

Circuit Court of Boone County

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RE: *02004-8109-CF-401 Ogden*

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IN THE SUPERIOR COURT OF ALLEN COUNTY
STATE OF INDIANA

STATE OF INDIANA,)	
)	
Vs.)	Cause No. 02D04-9-8109-CF-401
)	
ZOLO AGONA AZANIA,)	
Defendant.)	

ORDER BARRING THE STATE FROM SEEKING THE DEATH PENALTY
And
DENYING ALL OTHER PENDING MOTIONS FILED BY THE DEFENDANT

1. A hearing was held in the Allen County Superior Court on January 21, 2005. The State appeared by the Prosecution Team from Lake County, Indiana. The Defendant appeared in person and by counsel, the Defense Team.
2. In February of 1982, the Defendant was convicted of Felony murder and intentional murder for the August 11, 1981 killing of a Gary, Indiana police officer in the course of a bank robbery.
3. On May 25, 1982, The Defendant was sentenced to death.
4. The conviction and sentenced were affirmed on direct appeal.
5. In 1993, the Indiana Supreme Court vacated the Defendant's death sentence and ordered a new penalty phase trial.
6. The Supreme Court held that the prosecution's failure to turn over the reports of gun shot residue, despite specific requests made by the defense, constituted the withholding of material evidence since the failure to release such evidence undermined confidence in the jury's recommendation. Citing, *United States v. Bagley*, 473 U.S. 667, (1985), the Court stated, "The absence of gunshot residue on the disks forms part of a chain of circumstantial evidence pointing away from the appellant as the triggerman. Confidence in the manner in which the jury evaluated the aggravating circumstances with respect to appellant cannot be maintained in this atmosphere."


7. The Supreme Court also held that the Defendant's court appointed public defender provided ineffective assistance of counsel in that he presented "no evidence of mitigating circumstances...before the sentencing judge."
8. In February of 1996, a second penalty phase trial occurred. Part of the delay can be attributed to the State's failure to comply with discovery orders and the State's efforts to remove the Defendant's appointed counsel and named expert.
9. After his second death sentence was affirmed, the Defendant was given leave to file a Post Conviction Relief Petition, in which he alleged that the Allen County jury selection system systematically eliminated from the selection pool almost one half of the eligible African American jurors in Allen County.
10. On November 22, 2002, the Indiana Supreme Court reversed the trial court's denial of the PCR relief and held that "because of the heightened need for public confidence in the integrity of the death penalty, we conclude that although the conviction was proper, the jury pool selection process was fundamentally flawed, and reversal of the death penalty and a new penalty phase or resentencing is required."
11. If the third trial on the death penalty proceeds in January 2006, as currently scheduled, a jury will be asked to determine whether the death penalty should be imposed approximately 24 ½ years after the crime.
12. In analyzing the period of delay between Defendant's 1982 conviction and the currently pending penalty proceeding, it is clear from the record that the State bears most of the responsibility for the delay. Although blaming the State is not the appropriate analysis alone, the bottom line is that very little of the overall delay, is attributable to the Defendant. Again, the issue is not so much whether the State is at fault for the delay or should be at fault for the delay, but rather that the Defendant should not be held responsible or faulted for much of the delay. After all, it is the State seeking to impose the death penalty and the Defendant has the right to defend himself and his life. The record of this case reflects that most of the delay attributable to Defendant are in pursuit of this right.
13. The appropriate analysis of the delay between conviction and sentencing in this case is from the date of the offense and one must look at all of the intervening events, not just focus on the time since the most recent remand. Limiting the analysis to the period of time after remand would never afford a Defendant the opportunity to consider the entire period of time since the alleged offense.
14. A fair application of the *Barker v. Wingo* factors to the post conviction delay in sentencing the Defendant establishes speedy trial and due process violations. There is merit to the Defendant's argument that given the 23 plus year passage of time the jury will likely conclude that the Defendant if not given the death penalty, will soon be released from prison. This "future dangerousness" issue is very relevant. While the Court acknowledges under Indiana law that "future dangerousness" is not a factor

the jury is allowed to consider during death penalty deliberations, under the specific facts of *this case*, which facts now include the significant time delay between conviction and sentencing, the Court and all parties must recognize that there is no realistic way to prevent this issue from being in the minds of jurors as they deliberate the case. Thus the delay has reached constitutional proportions. In addition to the "future dangerousness" issue, mitigation witnesses have died. Some witnesses for the prosecution on the issue of aggravation have died. Taking these issues together, the delay has significantly compromised Defendant's constitutional protections and as a result prejudice to the Defendant will result in allowing the State to proceed with the Death Penalty after so much time has elapsed.

15. This case is unique because of its particular circumstances. The State should not be chastised. The Defense should not be chastised. Both counsel for the State and counsel for the Defendant have represented their respective clients with the highest degree of professionalism and competency. The undersigned trial court judge is genuinely impressed with their efforts. Likewise, the "flaws" found in the Allen County Jury selection process have been remedied and neither Allen County, nor the Allen County judiciary, or nor the Allen County Jury Administrator are at fault.
16. The undersigned trial court judge is supportive of Indiana's Death Penalty law and believes that the Death Penalty is an appropriate sanction to be imposed in appropriate circumstances. However under the facts of this case, the trial court believes it is appropriate and necessary to prohibit the State from proceeding with the Death Penalty.
17. The Defendant's right to present his mitigation case would be severely prejudiced by delay between his conviction and sentencing if the State were allowed to proceed with the Death Penalty.
18. Our system of justice is founded upon rules of law and fundamental fairness. Injecting the death penalty into the equation mandates the highest level of scrutiny. Neither the Courts, nor the public will support a death penalty proceeding that impairs or limits the rights of the Defendant to fight for his life. Borrowing again the language from our Indiana Supreme Court, who so aptly stated in an earlier opinion regarding this case, "because of the heightened need for public confidence in the integrity of the death penalty", this Judge finds that 24 years is too long.
19. Nothing in this decision is intended to minimize the despicable acts committed by the Defendant or to minimize his culpability; however fundamental constitutional principles of fairness, due process and speedy justice warrant this court prohibiting the State to seek the death penalty against this Defendant *in this case under these circumstances*.
20. The Defendant's Motion to Dismiss or otherwise limit the application of the Death Penalty based on violation of International Law is Denied.

- 21. All other outstanding Motions brought by the Defendant and heard on January 25, 2005 are Denied.
- 22. To the extent either the State or the Defendant believes the Court should supplement this order in more detail, the court will consider same upon written request and upon submission by the parties of proposed orders.
- 23. This matter remains set for hearing on May 20th, 2005 as previously scheduled.

SO ORDERED THIS 1st day of MAY, 2005



Steve Devlin, Special Judge
Allen Superior Court

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