

NO. 20-7071

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

PETE RUSSELL,
Petitioner

v.

BOBBY LUMPKIN,
Director of Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

**PETITIONER’S REPLY BRIEF ON THE
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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18 U.S.C. §3006A(d)(6)

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in denying a certificate of appealability, through a merits review, of Russell's claim that he received ineffective assistance of counsel at the punishment stage of trial with respect to future dangerousness?

LIST OF ALL PARTIES

Pete Russell, a/k/a Pete Russell, Jr.. No. 999443, Texas Dept. of Criminal Justice, Correctional Institutions Division	Petitioner, Defendant at Trial and Applicant in State Habeas Proceedings
Bobby Lumpkin Director of Texas Department of Criminal Justice, Correctional Institutions Division	Respondent

LIST OF RELATED PROCEEDINGS

1. 262nd District Court, Harris County, Texas
No. 898795 *State of Texas v. Pete Russell, Jr.*
Judgment entered: February 17, 2003
2. Court of Criminal Appeals of Texas
No. AP-74,595, *Pete Russell v. State of Texas*
Judgment entered: February 2, 2005
3. 262nd District Court, Harris County, Texas
No. 898795-A, *Ex parte Pete Russell, Jr.*
Findings of Fact and Conclusions of Law entered: May 9, 2013
4. Court of Criminal Appeals of Texas
No. WR-78,128-01, *Ex parte Pete Russell*
Judgment entered: November 27, 2013
5. Court of Criminal Appeals of Texas
No. WR-78,128-02, *Ex parte Pete Russell, Jr.*
Order of Dismissal entered: March 8, 2017
6. United States District Court for the Southern District of Texas,
Houston Division
No. 4:13-cv-03636, *Pete Russell v. Lorie Davis*
Judgment entered: July 23, 2019

7. United States Court of Appeals for the Fifth Circuit
No. 19-70015, *Pete Russell v. Bobby Lumpkin*
Judgment Entered: September 4, 2020

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CITATION OF OPINIONS AND ORDERS

1. The opinion of the Court of Criminal Appeals on direct appeal is published as *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005).
2. The order of the Court of Criminal Appeals denying postconviction relief appears on that court's web site as *Ex parte Russell* (Tex. Crim. App. No. WR-78,128-01, November 27, 2013).
3. The order of the Court of Criminal Appeals dismissing Russell's second state habeas application appears on the Court's web site as *Ex parte Russell* (Tex. Crim. App. No. WR-78,128-02, March 8, 2017).
4. The memorandum and order of the United States District Court appears as *Russell v. Davis* and was that court's No. 4:13- cv-03636. It was not designated for publication.
5. The opinion of the Fifth Circuit Court of Appeals, denying a certificate of appealability, was in that court's No. 19-70015. It was not designated for publication and has not yet appeared in the Federal Appendix.

TO THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the Petitioner, Pete Russell (“Russell”), through the undersigned counsel appointed under the Criminal Justice Act, and submits this Reply Brief. Russell requests the grant of a writ of certiorari, and ultimately remand to the United States Court of Appeals for the Fifth Circuit (the “Fifth Circuit”) for full briefing and review by the Fifth Circuit panel.

BASIS FOR JURISDICTION

1. Russell seeks to have this Court review a judgment of a panel of the United States Court of Appeals for the Fifth Circuit, which was entered on September 4, 2020.
2. Russell timely filed a Petition for Writ of Certiorari, now pending before this Court.
3. Jurisdiction is conferred upon this Court to review the Court of Appeals’ judgment by 18 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. CONST. amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

Russell relies in particular on the counsel clause.

2. U.S. CONST. amend. VIII states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Russell relies in particular on the punishment clause.

3. U.S. CONST. amend XIV, §1 states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Russell relies in particular on the due process clause.

4. 28 U.S.C. §2254(d) states:

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.

5. TEX. CODE CRIM. PROC. Art. 37.071, §2(b)(1) states:

On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; ...¹

6. TEX. CODE CRIM. PROC. Art. 37.071, §2© states:

The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of “yes” or “no” on each issue submitted under Subsection (b) of this Article.

STATEMENT OF THE CASE

This cause is before the Court on Russell’s petition for writ of certiorari (the “Petition”), which concerns the failure of the Fifth Circuit to grant a certificate of appealability (“COA”) on one particular issue. The Fifth Circuit denied a COA as to all issues on September 4, 2020 (Pet. App., Exh. 1).² Russell did not seek rehearing of the application for COA in the Fifth Circuit.

Russell’s Petition presents the following question for this Court’s consideration:

Did the Court of Appeals err in denying a certificate of appealability,

¹ Subsection 2(b)(2) concerns the law of parties and was not at issue here.

² The exhibits within the Appendix to Russell’s petition for writ of certiorari are cited as “Pet. App., Exh.” with the corresponding exhibit number.

through a merits review, of Russell's claim that he received ineffective assistance of counsel at the punishment stage of trial with respect to future dangerousness?

In the interest of brevity for this Reply Brief, Russell incorporates by reference the contents of the Petition for Writ of Certiorari, including the Appendix.

The factual and procedural case framework of the case is set out at length in the Petition. Briefly summarized, the record shows that Russell raised an argument, at every stage of habeas proceedings, that his court-appointed trial attorneys failed to provide effective assistance of counsel at the punishment stage of trial, depriving him of his right to counsel under U.S. CONST. amend. VI (applicable in Russell's state trial via U.S. CONST. amend. XIV). Specifically, Russell's trial attorneys failed to investigate and present a meaningful defense with respect to the first of two special issues which a jury must answer in a death-penalty case. A Texas statute, TEX. CODE CRIM. PROC. Art. 37.071, §2(b)(1), requires a jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The State must prove that probability beyond a reasonable doubt. TEX. CODE CRIM. PROC. Art. 37.071, §2(c). Any result other than a unanimous verdict, finding that there is such a probability, avoids the death penalty, as explained on page 19 of the Petition.

This statutory special issue is often called the “future dangerousness” issue, based on terminology used in an older version of the statute, in cases from this and other courts, and in scholarly commentary.³ The label put on the topic is not important, but its role in determining whether a defendant lives or dies unquestionably is important.

The failure of Russell’s trial counsel to research, prepare, and present a defense position on future dangerousness created a huge barrier to arguing directly that the state prosecutors failed to meet their burden. That failure by counsel, constituted ineffective assistance of counsel. Claims of ineffective assistance are evaluated under the two-pronged test from *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a habeas applicant to demonstrate both inadequate performance by counsel and resulting prejudice. In the state habeas proceedings, and at every stage thereafter, Russell has contended that his trial attorneys provided ineffective assistance on this special issue, resulting in a death sentence.

The state habeas judge, who was not the same judge who had presided at trial, adopted without alteration the proposed findings of fact and conclusions of law submitted by the state prosecutor (Pet. App., Exh. 4, last page). The Court of Criminal Appeals denied relief, stating without elaboration that the findings and

³ See, for example, *Simmons v. South Carolina*, 512 U.S. 154 (1994).

conclusions were supported by the record. In the United States District Court for the Southern District of Texas, Russell pointed out that the state habeas court ‘s findings and conclusions contained almost no substantive analysis of the voluminous research which was provided to Russell’s state habeas counsel in a report prepared by a Ph.D. psychologist, Mark Cunningham. His report explained in detail the scholarly studies which provided reasons why a jury should be doubtful as to a prediction of future dangerousness (Pet. App., Exh. 7). The federal district court denied relief, so this issue joined a handful of others in Russell’s application for a COA.

REPLY ARGUMENTS

Russell places primary reliance on the Petition, and this brief serves to reply to a few arguments made by the Respondent.⁴ As explained below, the Respondent’s counter-arguments should not dissuade this Court from facilitating a more systematic and thorough review by the Fifth Circuit panel.

I.

The Respondent has overlooked the principle that a COA application is not to be regarded as complete briefing on an issue.

Russell’s issue concerns the COA process in the Fifth Circuit. It would be adequately addressed at this point by simply remanding this cause to the Fifth Circuit

⁴ Russell’s counsel first apologizes for some typographical errors which appear in the Petition, despite proofreading efforts. None of those errors materially affect the content.

with instructions to conduct a full appellate review of Russell's underlying ineffective-assistance claim. In opposing the Petition, the Respondent overlooks the fundamental principle that the COA process is not designed to create full briefing of every issue in an applicant's first presentation of the issues to the federal appellate court. If it were otherwise, there would be no good reason for having two steps, *i.e.* a COA step and a full consideration step, in a court of appeals.

The COA process is really a "gatekeeping" function. This Court has repeatedly cautioned against the use of the COA process as a "short cut" for a decision on the merits. The Petition cites *Miller-El v. Cockrell*, 37 U.S. 322 (2003), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017). Stated another way, what Russell and other COA applicants actually seek is merely the opportunity to have a full appellate review on a particular claim. Often, as Russell's case illustrates, other claims may fall by the wayside. Even that is of some benefit to an applicant because it allows appellate focus on a more promising issue. The COA process sets a relatively low bar for what an applicant actually is seeking, namely the chance to fully brief any issue which makes it through the COA "gate." That contrasts with the high bar which a petitioner must hurdle for ultimate relief under 28 U.S.C. §2254(d).

A good example of how the COA process should work is provided in *Oliver v. Quarterman*, 254 Fed. Appx. 381 (5th Cir. 2007). Oliver had presented several

issues, including two on which a federal district court had granted a COA. The Fifth Circuit ordered full briefing and argument for those two. Ultimately Oliver did not prevail, either in the Fifth Circuit or when seeking review in this Court. *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008), *cert. denied* 556 U.S. 1181 (2009).⁵ But a COA does not guarantee success, and the COA system worked as it should in *Oliver*. The Fifth Circuit should have taken the same approach in Russell’s case.

The Fifth Circuit’s denial of a COA also went against a longstanding policy which the Circuit had developed for death penalty cases. Based on a comment in *Barefoot v. Estelle*, 463 U.S. 880, 888 (1982) that all non-frivolous issues should be resolved in a death penalty case, the Fifth Circuit stated that “any doubts whether CPC should be issued are to be resolved in favor of the petitioner.” *Jones v. Warden, La. State Penitentiary*, 402 F.2d 776 (5th Cir.1968); *Buxton v. Collins*, 925 F. 2d 816 (5th Cir. 1991). That view has been reiterated since the current COA process replaced the CPC process. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000) emphatically stated that “any doubts as to whether a COA should issue must be resolved in [the petitioner’s] favor,” The Circuit said “must be,” not “could be.” The Fifth Circuit should have followed that guidance in Russell’s case, for there surely are doubts as to the state habeas court’s decision.

⁵ The key issue in *Oliver* was the use of a Bible in the jury room as a guide to application of the death penalty. Oliver convinced the Fifth Circuit panel as to error, but not as to harm. *Oliver*, 541 F.3d at 340-344.

The Respondent contends that the Fifth Circuit only conducted a “threshold inquiry,” that being appropriate to the task of deciding whether to grant a COA (Resp. Brief, pp. 13-14). Simply calling the Fifth Circuit’s decision a “threshold inquiry” does not make it so. *Miller-El* tried to flesh out the meaning of a “threshold inquiry,” clearly stating that only “an overview of the claims in the habeas petition and a general assessment of their merits” should guide the decision to grant a COA,” eschewing “full consideration” of the facts and the competing legal arguments.” *Miller-El*, 537 U.S. at 336.

The substance of what the Fifth Circuit panel wrote in Russell’s case shows that the panel was looking to the merits of the issue, then deciding on the merits without receiving full briefing on the merits. While the Respondent declares (Respondent’s brief, p. 12), that Russell is “wrong,” the parties just disagree as to how to determine whether there was a properly limited “threshold inquiry.” Such a disagreement shows that the parties, the Circuit, and the jurisprudence in general could benefit from further guidance by this Court as to what constitutes a “threshold inquiry.” That is a practical reason to *grant* the writ of certiorari, not deny it.

Russell does agree with the Respondent that the Circuit panel’s treatment of the issue was light (especially in contrast to the treatment of some of the other issues), as it only devoted *two pages* to this particular ineffective-assistance claim (according to the Brief in Opposition, p. 15, which likely would not understate the Circuit’s

efforts). The Respondent's point seems to be that light treatment of the issue establishes that there was a threshold inquiry, rather than a full merits review. Russell thinks the shortness of the Fifth Circuit's treatment of the future dangerousness only reflects the fact that the panel did not authorize, and did not receive, full briefing.

The sparse discussion by the Circuit panel certainly does not prove that Russell had nothing worthwhile to say. For example, Russell only had space within the COA application to identify ten different studies found by Dr. Cunningham with bullet points.⁶ Each of them could warrant a full page or more in a merits brief. Full discussion of Cunningham's full commentary on future dangerousness would be quite lengthy, as shown by what was appended to the COA application in the Appendix (Pet. App., Exh. 7). To paraphrase the Apostle Paul in the Book of Acts, Russell's presentations of Cunningham's research, at every step, "were not done in a corner."

Despite its brevity, the Fifth Circuit panel's attention to this issue still topped that of the state habeas court, where the judge made *exactly one finding* which related to the available scholarly evidence on the future dangerousness issue. While the

⁶ A big chunk of Russell's application, and of the Circuit panel's review, had to be devoted to a fact-intensive sufficiency issue which hinged on how a portion of the Texas statute defining Capital Murder was interpreted. By bringing that claim to the Fifth Circuit, Russell was aiming to achieve certification of the question to the Court of Criminal Appeals. That was Russell's last chance to get the Texas court to clarify that facet of Texas law. Success on that issue could have been a life-saver. There also were ineffective-assistance claims derived from procedural default on other issues. All of this had to be covered within the formal word limit, and Russell was pushing that limit as it was. The thorough discussion of future dangerousness which should be expected from full briefing was not feasible at the COA application stage.

Respondent accuses Russell of “selectively ignoring” the state habeas findings (Brief in Opposition, p. 19), Russell’s Petition discussed *all* of what was germane to future dangerousness in the state habeas findings. It was the state habeas prosecutor and state habeas judge who did the “ignoring.” The state findings and conclusions did not even break out future dangerousness as a separate topic.

Nor did the state habeas findings adequately examine trial counsel’s “strategy” claim, *i.e.* the contention that favorable comments from laymen would be superior to expert testimony. As the Petition points out at pages 27-28, Russell’s trial attorneys already had a preconceived bias against the use of expert testimony on future dangerousness by either side. They did not just “neglect” pretrial investigation to find expert insights; they deliberately avoided doing it.

Ultimately the question under Section 2254(d) is whether the state habeas judge’s findings of fact and conclusions of law could be squared with this Court’s case law, as it existed at the time the state habeas decision was reached. They could not. The absence of pretrial investigation into defense themes on future dangerousness ran afoul of *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003). Now the Court can add *Andrus v. Texas*, 590 U.S. ___, 140 S.Ct. 1875, 207 L.Ed.2d 335 (2020) to the case law supporting Russell’s position. Those cases dealt with mitigation investigation, but the Respondent has not suggested that counsel’s preparation duty is any less important for the future dangerousness issue.

The Respondent also contends that Russell failed to show that “reasonable jurists would debate whether the state court’s denial of his claim was unreasonable.” *Id.*, at 14, quoting the Circuit’s opinion (Pet. App., Exh. 1, p. 26). U.S. CONST. amend. VIII has been interpreted as requiring a heightened degree of reliability in death-penalty cases, so any jurist who simply read through Cunningham’s report should be deeply troubled by the unreliability caused by the state habeas judge’s disregard of Cunningham’s report. A state habeas judge who had not presided at trial utterly failed to consider the possibility that one or more jurors could have had a reasonable doubt if they had been given the benefit of the kind of research which Dr. Cunningham conducted. No reasonable jurist would fail to consider whether Russell’s trial attorneys even made a proper effort. The cold, hard fact is that those attorneys did not want to do that, having already settled on their view that expert opinion and research should be kept out of the trial. See the Petition, at pages 26-27.

An argument can be made that the state habeas review, with but one pertinent finding and one incorrect conclusion of law, was so inherently inadequate that the state habeas findings are entitled to no deference at all. But it is not necessary to go that far, because the woefully inadequate state habeas findings and conclusions also fail under the terms of Section 2254(d). While the Respondent argues that Russell does not meet the criteria for review under SUP. CT. R. 10, part (c) of that rule calls for granting the writ when a state court decision conflicts with relevant decisions of

this Court on a federal question. Sixth Amendment violations present a federal question. In Russell’s case, the state habeas findings and conclusions are incompatible with the duties of counsel under *Williams*, *Wiggins*, and *Andrus*.

II.

The uncertainty of Dr. Cunningham’s availability as an expert witness does not undermine Russell’s position.

In footnote 5 of the Brief in Opposition, at page 16, the Respondent points out that there was no proof in the state habeas record that Cunningham himself would have been available to testify for Russell at trial. Russell had candidly admitted that in his COA application. Seizing on that admitted fact, the Respondent contends that proof of Cunningham’s availability as a witness was “necessary” in order for Russell to prove prejudice. *Id.* Apparently the Respondent hopes for this argument to be a *deus ex machina*, so that the merits of what Dr. Cunningham had to say can be avoided. This Court should not be swayed.

Dr. Cunningham’s lengthy report addressed published scholarly opinions by many authors, including some who helped produce a Department of Justice Study. See Pet. App. Exh. 7. Cunningham was not the only trained expert capable of such research. At the very least, the published authors cited by Dr. Cunningham likely had good research skills and could be potential witnesses. Russell’s trial attorneys had the services of a mitigation specialist, whose skill set would include doing research

and identifying possible expert witnesses. Additionally, the fact that Dr. Cunningham himself would have been willing to help Russell's attorneys in some manner is shown by the fact that Cunningham did Herculean work on his written analyses for the state habeas application. As to whether Cunningham, as the chosen expert, could have testified, any scheduling conflict for Cunningham could have been overcome with a motion for continuance. In any event, difficulty in finding an expert is not decisive. Finding expert help is one of the core tasks in the pretrial preparation necessary for effective representation.

The sad fact, shown by the pretrial pleadings, is that Russell's attorneys did not try, since they had no appetite for expert testimony on future dangerousness. They were operating from an obsolete perspective, as explained in the Petition, at pages 27-28. The Respondent tries to sanitize trial counsels' choice as "strategy," but *Williams*, *Wiggins*, and *Andrus* made it clear that purported "strategy" cannot rest on a patently inadequate investigation. The state habeas judge did not even address the constitutional defect in counsel's preparation, even though *Williams* and *Wiggins* had been the law for years by that time.

III.

The Respondent urges the use of an incorrect standard for the prejudice prong of *Strickland*.

The Respondent's Brief in Opposition states at page 22, regarding prejudice,

that “there is no reason to believe that [Russell’s] sentence would have been different.” That statement, using the word “would,” is a distortion of the second prong of *Strickland v. Washington*, *supra*, and the problem is not just a semantic one.

Russell has no burden to prove that the complete omission of science-based evidence regarding future dangerousness definitely did contribute to the jury’s unanimously adverse answer to the special issue. The proper measure of prejudice is “whether there is a reasonable probability’ of an effect on a jury’s verdict. *Strickland*, 466 U.S., at 694. That means a probability “sufficient to undermine confidence in the outcome.” *Id.* Later *Cullen v. Pinholster*, 563 U.S. 170 (2011) and *Harrington v. Richter*, 562 U.S. 86, 112 (2011) noted that a “reasonable probability” means a “substantial,” not just a “conceivable” likelihood of a different result. Even if those latter decisions shaded the language of the *Strickland* test to be a little more favorable to the Respondent’s position, they did not suggest that a habeas applicant needed to prove that a different result *would have* occurred.

It was a certainty that the jury would have to address the future dangerousness issue if it found Russell guilty of Capital Murder. Russell’s attorneys gave the jurors no scientific basis for having reasonable doubt on that issue. Could they have done so? Certainly. They chose not to do so without putting in the pretrial effort to get a grasp of the professional literature or to find a qualified expert.

There is one other aspect of prejudice worth mentioning. The dissent in

Andrus referred to future dangerousness as a “counterweight” to mitigating evidence. While the Texas statute is not structured to make a finding of future dangerousness a formal “counterweight” that *must* be considered in deciding the mitigation special issue, it is entirely possible that the “counterweight” effect is present, at least with some of the jurors. At the very least, a finding of future dangerousness could give the prosecution’s position momentum in the jury’s further deliberations on mitigation.

CONCLUSION

Wherefore, for the reasons stated in Russell’s Petition and in this Reply Brief, Russell prays that this Court grant the writ of certiorari and ultimately remand this cause to the Fifth Circuit for full review of the effectiveness of trial counsel regarding future dangerousness.

Respectfully submitted,

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