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NO. 88-2613

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 10 1989
GILBERT F. GANUCHEAU
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CARLOS DeLUNA,

Petitioner-Appellant,

V.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

PERMANENT

Respondent-Appellee.

On Appeal From the United States District Court
For the Southern District of Texas
Corpus Christi Division

SUGGESTION FOR RE-HEARING EN BANC

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CERTIFICATE OF INTERESTED PARTIES

This is an appeal from the dismissal of an Application for Writ of Habeas Corpus by Petitioner in State custody attacking his conviction for the offense of capital murder and sentence of death. No Certificate of Interested Parties is required.

CERTIFICATE OF COUNSEL

I expressly believe, based on reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Fourth Circuit where Writ of Certiorari has presently been granted by the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions:

Murray v. Giarratano, 847 F.2d 1118 (4th Cir. 1988) (en banc) cert. granted 44 CrL 4061.

Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987) cert. granted 44 CrL 4024.

I express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

(1) That the procedure of the State of Texas in

failing to provide counsel for indigent inmates on death row and the procedure as interpreted by the Fifth Circuit in regulating post-conviction attacks denies indigent petitioners effective assistance of counsel.

(2) That the record in this cause adequately supports the position that a hearing should be held to determine whether the failure of trial counsel to call witnesses to present evidence in mitigation of punishment was ineffective assistance of counsel.

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STATEMENT OF THE ISSUES

(1) The panel opinion citing Pennsylvania v. Finley, ____ U.S. _____ 107 S.Ct. 1990 at 1993 (1987) held that there is no constitutional right to appointed counsel in collateral proceedings such as a habeas corpus petition, and therefore the statutory scheme in the State of Texas consistent with the procedure as interpreted by this Court in regulating post-conviction attacks does not violate Sixth Amendment considerations for failure to provide effective assistance of counsel to indigent death-row inmates. The Supreme Court has granted Certiorari to consider this issue in Murray v. Giarratano, 847 F.2d 1118 (4th Cir. 1988) (en banc) cert. granted 44 CrL 4061.

(2) The panel opinion held that the Petitioner failed to satisfy the first prong of an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in that the failure of trial counsel to call available witnesses in mitigation of punishment for this twenty-one year old petitioner, "might be considered sound trial strategy", for the reason that such testimony could be considered as an aggravating circumstance by the jury. The rationale of the panel opinion is based upon the fact that the Texas Death Penalty

Statute does not allow the jury to be instructed on matters that constitute mitigating evidence, an issue presently before the United State Supreme Court in Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987) cert. granted 44 CrL 4024.

COURSE OF THE PROCEEDINGS BELOW:

Petitioner/Appellant was convicted in Cause No. 83-CR-149-A in the 28th Judicial District Court of Nueces County, Texas, on the 15th day of July, 1983, for the offense of capital murder, and the jury finding the special issues to be true, the Court sentenced Petitioner to death.

The conviction and sentence were automatically appealed pursuant to Texas law to the Texas Court of Criminal Appeals. On June 4, 1986, Petitioner's conviction was affirmed in Cause No. 69,245.

Petitioner was represented by court appointed counsel at the trial of the cause, and one of his court appointed counsel represented him on appeal. The latter abandoned him after affirmance by the Court of Criminal Appeals for the State of Texas and Petitioner's first execution date was set for October 15, 1986.

An Application for Stay of Execution to the United States Supreme Court pending the filing of an Out of Time Writ of Certiorari was filed on October 8, 1986, and denied

by the Supreme Court of the United States on October 10, 1986. Simultaneously, on October 8, 1986, an original Application for Writ of Habeas Corpus pursuant to Art. 11.07, TEX. CODE CRIM. PRO., along with an Application for Stay of Execution pending a hearing, was filed in the convicting court, the 28th Judicial District Court, Nueces County, Texas. Petitioner's Application for Writ of Habeas Corpus was denied on October 9, 1986, without the opportunity for an evidentiary hearing. An Appeal of the denial of an evidentiary hearing and Motion for Stay of Execution was filed with the Texas Court of Criminal Appeals on October 10, 1986, the latter denying the Appeal and the Stay of Execution that same date.

On October 14, 1986, Petitioner/Appellant filed his original Application for Writ Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas, Corpus Christi Division. Petitioner raised three issues in the original Application for Writ of Habeas Corpus;

(1) That Petitioner/Appellant's rights had been violated pursuant to the FIFTH, SIXTH, EIGHTH and FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, in that the statutes allowed prosecutorial discretion in determining in a discriminating manner based on the victim's race, in which cases

the death penalty would be sought.

(2) That Petitioner/Appellant was denied effective assistance of counsel pursuant to the SIXTH and FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, in several different particulars, by court appointed trial counsel.

(3) That Petitioner/Appellant was denied effective assistance of counsel on appeal by court appointed counsel.

An Order for Stay of Execution was issued by the United States District Court on October 14, 1986.

On November 12, 1986, Respondent filed a Motion for Summary Judgment requesting dismissal of Petitioner's he Application for Writ of Habeas Corpus. On January 25, 1987, Petitioner/Appellant filed his Response to the Motion for Summary Judgment, further delineating aspects of proof that he intended to present at an evidentiary hearing. On February 3, 1988, Respondent filed a Motion to Expedite the Court's decision. On June 13, 1988, the trial court, without an evidentiary hearing, entered an Order Dismissing Petitioner's Application for Writ of Habeas Corpus and Vacating the Stay of Execution. On June 29, 1988, Petitioner/Appellant filed a Motion for Relief from the Order of June 13, 1988, and simultaneously filed its First Amended Writ of Habeas Corpus and Brief in support thereof in which Petitioner/Appellant (1) abandoned his first point

of attack concerning the discriminating application of the death penalty, pursuant to the decision of the Supreme Court of the United States in McLeskey v. Kemp, 107 S.Ct. 1756 (1987); (2) further delineated Petitioner/Appellant's allegations of ineffective assistance of counsel at the time of trial and (3) reiterated his claim of ineffective assistance of counsel on appeal. On July 12, 1988, Petitioner / Appellant filed a Motion to Attach Affidavits along with a number of Affidavits supporting the claim concerning his trial counsels' failure to investigate and present mitigating evidence that was available at the punishment phase of trial. On July 19, 1988, the district court entered an Order Denying Relief from Judgment and Petitioner/Appellant gave notice of appeal on July 28, 1988. A Panel Opinion of this Court was issued April 26, 1989, affirming the dismissal of the Writ of Habeas Corpus and denying relief from judgment.

ARGUMENTS AND AUTHORITIES

ISSUE NO. ONE: THE PANEL OPINION THAT THERE IS NO CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL IN COLLATERAL PROCEEDINGS SUCH AS HABEAS CORPUS AND THAT THE FAILURE OF THE STATE OF TEXAS TO PROVIDE COUNSEL TO INDIGENT INMATES ON DEATH ROW, THAT PROCEDURE HAVING BEEN INTERPRETED BY THIS COURT IN REGULATING POST-CONVICTION ATTACKS to NOT DENY EFFECTIVE ASSISTANCE OF COUNSEL, IS AN ISSUE BEFORE THE SUPREME COURT IN MURRAY V. GIARRANTANO, 847 F.2d 1118 (4th Cir. 1988) (en banc) CERT. GRANTED 44 CrL 4061.

In Petitioner's Point of Error No. Three in his

Brief before this Court, Petitioner attacked the procedure provided by the State of Texas in failing to provide counsel for indigent inmates on death row, as that procedure has been interpreted by this court in regulating post-conviction attacks. Petitioner argued that such procedure denied him effective assistance of counsel, because there is a qualitative difference between death and any other permissible form of punishment. Recognizing Ross v. Moffit, 417 U.S. 600 (1974). The Panel Opinion rejecting this point of error stated that the law is clearly established that there is no consitutional right to appointed counsel in collateral proceedings. Citing Pennsylvania v. Finley, ___ U.S. _____ 107 S.Ct. 1990 at 1993 (1987). The Panel held that, because Petitioner was fortunate to have volunteer counsel, Petitioner had no standing to raise this attack.

The question presented in Giarrantano is: "Does the right of meaningful access to the courts require the State to provide a personal lawyer to represent an inmate who desires to attack a death sentence in State Habeas Corpus proceedings, notwithstanding the Supreme Court's rulings that the Federal Constitution does not provide the right to post-conviction counsel and that no preferred status for death row inmates in post-conviction matters is constitutionally required, and that States may meet their obligation

by providing access to courts in a way that Virginia has chosen?" [Virginia uses a combination of librarians and paralegals to act as legal advisers and individual appointment of counsel only after habeas filed and non-frivolus claim ascertained.]

The failure of the State of Texas to provide a systematic method for providing counsel for indigent death-row inmates should be reviewed by this Court in the same manner and in light of Giarratano, supra, as the Opinion of the Court of Appeals for the Fourth Circuit also cited Pennsylvania v. Finley, supra, as the basis for denying Appellant relief. While Petitioner here had the benefit of volunteer counsel, his access to the court in securing affidavits of witnesses and access to trial materials was severely hampered in that the only counsel available and willing to take the case was at a location distant from the trial proceedings.

As the issue is squarely before the Supreme Court in Giarrantano, supra, the full Court should review the Panel Opinion in light of the pending Certiorari.

ISSUE NO. TWO: THE PANEL OPINION OF THIS COURT IN DENYING PETITIONER/APPELLANT AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE OF TRIAL COUNSEL TO CALL AVAILABLE WITNESSES IN MITIGATION OF PUNISHMENT FOR THE TWENTY ONE YEAR OLD PETITIONER BECAUSE SUCH EVIDENCE COULD BE VIEWED AS AGGRAVATING RATHER THAN MITIGATING IS AN ISSUE BEFORE THE SUPREME COURT IN PENRY V. LYNAUGH, 832 F.2d 915 (5th Cir. 1987) CERT. GRANTED 44 CrL 4024.

The record shows, and the Opinion reflects, that Petitioner/Appellant was a twenty-one year old individual with one prior trip to the peniteniary at the time of this offense. (OP.p.4). Petitioner/Appellant, in support of his Motion for Relief from the Order of June 13, 1988, and in support of his First Amended Writ of Habeas Corpus, seeking review of the trial court's dismissal order under Rule 60b, FEDERAL RULES OF CRIMINAL PROCEDURE, filed a Motion to Attach Affidavits and Evidentiary Matters which included affidavits of fourteen family members and friends who were available and known to defense counsel at the time of trial, but who were never contacted by defense counsel concerning what information they may have to offer in mitigation, and who would have testified in regard to Petitioner/Appellant's background in the context of non-penitentiary activities. Additionally, evidentiary matters in the form of numerous arrest reports for substance abuse, most particularly glue and paint sniffing, during Petitioner/Appellant's juvenile years were attached as part of the materials that were made available to defense counsel during pretrial discovery proceedings. The trial record contains psychiatric reports ordered by the court that reflect psychological testing of intelligence at borderline (IQ, 79) but a diagnosis that

Petitioner/Appellant was malingering and should have scored much higher.

The Panel Opinion citing Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Byrne v. Butler, 845 F.2d 501 at 512 (5th Cir. 1988) cert. denied ____ U.S. _____, 108 S.Ct. 2918 (1988), held that in light of the offense, that the failure to investigate and call witnesses in mitigation of punishment was acceptable trial strategy, and such failure failed to satisfy the first prong of Strickland, supra. Therefore no evidentiary hearing to further inquire into counsel's ineffectiveness was required. This was held by the Panel Opinion to be true even though the jury in this cause originally returned a verdict that left the answer to Special Issue No. 2 blank (mandating a life sentence if this case had been tried after 1985), and it was only after several more hours of deliberation forced on the jury by the court that a unanimous affirmative response to Special Issue No. 2 was delivered. Compare Mills v. Maryland, _____ U.S. ____, 108 S.Ct. 1860 (1988).

To hold that the failure to call witnesses who are available to testify in mitigation of punishment of this relatively young person who had been convicted of capital murder, because the evidence could just have easily been

considered by the jury to be aggravating frames in this case the same issue before the Supreme Court in Penry v. Lynaugh, supra. As the jury, under the Texas Statute, has no basis in which to consider mitigating evidence, and therefore evidence offered in mitigation can always be considered as aggravating circumstances, petitioners who raise ineffective assistance of counsel for failure to investigate and call witnesses in mitigation of punishment are subjected to a perpetual "Catch 22."

In light of the totality of the record, and the fact that the jury had an exceptionally difficult time in reaching an affirmative answer to Special Issue No. 2, an evidentiary hearing on the effectiveness of counsel for failure to call witnesses in mitigation of punishment and to put on mitigating testimony should be mandated. Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987) Opinion on Rehearing 825 F.2d 879 (5th Cir. 1987); Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983); Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983); Green v. Zant, 715 F.2d 551 (11th Cir. 1983); Hardwick v. Dugger, 864 F.2d 792 (11th Cir. 1988). See also Streetman v. Lynaugh, 812 F.2d 950 (5th Cir. 1987).

CONCLUSION

For the reason that the Panel Opinion is bound by Fifth Circuit precedent and the issues raised by Petitioner's case are presently before the Supreme Court on Petitions for Certiorairi that have been granted by the Supreme Court, it is respectfully suggested that this Court should hear and resolve the issues in Petitioner's case en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was forwarded to Mr. Jim Mattox, Attorney General of Texas, c/o Mr. William C. Zapalac, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711.

SIGNED this the 9th day of May, 1989.

RICHARD A. ANDERSON