No. _____

In The Supreme Court Of The United States

DUSTIN DRESSNER,
Petitioner,
v.
DARREL VANNOY, Warden,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - NO EXECUTION DATE SET
QUESTIONS PRESENTED

Whether it violates the Sixth Amendment and this Court's precedent in *Strickland v. Washington* 466 U.S. 668, 104 S. Ct. 2052 (1984) and *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259 (2010) where trial counsel, while presenting some mitigating evidence, failed to follow up on "red flags" indicating organic brain damage, and where, in denying relief, the Louisiana Supreme Court applied an incorrect prejudice standard to Petitioner's claim that he received ineffective assistance of counsel at the penalty phase, holding that Petitioner did not show that "the result would have been different had [trial counsel] presented the evidence upon which [Petitioner] currently relies."

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Dustin Dressner, Petitioner/Appellant

2. Darrel Vannoy, Louisiana State Penitentiary

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Petitioner, Dustin Dressner, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court entered in this case.

OPINIONS DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the Louisiana Supreme Court on October 29, 2018, denying Petitioner's writ to review the district court's denial of post-conviction relief is attached as Appendix A. The January 12, 2018 *Order* of the Twenty-Fourth Judicial District Court of Jefferson Parish, Louisiana, denying Petitioner's application for post-conviction relief is attached as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Louisiana Supreme Court issued its denial of Petitioner's writ of review on October 29, 2018, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

STATEMENT OF THE CASE

In 2004, Petitioner Dustin Dressner was tried for the July 6, 2002 stabbing death of Paul Fasullo. Trial was initially set for January 12, 2004. On the first date of trial, defense counsel filed a motion for continuance based, in part, on the need for experts to evaluate Petitioner. R. 579. The court denied the motion, finding that "defendant has had more than adequate time to seek the assistance of these experts if he truly believes their testimony is necessary for this defense." R. 621. Trial counsel took a writ, which the appellate court granted, stating that "[t]his Court is reluctant to tamper with the trial court's docket, particularly when, as in this case, defense counsel's motion for continuance is blatantly dilatory. However, given the serious nature of this capital case, we are unwilling to penalize the defendant for defense counsel's inadequate preparation for trial." *State v. Dressner*, 04-007 (La. App. 5 Cir. 01/13/04).

Trial was reset for May 17, 2004. Ten days before the start of trial, defense counsel informed the court of its intention to call psychologist Dr. Justin Wiley, who it appears from the record had not yet examined Petitioner, and further indicated that it was attempting to retain the services of a psychiatrist. R. 1313; R. 1332-33.

At the penalty phase of trial, Petitioner's attorneys presented the testimony of two mental health experts—a psychologist and a psychiatrist—and several family members and friends. Both mental health experts, a psychologist and a psychiatrist, testified that Dustin had diagnoses of Bipolar Disorder: Type II, a history of Attention Deficit Disorder, and polysubstance abuse, and that his IQ was in the borderline or low average range. R. 3731-3732; R. 3824-3825. Petitioner's

family and friends testified to a normal childhood punctuated by Dustin's hospitalization and treatment for his mental health issues and substance use. *See, e.g.*, R. 3691-3702; R. 3888-3893. They also expressed sadness at the prospect of his execution. *See, e.g.*, R. 3700; R. 3883-3884; R. 3899; R. 3903. Witnesses also testified to Dustin being born anoxic—lacking oxygen to the brain—and that he suffered at least one major head trauma at age six or seven. R. 3748-3751; R. 3886. Further, many witnesses testified that Petitioner was remorseful for the crime. *See e.g.*, R. R. 3699; R. 3770; R. 3805; R. 3928. The jury sentenced Petitioner to death. The Louisiana Supreme Court affirmed Petitioner's conviction and sentence. *State v. Dressner*, 45 So. 3d 127 (La. 2010), *certiorari denied by Dressner v. Louisiana*, 131 S. Ct. 1605 (2011).

In state post-conviction proceedings, Petitioner was evaluated by two neuropsychologists, who concluded that he suffers from organic brain damage that impairs his ability to function in the world. Both experts' testing found that Petitioner had frontal lobe dysfunction, with specific impairments in perceptual reasoning, working memory, and processing speed, which affect Petitioner's ability to plan and respond to new situations.

The state district court denied state habeas relief without a hearing. Addressing Petitioner's claim of ineffective assistance of counsel at the penalty phase, the state district court addressed the new evidence of organic brain damage:

> Petitioner relies solely on the psychological testing that was performed while petitioner has been incarcerated in Louisiana State Penitentiary. Petitioner fails to provide any actual medical records verifying brain injuries. As the State points out in its response, no diagnostic imaging of Petitioner's brain has been performed. The court agrees with the State's position in that the evidence presented of organic/traumatic brain damage is insufficient, unreliable and speculative. The court also considers Petitioner's actions in committing the offenses for which he was convicted, and his calculated actions immediately following the crimes, which are counteractive to the allegations and assumptions presented in this claim.

See Appendix B at 5. The Louisiana Supreme Court likewise denied relief, stating as to his claim of penalty phase ineffectiveness:

> In sum, while Dressner now identifies different evidence that he would have had trial counsel present to the jury, he fails to carry his burden of demonstrating why trial counsel were ineffective in choosing to present to the jury what they did. He has not shown that trial counsel performed deficiently in their penalty phase representation or that the result would have been different had they presented the evidence upon which he currently relies.

See Appendix A at 14. Mr. Dressner's writ to the Louisiana Supreme Court was denied on October 29, 2018. *See* Appendix A. Petitioner now timely files this Petition for Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

I. This Court should grant a writ of certiorari to ensure that the Louisiana Supreme Court applies the correct prejudice standard to Petitioner's ineffective assistance of counsel at the penalty phase claim in accordance with this Court's precedent in *Strickland v. Washington* 466 U.S. 668, 104 S. Ct. 2052 (1984) and *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259 (2010).

Despite numerous indications that Petitioner may have brain damage—he was born anoxic, had experienced at least one head trauma as a child, and began self-medicating with substances at an early age—trial counsel failed to retain a neuropsychologist to evaluate Petitioner. As with the defendant in *Sears*, Petitioner's "'history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected' to lead to these significant impairments,"—*Sears v. Upton*, 561 U.S. 945, 949, 130 S. Ct. 3259, 3263 (2010)—and "plenty of 'red flags'" existed that "pointed up a need to test further." *Rompilla v. Beard*, 545 U.S. 376, 395, 125 S. Ct. 2456, 2469 (2005) (indicating that post-conviction testing found defendant suffered from organic brain damage).

In spite of receiving a four-month continuance to hire experts, trial counsel retained its mental health experts—neither of whom was a neuropsychologist—alarmingly close to the start of trial. Their testifying psychologist was retained only two and a half weeks before trial, and

because of this, did not have time to review all of the records; he had also never testified as an expert before. R. 3779-3782. The defense psychiatric expert was retained ten days or less before trial began. *See* R. 1332-1333 (indicating trial counsel had not retained a psychiatrist as of May 7, 2004). Trial counsel also failed to provide their experts with essential documents, including records of prior convictions that counsel was fully aware the State intended to admit at trial. R. 1172; R. 3802-3803. Due to trial counsel's deficient performance, Petitioner's organic brain damage and its effects on him were not discovered or presented to the jury.

This Court has long held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066. And that "[i]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S. Ct. 2527, 2538 (2003). Given the available evidence pointing to the likelihood of brain damage, trial counsel's failure to investigate further is unreasonable.

Had trial counsel followed up on the red flags and retained a neuropsychologist to evaluate Petitioner as post-conviction counsel did, the jury would have been told that Mr. Dressner has organic brain damage with "deficits in his ability to plan, and challenges in his ability to exercise adequate judgment and impulse control compared to age and education matched peers" and that these impairments "adversely impacted [Petitioner's] ability to employ alternative conflict resolution strategies at the time of the instant offense." Petition Ex. 44 at 34. The jury would have further learned that "[i]ndividuals with this type of dysregulation from anoxia at birth [] have difficulty halting an ongoing sequence of behavior, considering new information, and choosing

behavior based on inevitable consequences." Petition Ex. 47 at 7. Critically, the jury would have understood that "Mr. Dressner's difficulty conforming his behavior has a neurological basis and is not a matter of direct choice." *Id.* As one post-conviction expert explained in his report:

> Testing for brain damage was never conducted pre-trial and as such, a major contributor and potential root cause of his [Petitioner's] behaviors was never detected nor treated.
>
> Mr. Dressner's past history of behavioral and substance use problems, when viewed in this light, enable a better understanding of his impairments. Brain damage in the very areas where decision-making is most vulnerable leads to impulsive, poorly thought out, and self-defeating behaviors. Coupled with a Bipolar Disorder that causes vacillating mood states and irritability, Mr. Dressner's childhood would understandably be chaotic and resistant to ordinary treatment measures. In large part, this is due to a lack of brain and/or neuropsychological testing which would have revealed significantly impaired brain functioning and would have informed his medical providers in their treatment decisions. ***In other words, "bad behavior" would have been framed more appropriately as "brain damage with a major mood disorder" with interventions targeted accordingly.***

Petition Ex. 55 at 6-7 (emphasis added).

Without the presentation of Petitioner's neuropsychological deficits, the State had an unfettered ability to argue to the jury in its penalty phase closing that this case was about Petitioner's "choices":

> Because, remember, remember about the choices he made. Hurry up, stab her, kill her, the police are coming. I hope you remember that 9-1-1 tape. And I hope you close your eyes and imagine the horror of someone fighting for their life, in their own house, while the man over there, Mr. Choice-maker, is wielding this. And wielding it with deadly accuracy. . . .
>
> So think about his choices. Think about them long and hard. I'll bet you, you think on them longer and harder than he did. . . .
>
> We've been here a week deciding and deliberating on his fate. And do you know that on that night, how quickly did he decide and deliberate to be the judge, jury, and executioner of Paul Fasullo and slashing his wife? How much do you think he deliberated? How much do you think consideration-wise he gave to them when he butchered them?
>
> And this is his moment that he chose to be in the sun.

R. 3963-3964; R. 3968; R. 3969.

The State continued, detailing Petitioner's "choices":

> He had a loving family. They provided him shelter. They provided him food. They gave him an education. They put up with his tirades in his lashing out, and his misbehaving, and his chosen alcohol use, and his chosen drug abuse, and his chosen fits of violence, and his chosen manipulation, from the time he was a baby. . . .
>
> He chose to do what he wanted to do. Just like he chose back on June 18, 2001, without provocation, with his friend in tow - sound familiar? Hit William Knight in the back of the head - sound familiar? Rifle through William Knight's pockets, consistent with his behavior one year later.

R. 3988-3989; R. 3991. If trial counsel had thoroughly investigated, developed, and presented neuropsychological evidence of Petitioner's organic brain damage, the behaviors that the State incorrectly characterized as Petitioner's choice would have been explained, and the jury would have known that Petitioner's "difficulty conforming his behavior has a neurological basis and is not a matter of direct choice." Petition Ex. 47 at 7. Instead, left with nothing to counter the State's argument, the jury sentenced Petitioner to death.

In Williams v. Taylor, this Court found that counsel was ineffective in their failure to investigate and present evidence, holding that "if competent counsel had presented and explained the significance of all the available evidence" there is a reasonable probability that "the result of the proceeding would have been different." 529 U.S. 362, 399, 120 S. Ct. 1495, 1516 (2000). In Petitioner's case, if the jury had been presented with information about Petitioner's brain damage and its significance, there is "a reasonable probability that, but for counsel's [] errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984).

However, not only was the jury not told of Petitioner's neuropsychological deficits and its effect on his behavior, the Louisiana Supreme Court applied an incorrect—and more demanding—

prejudice standard in denying Petitioner's claim. The state supreme court held that Petitioner "has not shown that trial counsel performed deficiently in their penalty phase representation or ***that the result would have been different*** had they presented the evidence upon which he currently relies." Appendix A at 14 (emphasis added). As in *Sears v. Upton*, "it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry . . . [this Court has] established for evaluating [a] Sixth Amendment claim." 561 U.S. at 946, 130 S. Ct. 3261.

In *Strickland v. Washington*, this Court expressly rejected a higher standard of proof for the prejudice prong of the ineffective assistance of counsel test:

> [A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case . . . . The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.

Strickland v. Washington, 466 U.S. 668, 693-694, 104 S. Ct. 2052, 2068 (1984). In defining prejudice as "a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different," this Court explained that a reasonable probability is less, even, than a preponderance of the evidence:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. 2052, 2068.

In addition to its application of an incorrect prejudice standard, the Louisiana Supreme Court's denial of Petitioner's claim belies an understanding of neuropsychological testing. The court's opinion belittles the findings of brain damage due to a lack of corresponding medical

records and conflates mental illness and brain damage, holding that the new evidence is "somewhat cumulative":

> [Petitioner] contends that new reports indicate pretrial neuropsychological testing would have revealed he suffers from organic and/or traumatic brain damage. While the reports state that Dressner might have issues with impulse control and his ability to exercise proper judgment, he fails to attach actual medical records or demonstrate why this subsequent testing is more reliable or accurate than that conducted by his trial experts. Moreover, these conclusions are somewhat cumulative of the evidence the jury considered.

Appendix A at 13. Like the state court in *Moore v. Texas*, the state courts in Petitioner's case reject the gold standard for neuropsychological testing and discount the compelling and scientifically validated evidence of Petitioner's brain damage. *See Moore v. Texas*, 518 U.S. ___, ___, 137 S. Ct. 1039, 1053 (2017) (reversing the state court judgment based, in part, on the state court's failure to "adequately to inform itself of the medical community's diagnostic framework") (internal citations omitted); *see, e.g.*, Appendix A at 13 (state supreme court's denial noting Petitioner "fails to attach actual medical records"); *see also* Appendix B at 5 (state district court's denial noting a lack of medical records and that "no diagnostic imaging of Petitioner's brain has been performed"). In *Moore*, this Court observed that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide" but that "neither does our precedent license disregard of current medical standards." *Moore v. Texas*, 518 U.S. at ___, 137 S. Ct. 1049. Here, the state court's denial wholly disregards current medical standards regarding neuropsychological testing.

The state supreme court's denial also rests on factual error—neither trial mental health expert conducted *any* testing of Petitioner, and as neither is a neuropsychologist, could *not* have conducted the testing that was done in post-conviction proceedings. *See* R. 3729 & R. 3822. The trial experts diagnosed Petitioner with mental health conditions but did not evaluate him for or

testify to brain damage. *See* R. 3731-3732; R. 3824-3825; *see also* Petition Ex. 55 at 6 (stating that "testing for brain damage was never conducted pre-trial").

Because the Louisiana Supreme Court did not properly consider Petitioner's organic brain damage and failed to apply the appropriate prejudice standard to his claim, this case is ripe for summary reversal.

CONCLUSION

Therefore, this Court should grant the Petition for Writ of Certiorari, summarily reverse the decision below, and remand this case to the Louisiana Supreme Court for further consideration.

Dated: 1/28/2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 28th of January, 2019 upon Assistant District Attorney Juliet Clark, of the Jefferson Parish District Attorney's Office, 200 Derbigny StreetGretna, Louisiana 70053. All persons required to be served have been served.

Respectfully submitted,

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