

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

FILED

98 JUN 23 PH 12:43
U.S. DISTRICT COURT
N.D. OF ALABAMA

RONALD PATRICK SWINEY,)

Petitioner,)

v.)

CHARLIE JONES, Warden;)
ATTORNEY GENERAL FOR)
THE STATE OF ALABAMA)

Respondents.)

CIVIL ACTION NO. 96-P-2823-S

ENTERED

JUN 23 1998

MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION

Ronald Patrick Swiney, hereafter referred to as the petitioner, filed this *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On June 12, 1989 petitioner was convicted in the Circuit Court of Shelby County, Alabama of capital murder and was sentenced to life imprisonment without parole.

On direct appeal petitioner raised the following issues:

- I. Did the trial court err to reversal by failing to include the [petitioner's] waiver of a jury trial for the determination of his punishment in the minute entry for the instant case?
- II. Did the trial court err to reversal in denying the [petitioner's] motion for judgment of acquittal at the close of the state's evidence against the [petitioner]?
- III. Did the trial court err to reversal in denying the [petitioner's] motion for mistrial after the mother of the deceased, Betty Swiney, testified that the [petitioner] murdered her daughter?

(Respondents' Exhibit B).

28

Petitioner was represented on appeal by the same attorney who represented him at trial. On August 3, 1990 the Alabama Court of Criminal Appeals affirmed petitioner's conviction in a memorandum opinion stating:

The judgment of the circuit court is affirmed because appellant's issue concerning lack of mention of his waiver of jury sentence is without merit. His issue concerning sufficiency is also without merit. His issue concerning his motion for mistrial is also without merit. No procedural bars apply.

(Respondents' Exhibit D).

The Alabama Supreme Court denied the petition for writ of certiorari on December 14, 1990.

On November 25, 1991 petitioner filed a Rule 32 petition in state court raising the following claims:

- A. A statement that was illegally obtained following the petitioner's illegal arrest was later admitted into evidence at his trial in violation of petitioner's rights as guaranteed by Article I, §5, 6 of the Alabama Constitution (1901) and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.
- B. The trial court's failure to allow defense counsel to voir dire veniremembers individually as to their opinions regarding capital punishment deprived the petitioner of due process and a fair trial as guaranteed by the Constitutions of the State of Alabama and the United States.
- C. The petitioner was denied the effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Constitution and laws of the State of Alabama.
- D. Critically damaging and prejudicial hearsay evidence was admitted during the petitioner's trial in violation of the petitioner's right to due process and a fair trial as guaranteed by Article I, §6 of the Alabama Constitution (1901) and the Fifth, Sixth, Eighth and Fourteenth amendments of the United States Constitution.

objective standard of reasonableness constituting ineffective assistance of counsel which prejudiced the petitioner.

(Respondents' Exhibit F).

On July 8, 1994 the Alabama Court of Criminal Appeals affirmed the denial of the Rule 32 petition by memorandum. (Respondents' Exhibit H).

In the federal habeas corpus petition before this court petitioner raises the following claims:

- (1) Trial counsel was ineffective for his failure to file a motion for discovery in reliance on his gentleman's agreement to "OPEN FILE" with the district attorney.
- (2) Trial counsel was ineffective in allowing prejudicial and irrelevant testimony about petitioner shooting a bird with a BB or pellet gun while he was living/married to the victim, his wife.
- (3) Trial counsel allowed the victim's mother to testify three times that petitioner murdered her daughter.
- (4) Trial counsel was ineffective for his failure to object to the prosecutor's prejudicial and improper remarks during closing argument.
- (5) Trial counsel was ineffective for his failure to prepare for the sentencing phase where the state did not produce the aggravating and/or mitigating circumstances.
- (6) The trial court denied petitioner a fundamentally fair trial when it denied the motion for mistrial based on the fact that the victim's mother testified that petitioner murdered her daughter.
- (7) The trial court denied petitioner a fundamentally fair trial when it instructed the jury on reckless murder and intentional murder when petitioner was on trial for capital murder.
- (8) The trial court denied petitioner a fundamentally fair trial when it did not grant the motion for acquittal at the end of the state case when there was no evidence that petitioner was the assailant.

- (9) Petitioner was denied his right to a fair trial based on the prosecutor's improper and prejudicial remarks during closing arguments.

The Court entered an Order to Show Cause requiring respondents to appear and show cause why the relief requested by petitioner should not be granted. In response thereto respondents filed an Answer and exhibits. The Court entered an Order advising petitioner that respondents' Answer would be considered as a motion for summary judgment. The Order further allowed petitioner an opportunity to file affidavits or other material in opposition to the motion and advising him of the consequences of default.

- (1) Trial counsel was ineffective for his failure to file a motion for discovery in reliance on his gentleman's agreement to "OPEN FILE" with the district attorney.

This claim was raised both in the Rule 32 petition and on appeal from the denial of the Rule 32 petition. The Rule 32 court found "it is uncontroverted that no motions needed to be filed as the District Attorney let defense counsel examine his file and all physical evidence." (Respondents' Exhibit E, p.65). The Rule 32 court concluded that trial counsel was not ineffective. (Respondents' Exhibit E, p.71). The Alabama Court of Criminal Appeals held in pertinent part, "appellant failed to point to any evidence that counsel failed to discover. Thus, the appellant failed to carry his burden, as set by *Strickland v. Washington*." (Respondents' Exhibit H).

The United States Supreme Court has established a national standard for judging the effectiveness of criminal defense counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984). The Court elaborated:

[F]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendants of a fair trial, a trial whose result is reliable.

80 L.Ed.2d at 693.

In order to show ineffectiveness of counsel a habeas petitioner must show both that his attorney's performance fell below an objective standard of reasonableness and that but for the attorney's failure, the result would probably have been different. *Chadwick v. Green*, 740 F.2d 897 (11th Cir. 1984). Also, in making such an evaluation "[t]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland, supra*, 80 L.Ed.2d at 694. Further, there is a strong presumption that trial counsel's conduct is the result of trial strategy and "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Sinclair v. Wainwright*, 814 F.2d 1516 (11th Cir. 1987), citing *Strickland v. Washington, supra* at 690.

Petitioner has not pointed to any evidence that counsel failed to discover; therefore, petitioner has failed to satisfy the prejudice prong of *Strickland*.