

Lawyer's writs come up short

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Like most of the death row appeals filed by attorney Stephen Taylor, the court brief that was meant to make the best possible argument for why inmate Johnny Conner shouldn't be executed was noticeably short, devoting 5 ½ pages to arguments that other attorneys typically take dozens of pages to develop. Even so, two pages contained a potentially explosive revelation.

Conner, convicted of robbing and shooting a Houston grocery store owner in 1998, has been slowed by persistent nerve damage in his right leg since 1997. He still walks with a noticeable limp and runs with a shuffling gait.

Yet three key witnesses to the crime that landed Conner on death row described the shooter as sprinting several blocks to a waiting car. Nobody mentioned a limp, though several witnesses offered conflicting descriptions of the shooter's appearance.

The jury that convicted Conner never learned about his medical condition because Conner's trial lawyers failed to investigate it. In fact, his lawyers presented no evidence and called no witnesses during the guilt-innocence phase of the trial. That handed Taylor an issue most appeals lawyers only dream about: possible proof that his client was innocent.

But in bringing Conner's condition to the Texas Court of Criminal Appeals' attention, Taylor did not include Conner's medical records with his writ of habeas corpus, an appeal that allows death row inmates to challenge their convictions with facts not presented at trial.

That omission, which Taylor says he does not remember, was a fundamental blunder, according to numerous attorneys with experience in death row cases.

A new attorney is now trying to raise the issue in a federal appeal, but Texas Attorney General Greg Abbott's office is arguing that it's too late in the process to introduce the medical records.

By omitting Conner's medical records, Taylor violated one of the most basic tenets of habeas representation: exclude nothing pertinent from the first habeas writ filed in state court. Most issues cannot be raised in federal court, the next stage of appeals, without first being considered by state courts.

"You have to put everything before the state courts to preserve it for the federal courts, and that's especially important in Texas," said Jim Marcus, a University of Texas adjunct law professor and former head of the Texas Defender Service, a nonprofit law firm specializing in death penalty cases.

"When you think about the more egregious cases - the sleeping lawyer, suppression of evidence, race in jury selection - all got relief in federal court" after being denied by the Texas Court of Criminal Appeals, Marcus said.

After the state court denied his writ, Conner entered federal court with a new writ lawyer, expanded arguments and the medical records. In March 2005, U.S. District Court Judge Vanessa Gilmore ordered that Conner be retried or released.

Gilmore's order was delayed when Abbott appealed, arguing that Taylor's failure to admit the medical records in state court makes the information off-limits for the federal court.

Abbott also criticized Taylor's writ for lack of effort.

Beyond making a “generic” request for a hearing, Taylor “made no other efforts to investigate his allegation,” failing to request expert assistance or even file affidavits from people who knew that Conner limped, Abbott’s appeal stated. The 5th U.S. Circuit Court of Appeals will hear arguments on the case Wednesday.

Conner’s new lawyer, Kenneth Williams, is somewhat confident that he can prevail despite the appellate court’s reputed hostility to overturning capital convictions. Still, he’s annoyed.

“All (Taylor) had to do was attach the records to the petition, and that would be the end of the state’s argument,” said Williams, a visiting professor at Southwestern Law School in Los Angeles and a licensed Texas lawyer.

Taylor, a 17-year lawyer from Conroe, said he could not recall what information he included with Conner’s writ. When told that the omitted records are the subject of a federal court battle and that both sides agree the material was not included, Taylor replied that he couldn’t answer without checking his files.

Taylor also rejected criticism that his short writs in other death row cases were deficient, saying he fully investigated every writ, consulting with his clients, their families and their trial lawyers. Taylor also said he regularly confers with investigators and mitigation specialists, hiring them if their help is needed.

“We did the best that we could with the information we had,” Taylor said. “Sometimes, there aren’t very many claims to be raised in habeas.”

In addition to the Conner writ, the Austin American-Statesman inspected five other Taylor appeals, including:

- A two-claim writ for Robert Campbell, convicted in the 1991 kidnapping, rape and murder of a Houston bank employee.

One claim was raised and rejected on direct appeal and therefore not allowed in a writ. Taylor’s second claim, that trial lawyers failed to investigate Campbell’s past, did not detail what such an examination might have shown, leaving the court with no information to determine whether the trial lawyers were negligent.

- A five-claim writ for Keith Thurmond, convicted in the 2001 killing of his estranged wife and her boyfriend in Magnolia, northwest of Houston.

In addition to being misnumbered and mislabeled, the five record-based claims do not belong in a writ, according to the trial judge’s findings. More important, the judge noted that Taylor “did not attach or reference new evidence in support of his claims,” a fatal flaw for writs.

- The state writ for Pablo Vasquez, sentenced to death in the 1998 killing of a 12-year-old boy in the South Texas town of Donna, which devotes 10 pages to backing three claims that Vasquez’s trial lawyers were deficient.

In its findings, the trial court took issue with a favorite claim in Taylor writs: criticism that trial lawyers did not conduct a “biopsychological” assessment of their client to unearth mitigating evidence, such as child abuse or mental impairment, that could lead a jury to choose a life sentence over execution. Taylor failed to show that biopsychology is a recognized area of expertise, relying only on an affidavit from his mitigation specialist that was inadmissible as “relevant, reliable testimony,” the court found.

Campbell, Thurmond and Vasquez are still on death row.

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