IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8051
Conference Calendar

ROBERT M. DISMUKES,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-91-CV-3

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August 17, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Robert M. Dismukes has appealed the district court's denial of his petition for habeas corpus relief relative to his convictions in a Texas state court of burglary of a habitation and attempted murder. We affirm.

Dismukes raised several grounds in his federal habeas petition. He has briefed only two issues, however. Thus, he has

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in effect abandoned his other habeas grounds. See Fransaw v. Lynaugh, 810 F.2d 518, 523 n.7 (5th Cir. 1987).

Dismukes contends that he is entitled to relief because the state trial court's denial of a continuance violated his constitutional right to be represented by counsel of his choice at his mental-competency trial before a jury. (After Dismukes had been convicted, on appeal the state appellate court had remanded for a competency hearing.) He argues that the denial of his right to counsel of his choice at the competency hearing constituted prejudice per se.

The state trial court required that Dismukes be represented at the competency trial by the previously court-appointed Attorney Robert Wales, who was ready to proceed. The court denied a motion for continuance made by retained Attorney Arvel Ponton on the day of the hearing. Ponton was not prepared to go to trial that day. The court was under instructions of the appellate court to hold the trial within 90 days, i.e., by January 26, 1988; the court had other cases on its docket so that rescheduling by that date was not feasible; and the prospective jurors and witnesses were in court on January 5 for the trial.

"While it cannot be disputed that the Sixth Amendment to the Constitution grants an accused in a criminal prosecution an absolute unqualified right to have the assistance of counsel for his defense, it does not necessarily follow that his right to a particular counsel is absolute and unqualified." United States v. Sexton, 473 F.2d 512, 514 (5th Cir. 1973) (emphasis in the original). "Last minute requests [for a change of counsel] are

disfavored," so that the denial of a continuance for that purpose "will not be reversed absent a clear abuse of discretion." United States v. Silva, 611 F.2d 78, 79 (5th Cir. 1980); accord United States v. Magee, 741 F.2d 93, 94-95 (5th Cir. 1984).

Dismukes contends that the district court reversibly erred by requiring him to demonstrate that prejudice resulted from the state court's denial of his request for a continuance. He relies on Gandy v. State of Alabama, 569 F.2d 1318 (5th Cir. 1978), wherein this Court held that the petitioner's "trial was rendered fundamentally unfair when [he] was effectively denied his right to choose his counsel." Id. at 1327.

Dismukes does not advert to this Court's decision in McFadden v. Cabana, 851 F.2d 784, 788 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989), which cited Gandy. McFadden held that "[t]o warrant federal habeas relief, the denial of the continuance must have been not only an abuse of discretion but also `so arbitrary and fundamentally unfair that it denied [the petitioner] due process.'" Id. (footnote omitted). Accordingly, "[t]he petitioner making this claim must show prejudice from the denial of the continuance." Id. This holding is not contrary to the teaching of Gandy that "in the unusual case the denial of a continuance may be so arbitrary and so fundamentally unfair as to do violence to the Constitutional principle of due process." 569 F.2d at 1323 (footnote omitted).

The transcript shows that at the competency trial Dismukes was represented by counsel who was fully familiar with the case and who was prepared to represent him. Although Dismukes knew by

November 7 that there would be a competency hearing, he did not notify the court of his desire to be represented by recently retained counsel until the date of the trial. Dismukes actually discussed with that attorney the possibility that he might represent Dismukes almost two weeks prior to the trial. Under these circumstances, the fact that Dismukes first learned of the trial date on the previous day, did not render the denial of his motion for a continuance fundamentally unfair. Moreover, Dismukes has not attempted to make the requisite showing that prejudice resulted from the denial of a continuance. McFadden, 851 F.2d at 788.

Finally, Dismukes contends that the district court abused its discretion in overruling the magistrate judge's finding and recommendation that he was entitled to habeas relief. This lacks merit because "[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1).

The judgment of the district court is AFFIRMED.