme Court ruled that because "[n]o holding of *this* Court required the California Court of Appeals to apply the test of Williams and Flynn to the spectators' conduct here...the state court's decision was not contrary to or an unreasonable application of clearly established federal law."[13]

Indeed, even the Second Circuit has been recently chastened by the Supreme Court's Musladen holding. Thus, in Rodriguez v. Miller,[14] after having been directed by the Supreme Court to reconsider a twice-granted *habeas* petition in light of Musladen, the Court abandoned its earlier rulings and denied the relief. It explained that although "in the past we (and other courts) occasionally have relied on our own precedents to interpret and flesh out Supreme Court decisions to decide variegated petitions as they come before us[,]...[i]t would appear that we can no longer do this."[15]

Concerns of Unconstitutionality

Recently, Judge Nicholas G. Garaufis of the Eastern District of New York, in Figueroa v. Walsh,[16] an unpublished decision, articulated grave misgivings about the rule solidified in Musladen. In obvious dictum, Judge Garaufis noted that he "would be remiss not to mention a number of serious and broad concerns that this petition raises and that this court shares with a number of other federal judges around the nation with regard to AEDPA's narrowing of protections of the writ of habeas corpus and the way in which it interferes with the district courts' Article III powers."[17]

According to Judge Garaufis,

> while the Constitution clearly vests in Congress the power to limit this court's exercise of jurisdiction over a successive habeas corpus petition, AEDPA goes well beyond that by restricting fundamentally the scope of the court's Article III judicial power by foreclosing consideration of Second Circuit holdings that are otherwise binding on this court...[footnote omitted]. The great writ of habeas corpus lies at the heart of our liberty. As some judges have recently found, by restricting district courts' authority to rely only upon the Supreme Court's clearly established jurisprudence to address the issue -- rather than the full array of federal cases, including cases from the Second Circuit -- AEDPA interferes with core functions of judicial decisionmaking granted to the judicial branch in Article III of the U.S. Constitution. As a matter of constitutional separation of powers, it is troubling to this court that AEDPA restricts what juridical sources this court may consider in reaching a decision on the merits of a habeas corpus petition. Even in habeas cases where a district court concludes that the state court has erred in interpreting the U.S. Constitution, the district court may not grant relief unless it also determines that the error was either contrary to or involved an unreasonable application of clearly established Supreme Court precedent. This presents a problem that can, in some situations, force a district court to defer to and uphold an erroneous state court ruling on a federal constitutional question simply because the issue has not yet reached the Supreme Court or the Supreme Court has declined to reach it. This standard should give district courts pause.[18]

Thereupon noting that "[a]s far back as Marbury v. Madison, 5 U.S. (1 Cranch)

133, 177 (1803) (Marshall, C.J.), the Supreme Court has held that the 'very essence' of Article III judicial power is to interpret federal law under the Constitution in light of precedent[,] [and that] [t]he Supreme Court has throughout its history, in many contexts, invalidated congressional enactments that have interfered with the core functions of judicial decision-making[,]"[19] Judge Garaufis re-emphasized that he was not the first judge to call attention to this problem:

> Although the Supreme Court has not squarely decided this issue, some circuit judges in dissent have concluded that Section 2254(d)(1) unconstitutionally trenches upon the Article III judicial power. *See, e.g.,* Crater v. Galaza, 508 F.3d 1261 (9th Cir.2007) (Reinhardt, J., dissenting from the denial of rehearing *en banc* and joined by Pregerson, Gould, Paez, and Berzon, JJ.); Davis v. Straub, 445 F.3d 908 (6th Cir.2006) (Martin, J., dissenting, and joined by Daughtrey, Moore, Cole, and Clay, JJ.); Irons v. Carey, 505 F.3d 846, 854 (9th Cir.2007) (Noonan, J., concurring); Lindh v. Murphy, 96 F.3d 856, 885 (7th Cir.1996) (Ripple, J., dissenting, and joined by Rovner, J.) As Judge Lipez of the First Circuit recently wrote in an eloquent dissent from a denial of rehearing *en banc* in a case squarely addressing this issue:
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> > If Congress intrudes unduly upon the process of judicial reasoning, or if it restricts the ability of the federal courts to declare the law of the Constitution and maintain its supremacy, it offends the separation of powers principles at the core of our constitutional system.... By limiting the sources of law a federal court may rely upon in granting habeas relief to "clearly established Federal law, as determined by the Supreme Court," §2254(d)(1) impinges upon a federal court's "judicial power" by "strik[ing] at the center of the judge's process of reasoning."It forces federal courts to essentially ignore the binding precedents of their own circuit, and persuasive decisions of other circuits, in determining if a habeas petitioner is being held in violation of the Constitution.... The statutory limitation applies regardless of how long and firmly the circuit precedent has been established. As a consequence, § 2254(d)(1) prevents courts from applying the ordinary tool of stare decisis to reach an independent judgment on the constitutional issues.

Evans v. Thompson, 524 F.3d 1, 2008 WL 1735297 at *2-3 (1st Cir. 2008) (Lipez, J., dissenting) [*cert denied*, 129 S.Ct. 255 (2008)] (citations omitted).[20]

Conclusion

The rule reaffirmed in Carey v. Musladen, which precludes a *habeas* court from applying otherwise binding precedents in its Circuit, let alone its own assessment of what is constitutionally appropriate, clearly impinges on the independence of Article III courts. For, although a constitutional ruling in a state court may be at odds with controlling circuit law or the *habeas* court's own view, a petitioner cannot prevail if the Supreme Court has yet to rule. The requirement for an "unreasonable" application of Supreme Court law by the challenged state court decision is equally intrusive on the independence of the federal judiciary by constraining it to ignore what might nevertheless be regarded as a constitutional infringement. Hopefully, *habeas* petitioners will continue pressing challenges to 18 U.S.C. §2254(d) so that these concerns might finally be resolved.

1. Pub. L. No. 104-132, 110 Stat. 1214.
2. Brown v.Artuz, 283 F.3d 492, 497 (2d Cir. 2002)
3. 28 U.S.C. §2254(d)(1); emphasis added.
4. Carey v. Musladen, 549 U.S. 70 (2006); Rodriguez v. Miller, 537 F.3d 102 (2d Cir. 2008).
5. Carey v. Musladen, 549 U.S. at 74, citing Williams v. Taylor, 529 U.S. 362, 412 (2000).
6. 549 U.S. 70 (2006).
7. 529 U.S. 362, 412 (2000)
8. 549 U.S. at 74; emphasis added.
9. 425 U.S. 501, 503-506 (1976)

10. 475 U.S. 560, 568 (1986)

11. 549 U.S. at 74.

12. 549 U.S. at 76.

13. 549 U.S. at 77; emphasis added. *See also* Wright v. Van Patten, __U.S.__, 128 S. Ct. 743 (2008), where the Court reversed a grant of *habeas* relief by the Seventh Circuit which had concluded that an attorney's participation in plea discussions by conference call required a *per se* vacatur under United States v. Cronic, 466 U.S. 648 (1984), rather than a consideration of prejudice under Strickland v. Washington, 466 U.S. 668 (1984), since"[n]o decision of this Court...squarely addresses the issue in this case...[citation omitted], or clearly establishes that Cronic should replace Strickland in this novel factual context."128 S. Ct. 746.

14. 537 F.3d 102 (2d Cir. 2008).

15. 537 F.3d at 109.

16. 2008 WL 1945350 (E.D.N.Y. 2008).

17. *Id.*, at *6 [footnoted omitted]

18. *Id.*

19. 2008 WL 1945350, at *7.

20. *Id.* Likewise, Judge Lipez would void the "unreasonableness" requirement of 28 U.S.C.§2254(d) since it "direct[s] federal courts to deny relief in the face of a constitutional violation..., [and] requires the 'involuntary participation of the federal judiciary' in the continuing breach of a habeas petitioner's right not to be unlawfully detained.[internal quotes omitted]." Evans v. Thompson, 524 F.3d 1, 2008 WL 1735297 at *5 (Lipez, J., dissenting)