No. 23-5421

IN THE
Supreme Court of the United States

BRENT RAY BREWER,
Petitioner,
v.

BOBBY LUMPKIN, 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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Was the Fifth Circuit required to grant a certificate of appealability when it determined, consistent with the state court's denial of habeas relief, that Brewer's trial counsel did not render ineffective assistance by failing to object to the testimony of Dr. Richard Coons?

2. Brewer's state habeas application was over 400 pages in length and raised 29 claims in all, including sub-claims. One judge on the Texas Court of Criminal Appeals indicated she would grant Brewer's application, but she did not indicate which claim warranted relief or explain the basis for her decision. Was the Fifth Circuit required to grant a certificate of appealability on Brewer's ineffective assistance claim concerning Dr. Coon's testimony based on one judge's unexplained dissent?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 1991, Petitioner Brent Ray Brewer was convicted for the capital murder of Robert Laminack and sentenced to death by a Texas court. In 2009, he was again sentenced to death after receiving a new sentencing trial. In 2015, after his direct appeal and state-habeas application were denied, Brewer filed a federal habeas petition. After receiving a stay to allow him to exhaust claims, the federal district court denied relief in 2022. The Fifth Circuit denied a certificate appealability (COA) and declined to rehear the case. Brewer's execution is set for November 9, 2023, over thirty-two years later.

Brewer now requests certiorari review of the Fifth Circuit's denial of a COA, arguing that conflicting rulings by the state and federal courts, and an unexplained dissent by a state court judge—in a state habeas case with a 400-page application—warranted a COA. But Brewer's allegation of conflicting rulings is illusory. Further, there was no dispute between the courts that he failed to prove prejudice on the relevant ineffective assistance claim, so the claim fails regardless. And Brewer fails to show the unexplained dissent is even related to the claims he sought a COA on. Absent such a showing, Brewer's case is distinguishable from the cases he cites in support of review and a poor vehicle to decide the alleged circuit split. Thus, certiorari review is not appropriate here and Brewer's request should be denied.

STATEMENT OF THE CASE

I. Factual Background

The Fifth Circuit briefly summarized the factual background of this case as follows:

> On April 26, 1990, then 19-year-old Brent Brewer and his girlfriend, Kristie Nystrom, approached Robert Laminack outside his flooring store in Amarillo, Texas and asked for a ride to the Salvation Army. Laminack invited the young couple to get in his truck; Nystrom took the front seat, and Brewer sat in the back. While en route, Brewer grabbed Laminack and began to stab him in the neck with a butterfly knife. Laminack begged for his life while obeying Brewer's demand to hand over his keys and wallet. He was wounded in the carotid artery and jugular vein. After losing consciousness, he bled to death.
>
> In 1991, Brewer was convicted of capital murder and sentenced to death. A multi-year saga of direct and collateral challenges to his conviction and sentence ended in 2007 when the United States Supreme Court, ruling on the adequacy of jury instructions for the sentencing phase, ordered that Brewer be resentenced. *See Brewer v. Quarterman*, 550 U.S. 286, 127 S. Ct. 1706, 167 L.Ed.2d 622 (2007).
>
> In a 2009 retrial of the sentencing, the state presented many of the same witnesses and evidence as it had at Brewer's first capital murder trial. These included: Robert Laminack's widow and daughter; numerous crime scene photographs; blood spatter testimony and other physical evidence, such as Brewer's bloody fingerprint on the butterfly knife found at the crime scene; testimony that Brewer "smirked and giggled" when describing to a witness how Laminack begged for his life; testimony that Brewer told a former cellmate that Laminack pleaded "please don't kill me, Boy" as Brewer stabbed him; and a photograph of Brewer "shooting the finger" while exiting the courthouse around the time of his arraignment for Laminack's murder. Dr. Richard Coons, a forensic psychiatrist, testified that there was a probability that Brewer

would commit criminal acts of violence in the future, as he had opined before at Brewer's 1991 trial.

Unlike in 1991, Kristie Nystrom, Brewer's former girlfriend and accomplice in the murder of Robert Laminack, agreed to testify in order to obtain a favorable parole consideration. Nystrom gave a chilling firsthand account of the killing, which contained details the 1991 jury did not hear, such as that Brewer began to stab Laminack before asking for his wallet or truck keys.

The defense presented testimony from Brewer's mother and sister, who described Brewer's childhood and teenage years, and numerous correctional officers, who testified that Brewer had been an exemplary inmate for nearly two decades both on and off death row. The defense also used Dr. John Edens, a forensic psychologist, to attack Dr. Coons's methodology as having no basis in legitimate science. Finally, in order to counter the state's aggravating evidence and show Brewer's remorse, the defense put Brewer on the stand. He described his childhood, his former relationship with Kristie Nystrom, and the murder of Robert Laminack. He said he was sorry for what he had done to Laminack and his family.

A unanimous jury again found beyond a reasonable doubt that there was a probability that Brewer would commit criminal acts of violence that would constitute a continuing threat to society. The jury also found that the mitigating evidence presented by defense counsel was insufficient to merit a life sentence. The trial court resentenced Brewer to death.

Brewer v. Lumpkin, 66 F.4th 558, 561 (5th Cir. 2023).

II. Appellate and Postconviction Proceedings

The Texas Court of Criminal Appeals (CCA) affirmed Brewer's second sentence. ROA.10722–39; *Brewer v. State*, No. AP-76,378, 2011 WL 5881612 (Tex. Crim. App. Nov. 23, 2011); Pet. Appx. A299–316. Brewer then filed a state habeas application challenging his re-trial. ROA.5125–535. The application

was over 400 pages and raised 29 claims in all, including sub-claims. ROA.5125–535. Following an evidentiary hearing, the trial court submitted findings of fact and conclusions of law recommending denial of habeas relief. ROA.21485–587; Pet. Appx. A196–298. The CCA adopted most of the trial court's findings and conclusions and denied relief. ROA.18045–46; *Ex parte Brewer*, No. WR-46,587-02, 2014 WL 5388114 (Tex. Crim. App. Sept. 17, 2014); Pet. Appx. A194–95. Judge Cheryl Johnson indicated she would grant the application but offered no explanation. ROA.18045; *Brewer*, 2014 WL 5388114, at *1; Pet. Appx. A194.

Brewer then moved to federal court, where he filed a federal habeas petition under 28 U.S.C. § 2254. ROA.83–188, 841–970. The district court granted Brewer's motion to stay and abate his federal habeas proceedings. ROA.1542–64; ROA.1749–62, 1825–33. Brewer filed a subsequent state habeas application, ROA.22195–249, which the CCA dismissed as an abuse of the writ without considering the merits. ROA.22189–91; *Ex parte Brewer*, No. WR-46,587-03, 2019 WL 5420444 (Tex. Crim. App. Oct. 23, 2019). Brewer returned to the district court and filed an amended federal petition. ROA.7457–595. The Director answered. ROA.8983–9157. The magistrate issued findings, conclusions, and a recommendation that Brewer be denied habeas relief, ROA.9272–427; Pet. Appx. A38–193. The district court adopted the magistrate's findings and recommendation, denied relief, and denied a COA.

ROA.10244–67; Pet. Appx. A14–37. Brewer then filed a motion to alter or amend the judgment and for a COA, ROA.10425–35, but the lower court denied these motions, ROA.10445–51.

Brewer filed an application for COA on three grounds in the Fifth Circuit Court of Appeals, including his claim that trial counsel rendered ineffective assistance by failing to properly challenge the State's expert testimony on future dangerousness. The Fifth Circuit denied COA and denied Brewer's motion for rehearing. *Brewer*, 66 F.4th at 561, 568; Pet. Appx. A1, A3–13.

REASONS FOR DENYING THE WRIT

I. Certiorari Review Should Be Denied Where the Fifth Circuit's Ruling Applied the Correct Standard for Denying a COA and Was Consistent with the CCA's Denial of Relief.

Brewer's first argument for granting certiorari rests on the false assertion that the Fifth Circuit's ruling conflicted with the CCA's decision. Specifically, Brewer takes issue with the Fifth Circuit's conclusion that "[r]easonable jurists could not debate the district court's conclusion that the state courts did not act unreasonably in holding that trial counsel were not ineffective for failing to make what at that time would have been a futile objection to the introduction of Dr. Coons's testimony." Pet. 12–14 (citing Pet. Appx. A9). Ignoring unfavorable findings and conclusions that support the Fifth Circuit's ruling, he contends that the CCA never held an objection would have been futile and instead found trial counsel was deficient for failing to

object. Pet. 10, 13, 19. But the state habeas court never found trial counsel was deficient for failing to object, and its findings and conclusions support the Fifth Circuit's ruling that an objection would have been futile at the time of trial.

Indeed, after first stating the claim in the findings, the state court's second factual finding noted that the CCA's decision in *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), which found Dr. Coons's testimony inadmissible, was not issued until after trial. Pet. Appx. A200. In its second conclusion of law, just after stating the standard for ineffective assistance claims, the state habeas court concluded counsel's performance is judged on the law at the time of trial and *Coble* occurred after the trial. Pet. Appx. A268. Nowhere in the findings and conclusion does the state court actually find trial counsel deficient for failing to object. Pet. Appx. A200–20, A268–72.

Consistent with the state habeas court's findings and conclusions, the Fifth Circuit ruled a COA was not warranted on Brewer's claim that trial counsel were ineffective for failing to object to the admission of Dr. Coons's testimony. *Brewer*, 66 F.4th at 563–64. In reaching its decision, the court noted that "[b]y 2009, Dr. Coons had testified in at least sixteen Texas judicial proceedings on the special issue of future dangerousness, including Brewer's 1991 trial," and "*Coble* marked the first time that Dr. Coons's testimony had

been deemed inadmissible."[1] *Id.* at 564. Further, the Fifth Circuit found the district's court's conclusion that trial counsel cannot be faulted for lacking clairvoyance was correct. *Id.* (citing *United States v. Fields*, 565 F.3d 290, 295 (5th Cir. 2009). Thus, although objecting to the admissibility of Dr. Coons's testimony may not have been futile in the sense it could have led to a finding of error on appeal, it was futile under the law at the time of the trial so counsel was not deficient for failing to object.

Moreover, regardless of whether trial counsel was deficient, both the CCA and federal courts agreed counsel's lack of objection did not prejudice Brewer. Pet. Appx. A212–20, A269, A272; *Brewer*, 66 F.4th at 564–65. Thus, the ineffective assistance claim fails. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (failure to prove either deficient performance or resultant prejudice will defeat an ineffectiveness claim, making it unnecessary to examine the other prong). Where there was no dispute on the prejudice prong between the state and federal courts, a COA was not warranted because there

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[1] Texas law at the time of trial was "settled . . . that psychiatric expert opinion testimony of a defendant's future dangerousness may be based solely upon hypothetical questions, without the benefit of an examination of the defendant." *Ward v. State*, AP-74,695, 2007 WL 1492080, at *8 (Tex. Crim. App. May 23, 2007) (not designated for publication). And in many cases prior to *Coble*, including some shortly before Brewer's retrial, the CCA had not found error when the trial court overruled various objections to Dr. Coons's testimony. *Ramey v. State*, No. AP-75,678, 2009 WL 335276, at *14 (Tex. Crim. App. Feb. 11, 2009) (not designated for publication); *Espada v. State*, No. AP-75,219, 2008 WL 4809235, at *8–9 (Tex. Crim. App. Nov. 5, 2008) (not designated for publication); *Lagrone v. State*, 942 S.W.2d 602, 616 (Tex. Crim. App. 1998).

was no conflicting ruling suggesting a reasonable jurist could find the district court's assessment of his claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Ultimately, Brewer presents no compelling reason for the Court to expend its limited resources and grant certiorari. Certiorari is generally reserved for resolving splits in authority or novel and undecided questions of federal law. Sup. Ct. R. 10. Brewer fails to prove the basis of his proposed reason for granting certiorari and relies on a false premise. That alone is justification to reject this argument. *See* Sup. Ct. R. 14.4 ("The failure of a petition to present with *accuracy*, brevity, and *clarity*, whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." (emphasis added)). Additionally, Brewer does not assert the Fifth Circuit applied the wrong standard for a COA, rather his argument is that the court misread the CCA's decision when evaluating the claim. Therefore, certiorari should be denied. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

II. There Is No Compelling Reason to Grant Certiorari Where Brewer Fails to Prove a State Court Judge Would Have Granted Relief on The Claim Raised in His COA Application.

Next, Brewer asserts that because one judge on the CCA indicated she would grant relief without explanation, the Fifth Circuit should have granted a COA on his claim that trial counsel was ineffective for failing to object to the admission of Dr. Coons's testimony. Pet 14–19. But Brewer fails to show there was any division on the state court concerning that ineffective assistance claim. Consequently, he fails to show the Fifth Circuit should have found the claim debatable based on one unexplained dissent.

Here, Judge Cheryl Johnson merely indicated she would have granted habeas relief; she did not author a dissenting opinion or otherwise explain what claim she would have granted relief on and why. ROA.18045; *Brewer*, 2014 WL 5388114, at *1; Pet. Appx. A194. Moreover, Brewer's state habeas application was over 400 pages and raised 29 claims in all, including sub-claims.[2] ROA.5125–535. Therefore, the basis for Judge Johnson's decision is unknown. And while Judge Johnson may have been in the *Coble* majority, that decision found the admission of Dr. Coons's testimony to be harmless error. *Coble*, 330 S.W.3d at 281–87. Thus, it does not show Judge Johnson believed relief was warranted on the basis of Dr. Coons's testimony.

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[2] Brewer later dropped part of one subclaim, two other subclaims, and claims seventeen and eighteen. ROA.21293.

Notably, during the state habeas proceedings, Brewer also made claims concerning the admission of testimony from A.P. Merillat.[3] Pet. Appx. A221–34, A275–76. Judge Johnson was in the majority in two cases that granted relief based on Merillat's false testimony about TDCJ's classification of capital defendants, and she wrote one of opinions. *Velez v. State*, No. AP-76051, 2012 WL 2130890, at *31–33 (Tex. Crim. App. June 13, 2012); *Estrada v. State*, 313 S.W.3d 274, 286–88 (Tex. Crim. App. 2010). Judge Johnson's dissent could just as likely have been based on that claim, or any of the other claims considered.

Brewer offers only self-serving speculation to support his contention that Judge Johnson thought relief was warranted on basis of trial counsel's failure to object to the admissibility of Dr. Coons's testimony. His argument that the state court found counsel deficient is meritless for the reasons addressed above. BIO 5–7. Brewer fails to show Judge Johnson was concerned with claims involving Dr. Coons's testimony rather than Merillat's testimony or any of the other claims that were not at issue in his COA application.

Because of Judge Johnson's unexplained and ambiguous decision, this case is distinguishable from the case Brewer cites to support his assertion of a circuit split that warrants review. In *Jones v. Basinger*, 635 F.3d 1030, 1038–40 (7th Cir. 2011), the only circuit case supporting his view, there was a

[3] Brewer also raised claims concerning Merilatt in federal district court that were rejected. Pet. Appx. A87–104.

dissenting opinion from a state court judge explaining the reasoning for the dissent that involved the relevant issue at issue in the COA application. Without any contrary reasoning, Brewer's case is different. In a case with as many claims as Brewer's, courts should not have to divine a judge's reasoning and find a claim debatable where there is no explanation for a dissent.

Brewer also cites two opinions dissenting from the denial of certiorari that involved divisions among state and federal judges on the issues before the courts. Both dissenting opinions involve clear divisions of far more significance. In *Johnson v. Vandergriff*, 143 S. Ct. 2551, at 2551–53, 2555–56 (Aug. 1, 2023) (Sotomayor, Kagan, and Jackson dissenting), which involved a competency to be executed claim, a state court judge noted his dissent, an Eighth Circuit panel had granted a stay and COA, and three judges dissented when the en banc court vacated the panel's order. In *Jordan v. Fisher*, 135 S. Ct. 2647, 2648–52 (2015) (Sotomayor, Kagan, and Ginsburg dissenting), there was a contrary Ninth Circuit en banc opinion in a similar case, as well as a dissenting state court judge and dissenting Fifth Circuit judge who had both written on the relevant issue. This case does not come close to the clarity and level of dispute in those two cases, and this Court still denied certiorari in both of them. Thus, given the ambiguity and distinguishing facts here, this case is a poor vehicle to decide whether division among judges requires a COA.

Finally, as the Fifth Circuit noted when discussing the appropriate standard of review, the issue of whether the claim was debatable and worthy of COA must be analyzed through AEDPA's deferential standard of review, which requires the petitioner to show the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Brewer*, 66 F.4th at 562–63 (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Even if Judge Johnson thought relief was warranted on the relevant claim, she was not analyzing the issue through AEDPA's standard. Thus, her ruling does not fully address the issue before the Fifth Circuit. The state trial court, all the other judges on the CCA, a federal magistrate judge, a federal district court judge, and a unanimous panel of the Fifth Circuit concluded relief was not warranted. Judge Johnson certainly did not indicate there was any federal constitutional error that was beyond any possibility for fairminded disagreement. Brewer fails to show this case was worthy of a COA based only a state court judge's unexplained dissent in a case with numerous claims.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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