02-9914

No._____

Supreme Court, U.S.
FILED
APR 3 2003
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

DON WILSON HAWKINS,

Petitioner,

v.

MIKE MULLIN, WARDEN,
OKLAHOMA STATE PENITENTIARY

Respondent.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

SCOTT W. BRADEN
ASSISTANT FEDERAL PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

THIS IS A CAPITAL CASE
EXECUTION IS SET FOR APRIL 8, 2003

INTRODUCTION

The State of Oklahoma provides lawyers for death sentenced inmates to petition the Oklahoma Court of Criminal Appeals for subsequent post conviction relief. These state lawyers are appointed by the state district court. Mr. Hawkins petitioned the Oklahoma County District Court three times for the appointment of counsel to present a subsequent post conviction petition based on Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002). The district court never ruled on any of these requests even though the same court appointed lawyers in other cases in the same posture as Mr. Hawkins. Mr. Hawkins sought assistance from the Oklahoma Court of Criminal Appeals to redress the district court's failure to take action. The appellate court answered by denying Mr. Hawkins counsel and set a date for his execution. Based on Mr. Hawkins's brief pro se request for counsel the court took up the merits of Mr. Hawkins's unpresented claims. Relief was denied even though no petition had been presented to the state court.

Seven days later the Oklahoma Court of Criminal Appeals held it did not have the power to appoint lawyers for post conviction purposes. Howell v. State, PCD-2003-85, Order February 20, 2003, Attachment A. The Oklahoma Court of Criminal Appeals cannot have the power to deny Mr. Hawkins's request for the appointment of counsel for subsequent post conviction actions and seven days

later, with no statutory change not have the authority to appoint counsel in a similar case. This uneven application of rules and procedures denies Mr. Hawkins the Equal Protection of Law and denies him Due Process as guaranteed by the Fourteenth Amendment.

The determination, on the merits, of Mr. Hawkins's claim of ineffective assistance of counsel is contrary to federal law as determined by this Court.

BASIS OF MR. HAWKINS'S CONFINEMENT

Mr. Hawkins is presently confined at the Oklahoma State Penitentiary in McAlester, Oklahoma, by Warden Mike Mullin.

Mr. Hawkins's confinement is pursuant to the judgment and sentence of death by the District Court of Oklahoma County, Oklahoma.

Mike Mullin, in his capacity as Warden of the Oklahoma State Penitentiary at McAlester, is charged under Title 22 O.S. § 1001 with the duty of executing Mr. Hawkins's sentence of death and is presently holding Mr. Hawkins pending execution of the sentence.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 and 2242 and Rule 20 of the Rules of the Supreme Court. Mr. Hawkins has no other avenue of relief available to him. The State of Oklahoma has failed to appoint counsel for state court proceedings. Therefore he is unable to challenge the denial of

counsel and the ruling on the merits of his claim by a petition for a writ of certiorari. A petition for an original writ of habeas corpus is the only avenue of redress available to Mr. Hawkins.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Article I, Section 9, Clause 2:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

U.S. Const. amend. V (excerpt):

> No person shall be ... deprived of life, liberty, or property without due process of law....

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

A. Introduction

Don Wilson Hawkins, was charged by Information in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-85-6156, with Felony Murder in the First Degree; Kidnaping for Extortion, After Former Conviction of a Felony(AFCF); Kidnaping for

Extortion(AFCF); and Rape in the First Degree. O.R. 1. The rape count was dismissed at the start of the trial due to insufficient evidence at the preliminary hearing. Vol. I, Tr. 46. Mr. Hawkins was charged with Dale Austin Shelton. A Bill of Particulars was filed against both defendants alleging: (1) the murder was especially heinous, atrocious or cruel; (2) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; (3) the murder was committed by [sic] the purpose of avoiding or preventing a lawful arrest or prosecution; and (4) the defendant was previously convicted of a felony involving the use or threat of violence to the person. O.R. 24.

A jury trial was held before the Honorable Leamon Freeman, District Judge. Mr. Hawkins was represented by Virgil C. "Chuck" Black. Codefendant Shelton was represented by Irven R. Box and Diane Clowdus. The State was represented by District Attorney Robert Macy and Assistant District Attorney Barry Albert. The jury returned a verdict of guilty of Felony Murder in the First Degree against Mr. Hawkins. O.R. 314. The jury also found Mr. Hawkins guilty of both counts of kidnaping for extortion. O.R. 315-16. Mr. Shelton was also found guilty of each charge. Mr. Shelton was sentenced to consecutive life sentences for each charge.

In the punishment stage of the trial, the jury found the

existence of all four alleged aggravating circumstances and recommended the death penalty for Mr. Hawkins. O.R. 317-18. No mitigating evidence was presented. In accordance with the jury's verdicts, Mr. Hawkins was sentenced to two consecutive life sentences on the kidnaping for extortion charges and to death for the felony murder based upon the kidnaping for extortion charges. O.R. 330-36. Mr. Hawkins appealed to the Oklahoma Court of Criminal Appeals.

The Oklahoma Court of Criminal Appeals affirmed Mr. Hawkins's convictions and sentence of death. Hawkins v. State, 891 P.2d 586 (Okla. Crim. App. 1995). Attachment B. The United States Supreme Court denied a petition for a writ of certiorari to the Oklahoma Court of Criminal Appeals on November 13, 1995. Hawkins v. Oklahoma, 516 U.S. 977 (1995). Attachment C.

On December 23, 1996 an application for post conviction relief was filed in the Oklahoma Court of Criminal Appeals. This application was denied on March 18, 1998. Hawkins v. State, Order, Unpublished (March 18, 1998), Attachment D. A petition for a writ of certiorari was denied on October 5, 1998. Attachment E.

On March 30, 1998, Mr. Hawkins petitioned the Western District for the appointment of counsel under Title 18 U.S.C. §848 and McFarland v. Scott, 512 U.S. 849 (1994). Doc. 1. This Court appointed the office of the Federal Public Defender on April 3,

1998 and undersigned counsel was assigned to this matter. Doc. 7.

On July 17, 1998 a petition for a writ of habeas corpus was filed in the Western District of Oklahoma. This petition was denied by the district court on May 15, 2000. Attachment G. A notice of appeal was filed on June 15, 2000.

An initial brief on appeal was filed in the Tenth Circuit on November 2, 2000. This matter was argued before the Tenth Circuit on June 22, 2001. The opinion of the Tenth Circuit was delivered on May 22, 2002. Hawkins v. Mullin, 291 F.3d 658 (10th Cir. 2002) Attachment G.

Mr. Hawkins then sought review by this Court. The petition for a writ of certiorari was denied by this Court on January 27, 2003. Hawkins v. Mullin 123 S.Ct. 1012 (2003). Attachment H.

Prior to the denial of the certiorari petition Mr. Hawkins asked the Oklahoma County District Court to appoint him a lawyer to present claims of ineffective assistance of counsel as a second petition to the Oklahoma Court of Criminal Appeals as permitted in Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2002). The Office of the Federal Public Defender is not permitted to represent Mr. Hawkins in state court matters not related to a stay of execution.

The initial pro se request for the appointment of counsel was made November 26, 2002. Accompanying the request was a Pauper's Affidavit under State Rule 13.3. Attachment I. After filing this

request Mr. Hawkins realized the wrong case number was on the motion and affidavit. The incorrect number was CRF-86-6156.

To correct this error Mr. Hawkins had filed a second pro se motion and affidavit with the correct number. Attachment J. The correct case number is CRF-85-6156. This second motion was filed on December 19, 2002. The court clerk's office would not file the Rule 13.3 affidavit but accepted the request for the appointment of counsel. Even though the clerk had filed the Rule 13.3 affidavit on November 26 2002 the clerk's office would not accept the Rule 13.3 affidavit for filing.

Because the state court did not rule on Mr. Hawkins's two pro se requests for counsel on January 3, 2003 Mr. Hawkins had filed a third motion. Attachment K. In this motion Mr. Hawkins explained the clerk's failure to accept the Rule 13.3 affidavit on December 19, 2002. Mr. Hawkins, for the third time, requested the appointment of counsel. The docket sheet of the Oklahoma County case number is attached here showing the three pending and unanswered requests for the appointment of counsel. Attachment L. These requests for counsel remain unruled on to this date.

On January 21, 2003, because the state trial court was ignoring his request for counsel, made a pro se request for the assistance of the Oklahoma Court of Criminal Appeals. Attachment M. Mr. Hawkins asked the state appellate court to either

appointment him a lawyer to assist him in filing a second post conviction petition or to order the District Court of Oklahoma County to take action on the three pending motions and to appoint him counsel.

The Court of Criminal Appeals, based on the pro se request for counsel, held Mr. Hawkins's claims had no merit and therefore he was not entitled to counsel. In the same order the state court set Mr. Hawkins's execution date. Attachment N.

This determination deprived Mr. Hawkins the effective assistance of counsel as guaranteed by the Sixth Amendment and the Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment.

GROUND I

MR. HAWKINS WAS DENIED THE EQUAL PROTECTION OF THE LAW BY THE STATE COURT.

Oklahoma has created two distinct classes of persons for post conviction petitioners. One class is a group of death row inmates who have petitioned the Court of Criminal Appeals for subsequent post conviction relief with state appointed lawyers. The other class are persons who have been denied a state appointed lawyer, and thus the ability to petition for review. Mr. Hawkins is the only person in this second class of post conviction petitioners.

As the facts above indicate Mr. Hawkins asked the state