No. 17-6883

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS TREVINO,
Petitioner,

V.

LORI DAVIS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent presents an argument based on an analysis of the double-edged nature of new evidence, which would support both a finding of future dangerousness, and a finding of mitigation sufficient to warrant not imposing the death penalty. This follows and supports the Fifth Circuit's analysis of Mr. Trevino's Wiggins claim. In developing that claim, federal habeas counsel undertook a significantly more extensive mitigation investigation, and did in fact uncover additional damaging evidence not presented at Mr. Trevino's trial. Nevertheless, Mr. Trevino's claim is based largely on evidence indicating he suffers from Fetal Alcohol Spectrum Disorder (FASD) as a result of excessively heavy alcohol consumption by his mother while he was in utero. That was the thrust of the COA granted and denied by the Fifth Circuit. Recognizing FASD as at least being in the family of evidence of a mental health issue, Respondent cites this Court for the proposition, at least in a Texas death penalty case, that such evidence is double edged. Brief in Opposition, at 17, citing Penry v. Linaugh, 492 U.S. 302, 243 (1989) ([a defendant's] mental retardation and history of abuse is thus a two-edged sword [that] may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.). Both Respondent and the Fifth Circuit then conclude that such double-edged evidence would not be mitigating in the punishment phase of Mr. Trevino's trial. But Texas death penalty trial procedure has changed significantly since 1989. Both Respondent's argument and the Fifth Circuit's analysis and opinion fail to recognize that.

Respondent acknowledges that a single juror can preclude the imposition of the death penalty in a Texas capital trial. Brief in Opposition, at 16. Respondent presents

this in terms of the Texas "12/10" rule, which requires that the Texas mitigation special issue may not be answered in the negative unless 10 or more jurors agree. Id. That special issue is stated as:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Petition at 23. Thus, if a single juror determines that a defendant's personal moral culpability is such that a death sentence is not appropriate in that case, that sentence is not imposed.

That instruction did not exist at the time of this Court's opinion in Penry. The Respondent fails to acknowledge the significance of that instruction on the Texas death penalty trial procedure. At the time of Penry, Texas did not have a separate mitigation special issue jury instruction in a death penalty case. However, by the time of Mr. Trevino's trial in 1996, not only was there a specific mitigation special issue instruction, but a Texas death penalty jury was instructed that it is to address the mitigation question only if it has already separately made affirmative findings regarding "future dangerousness" (and "party liability," if appropriate). Respondent fails, or refuses, to recognize this significant procedural change.

Respondent also fails to acknowledge Texas' own precedent regarding the disconnect between future dangerousness and mitigation. Mr. Trevino's jury was not asked to weigh aggravating evidence against mitigating evidence when considering mitigation, because Texas Courts have recognized that Texas is not a "weighing state."

Ex parte Gonzales, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006) ("Texas' capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances"); Ex parte Davis, 866 S.W.2d 234, 239 (Tex. Crim. App. 1993) ("Unlike Florida, where Strickland arose, we do not have a capital sentencing scheme that involves the direct balancing of aggravating and mitigating circumstances"). Indeed, "[t]he issue of future dangerousness is completely independent of the [mitigation] special issue[.]" Eldridge v. State, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996) (emphasis added).

Significantly, Texas places no restrictions on what an individual juror may find as mitigating. Nevertheless, both the Fifth Circuit analysis and Respondent's argument are based on a predicate that because the new evidence Mr. Trevino presents is both good and bad, it is double edged, and therefore cannot support an answer to the mitigation question other than "no". But by definition, double-edged evidence cuts both ways. The question is not whether "Trevino's new evidence would have bolstered the prosecution's case." Brief in Opposition at 16. Rather, the question is what impact would the evidence have on a single juror deciding Mr. Trevino's personal moral culpability when considering the mitigation special issue. Mr. Trevino contends this is in line with this Court's guidance that the question is whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against sentencing the defendant to death. Wiggins, 539 U.S. at 537. Neither the Respondent's argument nor the Fifth Circuit's analysis allow for this question to be answered.

Respondent also argues that Mr. Trevino's Wiggins claim fails because he failed to establish deficient performance. Brief in Opposition at 20-23. The Fifth Circuit assumed, without specifically finding, deficient performance when it proceeded to review the prejudice prong. The foundation of Respondent's argument is that trial counsel had no notice from Mr. Trevino or other sources, that FASD-associated evidence existed. Thus, "there were no leads for trial counsel to follow. Id. at 23. Respondent contends that to discover such evidence, trial counsel would have had to "contact Trevino's mother before trial." Id. at 20. Mr. Trevino admits that his mother was the source that led federal habeas counsel to believe such evidence existed, but he does not concede that trial counsel could not have found that evidence by any other means. Trial counsel not only did not mount a thorough mitigation investigation, counsel failed to even adequately interview the one mitigation witness he did call. As Respondent noted, "Trevino's aunt testified that his mother could not attend the trial because she had a problem with alcohol." Id. at 21, citing to 23 RR 135. However, Respondent's then contends in the very next sentence that "She did not say at that time, nor has she said any time since, that she knew where Trevino's mother lived or how to contact her." Id. at 21. That is simply wrong. The trial transcript shows the following relevant portion of the examination of Mr. Trevino's aunt by trial counsel:

. . .

Q: All his life? Where is Carlos' mother?
A: She has an alcohol problem right now.
Q: Excuse me?
A: She has an alcohol problem.
Q: So where is she?

A: In Elgin.

The Court: Where?
Witness: Elgin.
The Court: Elgin?
Witness: Uh-huh.

23 RR 135. Three things are apparent from this short transcript excerpt. First, trial counsel knew how to contact Mr. Trevino's aunt, at least to the extent of having her appear as a witness for Mr. Trevino. Second, trial counsel had not asked his only mitigation witness where Mr. Trevino's mother was before she took the stand. Third, as the aunt was aware of both Mr. Trevino's mother's location and her current state of health, she clearly knew how to contact his mother. This simple ten-line trial testimony demonstrates deficient performance.

CONCLUSION

This petition presents a compelling issue of the proper review to be undertaken by the Fifth Circuit in reviewing prejudice resulting from Ineffective Assistance of Trial Counsel at the punishment phase of a Texas death penalty case, and should be granted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Warren Alan Wolf, hereby certify that on the 12th day of March, 2017, a true and correct copy of PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served on counsel for Respondent via First Class United States Mail, addressed to Ms. Fredericka Sargent, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Capital Station, Austin, Texas 78711, in accordance with Sup. Ct. R. 29. All parties required to be served have been served. I am a member of the Bar of this Court.

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