

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

Rosado v. Allen

494 F. Supp. 2d 51 (D. Mass. 2007) · No. Civil Action No. 02-10359-DPW · Decided June 29, 2007

SUMMARY

The court denied the petitioner’s application for a Certificate of Appealability in a federal habeas corpus proceeding under 28 U.S.C. § 2254. Although the court found that its conclusion regarding trial counsel’s performance in failing to consult a mental-health expert was debatable, it held that the petitioner could not show prejudice under the Brecht standard. Because the lack-of-prejudice ground independently supported denial of relief, the court concluded that the ineffective-assistance claim did not warrant further appellate review.

CASE DETAILS

COURT	United States District Court for the District of Massachusetts
WRITING FOR THE COURT	Douglas P. Woodlock
JURISDICTION	Massachusetts
DECIDED	June 29, 2007
DOCKET	Civil Action No. 02-10359-DPW
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner sought a Certificate of Appealability under 28 U.S.C. § 2253 from the denial of his 28 U.S.C. § 2254 habeas petition, challenging the rejection of an ineffective-assistance claim based on trial counsel's failure to consult a psychological expert regarding a mental-capacity defense.
STANDARD OF REVIEW	A Certificate of Appealability requires a showing that the district court's resolution of a constitutional claim is fairly debatable among reasonable jurists and that the claim deserves encouragement to proceed further. For prejudice in a 28 U.S.C. § 2254 proceeding, the court applied the Brecht substantial-and-injurious-effect standard.
PRECEDENTIAL VALUE	published district court memorandum and order
PARTIES	David W. Rosado, Petitioner v. Peter Allen, Respondent

TOPICS

federal habeas corpus

ineffective assistance

post-conviction relief

appellate procedure

standard of review

PRACTICE AREAS

federal habeas corpus

criminal procedure

post-conviction relief

ineffective assistance

appellate procedure

QUESTIONS PRESENTED

1. Whether reasonable jurists could debate the district court's conclusion that trial counsel was not ineffective for failing to consult a mental-health professional regarding a possible mental-capacity defense.
2. Whether reasonable jurists could debate the district court's conclusion that Rosado suffered no prejudice from the alleged ineffective assistance under the Brecht substantial-and-injurious-effect standard.
3. Whether Rosado was entitled to a Certificate of Appealability under 28 U.S.C. § 2253.

HOLDINGS

1. The court concluded that its determination that trial counsel was not ineffective was debatable because the case law reflected tension between a categorical approach requiring expert consultation whenever a mental-capacity defense might be available and a contextual approach evaluating counsel's conduct in light of the particular case.
2. The court held that its no-prejudice determination was not fairly debatable because, after a full evidentiary hearing and consideration of the expert testimony in the context of the entire trial, the alleged error did not have a substantial and injurious effect on the judgment.
3. The court denied Rosado's Application for a Certificate of Appealability because one of the two adequate and independent grounds supporting denial of habeas relief—the absence of prejudice—did not satisfy the Certificate of Appealability standard.

KEY QUOTATIONS

“In addressing an Application for a Certificate of Appealability, I must evaluate whether my conclusions can be said to be fairly debatable in the sense that reasonable jurists might dispute them, even if every jurist of reason would ultimately agree after consideration that the petitioner should not prevail.” (494 F. Supp. 2d at 52)

“With respect to whether counsel in this case performed effectively, I find my conclusion to be debatable within the meaning of Miller-El.” (494 F. Supp. 2d at 53)

“Consequently, I find that the lack of prejudice basis upon which I rejected the ineffectiveness ground for relief cannot serve as a basis for issuing a Certificate of Appealability.” (494 F. Supp. 2d at 54)

FACTUAL BACKGROUND

Rosado was convicted in state court and later asserted that his trial counsel was ineffective for failing to engage a psychological expert to explore a mental-capacity defense. In the federal habeas proceeding, the district court conducted an evidentiary hearing and considered the potential value of expert testimony in the context of the

entire trial. The court found that the expert testimony would not have produced a different result and therefore found no prejudice.

PROCEDURAL HISTORY

The district court previously dismissed Rosado's state habeas petition after an evidentiary hearing, rejecting the ineffective-assistance claim on two independent grounds: counsel's performance was not deficient, and any deficiency caused no prejudice. Rosado then applied for a Certificate of Appealability. The court concluded that the performance issue was debatable, but that the prejudice determination was not debatable under the governing federal habeas standard, and denied the application.

DISPOSITION

other

CASES CITED

- Rosado v. Allen, 482 F. Supp. 2d 94 (D. Mass. 2007)
- Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003)
- Slack v. McDaniel, 529 U.S. 473, 484 (2000)
- Genius v. Pepe, 50 F.3d 60, 60-61 (1st Cir. 1995)
- Genius v. Pepe, 147 F.3d 64, 67-68 (1st Cir. 1998)
- Fry v. Pliler, 127 S. Ct. 2321, 2328 (2007)
- Brecht v. Abrahamson, 507 U.S. 619 (1993)
- Kotteakos v. United States, 328 U.S. 750, 765 (1946)

OPINION

WOODLOCK, J.

494 F. Supp. 2d 51 (2007) David W. ROSADO, Petitioner, v. Peter ALLEN, Respondent. Civil Action No. 02-10359-DPW. United States District Court, D. Massachusetts. June 29, 2007. *52 David W. Rosado, South Walpole, MA, Pro se. Emanuel Howard, Brookline, MA, for Petitioner. Emanuel Howard, Brookline, MA, for David W. Rosado. Cathryn A. Neaves, Dean A. Mazzone, Attorney General's Office, David M. Lieber, Assistant Attorney General, Criminal Bureau, Boston, MA, for Respondent.

Peter Allen, MCI Cedar Junction, South Walpole, MA, Pro se. MEMORANDUM AND ORDER WOODLOCK, District Judge. The petitioner in this state habeas corpus proceeding under 28 U.S.C. § 2254 seeks a Certificate of Appealability pursuant to 28 U.S.C. § 2253 as to one of the several grounds for relief that I rejected in dismissing his petition. See generally Rosado v. Allen, 482 F. Supp. 2d 94 (D.Mass.

2007). At issue in his Application for a Certificate of Appealability is the petitioner's assertion that his trial counsel did not engage a psychological expert to explore a mental capacity defense and was therefore ineffective. I rejected that ground on two alternative bases: first, I concluded, after an evidentiary hearing, that the petitioner's trial counsel did not perform ineffectively in failing to consult a mental health professional when determining what defenses to pursue; and second, I concluded that even if trial counsel's performance could be said to be ineffective, there was no prejudice to the petitioner.

Id. at 100-113. In addressing an Application for a Certificate of Appealability, I must evaluate whether my conclusions can be said to be fairly debatable in the sense that reasonable jurists might dispute them, even if every jurist of reason would ultimately agree after consideration that the petitioner should not prevail. See *Miller-El v. Cockrell*, 537 U.S. 322, 336-38, 123 S. Ct.

1029, 154 L. Ed. 2d 931 (2003). I must also consider whether the grounds presented "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotes omitted). *53 With respect to whether counsel in this case performed effectively, I find my conclusion to be debatable within the meaning of *Miller-El*.

There is a tension in the case law between what might be called a categorical approach and what might be called a contextual approach. The categorical approach suggests that in every case where a mental capacity defense might be raised, defense counsel who fails to obtain a mental health expert is ineffective.

The contextual approach, on the other hand, seeks to evaluate ineffectiveness in the broader setting of the facts and circumstances of the particular case. This debate is well illustrated by successive opinions of the United States Court of Appeals for the First Circuit in the same state habeas corpus proceeding. Compare *Genius v. Pepe*, 50 F.3d 60, 60-61 (1st Cir.1995) (Aldrich, J.) (declaring categorically "[w]here insanity would have been a complete defense, it was inexcusable not to pursue it" because, as the petitioner observed, "he had nothing to lose by having an insanity examination.") with *Genius v. Pepe*, 147 F.3d 64, 67-68 (1st Cir.1998) (Boudin, J.) (upholding rejection of the ineffectiveness claim after evidentiary hearing by the District Court on remand).

Given this tension between the categorical and the contextual approaches to the issue of ineffective assistance raised by this case, I conclude that my determination that counsel was not ineffective in this case is debatable. With respect to the issue of prejudice, however, I find that a Supreme Court decision handed down last week effectively forecloses debate on the record developed in this case.

In *Fry v. Pliler*, ___ U.S. ___, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007), the Supreme Court held that: in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht* [v.

Abrahamson], 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 [(1993)], whether or not the state appellate court recognized the error...

Id. at 2328. In this case, as in Fry, the state court failed to recognize the potential constitutional error. As I noted in my Memorandum and Order dismissing the petition here, the Supreme Judicial Court of Massachusetts seems to have mistakenly concluded that trial counsel engaged a psychological expert. Rosado, 482 F.Supp.2d at 102. Consequently, I conducted an evidentiary hearing to evaluate both the performance and the prejudice prongs of the petitioner's ineffectiveness claim.

In Fry, the debate between the Justices in the majority and those who concurred in part and dissented in part was a debate not over the legal issue whether the Brecht standard for evaluating prejudice in state habeas corpus proceedings was too demanding (all agreed it was appropriate) but rather over how the standard should be applied.

As is apparent from the Memorandum and Order I issued dismissing this petition, Rosado, 482 F.Supp.2d at 109-13, following a full evidentiary hearing, my application of federal court review of a state habeas corpus petition employed the approach of the Justices who concurred and dissented. I reached "fair assurance, after pondering all that happened without stripping the [debatably] erroneous action from the whole, that the judgment was not substantially swayed by the [debatable] error."

Fry, 127 S.Ct. at 2330 (Stevens, J., concurring in part and dissenting in part) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). Specifically, "having fully explored in the broadest context what the expert testimony would be[,] I f[ound] that it would not have created a *54 different result for Rosado." Rosado, 482 F.Supp.2d at 113.

That finding "involved a weighing of the probative value of proffered evidence" in light of the other aspects of the trial proceeding. Fry, 127 S.Ct. at 2330-31 (Breyer, J., concurring in part and dissenting in part), and affords no debatable basis for concluding that the "substantial and injurious" Brecht standard for assessing prejudice in § 2254 proceedings can be met.

This is a basis for rejecting the petition which does not deserve encouragement to proceed further. Consequently, I find that the lack of prejudice basis upon which I rejected the ineffectiveness ground for relief cannot serve as a basis for issuing a Certificate of Appealability.

Accordingly, having concluded that one of two adequate and independent grounds for denying the petitioner relief will not support a Certificate of Appealability, I hereby deny the petitioner's Application.