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Swiney

MARCH 28, 1997
(6895)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RONALD PATRICK SWINEY,
petitioner,

vs.

CIVIL ACTION NO. 96-P-2823-S

CHARLES E. JONES, et al.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS'
ANSWER OR MOTION FOR SUMMARY JUDGMENT

comes now the petitioner in the above-styled cause and respectfully files with this Honorable Court his reply to the Respondents' answer to his petition for writ of Habeas Corpus :

The petitioner recognizes that the duty of the writer for the Respondents is to defend a conviction once the conviction has been affirmed by the courts of appeals. However, the petitioner believes that it is unfair and against our jurisprudence to defend a conviction for a capital murder where the record affirmatively shows that his conviction is the direct result of ^{lacked of} adequate legal representation. For example; NO motion for discovery was filed. NO motion for the suppression of statements made and evidence to be used at trial, was ever filed. How can a man receive a fair trial under the above and other circumstances?

petitioner further believes that an objective reader (after reviewing the evidence used to convict him) would have no other alternative but to conclude that petitioner's trial counsel was patently unprepared to represent his client.

to establish that trial counsel was ineffective, a defendant must show that it fell below an objective standard of reasonableness, and there is a reasonable

probability that, but for the deficiency, the result of the trial would have been different. Atkins v. Attorney General of state of Alabama, 932 F. 2d 14-30(11th cir. 1991).

In the case of Grace v. State, 583 So. 2d 17(Ala.Cr.App. 1996), the court of appeals reversed the conviction and one of the grounds or, the first ground is and was that trial counsel's failure to file written motion for discovery constituted ineffective assistance of counsel.

In their answer the Respondents claim that claims one, two, and three are barred or procedural defaulted. Yet, the Respondents admit the Petitioner raised the claims in his Rule 32 petition. (Respondents' answer p. 7). Apparently, the writer for the Respondents is asking the court to hold the petitioner to the same standard as the one applicable to professional lawyers. Therefore, the conclusion this court should reach is, that all claims presented in petitioner's federal habeas petition have been exhausted and they are ripe for federal habeas corpus review. See, Rose v. Lundy, 455 U.S. 509, 518-20(1982).

petitioner respectfully submits to the court that not only he demonstrated the deficient performance of his trial counsel, at the hearing on this habeas petition petitioner will provide through witnesses and exhibits the necessary evidence (if the court deemed necessary) to further affirmatively prove prejudice.

The Respondents claim in their answer that petitioner's claim that counsel was ineffective in failing to file a discovery motion is inherently speculative with respect to the prejudice prong.... In fact, while trial counsel's failure to file a discovery motion rested on his alleged friendship with the district attorney, the record on appeal clearly and conclusively establish that: (1) No such friendship ever existed, and (2) district attorney did not trust trial counsel(s)

nor that the district attorney (based on friendship) will fail to do his homework in order to prepare a case.

Had trial counsel filed discovery motion any and all statements made by people during the police investigation of the case that ^{probably} were exploited by the prosecution in preparing its case (and destroyed after trial counsel failed or neglected to file discovery motion), could have been discovered and the Petitioner benefit from the trial counsel's work product and fruits of diligent and skillful legal work.

petitioner believes that his trial counsel's reliance on the "open file" in a capital murder case alone, establish the necessary prejudice. It is undisputed that there are circumstances where the prosecution possesses, either actually or constructively, brady information that for some reason is not in the file, such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing, no one in this case or in any other case can reasonably argue that under those circumstances, assuming the evidence was exculpatory, the prosecution's brady obligations would be satisfied by just opening the file to his untrusted alleged friend(trial counsel). The prosecution's affirmative obligation under Brady may often go beyond divulging what is in the file.

In their answer the Respondents claim that Petitioner's claim that counsel was ineffective for his failure to object to testimony that Petitioner killed a bird several years before the murders is without merit. In fact, under the rules of evidence, McClroy's Alabama Rules of Evidence, Rule 69.01(1)(4th ed. 1991), one of the provisions that make evidence of collateral conduct inadmissible is where is used to show the defendant's inclination or propensity to comit the crime for which he is being tried. In this case the petitioner is being tried

for the murders of his wife and her ex husband. The picture presented to the jury showed that Ronald Pate was first shot in the back of the neck from outside petitioner's wife's trailer and a witness was freely and without objection from trial counsel, allowed to testify that she witnessed petitioner killing birds or that petitioner shot a crow that was about thirty feet away. It is petitioner's contention that this witness's testimony was used for the sole purpose to show the jury (or to poison the jury's mind) that petitioner was a killer and/or petitioner's inclination or propensity to commit the type of crime for which he is being tried. Yet, up to this date, the state and/or anybody has placed petitioner in possession of the weapon allegedly used to murder these victims nor it has been proved beyond a reasonable of doubt that petitioner was the perpetrator of these murders. Only through his trial counsel's ineffectiveness, was petitioner convicted.

The respondents claim in their answer that petitioner failed to demonstrate either deficient performance or resulting prejudice regarding counsel's failure to file motion for disclosure of aggravating and mitigating circumstances. In fact, counsel's failure to discover aggravating and mitigating circumstances in order to formulate argument and to present evidence during the sentencing stage, establish that counsel was patently unprepared for that stage of the proceedings against petitioner. While, it is true that the State decided not to seek the death penalty, the petitioner was sentenced to die anyway. The result of death by electrocution is, no different from sitting in the penitentiary until you die. Death is death, regardless. In fact, sitting in the penitentiary until you die is more inhuman, cruel and torturous. Thus, the failure to adequately prepare for the sentencing phase, can not be deemed harmless.

The Respondents claim in their motion or answer that there is no merit to the claim of denial of mistrial motion. In fact, it is unrealistic to believe that after poisoning the jury's mind with the testimony of the victim's mother that her daughter was murdered or that "two weeks before he (meaning petitioner) murdered her", the judge's instruction to the jury that he want them to totally strike that from your consideration, will cure the poison already injected. petitioner maintains that to believe that the said instruction to the jury (twelve uneducated and untrained persons in the law) cured the mistrial error in his case is, like believing that an omelet can be unscrambled before placing it in the frying pan. This harmful error not only occurred during direct examination of the victim's mother, it was also committed during the cross-examination.

In their answer the Respondents claim that there was sufficient evidence to support the capital murder conviction. In fact, there is no evidence to convict. There is not even a single witness that can testify under oath, that petitioner is the perpetrator of these murders, and/or that if he was the perpetrator of the crime, that it was done intentionally. While it is true that the state showed that petitioner and his wife had had a rocky marriage, there is not even an scintilla of evidence of domestic violence. In this case the jury was allowed to believe that petitioner's trial was the fair trial guaranteed by the United States Constitution, laws or treaties, when the undisclosed truth is that the evidence to convict was insufficient and inadmissible to be used, had petitioner's counsel acted with the skill commonly possessed by ordinary lawyers regarding the reasonable and adequate representation of its client, when it comes to investigation and preparation of a defense. Petitioner's lawyer did no more than what a penitentiary writ writer would have done.