

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-8528

CHRISTOPHER JOSE RUSSELL, Petitioner-Appellee,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice, Institutional Division, Respondent-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-92-CV-265)

(August 23, 1994)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

PER CURIAM¹:

Respondent-Appellant Wayne Scott ("Scott") appeals the district court's granting of Petitioner-Appellee Christopher Jose Russell's ("Russell") writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Our examination of the record reveals that there exists no evidence supporting Russell's claim that he was denied his constitutional right to a jury instruction on the lesser included offense of murder. We reverse.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS AND PROCEDURAL HISTORY

On April 27, 1985, Russell and two friends, Julio Ceasar Diaz ("Diaz") and Stephen Benson ("Benson"), spent the night cruising the streets of San Antonio. Some time early the next morning, the three stopped at a convenience store, parking beside Rodney Arias' ("Arias") jeep. While parked in the store lot, Russell moved a pistol from one side of his pants to another. Russell exited the car, went around the back of the jeep and entered the passenger's side at about the same time Arias was entering the driver's side. Russell and Arias spoke for a moment and then drove off together. Diaz and Benson followed the jeep, lost sight of it, then found it again. They following it to a brushy area, stopping some distance behind.

Diaz and Benson observed what appeared to be a fight or struggle. Russell emerged alone and drove the jeep onto another road. When Diaz and Benson caught up with him, Russell was covered in blood and carrying a bloody knife and a pistol, which he gave to Benson with instructions to clean the knife. When Diaz asked Russell if he had killed Arias, Russell responded that he "had to kill him."

Russell, Diaz, and Benson returned to Diaz's home, disposing of the pistol cartridges en route. Diaz accompanied Benson and Russell back to Russell's house, then walked home. Russell showered and changed clothes, then drove the jeep around town with Benson. When the jeep ran out of gas, Russell and Benson went by motorcycle to Diaz's house to borrow money. Russell and Benson

then went to a convenience store to buy gas for the jeep. After experiencing more problems with the jeep, Russell set it on fire and drove off with Benson on the motorcycle. Russell and Benson were apprehended as a result of eyewitness testimony linking them to the arson of Arias' jeep. Diaz was arrested after further investigation.

Russell was indicted for the capital murder of Arias. At trial in state court, Russell requested an additional jury instruction on the lesser included offense of murder. The court denied the request on the grounds that it was not raised by the evidence. During the charge, the court instructed the jury that they could not convict Russell of capital murder without proof of a robbery or attempted robbery.

The jury found Russell guilty of capital murder and he was sentenced to life imprisonment. On appeal in state court, his conviction was affirmed. He filed a federal habeas petition which was dismissed for failure to exhaust state remedies. After exhausting his state remedies, Russell filed a second application for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, based on the claim that the trial court violated his constitutional rights by denying his request for a jury instruction on the lesser included offense of murder. The magistrate judge recommended that the application for writ be denied. After review of the magistrate's Report and Recommendation, the district court granted Russell's writ of habeas corpus. In applying the federal test enumerated by the Fifth Circuit in *Cordova v. Lynaugh*, 838 F.2d 764

(5th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2832, 100 L.Ed.2d 932 (1988), the court concluded that a rational jury could have found from the same evidence that Russell was guilty of non-capital murder and not guilty of capital murder.

DISCUSSION

After reviewing the entire record, we conclude that the state trial court did not err in denying Russell's request for an additional jury instruction on the lesser included offense of murder. The court properly concluded that there existed no evidence contradicting proof that Russell's sole purpose in killing Arias was to steal his jeep. Nor do we find any direct or circumstantial evidence creating a set of circumstances from which a rational jury could conclude by inference that any motive other than robbery was involved.² Therefore, Russell did not have a constitutional right to a jury instruction on the lesser included offense of murder.

Having found that the record clearly supports the conclusion that the trial court committed no error, we decline to address the harmless error analysis recently established by the U.S. Supreme Court in *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Therefore, the judgment of the district court granting the writ is reversed. REVERSE.

² Although the Court in *Cordova* characterized the Court's finding that a jury could not rationally convict on the lesser offense as harmless error, we conclude that the more correct characterization is no error. See *Cordova*, 838 F.2d at 770 n. 8.