No. 19-5985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

LEEROY CESAR CARBALLO,

Petitioner,

-v-

LORIE DAVIS, DIRECTOR
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

"On cross, the defendant asked, "would you like to hear my version of the story? Is that possible? I never had that chance...you want me to explain to you exactly everything, my statement of what happened that night?" The prosecutor replied, "You can--your lawyer will have you on redirect, and he can go through it if that's what you guys want to do. When the prosecutor passes the witness, trial counsel replied, "I have nothing further," clearly ignoring his client's desire to testify to the underlying facts involved in this case. --Sentencing phase.

Leeroy Cesar Carballo #1462910
Petitioner - pro se
Pack Unit
2400 Wallace Pack Rd.
Navasota, Texas 77868

Petitioner - pro se

QUESTION PRESENTED

During Petitioner's sentencing hearing, Petitioner took the stand, maintaining his innocence, and expressed his desire to tell the jury his side of the story in this closed case where the complainant and the Petitioner shot each other with the same gun. The jury witnessed Petitioner's trial counsel thwart his efforts and heard counsel argue during closing arguments that the fact that Solis (the complainant) was shot, "can't possibly ever be justified," implying that Petitioner was guilty. Petitioner was sentenced to 40 years in a Texas prison.

Petitioner's case raises an issue of national importance because it involves the deprivation of an individual's fundamental and constitutional rights: whether and to what extent will the criminal justice system tolerate a defense attorney who overrides a defendant's right to testify, even if by only preventing him from testifying to a part of his defense. Specifically, did the United States Court of Appeals for the Fifth Circuit err when it denied Carballo a COA on his claim that his trial counsel was constitutionally ineffective in denying him his fundamental right to testify to his version of events to which he stood trial when Petitioner took the stand during the sentencing phase? Did the Fifth Circuit err in failing to address Carballo's appeal on the district court's denial of his motion to stay and motion for an evidentiary hearing regarding this claim?

PARTIES TO THE PROCEEDING

Leeroy Cesar Carballo, petitioner on review, was the petitioner-appellant below.

Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, respondent on review, was the respondent-appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

STATUTES & OTHER AUTHORITIES

INDEX OF APPENDICES

PETITION FOR WRIT OF CERTIORARI

Leeroy Carballo respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The June 12, 2019 panel Order of the Court of Appeals denying reconsideration is unreported and attached as Appendix A. The March 4, 2019 circuit judge Order denying a COA is unreported and attached as Appendix B. The April 12, 2018 Order of the United States District Court for the Southern District of Texas adopting the Memorandum and Recommendation as its Memorandum and Order and denying habeas corpus relief is unreported and attached as Appendix C. The January 3, 2018 Memorandum and Recommendation of the United States Magistrate Judge for the Southern District of Texas finding that Mr. Carballo has not met his burden as to either prong of the Strickland analysis is unreported and attached as Appendix D. The March 29, 2017 Action Taken of the Texas Court of Criminal Appeals denying without written order on the findings of the trial court without a hearing on Mr. Carballo's application for 11.07 writ of habeas corpus is unreported and attached as Appendix E. The February 27, 2017 Findings of Fact, and Conclusion of Law entered by the 179th district court of Harris County is unreported and attached as Appendix F. The July 30, 2009 Panel and Concurring Opinion issued from the state court of appeals is reported at Carballo v. State, 303 S.W.3d 742 (Tex.App.--Houston [1st Dist. 2009]) and attached as Appendix G.

JURISDICTION

The Court of Appeals entered its judgment on June 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights un-the Fifth, Sixth, and Fourteenth Amendments. The Fifth Amendment provides in relevant part:

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

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.

The Fourteenth Amendment provides in relevant part:

> ...nor shall any State...deny to any person within its jurisdiction the equal protection of the law.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court:
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Including the application of 28 USC § 2254(d)(1),(2), which states:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court 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.

STATEMENT OF THE CASE.

A. Introduction

By any measure, the colloquy that took place in Leeroy Carballo's sentencing hearing, in the presence of a jury, is an example of a troubling pattern in Texas courts of a defense attorney ignoring a defendant's desire to exercise his absolute and fundamental right to testify to his version of events during the sentencing phase. If a defendant does not have an absolute right to testify to his own version of events during the sentencing phase, then that right has no meaning.

Yet, when presented with the facts, circumstances, and evidence supporting Mr. Carballo's claim that "trial counsel was ineffective for...failing to allow him to testify in the punishment phase as to his version of the events," the Fifth Circuit turned a blind eye and declared that "Carballo has failed to make the requisite showing" to obtain a COA. App. B at 1-2. As a result, the Fifth Circuit not only denied a COA, but failed to review whether the district court erred in denying relief on this claim without conducting an evidentiary hearing and denying his motion to stay. App. B at 2. At a minimum, in part, state appellate court Justice Jennings recognized in her concurring opinion that "defense counsel's unilateral decision to override appellant's right to testify about the 'events surrounding' the offense in the punishment stage of trial fell below a reasonable level of professional assistance." App. G at 30.

Justice Jennings concurring opinion shows that reasonable jurists could disagree with the district court's conclusion that "Carballo has not met his burden as to either prong of the Strickland analysis." App. D. at 7 Justice Jennings recognized that there "can be no sound trial strategy in an attorney unilaterally overruling his client's decision to testify in his own defense." App. G at 26. Trial counsel's performance is at least debatably deficient.

B. The Trial Proceeding

Petitioner, Leeroy Carballo, is currently serving a 40 year sentence in Texas following a jury trial conducted in Harris County, Texas, about eleven months after his arrest, in late September 2007.[1] The entirety of the guilt and penalty phases took place September 24-26, 2007. During the sentencing phase, Mr. Carballo testified in his own behalf, maintaining his innocence.

On cross-examination, when asked whether he accepted responsibility for the robbery, Carballo responded that he had pleaded not guilty to the offense. The State asked Carballo whether he was saying that the jury "got it all wrong" with respect to its finding of guilt. Carballo responded that because he had "failed to testify" in the guilty-innocence phase, "the jury never got to hear my side of the story." He said the jury only "heard Mr. Luis Solis's story of the facts of his angles of where it happened of what he said happened. No one else saw what happened, and only me and Mr. Luis know exactly what happened." App. G at 16.

On further questioning, Carballo stated that "I did not rob Mr. Luis Solis." Carballo asked the prosecutor, "[W]ould you like to hear my version

[1] Mr. Carballo was tried for the offense of aggravated robbery. A background of the State's case is described in the state appellate court's opinion. App. G at 3, 4. Carballo v. State, 303 S.W.3d 742 (2009)

of the story? Is that possible? I never had a chance." After the prosecutor asked Carballo a few more questions, Carballo asked, "[Y]ou want me to explain to you exactly everything, my statement of what happened that night?" The prosecutor replied, "You can--your lawyer will have you on redirect, and he can go through it if that's what you guys want to do." App. G at 16,17.

After the prosecutor finished his cross-examination of Carballo, defense counsel stated, "I have nothing further." The trial court then told Carballo that he could "stand down." At that point, the following exchange occurred:

[Carballo]: I want to see if I can read something to the jury. Is this the last I'll be able to talk to them?

The Court: Yes. What are you asking?

[Carballo]: I asked my lawyer if I could read a letter to the jury.

[The prosecutor]: Judge, I'm going to object to him reading. First of all, that invades the province of the jury. Second of all, I'd like to see a proffer of that before we know what's going on, what's about to be--

The Court: You have a copy of it? How many pages?

[Carballo]: It's just this right here and this part right here, this page right here.

[Defense counsel]: The prosecution objected to it and I have nothing to say to the objection.

The Court: All right. Objection is sustain unless you want to continue this.

[The prosecutor]: I mean--

The Court: Are you opposed to him reading it?

[The prosecutor]: I have no problem with him testifying.

The Court: Testifying is different from a reading a statement.

[The prosecutor]: Yes, Judge, we're opposed to him reading from the statement.

The Court: All right. Objection is sustained.

See. App. G at 17, 18.; ECF No. 31-14, pp. 9-10.

C. Mr. Carballo's State Direct Review Proceedings

The First Court of Appeals for Texas affirmed the conviction. See Carballo v. State, 303 S.W.3d 742 (Tex. App.- Houston [1st Dist.] 2009, pet ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review and the United States Supreme Court denied his petition for certiorari.

On direct appeal, Carballo raised the issue that he "received ineffective assistance of counsel as his trial counsel did not abide by his request to testify on his own behalf in the punishment phase of trial." App. G at 15. Carballo contended that he "received ineffective assistance of counsel during the punishment phase because defense counsel did not question him about his own version of the events on the night in question." App. G at 18. The court of appeals proceeded straight into its harm analysis under the second prong of Strickland. The court ruled that Carballo had "not shown that there is a reasonable probability that the result of the punishment proceeding would have been different had he been permitted to testify about the events surrounding the offense. App. G. at 19.

Carballo did not file a "motion for new trial." The court of appeals pointed out that the record did not "contain the substance of the testimony" that Carballo claimed "he would have given on redirect questioning by his defense counsel." The court reasoned that "it is not possible to determine whether the result of the punishment proceeding would have been different if defense counsel had questioned" Carballo regarding "his version of the events." App. G at 19.

D. Mr. Carballo's State Habeas Proceeding

Carballo filed three pro se habeas applications with the trial court under Cause No. 1097497-A. Ex parte Carballo, No. WR-83, 506-02 (Tex. Crim.App.). In September 2011, he filed his initial application. ECF. No. 31-2, pp.6-16, (State Records electronically filed in the U.S. Dist. Ct., Southern District of Texas). Carballo filed his first amended application in November 2013. ECF. No. 31-4, pp. 23-35. He filed a second amended application in January 2016. ECF. No. 30-17, pp. 4-21.

Carballo's first amended application re-urged the claim that trial counsel was ineffective for failing to question or allow him to "testify about 'the events surrounding' the offense during the punishment phase." ECF No. 31-4, pp. 28. Because he did not have the benefit of an adequate record when he submitted the similar claim on direct appeal, Carballo submitted his own affidavit describing the substance of the testimony he would have given on redirect questioning by his defense counsel. ECF. No. 31-4, pp.12 and No. 31-4, pp. 14-21 (Affidavit of Leeroy Carballo).

The habeas court "rubber-stamped," verbatim, the State's Proposed Findings of Fact, Conclusion of Law, and Order following Remand. App. F at 1-8. The findings solely pertained to the claims raised in Carballo's second amended application. App. F at 2-3. Carballo objected to the findings and asserted that there remained "controverted, unresolved facts material to the legality" of his confinement. Carballo objected to the finding that trial counsel "filed an affidavit responding to the applicant's claims." He asserted that this finding was not supported by the habeas record and pointed out that he had filed three habeas applications and outlined the claims he raised in each. ECF. No. 30-20, pp. 3, 4. In addition, Carballo filed objection with the

Texas Court of Criminal Appeals (hereinafter, "TCCA") where he referred to his three applications, the claims raised in each, and asserted that he has "claims that trial counsel was not ordered and did not respond to." ECF No. 30-13, pp. 3-4. The TCCA denied habeas relief. ECF No. 30-12, p.1.

E. Carballo's Federal Habeas Proceedings

Carballo filed a federal habeas petition where he raised claim 4(c), ineffective assistance of trial counsel (hereinafter, "IATC") claim based on counsel failing to abide by his "request to testify to his version of events for which he was standing trial for when counsel called him to the stand during the punishment phase," failing "to question" him "about these events." Carballo v. Davis, No. 4:17-cv-00647 (S.D. Tex. Feb. 23, 2017). ECF No. 1 at 9; Pet. Memo at 43-51; ECF No. 19, pp. 44-45, 19-1, pp. 1-7.

Texas filed an answer and Motion for Summary Judgment with Brief in Support (hereinafter, "Respondent's Answer"). ECF No. 32. (S.D. Tex. Aug. 17, 2017).

On November 14, 2017, Carballo filed a reply to Respondent's Answer and submitted his own affidavit describing what he would have testified to during the punishment phase on redirect questioning by his defense counsel. ECF No. 37; ECF No. 37-2, pp. 11-18. (Affidavit of Leeroy Carballo).

On January 3, 2018, the Magistrate Judge issued a Memorandum and Recommendation (hereinafter, "M & R"). App. D. The M & R includes the following findings, Carballo: "has not met his burden as to either prong of the Strickland analysis."; "cannot show that his own testimony about his version of events on the night of the robbery would have led to a reduced sentence, and thus cannot show prejudice from his counsel's trial strategy."; " has not met his AEDPA burden to show that the state court's rulings were contrary to or an unreasonable application of federal law, or the result of an unreasonable

determination of facts." App. D at 7-8. In a footnote, the court acknowledged that Carballo argued the state court did not address certain specific claims which included claim 4(c) on habeas review and that the state court only addressed claims in his second amended habeas application. The court noted, "If true, Carballo's claims 4(c)-4(l) are unexhausted and procedurally defaulted ...To the extent he did not include all of his claims in his second amended application, he did not 'fairly present' such claims for review by the state's highest court...Like his other unexhausted claims of ineffective assistance of counsel, he has not met his burden under Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013) to excuse the default." App. D at 8. The court further noted, "In light of the significant evidence of guilt presented at trial, including the testimony of police officers and the complainant, Carballo would not be able to show Strickland prejudice" on his defaulted claims. The court concluded that "these claims of ineffective assistance should also be denied." Carballo's request for an evidentiary hearing was denied. App. D at 10.

Following the M & R, Carballo filed a motion to stay and abeyance to return to state court and resubmit his claim. ECF No. 45, pp. 1-5 (Motion to Stay & Abeyance, Mar. 7, 2018).

On April 12, 2018, the district court denied Carballo's motion to stay and habeas relief. App. C.

Carballo filed his application for a COA with the Fifth Circuit on July 16, 2018. Appellant's Br. in Support of Application for COA, Carballo v. Davis, No. 18-20263, Doc. 00514560831. On August 6, 2018, he filed supplemental claims in support of his motion for a COA. There he requested a COA on his IATC claim 4(c). Appellant's Supp. Br. at 17-31, Carballo v. Davis, No.

18-20263 (5th Cir. 8/6/2018). After being denied a COA by a single judge, Carballo filed a motion for Reconsideration on April 4, 2019. On June 12, 2019, a panel from the Fifth Circuit denied his motion for reconsideration.

REASONS FOR GRANTING THE WRIT

Carballo's case and every **non-capital case** in the Fifth Circuit do not have the benefit of the "any doubt" rule given in capital cases, "any doubt as to whether a COA should issue in a **death-penalty case** must be resolved in favor of the petitioner." Pippin v. Dretke, 434 F.3d 782, 787 (5th Cir. 2005). If cases in the capital posture are afforded more substantial process because death is involved, and still have the odds stacked against them, what are the odds that non-capital cases will often be ignored?

The Petitioner in Buck v. Davis showed the Court when he filed his petition that "a review of capital §2254 cases over the last five years show that in59% of cases arising out the Fifth Circuit, a COA was denied by both the district court and Court of Appeals on all claims. By contrast, during that same period, only 6.25% cases arising out of the Eleventh Circuit and 0% of cases arising out of the Fourth Circuit have had a COA denied on all claims." (Pet. at 21; App. F at 1-15, Buck v. Davis, No. 15-8049).

This stark disparity quantifiably demonstrates that the Fifth Circuit's application of the COA standard is significantly different from, and more burdensome than, that of the Fourth and Eleventh Circuits, which are more consistent with one another.

In Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003), the Court found that the Fifth Circuit "sidestepped the threshold COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," thereby, "in essence deciding an appeal without jurisdiction." Later, paying "lipservice to the principles guiding issuance of a COA." Tennard v. Dretke, 542 U.S. 274, 283 (2004). Having the "troubling habit of evaluating the merits of petitioners' [COA

application] claims." Jordan v. Fisher, 135 S.Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari).In Buck v. Davis, 137 S.Ct. 759 (2017), the Fifth Circuit repeated an error that this Court corrected in Miller-El, viz., denying a COA by failing to "give full consideration to the substantial evidence" presented by the habeas petitioner. Miller-El, 537 U.S. at 341.

In Tharpe v. Sellers, 138 S.Ct. 545 (2018), The Court did not agree with the Eleventh Circuit's review of the record when analyzing whether Tharpe was entitled to a COA. The Court issued a summary vacatur.

These cases reflect the Court's commitment to correct lower courts who fail "to apply the threshold COA standard required by this Court's precedent." Jordan, 135 S.Ct. at 2652 n.2. That commitment runs hollow if the Court reviews the record, is compelled with a different conclusion that a COA should issue, and does not intervene.

The Court must show that fundamental errors must not be ignored and must be afforded substantial process, even in a non-death-penalty case, and that the lower courts must not sweep such claims under the rug or punt the issues through summary denials when a petitioner has clearly shown a substantial showing of the denial of a constitutional right.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

ARGUMENT

I. Certiorari Should Be Granted Because The Fifth Circuit Paid Lipservice To The Principles Guiding Issuance Of A COA With Its Summary Denial Of Carballo's COA,which unquestionably made "a substantial showing of a denial of a constitutional right."

The Fifth Circuit stated in its summary denial:

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). If a district court has rejected the claims on their merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484; See Miller-El, 537 U.S. at 338. Where the district court denies habeas relief on procedural grounds, the petitioner must demonstrate that reasonable jurists would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484. Carballo has failed to make the requisite showing. Accordingly, his COA application is DENIED. App. B at 2.

Here, Carballo clearly met that standard in showing that reasonable jurists could disagree with the district court's denial of his federal petition and the district court's procedural rulings. "The barrier the COA requirement erects is important, but not insurmountable. In cases where a

habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue." Jordan, 135 S.Ct. at 2651.

With respect to Strickland deficient performance, Carballo showed trial counsel's performance effectively denied him the opportunity to testify about the facts of his case during the sentencing phase. The Constitution guaranteed Carballo "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). An 'essential' component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). Even if Carballo was only prevented from testifying to a part of his defense, his constitutional rights are violated. Crane v. Kentucky, 476 U.S. 683, 690-91 (1986).

Texas acknowledged that "it cannot be permissible trial strategy, regardless of its merits otherwise, for counsel to override the ultimate decision of a defendant to testify contrary to his advice." Respondent's Answer at 27; ECF No. 32.

At least one jurist of reason has stated that "defense counsel's unilateral decision to override" Carballo's "right to testify about the "events surrounding' the offense in the punishment stage of trial fell below a reasonable level of professional assistance" and that there "can be no sound trial strategy in an attorney unilaterally overruling his client's decision to testify in his own defense." App. G at pp. 26, 30 (Concurring opinion of state appellate Justice Jennings).

Reasonable jurists could debate whether it was reasonable for trial counsel not to further question Carballo on redirect during the sentencing phase and that counsel performed unreasonably. Carballo debatably satisfies the deficient prong of Strickland.

Carballo's demonstration of prejudice in this case is especially clear because the State's evidence of his guilt was far from overwhelming. The state appellate court noted that the determination of Carballo's guilt "boiled down to whether the jury found Solis's [the complainant] testimony credible." App. G at 9. The jury heard Carballo attempting to tell his version of what happened on the night he and the complainant shot each other with the same gun. Carballo testified that he was "asking, for mercy." ECF No. 31-13, p. 72 (sentencing hearing). Carballo described in detail in his affidavit what exactly happened after he got off of work, met up with the complainant who he knew, and attempted to buy drugs from him. Solis turned on him and attempted to rob Carballo. A fight ensued after Solis pulled out a gun and tried to hit Carballo. The end result was that Solis and Carballo shot each other. No one else saw what happened. ECF No. 37-2, pp. 11-18, (Affidavit of Leeroy Carballo).

In Carballo's closed case, virtually any recitation of events would seem to be as probable as the uncorroborated story put forth by Solis. The State's case was based, almost exclusively, on the testimony of Solis, who had a history of theft and violence. Carballo's version of the facts would have likely given the jury pause about his conduct during the offense. There is a strong likelihood that his testimony would have meaningfully affected the jury's deliberation. The jury had only heard Solis's version of what happened. Solis testified that he did not know Carballo and that Carballo tried to rob him. If the jury would have found Carballo's version about the "events surrounding" the offense more convincing and credible than Solis's, there is a reasonable probability that Carballo would have received a lower sentence or the jury would have been deadlocked on sentencing Carballo.

Instead of allowing Carballo to present his defense, trial counsel in-

terfered with his right to testify to his version of events and shortly after, argued to the jury during closing arguments, "I'm not...justifying the fact that Mr. Solis was shot. That can't possibly ever be justified." ECF No. 31-14, p. 32.

In McCoy v. Louisiana, No. 16-8255, 584 U.S.___138 S.Ct. 1500, the Court held that "Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category." The Court explained that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense. His lawyer must abide by that objective and may not override it by conceding guilt.

Counsel's actions negatively affected the jury's deliberations in imposing the harsh sentence of 40 years in prison he received, instead of a sentence near the minimum of 15 years he could have received. The jury heard Carballo attempting to clear himself of any guilt by denying that he tried to rob Solis and observed his readiness to explain everything that happened on the night of the incident, while his own lawyer declined to help him with this endeavor. The jury would have inferred that Carballo's own attorney conceded his guilt by suggesting that Solis getting shot can't "possibly ever be justified." He left the jury with the impression that Carballo tried to testify otherwise. Reasonable jurist could debate whether prejudice exists.

A. Reasonable Jurists Could Find That The District Court's Determination That The Claim Is Procedurally Defaulted Is Debatable Or Wrong.

1. The district court erred in, sua sponte, raising a procedural default on the claim as unexhausted, to the extent that Carballo did not include this claim in his second amended state application.

Texas argued that "the First Court of Appeals addressed" Carballo's "claim regarding his testimony during the punishment phase on direct appeal" and that he has "not shown that the decision of the state court was contrary to or involved an unreasonable application of clearly established federal law." Respondent's Answer at 29, 33; ECF No. 32.

As mentioned, supra, Carballo re-urged the claim in his first amended state application, and included his own affidavit describing the substance of the testimony he would have given on redirect questioning by his defense counsel.

In Carballo's reply to the Respondent's Answer, he argued that the state court denied his second amended application "without considering the claims he raised" in his "1st amended application," and that those claims "were not adjudicated on the merits." ECF No. 37, p.4. Carballo argued that his memorandum explained what claims were raised in each state application, the efforts he took to bring these claims to the state court's attention, these claims are entitled to "de novo review," were "inadvertently overlooked in state court," citing Johnson v. Williams, 568 U.S. 289, 133 S.Ct. 1088 (2013). ECF No. 37, p. 5. Carballo specifically, pointed out that his claims, which included claim 4(c), were raised in his first amended application, were overlooked and entitled to de novo review. ECF No. 37, pp. 5, 6.

In Williams, the Court explained that a petitioner may attempt to rebut the presumption that a federal claim was adjudicated on the merits in order to obtain de novo review. One way to rebut the presumption is to show that "the evidence leads very clearly to the conclusion that the federal claim was inadvertently overlooked in state court." Williams, 568 U.S. at 303.

The procedural default raised against Carballo's claim by the district

court, came out of left field. App. D at 8. On the premise that the claim was raised on direct appeal, Texas considered Claim 4(c) as exhausted. ECF No.32, pp. 2-3, 6, 29.

In Texas, a prisoner exhaust his federal claim by raising it in a state habeas application. Anderson v. Johnson, 338 F.3d 382, 388 n. 22 (5th Cir. 2003). Carballo fairly presented his federal claim on collateral review by citing the relevant provision of the United States Constitution and federal cases supporting his argument. ECF No. 31-4, p. 28 (state application); ECF No. 31-5, pp. 5-12 (Memo in Support); ECF No. 31-4, pp. 13-21 (Affidavit of Leeroy Carballo). "Once a post-conviction writ application has been filed, the next step in the 'habeas corpus proceeding' is for the convicting court to evaluate the pleading." Ex parte Pointer, 492 S.W. 3d 318, 322 (Tex.Crim. App. 2016).

The district court ignored Carballo's arguments under Johnson v.Williams, when the state court's Findings of Fact & Conclusions of Law make it debatable that the federal claim was overlooked and not adjudicated on the merits in state court. App. F at 2-3

Other Circuit Courts Recognize & Apply Williams

Bester v. Alabama, 836 F.3d 1331, 1337 (11th Cir. 2016)("state trial court 'inadvertently overlooked' the actual claim,"); Bennett v. Graterford, 886 F.3d 268, 279 (3d Cir. 2018)("federal claim was inadvertently overlooked in state court."); Brown v. Romanowski, 845 F.3d 703, 711-12 (6th Cir. 2017); James v. Ryan, 733 F.3d 911, 915 (9th Cir. 2013).

2. If the claim is procedurally defaulted, the district court should have considered the merits of it based on the rationale of Martinez & Trevino.

In Martinez and Trevino, the Court explained that a federal habeas petitioner can demonstrate cause and prejudice for procedural default where he had "no counsel" during his initial habeas proceedings and his IATC claims have "some merit." Martinez v. Ryan, 132 S.Ct. 1309 (2012); Trevino v. Thaler, 133 S.Ct. 1911 (2013).

The district court found that Carballo: "had not met his burden as to either prong of the Strickland analysis."; "cannot show that counsel's performance was deficient in this regard, or that he suffered prejudice."; "has not met his burden" under Martinez and Trevino "to excuse the default." ECF No. 39, pp. 7-8; App. D at 7-8. Further, that "In light of the significant evidence of guilt presented at trial, including the testimony of police officers and the complainant, Carballo would not be able to show Strickland prejudice on his defaulted allegations of ineffective assistance of counsel." App. D at 10.

The district court misapplied the prejudice prong of Martinez and Trevino in concluding that Carballo's claim is procedurally defaulted. This prong is not that demanding. Carballo only needed to show that the claim has "some merit" or "factual support" in the record or that it could satisfy the standard for a COA. Martinez, 132 S.Ct at 1318. The Ninth Circuit approaches it correctly. A Strickland prejudice analysis is different from, and made after, a "cause and prejudice analysis." Detrich v. Ryan, 740 F.3d 1237, 1246 (9th Cir. 2013).

In Buck v. Davis, 137 S.Ct. 759, 773-74 (2017), the Court condemned the practice of denying a COA based on a determination that the appellant would lose on the merits.

In essence, the district court determined that the Martinez exception

does not apply because Carballo would not prevail on the merits of his IATC claim. This analysis is contrary to Buck. Carballo's claim arguably has "some merit" or "factual support" in the record or could satisfy the standard for a COA.

B. Reasonable Jurists Could Find That The District Court's Rejection Of The Claim On The Merits Is Debatable Or Wrong.

1. The district court erred in applying 28 U.S.C. § 2254(d) to Carballo's claim.

The district court had it both ways: First, finding that "The state habeas court evaluated and rejected" this claim, and then, finding that Carballo "did not 'fairly present' such claim for review by the state's highest court." App. D at 8. The court concluded that "Carballo has not met his AEDPA burden to show that the state court's rulings were contrary to or an unreasonable application of federal law, or the result of an unreasonable determination of facts. App. D at 8.

The Court has explained that if a claim was not adjudicated on the merits in state court, the legal questions and mixed questions of law and facts are reviewed de novo. Cone v. Bell, 556 U.S. 449, 472 (2009)(citing Rompilla v. Beard, 545 U.S. 374, 390 (2005) and Wiggins v. Smith, 539 U.S. 510, 534 (2003). Because it dictates the standard of review, a predicate question in habeas corpus proceedings is whether the state court adjudicated a claim on the merits. A judgment is "on the merits only if it was 'delivered after the court...heard and evaluated the evidence and the parties substantive arguments.'" Williams, 568 U.S. at 302.

Based on the arguments, supra, in this petition, Carballo has shown that he was entitled to de novo review under Martinez and Trevino or Johnson.

2. The district court unreasonably applied Strickland's prejudice prong to Carballo's claim.

The district court found that "In light of the significant evidence of guilt presented at trial, including the testimony of police officers and the complainant, Carballo would not be able to show Strickland prejudice on his defaulted allegations of ineffective assistance of counsel. App. D at 10. Further, that Carballo "cannot show that his own testimony about his version of events...would have led to a reduced sentence, and thus cannot show prejudice from counsel's trial strategy." App. D at 7.

First, it cannot be trial strategy for a defense attorney to unilaterally override his client's decision to testify to his own version of events during trial. Second, the State's case against Carballo was far from unassailable and "A VERDICT OR CONCLUSION ONLY WEAKLY SUPPORTED by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland v. Washington, 466 U.S. 668, 696. (1984). Carballo's guilt "boiled down to whether the jury found Solis's [the complainant] testimony credible." App. G at 9.

The court ignored the substance of the testimony Carballo would have given on redirect questioning by his defense counsel, to determine whether there is a reasonable probability that but for counsel's error, the outcome would have been different. Strickland, 466 U.S. at 695. ECF No. 37-2, pp.11-18 (Affidavit of Leeroy Carballo).

The court took the approach that no defendant could ever show prejudice regardless of the claim as long as "significant" evidence of guilt was presented at trial. The court assumed that such error would have made no difference. This prejudice analysis involves an incomplete unreasonable application

of Strickland. It completely avoids the [prejudice] prong of Strickland, rather than analyzing what difference the error would have had on the outcome of the trial.

3. The district court erred in denying Carballo an evidentiary hearing on his claim.

In denying Carballo an evidentiary hearing, the district court cited Schriro v. Landrigan, 550 U.S. 465, 476 (2007)("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.") App. D at 10.

The record is clear that against the expressly stated decision of Carballo, his trial counsel, during the punishment phase of trial, failed to question as a witness before the jury about "the events surrounding" the offense of which he was accused, and then, shortly after, implied that Carballo was guilty during closing arguments.

The record does not reveal why trial counsel infringed on Carballo's rights, nor whether Carballo's purported testimony would have been found credible. Nevertheless, Carballo has alleged facts, which if proven true, would make counsel's conduct objectively unreasonable under Strickland and would entitle Carballo to relief. If the claim is procedurally defaulted, the district court still had the authority to conduct an evidentiary hearing--especially where the state court denied a hearing. Cullen v. Pinholster, 131 S.Ct. 1388, 1400-01 n/5 (2011)(federal court can conduct hearing where petitioner diligently attempted but failed to obtain hearing in state court on claim not adjudicated on merits).

The Ninth Circuit has held that a district court should allow discovery and an evidentiary hearing on a procedurally defaulted IATC claim. Detrich

v. Ryan, 740 F.3d 1237, 1246-48 (9th Cir. 2013).

Reasonable jurists could find that the district court's determination that the record refutes Carballo's factual allegations or otherwise precludes habeas relief is debatable or wrong or that the issues deserve encouragement to proceed further. Otherwise, district courts will continue to sidestep Martinez and Trevino by denying relief without providing habeas petitioners with the opportunity to develop the record to rebut the statutory presumption.

Carballo did not "fail to develop the factual basis" of the claim in the state court proceedings. Carballo filed a motion requesting "a formal evidentiary hearing" and expressed his intent to "subpoena trial counsel," "so that he could...depose...cross-examine, or question" him "to prove his ineffective assistance of counsel claims." The TCCA denied this motion. ECF No. 30-14, pp. 1-7.

4. The district court erred in denying Carballo's motion to stay and abeyance to resubmit the claim to the state court.

In Rhines v. Weber, 544 U.S. 269, 278 (2005), the Court explained that a motion to stay and abeyance should be granted only in limited circumstances when there is good cause for the failure to exhaust, the unexhausted claim is potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Carballo raised this same Claim 4(c) in his second motion to stay in response to the procedural default raised by the magistrate judge. Carballo relied on Martinez and Trevino to show good cause. ECF No. 45, pp. 1-5. A reading of Carballo's arguments concerning this claim show that this claim is potentially meritorious. ECF No. 19, pp. 44-45; 19-1, pp. 1-7; 37, pp. 5-21. Carballo did not engage in dilatory litigation tactics in moving to stay

the proceedings following the procedural default raised in the M & R. Texas did not oppose the motion to stay.

The Court recognized that most, but not all, prisoners would want speedy habeas relief on their claims, specifically pointing out that capital petitioners might have reason to be dilatory. Rhines, 544 U.S. at 277-78.

The district court merely stated, "After considering the record and the law, the court denies the motions to stay." App. C at 1.

CONCLUSION

The Fifth Circuit neither disputed the points Carballo raised surrounding this claim, nor approved of the District Court's analysis of the application of Strickland, Martinez & Trevino, and of 28 U.S.C. § 2254(d) or any of its procedural rulings.

Despite Carballo's substantial showing of the denial of a constitutional right in this case, the Fifth Circuit denied Carballo's application and conclusorily declared:"Carballo has failed to make the requisite showing." App. B at 2. The Fifth Circuit failed to review Carballo's appeal on the District Court's denial of his motion for an evidentiary hearing and motion to stay. Young v. Stephens, 795 F.3d 484 (5th Cir. 2015)(COA not required on a non-merits issue, such as a stay in a habeas case.).

This Court's review is warranted in order to ensure that the fundamental rights in this case will not be ignored and to maintain public confidence that courts will not permit a defense attorney to overridea defendant's right to testify, even if by only preventing him from testifying to a part of his defense.

This 10th day of September, 2019

Leeroy Cesar Carballo

DECLARATION

I, Leeroy Cesar Carballo, TDCJ #1462910, DOB 11-30-1978, am housed and in custody at the Pack Unit, 2400 Wallace Pack Rd., Navasota, Texas 77868 in Grimes County, Texas, do swear under penalty of perjury that the facts stated in this petition for Writ of Certiorari are both true and correct to the best of my knowledge.

Executed on the 7th, day of September, 2019

Leeroy Cesar Carballo

Leeroy Cesar Carballo
Petitioner - pro se