

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR -9 2009
CLERK, U.S. DISTRICT COURT
By _____
Deputy

MICHAEL WAYNE HALL,

Petitioner,

VS.

NATHANIEL QUARTERMAN,
DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS
DIVISION,

Respondent.

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§ NO. 4:06-CV-436-A
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MEMORANDUM OPINION
and
ORDER

This case is back before the court by reason of an order of reversal and remand by the United States Court of Appeals for the Fifth Circuit with the direction that the court conduct a hearing on the claim of petitioner, Michael Wayne Hall, ("Hall"), who is now subject to the penalty of death arising from a planned thrill killing of Amy Robinson by Hall and his friend, Robert Neville,¹ ("Neville") on February 15, 1998, that he is mentally retarded.² The impetus for the remand was the decision of the Supreme Court

¹On December 18, 1998, Neville was sentenced to death for Amy Robinson's murder and his sentence was carried out on February 8, 2006.

²Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008).

in Atkins v. Virginia that the execution of a mentally retarded defendant violates the Eighth Amendment to the Federal Constitution. 536 U.S. 304, 321 (2002). The Supreme Court concluded that a national consensus had developed that mentally retarded offenders should not be subjected to the death penalty. Id. at 316.

After a thorough review of the record and full consideration of the applicable authorities and briefs of the parties, the court has concluded that the relief sought by Hall's application under 28 U.S.C. § 2254 should be denied.

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I.

History of Hall's Criminal Case

The facts of Hall's crime and the history of his criminal case, commencing with his indictment, going through his appeals and habeas proceedings, and ending up here again, are found in three published opinions: first, the May 5, 2004, opinion of the Court of Criminal Appeals of Texas, Hall v. State, 160 S.W.3d 24 (Tex. Crim. App. 2004) (en banc) (in which the court concluded that the evidence adduced at Hall's trial and in his state habeas action supported findings that Hall's mental retardation claim was without merit, and, therefore, he was eligible for the death penalty); next, the August 3, 2006, memorandum opinion and order of this court, Hall v. Quarterman, 443 F. Supp. 2d 815 (N.D. Tex. 2006) (in which this court concluded that Hall did not overcome the deference owed under 28 U.S.C. § 2254 to the state court's

adjudication that Hall's mental retardation claim was without merit, and denied Hall's § 2254 application); and, finally, the June 30, 2008, opinion of the Fifth Circuit, Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008) (in which the Fifth Circuit concluded that this court erred in failing to conduct a hearing on Hall's claim of mental retardation, reversed this court's August 3, 2006, denial of Hall's habeas application, and remanded the case to this court for a hearing). The court refers the reader to those opinions.

II.

Issues Now Before the Court

Although the court conducted an evidentiary hearing on December 10, 2008, on the issue of Hall's claim of mental retardation, as the Fifth Circuit ordered, the court continues to owe deference to the state court's adjudication that Hall's mental retardation claim was without merit and the state court's determinations of factual issues related to that claim. The pertinent parts of 28 U.S.C. § 2254 direct that:

(d) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State

court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In Valdez v. Cockrell, 274 F.3d 941, 950-51, 959 (5th Cir. 2001), the Fifth Circuit explained that "a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme." Id. at 959. Thus, even though the state court did not provide a full and fair hearing on the mental retardation issue and this court had a hearing on that issue, this court is obligated to give § 2254 deference to the state court's adjudication and the determinations of factual issues made by the state court.³

³A concern Judge Higginbotham had with the decision of the majority of the panel in Hall v.

(continued...)

As reflected by the discussion between court and attorneys at pages 10-12 of the transcript of the December 10, 2008, hearing in this court, the parties agreed that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. Stated another way, the parties agreed that § 2254 deference is required and that the court need concern itself only with the deference requirement of § 2254(e)(1).

To the end of further defining the issues before the court, the parties stipulated to a definition of mental retardation which, as modified verbally at the hearing, is as follows:

Mental retardation is a disability characterized by:
(1) significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below];
(2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

J. Stipulation to Hr'g Exs. filed Dec. 9, 2008, at 2; Tr. of Dec. 10, 2008, Hr'g at 12-13.

³(...continued)

Quarterman to order this court to have a hearing rather than to direct the state court to have a hearing was that this court could not hold "a hearing free of the deference the federal district court must give to the state adjudication of retardation . . ." 534 F.3d 365, 398 (5th Cir. 2008) (Higginbotham, J., dissenting).

III.

State Court Proceedings Specific
to Whether Hall is Mentally Retarded, and
the State Court's Adjudication and Determinations
of Factual Issues Related to that Subject

A. General Remarks

Because the court is required by 28 U.S.C. § 2254 to give deference to the state court's adjudication and determinations of factual issues pertinent to the mental retardation issue, the court must consider the state court proceedings, including the evidence received at Hall's trial, the evidence received as a part of his state habeas action, and the state court's adjudication and determinations of factual issues.⁴ Therefore, the court discusses those things in some detail⁵ before proceeding to a discussion of the evidence received at the December 10, 2008, hearing and the impact, if any, that evidence has on the state court's adjudication and determinations.

⁴The state court's adjudication and determinations of factual issues related to Hall's mental retardation claim were based on evidence received during Hall's criminal trial, particularly the punishment phase, as well as additional evidence presented to the state court as part of Hall's state habeas action. Hall v. State, 160 S.W.3d 24, 27-35, 38 (Tex. Crim. App. 2004).

⁵Necessarily the court has omitted some of the details given in the state court evidence. Nevertheless, all the evidence is being considered by the court in its analysis, findings, and conclusions.

B. State Court Trial Proceedings

1. Evidence Received at Hall's February 2000 Criminal Trial

a. General

Even though the jury in Hall's criminal trial was not asked to decide whether Hall was mentally retarded, significant time was devoted at the trial, primarily at the punishment phase, to the development of evidence bearing on Hall's mental retardation contention.

The issue of mental retardation was touched on during the guilt phase of the trial. Hall's supervisor when he was employed at a Kroger store responded to a question asking if Hall appeared to be mentally challenged by saying, "No. He was lazy, but he wasn't mentally challenged, in my opinion." Hall, 160 S.W.3d at 27. The facts of and planning for the offense and the post-offense conduct of Hall and Neville, which tended to demonstrate that Hall had the ability to make reasoned, albeit extremely undesirable, decisions, were before the fact finder for consideration. The videotape of Hall's interview by news media personnel following his arrest provided the fact finder a chance to observe Hall carrying on a normal conversation, during which he displayed a rational understanding of what he had done and

that the consequence of his conduct probably would be the death penalty.

b. The Expert Witnesses Dr. Cunningham and Dr. Price

At the punishment phase, Mark Douglas Cunningham, Ph.D., and J. Randall Price, Ph.D. (the same two expert witnesses who testified at the December 10, 2008, hearing) testified at length, and were subjected to extensive cross-examination. Dr. Cunningham's testimony for the defense occupies 260 pages of the transcript of the evidence received at Hall's trial. One hundred sixty-three of those pages were devoted to direct examination, 68 to cross-examination, 26 to redirect, and 3 to re-cross. Most of Dr. Cunningham's testimony at each stage of the questioning was on the subject of mental retardation and his qualifications to speak to that subject. Dr. Price's testimony for the State is spread over 82 pages of the trial transcript, 37 pages of which were devoted to direct examination by the prosecutor, 40 to cross-examination, 4 to redirect, and 1 to re-cross. Dr. Price's testimony was devoted in its entirety to the subject of mental retardation and his qualifications to give opinions on that subject.

Dr. Cunningham said that his occupation was as a clinical and forensic psychologist. His testimony established that he was an experienced expert witness in death penalty cases, apparently earning hundreds of thousands of dollars per year from that activity. Dr. Price described his business, occupation, or profession as a clinical and forensic psychologist and a neuropsychologist. He had testified between seventy-five and one hundred times in capital sentencing cases. About seventy percent of the time Dr. Price testified for the defense, and about thirty percent of the time he testified at the request of the prosecution.

Dr. Cunningham's description of the standard he used to determine whether Hall was mentally retarded was similar to the standard to which the parties stipulated in this action. The difference between the two is that the standard Dr. Cunningham used at trial was more favorable to Hall than the stipulated standard because of the higher IQ score incorporated into Dr. Cunningham's trial standard. Dr. Cunningham explained during his trial testimony that:

Now, a diagnosis of mental retardation requires really three elements. The first one is an IQ score below 75. The second one is significant deficits in at least two areas of adaptive functioning.

Adaptive functioning means kind of practical intelligence, not on a test, but day-to-day life. What can the person do or not do, and how does that interfere with their functioning.

And so you need two areas, two arenas, of functioning that show significant deficits in order to call somebody mentally retarded. And then you have to have an onset of these things before the age of 18. . . .

R. of Crim. Trial, Vol. 34 at 195.

The focus of Dr. Cunningham's testimony was on the first two elements--Hall's IQ score and his perceived deficits in the area of adaptive functioning.⁶ Dr. Cunningham expressed the opinion that Hall is mildly mentally retarded. Hall's full-scale IQ score was 67 on a WAIS-III test conducted by Dr. Cunningham in 2000. Because the ultimate score has a plus or minus three range of error, the score was in the range of 64 to 70. Dr. Cunningham noted that Hall was subjected to an intelligence test at school in 1991, when his score on a WISC-R test was 71, with a plus or minus five margin of error, meaning that the score ranged between 66 and 76. In addition to the IQ tests, Dr. Cunningham based his opinion on extensive information provided to him concerning the environment into which Hall was born and raised and the way Hall

⁶The parties seem to take as a given that whatever mental disability Hall might have had when he and Neville murdered Amy Robinson existed before the age of eighteen. When he and Neville committed the murder, he was eighteen years of age, having a birth date of April 6, 1979.

conducted himself from a very young age up to his trial. Dr. Cunningham's evaluation of Hall's adaptive functioning caused him to conclude that Hall had adaptive functioning deficits in several respects.

Dr. Price did not speak with as much certainty as Dr. Cunningham. When asked by the prosecutor if Dr. Price was able to determine whether Hall was mentally retarded, he responded:

Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's -- it's sort of a judgment call.

R. of Crim. Trial, Vol. 35 at 196. Dr. Price said that Hall was able to understand the difference between right and wrong, the significance of committing a crime like murder, and what it means to take another person's life, and had the intellectual capacity to make choices.

When Dr. Price interviewed Hall for two hours on February 2, 2000, for a little over three hours on February 3, and for approximately two hours on February 9, Hall was oriented in that he knew who he was, where he was, and the time. Hall was appropriately dressed and had an appropriate appearance. Hall's thought processes were on the topic, logical, and goal-centered. He followed the line of questions Dr. Price was asking, and he

answered the questions. Hall's thought processes flowed pretty normally. When Hall would think of something to add to the conversation he did so. The conversation Dr. Price had with Hall was a normal conversation. He saw no evidence that Hall suffered from any kind of delusion or any form of hallucination. Hall's emotions seemed normal, though a little on the flat side, but the emotions changed depending on the topic. He found Hall very cooperative, with a good attitude about talking to Dr. Price and the testing Dr. Price conducted.

Dr. Price gave Hall a test that he considered to be an assessment of Hall's adaptive behavior, which resulted in a finding that Hall was in the low-average area in terms of his knowledge of adaptive skills and behaviors. The overall impression Dr. Price conveyed by his testimony is that, while Hall is intellectually challenged, there is doubt that he qualifies as mentally retarded.

* * * * *

The identities of the other witnesses who testified at the punishment phase of the trial, and a synopsis of the testimony of

each, are set forth below:

c. Other Witnesses Called by the State

(1) Richard L. Moon, Jr.

Mr. Moon is a staff photographer for the local daily newspaper. In early March 1998, he went to Eagle Pass, Texas, to cover the news story of the arrest of Hall and Neville at Eagle Pass. He identified an exhibit as a photograph he took of Hall and Neville while there.

(2) Rodrigo Rodriguez

Mr. Rodriguez is a police officer for the City of Arlington, Texas. On February 17, 1998, he was dispatched to a location in Arlington, Texas, to investigate a suspicious vehicle and two suspicious persons. When he arrived, he saw two persons who he later learned were Hall and Neville. They told him they were returning a vehicle that they had purchased because they were having problems with it, and they were removing property from the vehicle. He observed that the items included a crossbow, BB guns, .22 shells, CO₂ cartridges, and two knives. In the beginning, Neville did most of the talking. Hall and Neville indicated to Officer Rodriguez that the items he saw belonged to both of them.

(3) Thaddeus Corley

Mr. Corley is a Special Agent with the United States Department of Treasury, U.S. Customs Services. On March 3, 1998, he was dispatched to the port of entry at Eagle Pass, Texas, in reference to Hall and Neville, who had been stopped there pursuant to an outstanding murder arrest warrant. When he arrived, he arranged for a fellow special agent to interview Neville while he, in a separate room, interviewed Hall. He identified himself and informed Hall of his Miranda rights. Hall agreed to discuss the events leading, and related, to the murder of Amy Robinson, and gave the following description:

He said that he and Neville wanted to become serial killers. They wanted to kill one to five people a week. He said that they wanted to become White Supremacists and only kill blacks. He said that they didn't want to have to beat up, knock out, or drag anybody, so they decided to kill Amy. He said that they went to her house to pick her up, but she was already on her bike on her way to work and they convinced her to go with them to a secluded area. She told them that she would go, but she didn't want to be late for work. So they took her to a secluded area.

He said that Robert Neville got out of the vehicle, went to the bushes. He was in the car with Amy. He told Amy that her father would be upset if he knew that she was out there with him and that she should go to the bushes with Neville. He said that as she approached the bushes, Neville fired, shot at her

with a crossbow, but he missed her. He said that Neville sent her back to the vehicle. He said that he shot at her with a .22, but missed her. He then sent her back to the bushes.

.....

Neville shot at her first with his crossbow. When she went back to the vehicle, Hall shot at her with his .22. Then she went back to the bushes, and then Neville shot at her again with his .22.

Q. And did Mr. Hall also tell you that he shot at her with a pellet gun?

A. He said that after she returned to the car, she was on her way back to the bushes and he shot at her, but he missed. He said that Neville missed, but he got -- Hall got upset and grabbed his pellet gun, went after her, and shot her in the leg and in the chest. He said that she fell to the ground, started crying, and they --

Q. What did they do? What did he tell you that they did then?

A. He said they stood over her and laughed and she was crying and screaming. He said that Neville got tired of listening to her scream, so he took the .22 and shot her in the chest and then he shot her in the head.

.....

A. A couple of days after he killed her, he said that he and Robert Neville returned to the body. He said that he took four or five dollars from her.

Q. Did he say where he took the money from on her body?

A. He said he took it out of her pocket.

Q. Did he say he did anything else?

A. He said that they shot at her some more with the pellet gun and with the .22.

Q. I want to back up just a minute. The day that they killed her, did he say specifically anything about her keys?

A. Yes. He took the keys and threw them in the bushes. She also had a bike -- excuse me. She also had a bike, and he took the bike and placed it on the side of the hill.

R. of Crim. Trial, Vol. 33 at 48-52. Hall told Special Agent Corley that he expected to receive the death penalty for his crime.

As Special Agent Corley and Hall started to talk, and Hall started to reminisce about killing Amy, "he kind of went into like a zone"; "[y]ou could see his eyes get a little bit wider"; and, "[h]e became very excited, almost aroused." R. of Crim. Trial, Vol. 33 at 50. When asked if he raped Amy, Hall said that he did not because the body was nasty. Hall described in a general way where the body was located. Special Agent Corley was with Hall approximately one hour.

(4) Caroline Massey Barker

Ms. Barker was Amy Robinson's grandmother. She related information about Amy and Amy's disappearance. None of her

testimony would have a significant bearing on Hall's mental retardation claim.

d. Other Witnesses Called by Hall

(1) Karen Hall (Gray)

Ms. Hall is Hall's mother. She related information about her education and background and the educations and backgrounds of her children, Hall, Damon, and Rebecca. Hall was born April 6, 1979. Ms. Hall testified about her marital relationship with Hall's father and her relationships with other men who lived in the home with her and her children from time to time over the years. She described Hall's interaction and relationships with his father and the other men. Ms. Hall described the home environment as Hall was growing up, including unusual sexual activities between her, Hall's father, and other persons who came into the house, which occurred while Hall was present in the house, violence in the home, and alcohol and drug usage by her and others in the house. She told of suffering physical abuse from one of her male friends in front of Hall.

She met Larry Gray in 1994, at a time when Hall was living with his father. In December 1994 Hall returned to live in the home with her and Mr. Gray. Ms. Hall described the home environment after Hall returned to live with her and Mr. Gray,

including suicide attempts by Mr. Gray that Hall witnessed. She said that Hall lived twelve different places during the first eighteen years of his life. Ms. Hall said that as a result of the problems in their home, the family received counseling in 1996. She discontinued the counseling in June 1997 because they were "going into [her] childhood and trying to blame everything that's been going on [as her] fault." Id. at 114.

Ms. Hall described how in the summer of 1997 Hall withdrew to his room, and was not smiling anymore. He played video games and listened to the stereo, and would be by himself for long periods of time. Hall passed the written part of a driving test, but did not try to take the driving part.

She told of difficulties she had during her pregnancy with Hall. Ms. Hall discussed different times when Hall had an accident of one kind or another that could have resulted in a head injury. She described Hall's history in school. He was in special education classes up through the ninth grade, when Hall's father had him put in regular classes. Hall was unable to handle the regular classes. He was required to have the services of a speech therapist, and took Ritalin from the time he was in the first grade until he was in the fifth grade. Hall went to the tenth grade in public school. She described things that Hall was

unable to do, such as reading the hands on a clock, though he could tell time from a digital watch; using a menu; negotiating public transportation; and using a dinner knife, though he could use a fork and spoon. He sometimes chewed with his mouth open.

She described Hall's mental challenges. He could not count change. Hall had difficulty with directions, and would "get lost real easy." R. of Crim. Trial, Vol. 33 at 125. He was hired as a stocker at Kroger, but they moved him to a sacker position because his hands were so big he could not stack small boxes of JELL-O the way they should be stacked.

Hall did not fit in with people his age. He played as if he were eight years of age, and attracted kids eight, nine, or ten years of age. Children his own age would call him stupid or retarded, which would cause Hall to cry. Younger children accepted him.

Hall became a friend of Neville when they were working together at Kroger in the fall of 1997. She met Neville twice, once at Kroger and once when Neville came to the door with a car, and asked if Hall could come out. At that time, Neville was twenty-three years of age and Hall was eighteen. She did not approve of Hall's friendship with Neville because Neville was older than Hall. Neville would do things with Hall that Hall's

father once did, such as taking him to play bingo and shoot pool, and buying a pellet gun for him. Hall was excited about the things Neville did for him.

She taught all of her children how to use pellet guns when Hall was ten years old. Hall did not shoot a pellet gun well. He was not really interested in doing that. Hall enjoyed playing different video games, some of which involved violence. He read and wrote at about a fourth-grade level. Hall read children's books, and had been reading the Bible since he had been in jail.

She would not agree that Hall could express himself, though he could relate an event he experienced. There was a period of time when Hall was not able to distinguish fantasy from reality. That was after a situation with Mr. Gray, his sister, and his father. She was aware of two girlfriends Hall had, but did not know their ages. She met one of them, who was near his age. Hall could use a telephone, and he was involved in church.

Ms. Hall discussed the household chores that Hall performed, including taking care of his room, taking out the trash, cleaning up after the dogs in the back yard, helping her in the kitchen (such as loading the dishwasher), and cleaning up the bathroom. Hall could brush his teeth, shave, change his clothes, and button his shirt. After he quit working at Kroger, he got a job at