

Court of Criminal Appeals Death Penalty Topics

Jenkins v. Texas

No. AP-77,022

Case Summary Written by Nicole Amos, Staff Member.

JUDGE RICHARDSON delivered the opinion of the Court.

In June 2013, the appellant, Jenkins, was convicted of capital murder in the course of aggravated rape in November 1975 by a jury. The trial judge sentenced him to death. There was an automatic appeal to the Court of Criminal Appeals. On appeal, the appellant raised nineteen points of error, the Court found all of them to be without merit and affirmed the trial court's decision.

The victim, Sheryl Norris, moved from Florida to San Marcos, Texas in late August or early September of 1975. There she lived in an apartment with her boyfriend. One evening, her boyfriend, Charles Andrus, arrived home to find the apartment door slightly ajar and Norris dead on the bathroom floor. When police arrived to investigate, there were signs of a struggle. The apartment was tidy overall, but a front rug was rumpled, there was some loose change and a crumpled dollar bill on the floor of the master bedroom, there was fecal matter on the bed, and there was an area of the wall kicked in to sheetrock that was consistent with a white substance found on Norris's boot.

Norris's upper body was bent over the edge of the bathtub and submerged in water. The wristwatch she was wearing was stopped at 12:31 p.m. She was clothed, but her pants were pulled down. There was blood and fecal matter around her genitals and buttocks. The investigators concluded the evidence indicated a rape/murder. Later an autopsy revealed signs of strangulation, water in Norris's lungs, and intact spermatozoa. A hair fragment found under her fingernail did not belong to her, Andrus, or Sewell, the man who had lived in the apartment before Norris moved in.

No viable suspects were identified and the case went cold until Norris's sister called the police department in 1996 to check on its status. DNA tests were run, but at the time the technology was not advanced enough to provide viable witness identification. Finally, in 2010, the DPS lab was able to run a test on the sample obtained during

the 1975 autopsy and the sample matched with the CODIS profile of the appellant, then located in California. CODIS is a database containing DNA profiles of criminal offenders. The appellant had grown up and continued to live in Marion, Texas, an hour from San Marcos, or the surrounding areas during the time of the murder.

Testimony during the guilt/innocence stage of the trial established that the appellant intentionally caused the death of Sheryl Norris by continually submerging her in water until she drowned and did so with the expectation that she would die. During the punishment stage of the trial, the jury focused on whether there was a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society. To prove that there was, the State called in victims of appellant's past sexual assaults, his stepdaughters whom he had molested, and fellow inmates from penal and psychiatric institutions that he had brutalized.

The rape victims confirmed during testimony that the appellant was guilty of five rapes both in California, and in Texas in cities near San Marcos between 1975 and 1991. Two of the appellant's stepdaughters described, during testimony, being sexually abused and assaulted over the course of several years.

Through the testimony of the women above, the State established that the appellant was a threat to society while outside of custody. However, the State went further to demonstrate that even while in custody, the appellant would likely continue his abusive behavior. The jury watched nineteen deposition videotapes of patients and staff who had interacted with appellant while confined in a California hospital for being a sexually violent predator. While in treatment, appellant was so physically aggressive towards other patients and staff that police sometimes had to be called and he could not live in the dormitories. Patients did not press charges against him because they were afraid of him.

Further testimony given at trial established that appellant was equally aggressive while in prisons. Fellow inmates routinely requested he be moved from their cells because he was dangerous. Even inmates incarcerated for equally dangerous crimes felt unsafe with him.

Appellant for his first point of error required the death sentence to be reformed to life imprisonment because the evidence was insufficient to establish that he had deliberately caused the death of Sheryl Norris.

On appeal, the court views the evidence in the light most favorable to the verdict. The cumulative force of the evidence should point to the likelihood (beyond a reasonable doubt) that the defendant is guilty. Considering all the evidence, the court concluded that a jury could reasonably infer that appellant intentionally caused Norris's death. The point was overruled.

Appellant argued that the ligatures used to strangle Norris had been lost prior to trial, but the ligatures were not necessary to prove that Norris had been strangled. The totality of the evidence established that.

For his second point of error, appellant argued that the DNA evidence should have been inadmissible. For the evidence to be admissible, it must have been sufficiently reliable. To prove this, the State must show "(1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the technique was properly applied on the occasion in question." A hearing must be conducted outside the presence of the jury to determine whether these factors are met. After expert testimony and evidence brought by the defense and the prosecution, the trial court denied defendant's motion to suppress DNA evidence. The Court of Criminal Appeals reviewed the record to conclude that the trial court did not abuse its discretion in denying the motion to suppress, and the point was overruled.

On point three, appellant asserted that the trial court erred by not allowing him to introduce evidence to the jury of his willingness to enter a plea. The rules of evidence only prohibit introducing evidence of a plea against a defendant, not for him. However, the court decided that if the trial court decided not to allow evidence based on the State's argument that doing so would have required explanations to the jury about other, irrelevant law, then the trial court did not abuse its discretion. The appellant failed to offer any argument into how evidence of the plea offer could mitigate his punishment. Additionally, the probative value of admitting such evidence is greatly outweighed by the dangers of unfair prejudice and misleading the jury. Therefore, the court concluded that the trial court did not abuse its discretion, and this point was overruled.

On point four, the appellant argued that the trial court erroneously refused to grant his motion for a mistrial. Appellant argued that juror misconduct, in the form of conversation with a third party outside the trial, resulted in a mistrial. Specifically, a juror sent a text

message to a friend in New York wanting to talk about the case. During this brief conversation, he claims to have realized that he was a high school senior in San Marcos when the crime occurred, and after that he remembered it. An attorney not associated with the case brought this to the attention of the court. The juror was separated from other jury members and questioned, then ultimately replaced with an alternate juror. “A mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic alternatives have been explored.” The trial court questioned the other jurors to determine if they had been biased in any way by the tainted juror and concluded they had not. In reviewing the record, the Court of Criminal Appeals determined the same. This point was overruled.

On point five, appellant argued that the cumulative error of all of his above assertions were so damaging that a reversal was required. However, none of his prior assertions were found to be errors, so that point was also dismissed.

In point of error six, appellant asserted that the Sixth, Eighth, and Fourteenth Amendments were violated because the court failed to “instruct the jury that a vote by one of them would result in a life sentence despite the statutory requirement of ten votes for a ‘No’ answer to the question of future dangerousness, or for a ‘Yes’ vote to a finding of mitigating circumstance.” The appellant asserts that the jury members “were actively struggling” to reach a decision on the sentence they wished to impose. He reasons that the 10-12 Rule may have resulted in imposing the death penalty, because it obstructed their ability to reach a “true verdict.”

However, there was nothing wrong with the trial court’s instructions and the appellant did not refer to any part of the record to support the assertion that the jurors “were actively struggling” with any special issues. The Court of Criminal Appeals also did not identify any part of the record supporting that assertion in their independent review. Therefore, point six was overruled.

In point of error seven, appellant argued that his Eighth and Fourteenth Amendment rights were violated because of the introduction of evidence from Norris’s sister. Her testimony described the impact the crime had on her family, saying that her parents died before knowing who killed their daughter. Appellant argues that such evidence should have been admitted only with a jury instruction that (1)

the victim impact evidence should not be considered in connection with the future dangerousness issues, (2) the evidence did not relieve the State of its burden to prove future dangerousness beyond a reasonable doubt, (3) victim impact evidence not within the reasonable expectation of the defendant should be disregarded, and (4) they should not make a comparison between value of the victim to her family and the community to the defendant and other members of society. However, appellant did not request these instructions in the trial court and cannot cite to the necessity of such instructions. Subsequently point seven was overruled.

In points of error eight through eleven, appellant asserted that the trial court once again violated his Eighth and Fourteenth Amendments when it failed to define the terms “probability,” “criminal acts of violence,” “militates,” and “continuing threat to society” in the jury instructions at the punishment phase. However these claims were previously rejected. Appellant also argued that potential for bias on the basis of race is well mitigated by an instruction precluding consideration of race, but there is no authority for this assertion. The court overruled points eight through eleven.

Point of error twelve essentially repeated point of error ten in that appellant asserted Eighth and Fourteenth Amendment violations for failure to provide special instructions regarding the word “militate.” For the same reasons as point ten, the court overruled point twelve.

On point thirteen, appellant claimed yet another violation of his Eighth and Fourteenth Amendment rights for failure to provide the jury with an instruction that a guilty verdict did not preclude a consideration of moral blameworthiness in sentencing. He urged that this is especially important in a capital case. The court determined that the jury instructions provided by the trial court were sufficient and appellant was unable to point to evidence to the contrary, so this point was overruled.

On point fourteen, appellant claimed Eighth and Fourteenth Amendment violations for the trial court’s failure to include jury instructions explaining that there is “no presumption in favor of death.” However, the Court of Criminal Appeals has rejected such arguments before and there is no requirement that such an instruction is constitutionally required. Point fourteen was overruled.

Point of error fifteen asserted that the appellant's Eighth and Fourteenth Amendment rights were violated because there was no jury instruction regarding the possibility of invoking a life sentence instead of a death sentence if the jury determined his future dangerousness to be existing, but not so severe as to require death. Similar claims have been rejected and this point was overruled.

Appellant argued on point of error sixteen that the trial court's refusal to quash the indictment without a grand jury violated his Sixth, Eighth and Fourteenth Amendment rights. He argued that he was entitled to grand jury consideration. However, the court had previously rejected this claim and the point was overruled.

On point of error seventeen, appellant argued that the trial court erred in denying his motion to preclude the death penalty as a sentencing option. His assertion is that it violated his Equal Protection rights because there is no uniform standard for the State to use to determine when to seek the death penalty. However, there is nothing unconstitutional about having individual district attorneys' offices make decisions to pursue the death penalty without uniform, statewide standards. Moreover, appellant's case is unlikely to induce legislative action to invoke such uniform standards. Similar claims of Equal Protection violations have been repeatedly rejected. The court overruled point seventeen.

The appellant argued on point of error eighteen that his Eighth Amendment rights were violated because the jury instructions "failed to provide a rational basis to determine life or death." He argues this failure results in the jury being unable to apply mitigating factors to the sentencing decision. However, the jury instructions were in compliance with state statutes, and the record indicates the jurors understood their options. This point was overruled.

On his final point, nineteen, appellant argued that his Eighth and Fourteenth Amendment rights were violated because the jury instructions failed to define certain words. He asserts that a capital case does not allow for "vague and inherently flawed" instructions. However, this point relies on prior points of error that had previously been rejected. Subsequently, this point was overruled.

The Court of Criminal Appeals affirmed the judgment of the trial court.

JUDGE ALCALA filed a concurring opinion.

The concurrence joined the majority on all points except points of error three, eleven, and seventeen.

Ex Parte Rolando Ruiz

No. WR-27,328-03

Case Summary written by Ty Taylor, Staff Member.

PRESIDING JUDGE RICHARDSON delivered the opinion of the court, in which JUDGE JOHNSON filed a concurring opinion. JUDGE ALCALA filed a dissenting opinion.

Rolando Ruiz was sentenced to death after being convicted of the murder of Theresa Rodriguez. On July 14, 1992, Ruiz fatally shot Rodriguez in the head. Ruiz had been hired by Rodriguez's husband and brother-in-law to kill her and was paid \$2,000 to commit the act. Ruiz admitted to killing Rodriguez at his trial in 1995 and was subsequently convicted of the offense of capital murder. Ruiz does not contest his guilt, but seeks to avoid execution. Ruiz comes to the Court of Criminal appeals seeking relief based on claims that his trial counsel was ineffective during the punishment phase of his trial.

Ruiz's 1995 conviction was affirmed on appeal, and Ruiz subsequently filed multiple post-conviction writs of habeas corpus. His first state habeas appeal in 1997 did not raise ineffective assistance of counsel (IAC) as a ground for relief—this writ was denied. His first federal writ in 2004 raised claims of IAC, but the district court held he had procedurally defaulted on his claims for federal habeas relief. Ruiz filed a second state writ in 2007, and asserted that “his trial counsel performed deficiently by failing to investigate and present mitigating evidence at the punishment phase of trial.” This writ was also dismissed. Ruiz immediately filed a federal motion to stay his execution, arguing that he had received a ruling on his IAC claims and could now argue this ground in federal court. The federal district court disagreed, and held that “[b]ecause the state appellate court dismissed [Ruiz's] second state habeas application on state writ-abuse principles, [Ruiz] has procedurally defaulted on those claims for purposes of federal habeas review.” Ruiz appealed to the Fifth Circuit, who in turn sent the case back to the district court to address the merits of Ruiz's IAC claims.

On remand, the Texas Court of Criminal Appeals believes the federal district court addressed Ruiz's IAC claims as guaranteed by the Sixth Amendment. In its opinion, the federal district court wrote that, to prove IAC, the defendant must (1) show that counsel's performance was deficient—that it fell below a standard of objective reasonableness—and (2) “he must show that the deficient performance prejudiced his defense—that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been different.” The defendant has the burden to prove each prong of the *Strickland* ineffective assistance of counsel standard by a preponderance of the evidence.

Ruiz argues that he did not receive effective assistance of counsel because adequate evidence was not brought in at the sentencing phase of trial to mitigate his violent past. Although some witnesses were provided to bolster Ruiz's positive character traits—such as his mother, uncle, girlfriend, and former teacher and coach—Ruiz asserts this was insufficient. Ruiz argues that witnesses should have been presented to show his traumatic childhood and past as a drug abuser, such as Dr. Munsinger, to support his argument that he was troubled by a horrible upbringing and heavily influenced by drugs at the time of the murder.

The federal district court addressed the issue of Ruiz's trial counsel and their decision to not further investigate Ruiz's background of clinical depression, deficient social skills, and suicidal ideation. The court noted that his counsel's failure to consider these as possible defenses as “anything but objectively reasonable.” In its analysis of the second prong, however, the court noted that counsel did not completely fail to present a mitigating case for Ruiz. Admitting this evidence would not be sufficient to mitigate the great deal of evidence against Ruiz that demonstrated his history of violent conduct, reputation for violence, and participation in violent gang-related activities. Even at trial, although Ruiz claimed to have accepted responsibility for his crime, he “actually displayed the antithesis of sincere contrition and remorse for his crime throughout his trial testimony.” Further, the federal district court determined that the primary witness attesting to Ruiz's drug abuse, Dr. Munsinger, was unreliable. The volume of evidence weighing against Ruiz led the court to decide that he had failed to carry his burden that there was a reasonable probability the outcome of his punishment

phase would have changed had he been represented by effective counsel, even when including the new evidence.

Ruiz appealed the federal district court's decision to the Fifth Circuit, where the court agreed that the introduction of the new habeas evidence supporting Ruiz's IAC claims would not have changed the outcome of sentencing. The court agreed with the district courts standard for reviewing IAC claims and concluded that, although "[t]he new evidence paint[ed] a bleak picture of Ruiz's childhood," the new evidence would not have changed the outcome of his sentencing.

After Ruiz's final post-conviction application for habeas corpus, the Texas Court of Criminal Appeals determined whether Ruiz received a final merits determination of his IAC claims, and found that "[his] ineffective assistance claims have been fully and completely vetted in the federal court system over a period of roughly seven years...[and] there is nothing more [the] Court could or would do differently." Because Ruiz was provided sufficient habeas counsel and the claims have already been thoroughly addressed by two federal courts, overturning *Graves*—where the Court held that a writ applicant is not entitled to effective assistance of habeas counsel—would have no effect on Ruiz. The court also found that Ruiz's *Lackey* claim was also without merit, as the court had previously addressed and rejected the claim that years on death row make the death sentence cruel and unusual in violation of the Eighth Amendment. Ultimately, the Court dismissed Ruiz's current writ application, denied his motion to reconsider his prior writ application, and denied his motion to further stay his execution.

JUDGE JOHNSON, concurring.

Judge Johnson concurred with the majority's holding that Ruiz's IAC claims were fully and fairly heard by the federal courts. However, Judge Johnson argued that the Sixth Amendment right to "have the assistance of counsel for his defence" should include the right to competent writ counsel who are defending his rights that were allegedly denied at trial.

JUDGE ALCALA, dissenting.

Judge Alcala disagreed with the majority's dismissal of Ruiz's application. Judge Alcala argued that no substantive analysis was given to Ruiz, and his case was not actually considered on its merits. Judge

Alcala stated that the court only sought to justify what it had already decided on procedural grounds, and merely claimed to have made a meritorious ruling. Judge Alcala called for *Graves* to be overruled, and an avenue be created for cases such as Ruiz's to have an actual ruling that depends solely on the merits of the case, as opposed to collaterally.

Ex Parte Mabry J. Landor III

No. WR-81,579-01

Case Summary written by Emily Shanks, Staff Member.

PER CURIAM.

The applicant submitted a post-conviction application for writ of habeas corpus after a jury convicted him of capital murder and sentenced him to death in April 2010. The applicant presented eleven grounds for error. In claims one through four, the applicant asserted ineffective assistance of counsel. The applicant presented new evidence, and the trial court did not hold an evidentiary hearing. The court reviewed the record in light of the applicant's allegations and denied relief. The court concluded that a separate evidentiary hearing was not necessary in light of the jury's knowledge of the evidence and adopted the trial court's findings and conclusions. The court disposed of applicant's grounds one, two, three, four, eight, ten, and eleven for being procedurally barred.

JUDGE KELLER filed a concurring opinion, in which JUDGE KEASLER and JUDGE HERVEY joined.

Judge Keller wrote a separate concurrence specifically to agree with the denial of the applicant's ineffective assistance of counsel claims one through four on the ground that they were raised and rejected on direct appeal and to disagree with Judge Alcala's concurrence, which argues that the ineffective assistance claims should be resolved on the merits to evaluate the new evidence that was not available on direct appeal. Judge Keller explained that while the court has weighed new evidence material to an ineffective assistance habeas claim on direct appeal, the applicant in this habeas case did not offer new evidence regarding prejudice in which this court previously resolved against him on direct appeal. Because the issue of prejudice was previously resolved

against the applicant on direct appeal, this habeas claim need not be resolved on the merits.

JUDGE ALCALA filed a separate concurring opinion.

Judge Alcala wrote a separate concurrence arguing that the applicant's claims one through four for ineffective assistance of counsel claims would have been more properly resolved on the merits rather than on the basis of being procedurally barred. Judge Alcala reasoned that when a close question exists for whether a claim is procedurally barred, the claim is more properly decided on the merits of the actual evidence. However, Judge Alcala agreed, even after examining the applicant's claims on the merits, that the applicant's request should be denied.

JUDGE RICHARDSON filed a concurring opinion, in which JUDGE KELLER and JUDGE KEASLER and JUDGE HERVEY joined.

Judge Richardson wrote a separate concurrence to address the applicant's ineffective assistance of counsel claims because they were raised and rejected on direct appeal. Ordinarily, an applicant's direct appeal record does not contain sufficient evidence to evaluate claims of ineffective assistance of counsel, and the applicant must provide additional evidence to prove his claim. These ineffective assistance claims were not backed up by additional evidence; therefore, there was no need to evaluate these claims on the merits. Further, the applicant failed to show any prejudice from ineffective assistance of counsel.

In re Eric Dean Perkins

No. WR-85, 009-01

Case Summary written by Bailey McGowan, Staff Member.

JUSTICE JOHNSON delivered the concurring opinion of the Court, joined by JUDGE RICHARDSON and JUDGE NEWELL.

Attorney Eric Dean Perkins was appointed to serve as second chair for an indigent defendant on a capital-murder case. In the case, the state was seeking the death penalty and ultimately the jury did not sentence the defendant to death. Before the trial, Perkins submitted three invoices totaling \$30,017, which was calculated on a \$150 per hour basis. Perkins indicated at the time of the last pre-trial invoice he

was nearly finished with his trial preparation. Subsequently additional witnesses came forward and cellular phone tower analysis was required before trial. Perkins then submitted a final invoice for \$48,120 after the eighteen-day jury trial. The trial court judge refused to pay the full amount, instead only agreeing to pay \$27,000 after Perkins appealed her decision. The trial court judge justified the \$21,000 difference by agreeing only to pay for the eighteen-day jury trial. Perkins filed a writ of mandamus in the court of appeals and that court held that Perkins had an adequate right of appeal to the administrative judge.

Issue: Whether the attorney's writ of mandamus should have been granted by the Court of Criminal Appeals or be directed to an administrative judge?

The Texas Court of Criminal Appeals denied the writ of mandamus and did not issue a written opinion.

In Justice Johnson's concurring opinion, he explained that there are two different standards for granting a writ of mandamus. Under the Texas Supreme Court, the relator must have "no adequate remedy at law and that he requested action by the respondent [be] ministerial." For the Court of Criminal appeals there is a three-part standard to granting a writ of mandamus: "a legal duty to perform a nondiscretionary act; a demand for performance; and a refusal to act." The concurring justices argued that Perkins did not meet either standard because the language of the statute leaves the determination of an appropriate amount to the trial court's discretion. The justices went on to explain that the determination should be made in writing. If no writing was made, then the attorney should file a written request that the required written findings by the trial court judge be made. Afterwards, a writ of mandamus may be issued from a "presiding judge of the administrative judicial region, or by higher authority if the presiding judge fails to act." Only then can the normal appeal rules apply; however, the writ can only force the trial judge to make a written finding and cannot determine the contents of the writing. Therefore, Perkins was not entitled to a writ of mandamus because he had not satisfied the correct order of events.

JUDGE ALCALA, dissenting, with JUDGE MEYERS, joining.

Judge Alcala and Judge Meyers dissented in the case, finding Perkins attempted to appeal to an administrative judge twice. Further,

the judges took issue with the fact that the court of appeals did not make a finding of fact in the case because the trial court issued a written finding that was inadequate for the trial court's decision to withhold funds.

The trial court gave three reasons for withholding funds: Perkins claimed he was near the end of his trial preparation when he submitted his third invoice, Perkins' bill was higher than the first chair in the case, and Perkins' bill was greater than the amount requested by the appointed counsel for a co-defendant. The judges argued that each of these reasons were not permissible reasons for denying funds since the standard in the statute says a judge may only deny funds if the amount requested is not "reasonable and necessary time spent out of court on the case."

On the first point, there was no contention that additional witnesses and trial preparation became necessary after the third invoice, making Perkins' original assessment of being near completion incorrect. Also, the trial judge never found the additional work was unnecessary for the particular death-penalty trial. On the second point, basing a rejection of funds on another attorney's invoice is impermissible because it is immaterial what one attorney did and another did not as long as the work is reasonable and necessary for the case. Finally, the judges found comparing co-defendant attorney's invoices inappropriate because the punishment phase of a trial will require highly specialized preparation due to the many variables in each situation. Also, the rate of \$150 an hour resulted in a fee that would be far below what a typical defense attorney would charge for the same work in either a state or a federal case.

The judges took issue with the refusal to pay Perkins because "refusal to pay competent counsel in death-penalty cases will result in only incompetent counsel agreeing to take on these exceedingly complex cases." Instead, the dissenting judges would grant mandamus relief and order the respondent to pay the remaining sums for his work in a successful defense in a capital-murder trial.