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“Of Crime and the River (of Appeals)”: When Can a Federal Habeas Court Raise State Procedural Bars on Its Own Motion?

by Daniel D. Blinka

PREVIEW of United States Supreme Court Cases, pages 111–114. © 1997 American Bar Association.

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ISSUES

Under what circumstances may a federal court of appeals raise a state-law, procedural-default defense on its own initiative — *sua sponte* — in a federal habeas corpus proceeding? If an appeals court finds a procedural default, is it foreclosed from reviewing the habeas petitioner's claim on the merits?

FACTS

This is a tale of two different cases in two different states at two different times. Richard Trest wants to challenge his 1979 conviction and sentence for armed robbery in Louisiana, but the heart of his case relates to his 1976 burglary convictions in Mississippi.

In May 1976, Trest, who was 18 at the time, pleaded guilty in Mississippi state court to five counts of burglary. The Mississippi court sentenced him to concurrent four-year sentences.

At no time did Trest appeal or otherwise attack the validity of the Mississippi convictions. Mississippi released Trest in early 1978.

Trest did not avoid trouble for long. In 1979, he found himself in neighboring Louisiana, where he was charged and subsequently convicted by a jury of robbing a grocery store.

Trest's prior Mississippi convictions qualified him for habitual-offender status under Louisiana law. Based on the Mississippi burglary convictions, the Louisiana court sentenced Trest to 35 years in prison without the possibility of parole, probation, or suspended sentence.

At no time during the Louisiana sentencing proceedings did Trest object to use of the Mississippi convictions. Moreover, he did not suggest that the convictions were invalid on any ground.

Trest appealed his armed robbery conviction, but the Louisiana Supreme Court affirmed it on direct review. Trest filed motions for post-conviction relief in Louisiana state

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RICHARD F. TREST V.
BURL CAIN, WARDEN
DOCKET NO. 96-7901

ARGUMENT DATE:
NOVEMBER 10, 1997
FROM: THE FIFTH CIRCUIT

Case at a Glance

One might think that a case involving sandbagging, Mississippi, and Louisiana concerns flood control, but that would be incorrect. This case, instead, asks if a federal appeals court, on its own initiative, can interpose a Mississippi procedural bar to deny relief in a federal habeas corpus challenge to a Louisiana conviction. And both the state prisoner and the state complain that they were “sandbagged” by arguments that were unseasonably sprung on them.

court in 1981, 1983, 1990, and 1994; all were denied.

In 1991, Trest filed a petition for a writ of habeas corpus in federal district court. Following prevailing procedures, Trest's petition was reviewed initially by a magistrate judge who would issue a report and recommendation to the district judge.

Trest's federal habeas petition repeated the nine identical claims that had been denied by Louisiana courts in the 1990 post-conviction proceedings. In one of these claims, Trest contended that the Louisiana court erred by relying on the earlier Mississippi convictions. He argued that the Mississippi convictions were constitutionally invalid and should not have been used as habitual-offender predicates. In particular, the Mississippi convictions were infirm, Trest contended, because the trial court erred by failing to advise him of various rights (e.g., the maximum sentence, the right to appeal, and the right to counsel on appeal) prior to accepting his guilty plea.

The State of Louisiana responded to Trest's habeas petition but did not explicitly address his attack on the Mississippi convictions. For his part, the magistrate judge's report and recommendation to the district court, which recommended that the petition be denied, did not address Trest's challenge to his Mississippi convictions.

Trest objected to the magistrate judge's report and recommendation on a number of grounds. While reasserting his arguments about the invalidity of the Mississippi convictions, Trest conceded that his earlier claim had been "obscure" and "unskillful." Then for the first time Trest alleged that the Mississippi pleas were not intelligently and vol-

untarily made as required under *Boykin v. Alabama*, 395 U.S. 238 (1969). Denying the writ of habeas corpus in an unpublished decision, the federal district court rejected this and other challenges.

Trest appealed to the Fifth Circuit which affirmed the district court's decision by a two-to-one vote. Writing for the majority, Judge Edith Jones never got to the substance of Trest's claims because the majority held that Trest was procedurally barred from even challenging the basis of his habitual-offender sentencing.

The majority explained that it was precluded from reviewing Trest's challenge by an earlier Fifth Circuit decision in *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995). Indeed the majority found it inexplicable that neither party discussed or even cited *Sones*.

Sones construed a Mississippi statute that limited collateral challenges to convictions and sentences. (As a general matter, a *collateral challenge* focuses on the procedures under which an individual was convicted, not on the individual's guilt or innocence. A petition for a writ of habeas corpus is the most widely known type of collateral challenge.)

In the context of this case, Mississippi convictions before April 17, 1984, can be challenged collaterally only if a petition for post-conviction relief was filed by April 17, 1987. *Sones* clearly extended the Mississippi procedural bar to challenges against convictions triggering habitual-offender status under Mississippi law.

Trest's stiff 1979 Louisiana sentence was predicated on his 1976 Mississippi burglary convictions. Yet at no time between 1976 and April 1987 did Trest challenge those con-

victions. The Fifth Circuit majority concluded that Trest's claims could not be heard in Mississippi state court because of his own procedural default and that federal courts likewise were barred from considering those claims.

The majority observed that *Sones* provides some escape when the federal habeas petitioner can demonstrate cause and prejudice for the default or show that a fundamental miscarriage of justice will result if the petitioner's claims are not scrutinized. Trest alleged neither excuse and so could not take advantage of this exception. 94 F.3d 1005 (5th Cir. 1996).

Judge Robert Parker dissented. He argued that the Louisiana court did not explicitly rely on the Mississippi rule and that Trest never had the opportunity to rebut the presumption that the rule bars consideration of his claims. 94 F.3d at 1009.

The issue is now before the Supreme Court, which granted Trest's petition for a writ of certiorari. 117 S. Ct. 1842 (1997).

CASE ANALYSIS

The Fifth Circuit seemed somewhat astonished that neither party discussed the *Sones* case. *Sones* involved a Mississippi man who was sentenced under that state's habitual-offender statute to life in prison without parole. *Sones* filed a federal habeas corpus petition alleging that his trial counsel was ineffective, but the federal court ruled that the claim was time barred because it had not been filed prior to the April 1987 deadline.

The Mississippi procedural bar reflects a policy against retrying the offenses used to trigger a habitual-offender statute. Under that policy, a frontal assault on the legality of a prior conviction should be conduct-

ed in an entirely separate proceeding; the challenge should not be saddled on a trial judge in a hearing to determine habitual-offender status.

Trest seemed astonished that the Fifth Circuit raised *Sones* on its own and felt constrained to follow it, jot for jot. Trest raises two lines of attack.

Trest first claims that the Fifth Circuit erred in invoking the Mississippi procedural-default rule on its own motion. Fundamental fairness embraces the right to be notified and given an opportunity to respond. The Fifth Circuit, Trest charges, violated these due process principles by invoking the Mississippi rule without giving him notice or any opportunity to be heard. Trest suggests that his failure to demonstrate the absence of a procedural default or show cause and prejudice is attributable to the Fifth Circuit's denial of his due process rights, which alone requires reversal.

Second, Trest argues that the Fifth Circuit was not compelled to raise the procedural-default issue on its own motion and erred in concluding that it could not address Trest's underlying claims. Here Trest raises the general rule that procedural defaults usually are treated as affirmative defenses that are waived if not asserted, as they were not by Louisiana in this case.

Trest concedes that several other courts of appeals hold that a federal court may raise *sua sponte* a procedural default not asserted by a government defendant. But no court, he argues, holds that a federal court is required to raise the defense *sua sponte* or is barred from reviewing the merits when there is a procedural default.

Finally, Trest argues, Louisiana waived the right to assert the Mississippi procedural-default rule. He points out that Louisiana let pass multiple opportunities to assert the bar and has never suggested that it has an interest separate and apart from Mississippi's in enforcing the rule.

Louisiana argues, as would be expected, that the Fifth Circuit's decision is correct. The State relies on *Granberry v. Greer*, 481 U.S. 129 (1987), which recognized that federal courts have the authority to raise the procedural-default defense on their own motion; that is, a federal court can invoke the bar in order to promote the interests of federalism, despite a state's failure to assert it.

Such decisions should be made on a case-by-case basis, in the exercise of sound discretion. In this case, says Louisiana, both the district and the appeals court properly exercised their discretion to protect Mississippi's interest regardless of Louisiana's failure to raise its sister state's procedural bar.

Once the Fifth Circuit invoked the procedural-default defense, Trest was required by *Coleman v. Thompson*, 501 U.S. 722 (1991), ABA PREVIEW 228 (March 19, 1991), to demonstrate either cause and prejudice or show that failure to consider the merits of his claim will result in a fundamental miscarriage of justice. As to Trest's assertion that he has been denied notice and opportunity to address the procedural-default issue, Louisiana accuses Trest of attempting to "sandbag" state and federal courts by failing to clearly raise the issue earlier.

SIGNIFICANCE

Cutting through the Byzantine subtleties of federal habeas corpus litigation, this case raises three larger issues. These issues relate to the finality of criminal convictions, the nature of our federal system, and the limits of an adversary appellate system.

First, Trest's case highlights recent efforts to limit federal habeas review of state prisoners' convictions. In recent years, both the Supreme Court and Congress have attempted to abate the flood of federal habeas cases. Procedural rules limiting the number, timing, and content of habeas challenges seek to impose some finality in a legal system that features seemingly endless appeals, as happened in this case. Trest waited until the 1990s to raise various challenges to his 1976 guilty pleas to burglary. Along the way, he enjoyed separate rights to appeal in Mississippi and Louisiana and filed four separate post-conviction petitions in Louisiana state court.

Second, federalism involves the relationship between the federal government and the states as well as the relationship among the separate states. This case vividly illustrates not just the duration but the tortuousness of those federal habeas actions that involve the integrity of the criminal law of not one, but two sovereign states.

The federalism issue is complicated, however, by Louisiana's inaction in this case. What responsibility does Louisiana have to discover and raise issues about Mississippi law? What interests are promoted by enforcing a Mississippi rule in a Louisiana criminal proceeding? Are federal courts specially obligated to step in and protect one state's law (Mississippi) even if another state (Louisiana) neglects to do so?

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If Louisiana goes to the trouble of relying on Mississippi convictions to support a habitual-offender sentence, shouldn't it live with the consequence of failing to raise Mississippi's procedural bar — the consequence that the defense is waived?

The third issue also relates to the relationship between the courts and parties. Generally, parties who fail to raise claims in a timely fashion waive them. But parties are also entitled to reasonable notice and an opportunity to be heard.

Both parties in this case claim to be victims of procedural outrages. Trest rails against the Fifth Circuit for what he described as "springing" the *Sones* case on him. Had he had some inkling that the court might apply the Mississippi procedural-default rule, Trest suggests that he might have presented the case differently.

Not to be outdone, Louisiana argues that it was Trest himself who sandbagged the state and federal courts over the past 20 years. In effect, Trest "hid the ball," it argues, by raising the Mississippi claims in a tardy and convoluted way.

So, in deciding this case, the Supreme Court has more to focus on than the role of federal courts in federal habeas corpus proceedings. Despite the importance of validating state criminal proceedings and putting an end to cases, the Court is being called on to apply the same rules to both the habeas petitioner and the habeas respondent. If the habeas petitioner can be held to a default rule, should the rule also apply to the respondent?

ATTORNEYS OF THE PARTIES

For Richard F. Trest (Rebecca L. Hudsmith, Federal Public Defender for the Middle and Western Districts of Louisiana; (318) 262-6336).

For Burl Cain, Warden (Kathleen E. Petersen, Assistant Attorney General of the State of Louisiana; (504) 342-7552).

AMICUS BRIEFS

In support of Burl Cain, Warden
Joint brief: Mississippi, Florida, Montana, and Nevada (Counsel of Record: Marvin L. White, Jr., Assistant Attorney General of the State of Mississippi; (601) 359-3680).