

MAY 18 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODGER EINSTEIN HAYWARD,

Petitioner-Appellant,

v.

SALVADOR GODINEZ, et al.,

Respondents-Appellees.

No. 09-15807

D.C. No. 3:91-CV-147-LRH-VPC

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Larry R. Hicks, District Judge, Presiding

Argued and Submitted May 11, 2010  
San Francisco, California

Before: RYMER and McKEOWN, Circuit Judges, and FAWSETT, Senior District Judge.\*\*

Rodger Einstein Hayward appeals the denial of his habeas petition under 28 U.S.C. § 2254. Because Hayward filed his original federal habeas petition in 1991,

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Patricia C. Fawsett, Senior United States District Judge for the Middle District of Florida, sitting by designation.

the Anti-Terrorism and Effective Death Penalty Act of 1996 does not apply. *E.g.*, *Sechrest v. Ignacio*, 549 F.3d 789, 802 (9th Cir. 2008). Accordingly, “[l]egal questions and mixed questions of law and fact are reviewed de novo.” *Hovey v. Ayers*, 458 F.3d 892, 900 (9th Cir. 2006). Factual findings made by the district court are reviewed for clear error, and factual findings of state courts are “entitled to a presumption of correctness unless they are not fairly supported by the record.” *Id.*

First we must determine whether the respondents complied with this Court’s June 10, 1994 mandate for a “delayed appeal” by affording Hayward a modified state habeas proceeding instead of a direct appeal from his conviction and sentence. The Nevada courts applied the direct appeal standards of review in the modified state habeas proceeding, and Hayward was afforded counsel. To the extent Hayward complains about the lack of process for challenging the effectiveness of his counsel during the modified state habeas proceeding, it is premature. Hayward received the functional equivalent of a direct appeal through the modified state habeas proceeding, and we find that the respondents complied with this Court’s June 10, 1994 mandate.

Hayward’s remaining challenges to his underlying conviction are without merit. We adopt the reasoning of the district court.

**AFFIRMED.**