IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MARVIN LEE WILSON,	§	
Petitioner,	§	
vs.	§	No. 6:06cv140
RICK THALER, DIRECTOR, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.		

ORDER DENYING RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

This matter comes before the Court on Petitioner Marvin Lee Wilson's ("Wilson's") partially-opposed Rule 60(b) motion for relief from the Court's March 31, 2009 judgment denying Wilson's application for a writ of *habeas corpus*. The motion (docket entry #56), was filed on March 30, 2010. Having considered the circumstances alleged and authorities cited by the parties, as well as the complete state court record and the current law, the Court finds that the motion is not well-taken and it will be **DENIED**.

INTRODUCTION

In 1994, Wilson was convicted of capital murder and sentenced to death. His conviction and sentence were vacated on appeal, but he was retried and again convicted and sentenced to death. After completing his direct appeal and his first round of state and federal post-conviction review, he filed a second petition for post-conviction relief in state court, contending that his execution would violate the Eighth Amendment's ban against cruel and unusual punishment because he is mentally

retarded. The Texas Court of Criminal Appeals found that Wilson was not mentally retarded and denied relief. Wilson then filed an application for a writ of *habeas corpus*, which this Court denied on March 31, 2009. Wilson then filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), which this Court denied on June 8, 2009. Wilson then appealed this Court's denial of his application for a writ of *habeas corpus.* While the appeal was pending, Wilson discovered that some of the records of the state court post-conviction proceedings were not in the appellate record, and he filed a motion to supplement the record. The parties then determined that if the records were not in the appellate record, they must not have been before this Court when it decided the *habeas corpus* application, so they successfully moved the Court of Appeals to stay the appellate proceedings and allow Wilson to file a motion pursuant to Fed. R. Civ. P 60(b) to have this Court redecide his application, taking into account the missing documents. This Court also granted the National Association for the Advancement of Colored People's ("NAACP's") request for leave to file an *amicus curiae* brief.

Facts [1]

> On November 4, 1992, Officer Robert Roberts and other police officers entered [Wilson's] apartment pursuant to a search warrant. Jerry Williams was the confidential informant whose information enabled Roberts to obtain the warrant. Williams entered and left the apartment minutes before the police went in. [Wilson], Vincent Webb, and a juvenile female were present in the apartment. Over 24 grams of cocaine were found, and [Wilson] and Webb were arrested for possession of a controlled substance. [Wilson] was subsequently released on bond, but Webb remained in jail. Sometime after the incident, [Wilson] told Terry Lewis that someone had "snitched on [him]", that the "snitch" was never going to have the chance 'to have someone else busted,' and that [he, Wilson] "was going to get him."

[1] This recitation of the facts is taken from *Wilson v. State*, 7 S.W. 3d 136, 139-40 (Tex. Crim. App. 1999).

On November 9, 1992, several observers saw an incident take place in the parking lot in front of Mike's Grocery. Vanessa Zeno and Denise Ware were together in the parking lot. Caroline Robinson and her daughter Coretta Robinson were inside the store. Julius Lavergne was outside the store, but came in at some point to relay information to Caroline. The doors to Mike's Grocery were made of clear glass, and Coretta stood by the door and watched. Zeno, Ware, Coretta, and Lavergne watched the events unfold while Caroline called the police. . .

In the parking lot [Wilson] stood over Williams and beat him. [Wilson] asked Williams, "What do you want to be a snitch for? Do you know what we do to a snitch? Do you want to die right here?" In response, Williams begged for his life. Andrew Lewis, Terry's husband, was pumping gasoline in his car at the time. Williams ran away from [Wilson] and across the street into a field. [Wilson] pursued Williams and caught him. Andrew drove the car to the field. While Williams struggled against them, [Wilson] and Andrew forced Williams into the car.

At some point during this incident, either in front of Mike's Grocery, across the street, or at both places, Andrew participated in hitting Williams and [Wilson] asked Andrew: "Where's the gun?" [Wilson] told Andrew to get the gun and that he [Wilson] wanted to kill Williams. They drove toward a Mobil refinery. Zeno and ware drove back to their apartments, which were close by, and when they arrived, they heard what sounded like gunshots from the direction of the Mobil plant.

Sometime after the incident, [Wilson] told his wife, in the presence of Terry Lewis and her husband, " Baby, you remember the nigger I told you I was going to get? I did it. I don't know if he dead or what, but I left him to die." When Terry looked back at her husband, [Wilson] stated, "Don't be mad at Andrew because Andrew did not do it. I did it."

On November 10, 1992, a bus driver noticed Williams' dead body on the side of a road. The autopsy report concluded that Williams died from close range gunshot wounds to the head and neck. Having known [Wilson] for 16 years, Zeno identified [him]. Lavergne and Coretta recognized Williams but did not know [Wilson] or Andrew. Lavergne subsequently identified Andrew in a photo line-up.

STANDARD OF REVIEW

Title 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

ANALYSIS

I. Was the state court decision contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States?

a. Legal Standard

In order to decide whether the state court's rejection of Wilson's mental retardation claim is contrary to, or the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, the Court must determine whether the Supreme Court of the United States has clearly established federal standards for determining mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court of the United States Court held that there was a national consensus that because of their mental impairments, the personal culpability of the mentally retarded for their crimes is diminished. Among those impairments are diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. The mentally retarded often act on impulse rather than pursuant to a premeditated plan, and in group settings they are followers, rather than leaders. Noting that not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus that they should not be executed, the Supreme Court left to the states the task of developing appropriate ways to enforce the constitutional restriction upon executing mentally retarded offenders. This is the same approach

the Supreme Court took in *Ford v. Wainwright* with respect to the issue of insanity. *Atkins*, 536 U.S. at 317-318.

Because the Supreme Court left to the states the task of setting standards for determining whether a capital offender is so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus that they should not be executed, the inquiry for the Court becomes whether the state court's rejection of Wilson's mental retardation claim was directly contrary to, or the result of an unreasonable application of clearly established state law. In *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals held that the determination of whether a capital offender was mentally retarded was to be made by applying the definitions of mental retardation stated by the American Association of Mental Retardation ("AAMR") and the Texas Health and Safety Code. Those definitions are very similar: they both require significant limitations in both intellectual functioning and related adaptive behavior, originating before the individual was 18 years of age. The court also stated, however, that the adaptive behavior criteria in the two definitions were so subjective that in virtually every instance, a prosecution expert could opine that a behavior was indicative of an adaptive strength or was the result of a factor other than significantly sub-average intellectual functioning, while a defense expert would opine that a behavior was indicative of an adaptive weakness, which was related to the offender's sub-average intellectual functioning. Accordingly, the court suggested that the fact-finder in a mental retardation hearing might choose to focus upon seven evidentiary factors in determining whether an offender's adaptive deficits were the result of mental retardation or the result of a personality disorder. The seven evidentiary factors were:

> 1. Did the people who knew the offender during his developmental period think he was mentally retarded?
>
> 2. Has the offender formulated plans and carried them through or is his conduct impulsive?
>
> 3. Does his conduct show leadership or does it show that he is led around by others?
>
> 4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> 5. Does he respond coherently, rationally and on point to oral and written questions or do his responses wander from subject to subject?
>
> 6. Can the person hide facts or lie effectively in his own or other's interests?
>
> 7. Did the commission of the capital offense require forethought, planning, and complex execution of purpose?

Briseño, 135 S.W.3d at 7-9. In *Neal v. State*, 256 S.W.3d 264, 272-73 (Tex. Crim. App. 2008), the Texas Court of Criminal Appeals stated:

> For purposes of an *Atkins* claim, we have defined mental retardation as '1) significant sub-average intellectual functioning, usually evidenced by an IQ score below 70, that is accompanied by, 2) related limitations in adaptive functioning, 3) the onset of which occurs prior to the age of 18.' Factors relevant to evaluating the three prongs include:
>
> Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and if so, act in accordance with that determination?
>
> Has the person formulated plans and carried them through or is his conduct impulsive?
>
> Does his conduct show leadership or does it show that he is led around by others?
>
> Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> Does he respond coherently, rationally and on point to oral and written questions or do his responses wander from subject to subject?

> Can the person hide facts or lie effectively in his own or others' interests?
>
> Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

b. The State Court Decision

In its findings of fact and conclusions of law in the present case, the state court did not explicitly state that Wilson suffered from significantly sub-average general intellectual functioning. It did find, however, that:

> The defendant had IQ tests administered several times during his life. With the exception of his most recent score of 61, all of his scores were all (sic) above 70, considered the border below which a person is mildly mentally retarded . . . The only test on which the defendant scored lower than 70 was administered shortly before this hearing and Dr. Trahan's testing. Although in his report he notes that the test was administered by the highly respected Dr. Curt Willis, Dr. Trahan's testimony reflected it was actually administered by one of Dr. Willis' students . . .

The state court also did not make explicit findings and reached no explicit conclusions as to whether Wilson had significant limitations in adaptive functioning, and it made no explicit finding as to whether Wilson's significantly alleged sub-average intellectual functioning and significant limitations in adaptive skills (if he had them) occurred prior to the age of eighteen, although the state court did find that:

> [T]he defendant functioned sufficiently in his younger years to hold jobs, get a driver's license, marry and have a child. Although he did poorly in school, the record reflects that he seldom went to class. He was considered "slow" by most, yet there is nothing in the record to reflect that anyone diagnosed or considered the defendant mentally retarded prior to his becoming 18 years old.

The state court made explicit findings as to each of the seven *Briseño* factors, finding that there was no evidence that those closest to Wilson during his developmental stage believed he was mentally retarded; that there was no evidence that Wilson acted impulsively, and that he did in fact

formulate plans and carried them through; that there was no evidence that Wilson was ever considered a follower; that Wilson's conduct was rational and appropriate, although often illegal; that in most instances Wilson's responses to oral and/or written questions were coherent, rational and on point, that Wilson was capable of lying and hiding facts when he felt it was in his best interest, and that the crime at issue showed deliberate forethought, planning and execution of purpose.

c. Finding

The state court's decision, although less than clear, appears to be based on using the seven evidentiary factors to evaluate the conflicting evidence as to the three clinical mental retardation criteria. This is neither contrary to, nor the result of an unreasonable application of, the law as set forth in *Neal v. State.*

II. Was the state court decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding?

a. Legal standard

Because it appears that the state court resolved conflicting evidence about the three elements of the clinical mental retardation definition based upon the *Briseño* evidentiary factors, the inquiry for the Court is whether the state court's findings as to those evidentiary factors was unreasonable in light of the evidence presented in the state post-conviction proceedings.

b. The State Court Decision

The first evidentiary factor is whether the people who knew Wilson during his developmental period thought he was mentally retarded. The state court found that: "Giving the most liberal consideration to the evidence shown by the defendant at trial and upon hearings, those closest to the

defendant at best described him as 'slow.' There is no testimony anywhere indicating that those closest to the defendant during his developmental stage believed the defendant to be mentally retarded." Considering that the persons closest to Wilson were lay persons, assuming that they would have chosen the word "slow" because they believed there was a difference between slow and mentally retarded, as the state court seems to have done, the state court did not give "the most liberal construction to the evidence shown by the defendant." In addition, Walter Kelly, a childhood friend of Wilson's, stated in an affidavit that he thought that Wilson might have been retarded, and some of his friends used that word in teasing Wilson. On the other hand, Wilson's educational records, which would be expected to have been generated in an environment containing persons with above layperson understanding, contain no notation that he was ever considered mentally retarded, although they do show that he was enrolled in special education classes, and still performed poorly throughout his schooling. Although this is a close issue, the Court finds that the state court's finding as to the first evidentiary factor was not unreasonable in light of the evidence presented at the state post-conviction proceedings.

The second evidentiary factor is whether Wilson formulated plans and carried them through or his conduct is impulsive. The state court found that: "There is no evidence that the defendant ever acted impulsively. All of the trial evidence indicated that the defendant formulated a plan to kill the victim because the defendant believed the victim had informed on him to the police. . . All of the evidence in the record indicates that the defendant, although clearly not brilliant, had the mental ability and did in fact formulate plans for his normal activities." Wilson contends that those that knew Wilson during childhood thought that he acted impulsively. *See* Rule 60(b) motion, p. 21. This does not rebut the state court's finding that, while committing the capital crime for which he

was convicted, he did not act impulsively and he formulated a plan to commit the crime and carried it through. The Court finds that the state court's finding as to the second evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

The third evidentiary factor is whether Wilson's conduct shows leadership or shows that he is led around by others. The state court found that: "There is no evidence in the record that the defendant was ever considered a follower. His actions were all deliberate, although sometimes unwise." Wilson points to Dr. Trahan's report, in which he states that "[Wilson] was basically a follower, and had to be told everything to do even when performing simple tasks and playing childhood games." The facts of the crime, however, showed that when Wilson and Andrew Lewis kidnaped and killed Williams, Wilson, not Lewis, assumed the leadership role. The Court finds that the state court's finding as to the third evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

The fourth evidentiary factor is whether Wilson's response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable. The state court found that "All of the evidence in the record reflects that the defendant's conduct was rational and appropriate, although often illegal." Wilson contended that his conduct was not always rational, but he cited no instances of irrational conduct. The Court again notes that the crime for which Wilson was convicted has relevance to the determination of this factor, and Wilson's actions, killing Williams because Williams informed on him, were rational and appropriate, compared with, for example, killing a stranger or a child. The Court finds that the state court's finding as to the fourth evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

The fifth evidentiary factor is whether Wilson responds coherently, rationally and on point to oral and written questions or whether his responses wander from subject to subject. The state court found that "The record does not reflect that the defendant's normal responses wandered. The record does show that in most instances, the defendant's responses were coherent, rational and on point." Wilson does not take issue with this finding, and Dr. Trahan's report states that:

> During this examination, Mr. Wilson exhibited no evidence of delusions, hallucinations, or other psychotic manifestations. His conversational speech was fluent and articulate. His functional communication skills were quite good. Mr. Wilson exhibited no evidence of pressure or loose associations. His judgment and reasoning were clearly impaired based on his responses to a variety of general comprehension and verbal abstraction items. However, his insight regarding current circumstances seemed reasonably good. Behaviorally, Mr. Wilson exhibited no evidence of serious inattentiveness or distractibility.

The Court finds that the state court's finding as to the fifth evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

The sixth evidentiary factor is whether Wilson can hide facts or lie effectively in his own or other's interests. The state court found that "[t]he trial record clearly reflects that the defendant was capable of lying and hiding facts when he felt that was (sic) in his best interest." Wilson does not take issue with this finding. Examples of Wilson's ability include his living in a common-law marriage and not confessing when dealing with the police investigating the killing of Williams. The Court finds that the state court's finding as to the sixth evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

The seventh and final evidentiary factor is whether the commission of the capital offense required forethought, planning, and complex execution of purpose. The state court found that "[a]s the trial record and appellate decisions so clearly reflect, the defendant's conduct surrounding (sic) this crime show (sic) deliberate forethought, planning and execution of purpose." Wilson contends

in his reply brief that the facts of the crime show deliberate forethought, planning and execution of purpose "in only the simplest sense." He argues that the cognitive abilities he displayed in figuring out that the victim, Jerry Williams, had snitched on him, and then, after telling the wife of his accomplice that he was going to permanently silence the snitch, trapping Williams in a grocery store parking lot, abducting him at gunpoint with the help of the accomplice, and taking him to a secluded area and shooting him were "not inconsistent with mental retardation."

The Court notes that the state court found only that Wilson's conduct showed deliberate execution of purpose, as opposed to complex execution of purpose, and considers this omission significant. It stands to reason that the more complicated the criminal scenario planned by the killer, the less likely he could be retarded. The Court does not, however, agree with Wilson's conclusory contention that the crime at issue here shows only rudimentary planning. Stalking and cornering Williams, who knew of and feared retaliation, and having the assistance of an accomplice and a firearm both at the ready, and abducting Williams and killing him in an area where there were no witnesses was a complex, not simple, scheme. Accordingly, although the state court should have used more accurate language, this Court finds that the state court's finding as to the seventh evidentiary factor is not unreasonable in light of the evidence presented in the state court proceedings.

c. Finding

The Court finds that the state court's adjudication of Wilson's mental retardation claim was not based upon an unreasonable determination of the facts in light of the evidence presented in his state court proceedings.

CONCLUSION

Based upon the current state of federal and state law, and considering the entire record, including the documents that were omitted the first time the Court decided Wilson's application, the Court finds that the state court's adjudication of Wilson's application for a writ of *habeas corpus* was neither contrary to, nor the result of an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and was not based upon an unreasonable determination of the facts in light of the evidence presented in his state court proceedings. Wilson's motion for relief from judgment is **DENIED**.

So ORDERED and SIGNED this 4th day of January, 2011.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE