UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-6338
Summary Calendar

DANIEL RODRIGUEZ ORTA,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(CA H 90 3686)

(January 7, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges:

PER CURIAM:*

BACKGROUND

A Texas state-court jury convicted Daniel Rodriguez Orta (Orta) of murder and sentenced him to life imprisonment. After

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

exhausting state-law remedies, Orta filed the instant petition for federal habeas corpus relief. The United States district court denied Orta's motion for an evidentiary hearing and denied his petition for habeas relief, but did grant Orta a certificate of probable cause for an appeal.

OPINION

Orta first contends that he received ineffective assistance of counsel because counsel failed to obtain a psychiatric examination of Orta and to pursue an insanity defense. He contends that counsel's failure prejudiced him both at trial and at his sentencing hearing. He also contends that the district court should have held an evidentiary hearing on his ineffective-assistance contention.

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficient performance, the petitioner must show that counsel's actions "fell below an objective standard of reasonableness." Id. at 688. To prove prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. To show ineffective assistance based on failure to pursue an insanity defense or obtain a psychiatric examination, a petitioner must show "that his attorneys were alerted -- or should have been alerted -- to the presence of an underlying mental disorder" and "that his attorneys had some indication that mental impairment might prove a promising line of defense." Byrne v. Butler, 845 F.2d 501, 513 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).

Orta's counsel moved for a psychiatric examination. The state-court record does not indicate that the state court ruled on that motion. Orta, in one of his state-court habeas applications, submitted an affidavit sworn by his sister, Lupe Rosas. Rosas swore that Orta had asked counsel to arrange an examination. According to Rosas, the state-court judge approved an examination but then reset the trial date. Counsel then approached Rosas and suggested that she hire a psychiatrist rather than rely on a psychiatrist provided by the county. Rosas could not afford to hire a psychiatrist. Nothing was mentioned about the examination after the trial date was reset. Rosas swore that "[m]y brother has never been a violent man and I do not believe he was in his right frame of mind when this incident occurred nor do I believe he fully understood the proceedings against him."

On the record before this Court, Orta has failed to show that counsel knew or should have known about any underlying mental disorder or that an insanity defense might have been promising. Merely because counsel moved for a psychiatric examination does not mean that counsel suspected or believed that Orta was mentally impaired. Rosas' affidavit adds no support to Orta's contention. Her statement that she did "not believe that [Orta] was in his right frame of mind" does not indicate that Orta was suffering from any underlying mental disorder.

"`[T]o receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief.'" McCoy v. Lynaugh, 874 F.2d 954, 967 (5th Cir. 1989)(quoting Wilson v. Butler, 825 F.2d 879, 880 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988)). The question is close, but the district court need not have held an evidentiary hearing on Orta's ineffective-assistance claim. On the one hand, counsel moved for a psychiatric examination and then apparently abandoned the matter. According to Rosas, the state-court judge approved such an examination and also abandoned the matter. Rosas swore that counsel suggested that she hire a psychiatrist, something she could not afford to do. Counsel's motion for an examination and Rosa's affidavit indicate that counsel may have believed Orta mentally impaired. On the other hand, Orta does not allege that he suffered from any particular mental impairment when he committed his offense or when he was tried and sentenced. Nor does he allege that any subsequent psychiatric examinations have indicated that he is or has been

mentally impaired. Moreover, Orta alleges no facts to support the premise that there exists a reasonable probability that the jury would have acquitted him or imposed a lighter sentence had counsel presented evidence of mental impairment.

Orta next contends that the prosecutor, during the sentencing hearing, improperly commented on his failure to testify. "The fifth amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. A prosecutor may comment, however, on the failure of the defense, as opposed to the defendant, to counter or explain the evidence." United States v. Borchardt, 809 F.2d 1115, 1119 (5th Cir. 1987)(citations omitted).

During closing arguments at the sentencing hearing, Orta's attorney said,

> I have not introduced any additional evidence in this case simply because we feel that what you have heard here during the guilt-innocence phase of the trial is sufficient for you to set punishment in this particular case and we are asking that you consider as you told us you would consider in a proper case the minimum of five years in the penitentiary.

Later, the prosecutor said, "If you're easy on him, I would like to know why you would take that position. I ask you to . . . give him life because he has done nothing as far as the evidence is concerned to show that he deserves anything less." Defense counsel suggested that the evidence at the guilt-innocence phase supported a five-year prison term. The prosecutor's statement was a permissible response to that suggestion. The prosecutor did not comment on Orta's failure to testify. He merely implied that the

defense presented no evidence to support a sentence to a five-year term of imprisonment.

Orta finally contends that the state trial judge improperly instructed the jury about the possibility that Orta eventually could be paroled. He contends that the court's instructions confused the jury about the possibility of parole and thus influenced the jury to impose a sentence of life imprisonment. Orta's contention is unavailing.

The trial court instructed the jury:

> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-third of the sentence imposed or twenty years, whichever is less, without consideration of any good conduct time he may earn. . . . Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. . . . You are not to consider the manner in which the parole law may be applied to this particular defendant.
>
> . . . .
>
> You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor of the State of Texas, and must not be considered by you.

This Court has upheld similar instructions against constitutional challenges. Mendez v. Collins, 947 F.2d 189, 189-90 (5th Cir. 1991)(60-year term of imprisonment imposed); Day v. Collins, No. 90-8470, 2-5 (5th Cir., June 19, 1991) (unpublished) (life term of imprisonment imposed).

We AFFIRM the district court's denial of the writ.