

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JOHN STEVEN GARDNER § § CIVIL ACTION No. 1:10-CV-610
v. § § JUDGE RON CLARK
DIRECTOR, TDCJ-CID § §

MEMORANDUM OPINION AND ORDER OF DISMISSAL

Petitioner John Steven Gardner, an inmate confined on death row in the Texas prison system, filed the above-styled and numbered Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Mr. Gardner is challenging his capital murder conviction and death sentence imposed by the 219th District Court of Collin County, Texas, in Cause Number 219-81121-06, *The State of Texas vs. Gardner*. The Court finds that the Petition should be denied.¹

I. PROCEDURAL HISTORY OF THE CASE

On November 14, 2006, Mr. Gardner was convicted and sentenced to death for the murder of his estranged wife, Tammy Gardner, in the course of committing or attempting to commit burglary or retaliation for her status as a prospective witness. 2 CR (219-81121-06) 608. The offense took place on January 23, 2005. The Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009). On

¹ “CR” refers to the documents and pleadings filed in the State convicting court, or clerk’s record. The clerk’s record in this case totals six volumes; however, Mr. Gardner was re-indicted twice, so instead of six sequential volumes, there are three two-volume sets differentiated only by the trial court cause number. The references are preceded by the volume number and followed by the trial court cause number and page number where necessary.

“RR” refers to the reporter’s record of the transcribed testimony during the trial, preceded by the volume number and followed by the page number.

“SCHR” refers to the State habeas clerk’s record, preceded by the volume number and followed by the page number.

On the disc containing these documents, the CR and RR are in a file labeled AP 75,582. The SHCR is in a file labeled WR 74,030.

October 4, 2010, the United States Supreme Court denied the petition for writ of certiorari. *See Gardner v. Texas*, 562 U.S. 850, 131 S. Ct. 103 (2010).

While the direct appeal was pending, Mr. Gardner filed an application for a writ of habeas corpus in State court. 1 SHCR 3–216. The trial court entered written findings and recommended that relief be denied. 2 SHCR 383–401. The Texas Court of Criminal Appeals adopted a majority of the habeas trial court's recommended findings and denied relief. *Ex parte Gardner*, No. WR-74030-01, 2010 WL 3583072, at *1 (Tex. Crim. App. Sept. 15, 2010) (unpublished). On September 15, 2010, the Texas Court of Criminal Appeals denied relief based on the trial court's findings and conclusion and on its own review of the record, and included the following statement with its denial:

[The court] agree[s] with the trial judge's recommendation and adopt the trial judge's findings and conclusions, except for findings paragraphs 67, 85, and 86. In addition, we do not adopt the phrase, "at China Blue's direction," in findings paragraph 81. We also observe that the word, "first," in findings paragraph 94(c) should be changed to the word, "second." Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

Gardner, 2010 WL 3583072, at *1.

Mr. Gardner began the present proceedings on September 29, 2010. He filed his original petition for writ of habeas corpus on September 7, 2011. (Dkt. # 17). The Director responded (Dkt. # 27), and Mr. Gardner replied (Dkt. # 32).

Subsequently, the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012) held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance of trial.” 566 U.S. at 8. Later that year, the Fifth Circuit held that *Martinez* did not apply to habeas cases in Texas. *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012). In 2013, the United States Supreme Court released its decision in *Trevino v. Thaler*, in which it held that in Texas, a death row inmate can raise an

ineffective assistance of counsel (“IATC”) claim for the first time in a federal habeas petition because Texas courts make it “virtually impossible” to present an IATC claim on direct review. *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 1915 (2013) (quoting *Robinson v. State*, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000)).

Mr. Gardner then moved for “Additional, Conflict-Free Counsel,” on the basis of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (Dkt. # 49). The court granted the motion and appointed additional counsel to address whether Mr. Gardner could establish cause and prejudice for any procedurally defaulted ineffective assistance of trial (IATC) claims. (Dkt. # 74). That counsel filed a supplemental IATC claim. (Dkt. # 78). The Director filed a response (Dkt. # 79), and Mr. Gardner, through his additional-but-independent counsel, replied (Dkt. # 82). Mr. Gardner’s habeas counsel also filed a response. (Dkt. # 84).

II. FACTUAL BACKGROUND OF THE CASE

The Texas Court of Criminal Appeals summarized the factual background of the case as follows:

[Mr. Gardner] and Tammy Gardner had a relatively short, but violent, marriage. Before Tammy married [Mr. Gardner] in 1999, she was very outgoing and happy. After that marriage, she lost weight, became introverted, and lost her sparkle. [Mr. Gardner] dominated, threatened, and physically abused her. His name was tattooed on her inner thigh.

Jacquie West, Tammy’s best friend, testified that the one time she visited Tammy’s home after the marriage, she and Tammy’s daughter, Jessie, were sitting in the living room when [Mr. Gardner] came in, pushed Tammy onto the bed, sat on her, choked her with his hand, and then put a gun to her head. [Mr. Gardner] said that if Jacquie didn’t leave, he would kill Tammy. Jacquie left and never returned. Shortly thereafter, Tammy sent Jessie to live with her natural father for her safety.

Both Jacquie and Jessie saw injuries on Tammy’s face on various occasions. Tammy told Jessie that one time [Mr. Gardner] shoved her into a bookcase, then hit her and gave her a black eye. Jacquie said that Tammy once had a large bruise running diagonally across her face. When confronted, Tammy matter-of-factly admitted that [Mr. Gardner] had hit her in the face with a hammer. Both had seen [Mr. Gardner] “stalking” Tammy at different times. Tammy told them that “she wasn’t getting out of there alive,” meaning that she would not get out of her marriage alive. Candace Akins, her boss at the Action Company, a wholesale horse-equipment

company, said that Tammy was constantly fearful, nervous, and in extreme financial difficulties. Tammy said that “she wanted out of the relationship,” but she was afraid to leave, and she told Candace many times, “I can’t leave, he will kill me.”

Tammy eventually went to a neurologist complaining of vision loss, headaches, sleeplessness, anxiety, and depression. She told the doctor’s wife—who was assisting her husband and who had her own family counseling practice—that she was too embarrassed to tell the doctor that her migraines were caused by physical injuries from her husband. She said that [Mr. Gardner] had pulled her hair and hit her both with his fists and with a gun. She was very frightened of him and kept crying, “The only way I’m going to get out of this relationship is by being dead.” She explained that [Gardner] had threatened to kill her and her children if she left him.

Finally, in December 2004, Tammy borrowed money from her company to file for divorce. On Christmas day she told [Mr. Gardner] to move out, so his parents came and took him and his belongings back to Mississippi. She “perked up” after she filed for divorce, and she began to see more of Jacquie and her daughter Jessie. At work, Tammy marked her calendar for February 7, 2005, the day her divorce would become final, and she would go over to the calendar and say, “You’re almost there. You’re almost there.”

But she also told Jacquie, Jessie, and Candace that she didn’t think she would get to that day because [Mr. Gardner] would kill her first. Jessie testified that [Mr. Gardner] kept calling and leaving phone and text messages: “Are you going through with the divorce or not?” When Jacquie and Tammy had lunch together at Applebee’s on January 20th, Tammy’s cell phone started ringing as soon as they got there. It rang constantly, making Tammy upset and scared. She told Jacquie, “He’s going to kill me” before the divorce becomes final.

On Sunday, January 23rd, Tammy was driving Jessie home after church when [Mr. Gardner] kept text messaging about the upcoming divorce and asking “YES OR NO?” Jessie read the text messages to her mother, who became frantic, but Tammy did not reply to [Mr. Gardner’s] question. The messages stopped about 5 p.m. Jessie stayed at her father’s home that night.

Tammy called David Young, her company’s vice-president, early that evening and asked him if she could come talk to him. She arrived around 7:00 p.m. and stayed about three hours, seeking his help in “disappearing” so that no one could track her. Mr. Young was concerned about Tammy’s safety, but he felt more comfortable when she called him after she returned home about 11 p.m. According to the phone records, they talked until 11:13 p.m.

At 11:58 p.m., Erin Whitfield, the 911 dispatcher for the Collin County Sheriff’s Office, received a 911 call from a woman who identified herself as “Tammy,” gave her address, and said she needed an ambulance. Her speech was very slurred and hard to hear, but she said that her husband had either slapped or shot her (Ms. Whitfield wasn’t sure until she replayed the tape that the word was “shot”). The woman said that she couldn’t hear the dispatcher because her ears were still ringing from gunshots and that her head hurt and “there was blood everywhere.” When Ms. Whitfield asked if the person who shot her was still there, the woman said, “No, he left in a white pickup truck with Mississippi plates.” She said his name was Steven Gardner. The dispatcher had to yell and repeat herself because the woman sounded like she was choking and vomiting. Then the line disconnected.

Ms. Whitfield dispatched police and paramedics, but it took the police about 25 minutes to arrive because, at first, they went to the wrong address, 3191 FM 2862

instead of 9191 FM 2862. As Deputy Armstrong drove there, he saw a white truck sitting in a ditch by a creek about two or three miles from Tammy's home, but it was only later that he learned that they were looking for a white truck. He was the first to arrive at Tammy's home. He knocked on the doors, but there was no answer, and he could not get in through the windows. He had to kick in the front door. He saw a light on in the bedroom, and, when he entered, he saw Tammy on the bed with a trail of blood leading into the bathroom. She was trying to sit up, but she was bleeding badly from her head and seemed to be in shock.

By the time the paramedics arrived, Tammy was spitting up a lot of blood and mumbling incomprehensibly. She was wearing a red robe. One of the paramedics, Stephanie Taylor, cut the bottom part of the robe off because she couldn't properly assess Tammy's condition while she was dressed. Tammy was flown by helicopter to Parkland Hospital, but she went into a coma, and her family took her off life support two days later. Tammy died from a single gunshot to her head. The bullet had hit her in the front right temple, traveled downward through her brain, and exited below her left ear. Apparently, Tammy had been sitting up against a pillow in bed, and the exiting bullet went through the pillow and out the bedroom window. The bullet was never recovered.

Investigating police found Tammy's house keys—keys that Jessie said her mother always kept in her purse—in a tool chest in the back of her truck parked in the driveway. Nothing else appeared to have been taken from the house. There was no sign of forced entry.

Meanwhile, [Mr. Gardner] had borrowed his brother-in-law's white Ford F-150 pickup truck that Sunday afternoon, saying that he was going to visit relatives in nearby Hattiesburg. However, [Mr. Gardner's] credit card was used twice that day at a convenience store in Marshall, Texas, which is on the way from Mississippi to Collin County. He apparently bought gas for \$28.00 and then made another purchase for \$3.86. The backing and store price tag for a pair of Brahma work gloves—an item that the Marshall convenience store sold for \$1.49—were later found in the white F-150 pickup. [Mr. Gardner's] fingerprint was found in that pickup as were fibers that were similar in all respects to red fibers taken from Tammy's robe.

In the early hours of Monday, Collin County Det. Cundiff found [Mr. Gardner's] father's telephone number and called him in Mississippi. Det. Cundiff obtained [Mr. Gardner's] cell phone number and called him at 5:15 a.m. [Mr. Gardner] hung up on him. [Mr. Gardner] returned to his brother-in-law's home driving the white F-150 pickup at about 8:30 a.m. His sister, Elaine Holifield, had already been told that Tammy had "an accident." She confronted [Mr. Gardner] and asked, "What happened?" He didn't say anything; he just started crying. She asked if Tammy was okay, and [Mr. Gardner] said, "Yes." Elaine told him that he had to turn himself in to the police, and he said, "Okay." He showered, changed clothes, shaved, and went first to his parents' home and then to the sheriff's office. Elaine then went to check for her husband's .44 Magnum that he kept under his mattress. It was there, with five live rounds and one spent round. [Mr. Gardner's] brother-in-law testified that he never left spent shells in his gun; he always reloaded it.

When [Mr. Gardner] turned himself in to the sheriff's office in Mississippi, officers there called Det. Cundiff in Collin County, who said that he did not have a warrant out for [Mr. Gardner's] arrest. But he asked to speak to [Mr. Gardner] on the phone, and [Mr. Gardner] agreed. Det. Cundiff explained that he knew that [Mr. Gardner] had been in Texas and he wanted to find out what happened to Tammy. [Mr.

Gardner] said, “I don’t have an answer for that one.” When Det. Cundiff explained that Tammy had been shot in the head, [Mr. Gardner] replied, “Okay.” Then Det. Cundiff said that Tammy was still alive, and [Mr. Gardner] said that she could tell what had occurred “if she wants, that’ll be fine.” [Mr. Gardner] then went home but was later arrested and brought back to Collin County for trial.

Gardner, 306 S.W.3d at 281–84.

At the punishment phase of the trial, the State introduced evidence of Mr. Gardner’s violent past. Mr. Gardner had been married five times, and all of his marriages, with the exception of the first marriage, were marked with violence and depravity. Mr. Gardner married his first wife, Rita, in Hawaii, and they eventually separated without apparent incident. 23 RR 48.

Mr. Gardner thereafter married Rhoda, and they resided in Laurel, Mississippi. 22 RR 28–30; 23 RR 49. Their relationship ended when Mr. Gardner waited for Rhoda in hiding, called out to her, and then shot her when she turned around. 22 RR 77. Mr. Gardner shot Rhoda again as she lay on the ground, and stood over her until she urinated on herself, believing that this confirmed that she had died. 22 RR 77–78. But, Rhoda survived the three gunshot wounds but was rendered a paraplegic. 22 RR 16–17. She was pregnant at the time of the shooting and had a miscarriage approximately seven weeks after being shot. 22 RR 17–18. Rhoda underwent a surgical procedure after she miscarried; she died during the operation. 22 RR 19–20. Mr. Gardner was convicted of aggravated assault for shooting Rhoda and was sentenced to eight years’ imprisonment. 22 RR 33; SX 77.

While imprisoned for his criminal activity against Rhoda, Mr. Gardner began corresponding with Margaret Westmoreland. They became romantically involved. 22 RR 33–34. When Mr. Gardner was released on parole, he married and moved in with Westmoreland. Her two children from her previous marriage, six-year-old Tim and thirteen year-old Becky, lived with them. 22 RR 34–35. Westmoreland testified that their dating relationship was “great,” but after marriage, Mr. Gardner acted like “he owned” her. 22 RR 36. Mr. Gardner dictated what Westmoreland could

wear, eroded her self-esteem, and ominously watched her while she was at work. 22 RR 36, 38–39. Mr. Gardner also threatened Westmoreland and her family, including threats of “skinning” Westmoreland’s children alive, while Westmoreland watched, and breaking Westmoreland’s neck. 22 RR 37. Westmoreland thought that Mr. Gardner would eventually kill her, but she did not immediately leave him because she did not believe it was safe to do so. 22 RR 38, 40.

Testimony revealed that Mr. Gardner was also sexually and emotionally abusive to Becky during his relationship with Westmoreland. 22 RR 67, 78. Mr. Gardner’s and Westmoreland’s relationship ended when Mr. Gardner violently assaulted Becky. The teenaged girl required seventy-eight stitches in her head to repair the damage that Mr. Gardner inflicted. Becky had to spend the night in the hospital after the assault. 22 RR 43–47, 71–73; SX 69.

After the assault on Becky, Westmoreland ended her relationship with Mr. Gardner. Mr. Gardner then abducted Westmoreland at knifepoint at her place of employment. 22 RR 50–52. Mr. Gardner forced Westmoreland to drive to various locales, eventually engaging in a high-speed chase with the police. 22 RR 50–53. Westmoreland finally pulled over. 22 RR 52. Mr. Gardner was then arrested. His parole was revoked, and he was sent back to prison. 22 RR 53. Despite his imprisonment, Mr. Gardner still contacted Westmoreland, threatening to “hunt [her] down” if she left him. 22 RR 54.

Mr. Gardner then married a woman named Sandra, and the couple had a son, Nicholas. 23 RR 52–53. That marriage ended in June 1999. SX 72. In mid-August 2001, Sandra applied for a temporary protective order, alleging family violence. SX 72. A two-year protective order was granted in late-August 2001. SX 72.

Mr. Gardner’s final marriage was to Tammy, the homicide victim in the present case. Mr. Gardner was abusive to her during their marriage, and Tammy sought a divorce. Before the

divorce was finalized, Mr. Gardner shot and killed her. Mr. Gardner also sexually assaulted Tammy's daughter, Jessie, beginning when she was nine. 22 RR 124–127.

Testimony regarding other incidents of criminal activity was also introduced during the sentencing hearing. For instance, Mr. Gardner was also spotted by police masturbating in his vehicle at the Irving Mall during Christmastime in 1992, while women and children were in the area. 22 RR 93–95. When police apprehended him, Mr. Gardner possessed two illegal knives and a wooden club in his vehicle. 22 RR 102–03. Finally, while in the Army, Mr. Gardner was punished for disobeying a superior non-commissioned officer and for leaving his post without authority. SX 74. An Army psychiatrist noted that Mr. Gardner had an “inadequate, immature, [and] sociopathic personality” and that Mr. Gardner was considered “ineligible for [re]enlistment” when he was discharged. SX 74.

In his defense at punishment, Mr. Gardner called a former coworker to testify that he was responsible, diligent, and religious. 23 RR 8–9. Another former coworker testified that Mr. Gardner was professional and courteous at work. 23 RR 17. Although Mr. Gardner had trouble in the military, he did receive multiple commendations while in the Army, including the “National Defense Service Medal” and the “Good Conduct Medal.” SX 74.

Finally, Mr. Gardner's sister Elaine testified that their father had a violent temper and was abusive to their mother and Mr. Gardner. 23 RR 30–32. Mr. Gardner's father beat the children frequently. Mr. Gardner received the brunt of the beatings. 23 RR 30–32, 37–38. Elaine recalled one incident where their father was preaching at a church but then suddenly got up from his chair, took Mr. Gardner outside of the meeting hall, and beat Mr. Gardner so loudly that the congregation could hear it. 23 RR 35–36. Despite the abuse, Elaine explained that “two lives were led, the one in front of the public, and then the one behind closed doors,” and that the

authorities were never called because “[y]ou didn’t do that.” 23 RR 39, 44. Elaine also pleaded with the jury to spare her brother’s life. 23 RR 42, 58–59.

Elaine also acknowledged that Mr. Gardner had a good relationship with his parents at the time of trial. 23 RR 53. In fact, Mr. Gardner wrote his parents a letter, while in jail pending trial, thanking them for being great parents and for making his life easier. 23 RR 55, SX 79.

The jury found Mr. Gardner to be a future danger and concluded that there were not sufficient mitigating circumstances to warrant a life sentence. CR 616–17, 23 RR 121. Accordingly, the trial court sentenced Mr. Gardner to death. CR 618, 23 RR 124.

III. GROUNDS FOR RELIEF

Mr. Gardner presented the following grounds for relief in his petition:

1. Trial counsel were ineffective during the guilt-innocence phase of trial because they did not present an “abandonment rage” defense to negate an essential element of capital murder—retaliation for status as a prospective witness.
2. Trial counsel were ineffective because they presented multiple, inconsistent, and implausible theories in both the guilt-innocence and punishment phases of trial, due to their failure to timely investigate and develop crucial information.
3. Trial counsel were ineffective because they failed to adequately investigate and *develop* crucial mitigating evidence and failed to *present* that crucial mitigating evidence.²
4. The trial court erred in admitting Tammy’s 911 call into evidence because the admission violated Mr. Gardner’s Sixth Amendment right to confrontation.

(Dkt. # 19, at pp. 27–135). Mr. Gardner presented the following ground for relief in his Supplemental IATC Petition:

5. State habeas counsel should have raised the following claim in State court: Trial counsel were ineffective for failing “to get the work product of their recalcitrant mitigation

² In Mr. Gardner’s Petition, Mr. Gardner’s counsel presented trial counsel’s failure to adequately *develop* and to adequately *present* as crucial mitigating evidence as two separate grounds for relief. (Dkt. # 17 at p. 96). Mr. Gardner’s counsel then analyzed these two separate grounds together in Mr. Gardner’s Petition. For simplicity, the court considers these two grounds as one ground for relief.

specialist, Shelli Schade.”

(Dkt. # 78, at p. 1).

IV. LEGAL STANDARD

The petition was filed in 2011; thus, review is governed by the Antiterrorism and Effective Death Penalty Act (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a petitioner who is in custody “pursuant to the judgment of a State court” is not entitled to federal habeas corpus relief 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.

28 U.S.C. § 2254(d). “By its terms § 2254 bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington v. Richter*, 562 U.S. 86, 98 (2011). The AEDPA “imposes a highly deferential standard for evaluating state court rulings, and demands that state court decisions be given the benefit of the doubt.” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations and quotations omitted). With respect to the first provision, “[a] state court’s decision is ‘contrary to’ clearly established federal law if (1) the state court ‘applies a rule that contradicts the governing law’ announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts.” *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (*en banc*); *see also Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003).

“[R]eview under § 2254(d)(1) is limited to the record that was before the State court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). As