IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2021

No. _____

JUAN JOSE REYNOSO,

Petitioner,

v.

BOBBY LUMPKIN,
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

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PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE
CAPITAL CASE

QUESTION PRESENTED

Whether the Fifth Circuit has "so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power," Supreme Court Rule 10(a), by its slapdash review of the merits issue presented by Petitioner in his application for a certificate of appealability, as a result of which:

(a) the court mistook the issue presented by Petitioner for a very different issue, then decided that un-presented issue, and in the course of that,

(b) failed to take into account decisions from the United States Courts of Appeals for the Sixth and Tenth Circuits that demonstrated the merit of Petitioner's claim on identical questions of prejudice due to trial counsel's ineffectiveness.

PRIOR PROCEEDINGS DIRECTLY RELATED TO THIS CASE

Trial

263rd District Court for Harris County, Texas, No. 941651, *State of Texas v. Juan Jose Reynoso*, Judgment May 12, 2004

Direct Appeal

Texas Court of Criminal Appeals, No. AP-74,952, *Juan Jose Reynoso v. State of Texas*, Judgment December 14, 2005

Proceedings Related to Whether to Proceed with State Habeas Proceeding

Texas Court of Criminal Appeals, No. AP-74,952, *Juan Jose Reynoso*, May 4, 2005

Texas Court of Criminal Appeals, No. WR-66,260-01, *Ex parte Juan Jose Reynoso*, December 20, 2006

First State Habeas Corpus Proceeding

Texas Court of Criminal Appeals, No. WR-66,260-01, *Ex parte Juan Jose Reynoso*, June 27, 2007

Texas Court of Criminal Appeals, No. AP-75,963, *Ex parte Juan Jose Reynoso*, July 2, 2008

Subsequent (Second) State Habeas Corpus Proceeding

Texas Court of Criminal Appeals, No. WR-66,260-02, *Ex parte Juan Jose Reynoso*, June 16, 2010

Federal Habeas Corpus Proceeding

United States District Court for the Southern District of Texas, No. 4:09-cv-02103, *Juan Jose Reynoso v. Lorie Davis*, May 21, 2020

United States Court of Appeals for the Fifth Circuit, No. 20-70023, *Juan Jose Reynoso v. Bobby Lumpkin*, July 29, 2021

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit denied a certificate of appealability on the substantive claim on which this petition is based on July 29, 2021. *Reynoso v. Lumpkin*, 854 Fed.Appx. 605, *reh. denied* (October 13, 2021) [Appendices 1 and 2]. The United States District Court for the Southern District of Texas denied Mr. Reynoso's federal habeas petition May 21, 2020, *Reynoso v. Davis*, 2020 WL 2596785 [Appendix 3], and denied a Rule 59(e) motion October 27, 2020 [Appendix 4].

The Texas Court of Criminal Appeals' dismissed the state habeas application for abuse of the writ on June 16, 2010. *Ex parte Reynoso*, 2010 WL 2524571 [Appendix 5].

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment July 29, 2021, and denied rehearing October 13, 2021. *See* Appendices 1 and 2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

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

U.S. Const. amend. VIII.

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Statement of Facts Relevant to the Question Presented and the Claim Underlying this Petition

> [I]n turbulent, crisis-torn times like these, storytelling has always been essential.
>
> You see, stories ... can change our hearts and our minds. They can help us see each other in a new light. To have empathy....

Jane Fonda, 2021 Golden Globe Awards.

> It is the aim of the author, in presenting Tecumseh's life, to show how and why he became what he was. It is unworthy of him merely to bounce from major point to major point of his life and ignore or gloss over the minutiae of everyday life that molded him, guided him, and so decidedly influenced him. It is, therefore, my purpose in this book to meld in a continuous chronological flow the details of childhood and family life – the warmth and humor, the pleasures and games, the love and sadnesses of everyday living – with the pervasive aspects of tribal culture and the irresistible press of outside events.

Allan W. Eckert, *A Sorrow in Our Heart - The Life of Tecumseh*, Author's Note (Bantam Books 1992).

* * * *

Juan Reynoso was convicted of capital murder and sentenced to death for killing Tonya Riedel in the course of a robbery outside a convenience store in Houston in 2003.

The evidence showed that Mr. Reynoso approached George Jiminez and Tonya Riedel on March 2, 2003, as they were leaving a neighborhood convenience store and service station. ROA.2317-2319.[1] Mr. Reynoso pulled out a gun and demanded money. When Ms. Riedel told him she did not have any money, Reynoso hit her, and she fell to the ground in a sitting position. ROA 2320. Reynoso then shot her in the "right upper chest, close to the base of the neck, slightly above the collar bone, the clavicle." ROA.2314 (testimony of assistant medical examiner). Riedel later died from the gunshot wound. ROA. 2316. The autopsy showed that bullet traveled "right to left and downward, sharply downward." *Id*. It "fractured three bones, … perforated her right lung[,] … [a]nd … [caused her to] ble[e]d considerably from a torn major vessel[.]" *Id*.[2] Reynoso confessed to the killing in a videotaped interview. ROA.3380.

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[1]ROA refers to the Electronic Record on Appeal in the United States Court of Appeals for the Fifth Circuit.

[2]George Jiminez, the man with Ms. Riedel, testified that Reynoso "shot her in the heart." ROA 2320. The autopsy showed that Jiminez's observation was not accurate, but before the Fifth Circuit, the Texas Attorney General quoted Jiminez's testimony without noting that it was not accurate. This mis-characterization of the shooting painted a more aggravated portrait of Mr. Reynoso's intent than the actual facts revealed.

The killing of Ms. Riedel occurred during a month-long series of seven other violent crimes Mr. Reynoso committed – armed robberies in which he allegedly shot one victim and attempted to shoot another during a struggle over the gun Reynoso had. ROA.2974-78, 3029-30, 3035-36, 3043-50, 3050-54, 3057-69, 3115-17. These other crimes were the centerpiece of the prosecution case in the penalty phase.

The defense presented thirteen mitigation witnesses, including Mr. Reynoso, in the penalty phase. Ten of the mitigation witnesses were interviewed for the first time during trial outside the courtroom just before they testified, with no time to follow up on the leads the witnesses provided. Not surprisingly in these circumstances, the mitigation testimony "merely ... bounce[d] from major point to major point of [Juan's] life," Eckert, *A Sorrow in Our Heart*, *supra*: his mother's abandonment of the family when he was 13 years old; his father's lack of nurturing which hurt more after his mother left; his participation in gangs; his excessive, compulsive use of drugs and alcohol; his anxiety, depression, and erratic behavior. The evidence "ignore[d] or gloss[ed] over the minutiae of everyday life that molded him, guided him, and so decidedly influenced him...." *Id*.

Given the superficiality of the investigation, no witness was able to help the jury understand why Mr. Reynoso's life should be spared for killing Ms. Riedel.

Defense counsel unwittingly underscored this fundamental vacuum in the mitigating evidence when he asked several witnesses a question like this: "[W]ould you have ever believed that the person that you knew ... would rob many people with guns, shoot people in the legs, try to kill people, kill one woman? Is that the person you knew?" ROA.3147(RR 151).[3] The witness to whom this particular question was asked, responded, "I wouldn't never look at John[4] and think that he would ever be able to do anything like that. Knowing him for all the years, robbing somebody, I don't see why he would have ever have had to do that. I don't – I would never see him with that much hate, you know, to go and do that." *Id*.

Four of the other witnesses who were asked a similar question responded similarly. *See* ROA.3143-44 ("I don't know that person. I don't know that person at all. That's not my grandson. That's somebody else."); ROA.3153(RR 175) (he was "[n]ot at all" "capable of that kind of activity"); ROA.3221(RR 98) ("[t]hat wasn't my brother"); ROA.3227(RR 122) ("the things he's in here for now is just a – it's not him").

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[3]The pages of the Reporter's Record, or trial transcript, are displayed four pages per single page in the ROA. Where it is necessary to direct the Court to specific pages of the four pages displayed on a single ROA page, we have noted in parentheses the page number(s) of the Reporter's Record (designated, "RR"), as here.

[4]Juan was often called John within his family.

Nothing in the perfunctory mitigation investigation and ensuing testimony provided any insight into the inner life of Juan Reynoso, how he came to kill Ms. Riedel, or how he came to commit other violent crimes in the month in which he killed Ms. Riedel. His behavior clearly surprised and shocked family members and close friends, because there was nothing they knew about him that foreshadowed acts seemingly driven by "that much hate." ROA.3147(RR 151).

Had trial counsel conducted a professionally reasonable investigation of Mr. Reynoso's life, these witnesses and the jury would have begun to comprehend how the person the witnesses knew as kind and compassionate came to engage in violent crimes. The most important failure in the defense investigation was the failure to discover the vast amount of evidence showing that Mr. Reynoso "was repeatedly subjected to violent, traumatic events throughout the entire course of his life." ROA.415 (affidavit of psychiatrist Richard Dudley, presented in federal habeas proceeding).

From the time Juan was thirteen years old and through his teen years, he was assaulted multiple times by other gang members, ROA.236, 375, was the victim of several murder attempts by rival gang members, ROA.376-78, including a drive-by shooting into his house, ROA.411, and witnessed the attempted murder of his protector, his older sister's boyfriend. ROA.377. As that boyfriend observed in an

affidavit in the District Court, "Fear and threats were a constant in [Juan's] environment...." ROA.378.

By 2001 and 2002, "John was scared and acting paranoid a lot." ROA.411 (affidavit of Mr. Reynoso's father, in federal habeas proceding). He always carried a gun because he said "there were too many people trying to hurt him." *Id*. He often hid in his closet and barricaded himself in his room for entire days. *Id*. Mr. Reynoso's father found him twice in a closet, in the fetal position, holding a gun, shaking, and looking around "at things that weren't there." *Id*.

These events produced in Mr. Reynoso the multitude of psychiatric impairments and vulnerabilities "that often result from such ... events," ROA.415 (affidavit of Dr. Dudley):

- "the perception of the world and others as dangerous, exemplified by [Mr. Reynoso's] quickness to perceive betrayal, his distrust and difficulty with authority figures, and his extreme reactivity to perceived threat[,]" *id*.;
- self-medication with alcohol and drugs that "became alcoholism and other poly-substance abuse," ROA.416; and
- "chronic depression, suicidal ideation and multiple, serious suicide attempts – including deliberately driving his car off a highway overpass, stabbing

himself in the chest, attempting to hang himself while in the custody of the Texas Youth Commission, and attempting to overdose on PCP." *Id*.

There is a reasonable probability that this body of evidence, had it been discovered and presented, would have led to a life sentence. Presented only with the mitigating evidence the defense team could gather in hurried courthouse interviews, the jury did not know the most important facts about Mr. Reynoso's life. The jury did not know that he was exposed day-in and day-out for many years to severe violence and trauma. The jury did not know that his abuse of drugs and alcohol was the direct result of the abiding and severe pain caused by the trauma he experienced, and that it was an unrelenting addiction, not the voluntary choice to use drugs and alcohol that even he testified he thought it was. The jury did not know the severity of his depression and how it made him devalue his and others' lives. And, the jury did not know how any event that triggered the deep reservoir of life-threatening fear stored in Mr. Reynoso through his exposure to so much violence could cause outbursts of self-protective violence for no apparent reason, as it did when Tonya Riedel failed to do what he told her to do.

The evidence that went un-investigated and un-presented and ignored could, plainly, have change the outcome of Mr. Reynoso's sentencing trial. It could have provided insight and answers into the question that no one could answer at trial:

How could the Juan Reynoso that family and friends thought they knew – who was genuinely loving, kind, and compassionate – do such hateful things? The insight this evidence could have provided is not that Reynoso was not the kind of person they thought he was. It is that they did not know the violence he had experienced from others and how those experiences had overwhelmed his better, and just as real, character and nature.

This is the story that counsel's deficient performance failed to find and tell, and this is the story that would "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...." *Strickland v. Washington*, 466 U.S. 666, 695-96 (1984).

II. How the Claim of Trial Counsel's Ineffectiveness Was Raised and Decided Below

Mr. Reynoso's federal habeas petition was filed on July 2, 2009. ROA.10-80. It included an unexhausted claim of ineffective assistance of trial counsel in failing to investigate mitigating evidence – the claim underlying the Question Presented before this Court. The District Court stayed the federal proceedings to allow Mr. Reynoso to file a subsequent state habeas corpus application raising the claim. ROA.152. On June 16, 2010, the Texas Court of Criminal Appeal dismissed Mr. Reynoso's subsequent habeas application, finding that it "failed to satisfy Section 5(a)" of Article 11.071 of the Texas Code of

Criminal Procedure – the prerequisite for consideration of a subsequent application – and dismissed the application "as an abuse of the writ." Appendix 5.

Mr. Reynoso returned to federal court with the filing of his Amended Petition for Writ of Habeas Corpus on January 27, 2011. ROA.188-478. The District Court stayed consideration of the amended petition pending the Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). ROA.789. Thereafter, on May 21, 2020, the District Court "f[ound] the claim both procedurally defaulted and meritless [and] denied Reynoso a certificate of appealability (COA)," Appendix 1, and granted the State's motion for summary judgment. Appendix 3. Mr. Reynoso filed a motion to alter or amend the judgment, ROA.937-50. The court denied the motion summarily on October 27, 2020, Appendix 4, and Mr. Reynoso noticed an appeal to the Fifth Circuit. ROA.966-67.

In the Fifth Circuit, Mr. Reynoso argued that the default of the claim was due to state habeas counsel's ineffective assistance, and that he could establish cause and prejudice under *Martinez v. Ryan*, *supra*, and *Trevino v. Thaler*, *supra*. The Fifth Circuit examined only the merits of the trial ineffectiveness claim,

determined the claim had no merit, and denied a certificate of appealability. Appendix 1.[5]

The reasoning that led to this conclusion was utterly without reason. The panel mis-framed the ineffectiveness issue as a failure to present, rather than to investigate, mitigating evidence – changing exponentially the deference that must be given to trial counsel's performance. Despite Mr. Reynoso's urging the court to apply the test of cumulativeness developed by the Sixth Circuit to determine whether the uninvestigated and unpresented mitigating evidence was merely cumulative of the trial evidence, the panel applied no test at all, simply citing conclusory language from two of this Court's decisions that addressed starkly different circumstances. The panel determined that the expert opinion about the role of trauma in Mr. Reynoso's life was double-edged and thus outweighed any mitigating benefit it might have had, without considering a nearly identical Tenth Circuit case in which the court on similar facts reached the opposite conclusion.

[5]In finding no merit to the underlying trial ineffectiveness claim, the court's determination was tantamount to finding no cause under *Martinez* and *Trevino*. *See Martinez v. Ryan*, 566 U.S. at 15-16 (the courts may resolve the question of whether state habeas counsel's ineffectiveness amounts to cause if "the ineffective-assistance-of-trial-counsel claim is insubstantial").

REASONS FOR GRANTING A WRIT OF CERTIORARI

The Fifth Circuit denied a certificate of appealability in Mr. Reynoso's case seven weeks after the last brief was filed, without oral argument. Its opinion comprised seven paragraphs, only four of which addressed the merits of the issue presented by Mr. Reynoso. Appendix 1. The opinion mis-perceived the claim Mr. Reynoso presented and ignored altogether the arguments he presented in support of that claim.

This kind of appellate review amounts to no review at all. Indeed, the case presented by Mr. Reynoso on appeal was not decided and apparently not even considered. Mr. Reynoso was thus denied the appellate review implicitly guaranteed to anyone appealing a decision by a federal district court. In these circumstances, the Fifth Circuit also plainly failed to provide the kind of reliable consideration constitutionally required at every level of a capital case. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) (determinations in a capital case must be made "with the high regard for truth that befits a decision affecting the life or death of a human being"). *Accord Herrera v. Collins*, 506 U.S. 390, 406 (1992) (noting that guilt-innocence determinations "in our system of criminal justice" are made with such high regard).

Accordingly, the Fifth Circuit's handling of Mr. Reynoso's case "so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). What follows are the details that call for this Court's intervention.

A. Mr. Reynoso's ineffectiveness claim was about trial counsel's failure to conduct a professionally reasonable investigation of mitigation, not their failure adequately to present mitigation evidence.

In his opening brief before the Fifth Circuit, Mr. Reynoso captioned the argument about his trial ineffectiveness claim as follows: "Trial counsel provided ineffective assistance in the investigation of mitigating evidence." Op. Brief, at 36. Thereafter, Mr. Reynoso first argued that "[t]he mitigation investigation was not 'appropriate to a death penalty case,'" Op. Brief, at 37. *Id* at 37-40. In this section, he noted that the totality of the mitigation investigation was comprised of courthouse interviews of potential witnesses during the penalty phase of his trial. The point of that part of his argument was not to complain that the presentation that ensued after these interviews was perfunctory, but to show that, by professional standards, the investigation was constitutionally inadequate. The mitigation specialist expressly said this in her declaration before the district court:

> There was no time, and no direction, instruction or opportunity, to engage in a proper investigation of matters raised by the initial family

> interviews[6] that were potentially relevant to the mitigation special issue, such as: the reasons for and the extent of Mr. Reynoso's drug abuse, the mental health implications of his mother's abandonment combined with the lack of parenting by his father and physical and verbal abuse at home, the implications of his depression and suicide attempts, his gang involvement and exposure to excessive trauma and violence.
>
> In my judgment, based on my training and experience, I did not conduct the kind of investigation for mitigating evidence appropriate to a death penalty case, for reasons of lack of time, lack of resources, and lack of interest by the attorneys for Mr. Reynoso.

Op. Brief, at 39-40.

It matters greatly whether an ineffectiveness claim is about the *presentation*, or the *pretrial investigation*, of evidence. If it is about presentation, and the underlying investigation has been "thorough," choices about the presentation of the evidence "are virtually unchallengeable[.]" *Strickland v. Washington*, 466 U.S. 668, 690 (1984). However, choices about the presentation of evidence "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. at 691.

Mr. Reynoso's claim was one about unreasonable professional judgments limiting the mitigating investigation, not about the method of the presentation of

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[6]These were the interviews of mitigation witnesses conducted during the penalty phase of trial at the courthouse. There were no substantive interviews conducted before then.

the mitigating evidence. The mid-trial, and only, interviews of the potential mitigation witnesses did not provide a reasonably thorough investigation. Through these interviews, the mitigation specialist learned about "Mr. Reynoso's drug abuse," "his mother's abandonment," "lack of parenting by his father," "physical and verbal abuse at home," "his depression and suicide attempts," "his gang involvement," and his "exposure to excessive gang trauma and violence." ROA.267. However, what she learned during these interviews were leads for further investigation, not by any means all that could have been learned. By the mitigation specialist's own admission, "[t]here was no time, and no ... opportunity to engage in a proper investigation of [these] matters[.]" *Id*. The claim was thus one about professionally unreasonable investigation, *not* the way in which the evidence was presented.

Accordingly, the Fifth Circuit's citation to *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007), as dispositive of Mr. Reynoso's claim, Appendix 1, at 1, was entirely misplaced. Coble made no claim about the inadequacy of the investigation and in fact "concede[d]" its adequacy. *Id*. Coble's claim was one about presentation not investigation, just the opposite of Reynoso's claim.

Thus, the Fifth Circuit did not even address the claim presented by Mr. Reynoso.

B. The uninvestigated mitigating evidence was not cumulative of the evidence presented at trial.

The Fifth Circuit found that "[a]lmost all of this [uninvestigated] evidence—such as his mother's abandonment of the family and his subsequent substance abuse, depression, and self-harm—concerns aspects of Reynoso's history to which thirteen mitigation witnesses, including Reynoso himself, testified at trial." Appendix 1, at 1. For this reason, the Court held that the uninvestigated evidence was cumulative, and the failure to investigate it, non-prejudicial. *Id*.

This conclusion is wrong, because it fails to account for the material difference between the evidence that was presented at trial and the uninvestigated evidence. Simply reciting generalities about the evidence, as the Fifth Circuit did, is not an adequate or meaningful analysis. That is demonstrated clearly by *Sowell v. Anderson*, 663 F.3d 783 (6th Cir. 2011), discussed in Mr. Reynoso's Fifth Circuit reply brief.

In *Sowell*, the Sixth Circuit explained that uninvestigated mitigating evidence is not cumulative of the trial evidence if "[t]he additional mitigating evidence differs in strength and in subject matter from the evidence the [jury] heard...." *Id*. at 795. The additional mitigating evidence in *Sowell* differed in strength because the additional evidence pierced the "generalities" of Mr. Sowell's life that were presented in the trial testimony. These generalities "lacked any

details of the severe abuse and abject poverty Sowell experienced as a child, or any 'graphic descriptions' of the atmosphere of violence that permeated his formative years." *Id*. The uninvestigated evidence that could have been offered by Sowell's family members, by contrast, "offered first-hand, eyewitness accounts of specific examples of extreme poverty and abuse. These specifics had far more evidentiary power than the abstractions and oblique references contained in the experts' written reports." *Id*. The uninvestigated evidence in *Sowell* also differed in subject matter and was not simply cumulative because it "is [evidence] of more than a few scattered incidents. It is evidence of a lifetime of privation and abuse, beginning in early childhood and continuing throughout the formative years of Sowell's life." *Id*. at 796.

In Mr. Reynoso's case, these very same patterns are readily apparent when the trial evidence is compared to the uninvestigated evidence. *See* Op. Brief, at 12-17 (detailing penalty phase mitigation evidence), and 42-53 (detailing the uninvestigated mitigation evidence). While the jury heard generalities about Mr. Reynoso's deterioration and difficulties in the wake of his mother's abandonment, they did not hear the strength of the evidence that could have been presented through reasonable investigation – the "'graphic descriptions' of the atmosphere of violence that permeated his formative years," *Sowell*, 663 F.3d at 795. Nor did

they hear the full subject matter of that evidence – that Reynoso endured relentless violence throughout his childhood and adolescence and engaged in increasingly self-destructive behavior because of his inability to cope with that trauma.

Even though Mr. Reynoso presented this analysis under *Sowell*, the Fifth Circuit failed even to mention it, much less to try to explain why the analysis was not persuasive. Instead, the court swept aside the value of the uninvestigated evidence as cumulative, without accurately comparing it to the trial evidence:

> Almost all this evidence – such as his mother's abandonment of the family and his subsequent substance abuse, depression, and self-harm – concerns aspects of Reynoso's history to which thirteen mitigation witnesses, including Reynoso himself, testified at trial. Failure to present more of the same evidence cannot support a finding of prejudice.

Appendix 1, at 1 (citing *Bobby v. Van Hook*, 558 U.S. 4, 12 (2009), and *Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009)). Neither *Van Hook* nor *Belmontes* supports the Fifth Circuit's analysis in the face of the *Sowell* analysis.

In *Van Hook*, the uninvestigated evidence would have provided more detailed information about two aspects of the mitigation evidence already presented at trial – Van Hook's mother's need for psychiatric care and Van Hook's father's violence directed toward both his mother and him. 558 U.S. at 12. The greater details did not, however, pierce the "generalities" presented at trial, *Sowell*, 663 F.3d at 795, because the trial evidence was already detailed and not based on

generalities as to these matters. 558 U.S. at 12. Moreover, the greater details did not add "[evidence] of more than a few scattered incidents," or show "a lifetime of privations and abuse." *Sowell*, 663 F.3d at 796. The uninvestigated evidence just added more details to those the jury already heard about Van Hook's mother's psychiatric care and his father's violence against his mother and him. 558 U.S. at 12.

Similarly, in *Belmontes*, uninvestigated evidence would have provided more detailed information about three aspects of the mitigation evidence already presented at trial – the effect of his baby sister's death on him when he was five years old, his grandmother's alcohol abuse and addictions, and the longstanding strife and abuse within his family. 558 U.S. at 22. The greater details did not, however, pierce the "generalities" presented at trial, *Sowell*, 663 F.3d at 795, because the trial evidence was already detailed and not based on generalities as to these very matters. 558 U.S. at 23. Moreover, the greater details did not add "[evidence] of more than a few scattered incidents," or show "a lifetime of privations and abuse." *Sowell*, 663 F.3d at 796. The uninvestigated evidence just added more details concerning the three areas already presented in some detail at trial. 558 U.S. at 22.

At the very least, therefore the Fifth Circuit should have undertaken a careful comparison of the trial evidence and the uninvestigated evidence before declaring that the uninvestigated evidence was only cumulative. That is exactly what this Court did in *Van Hook* and *Belmontes*, and what the Sixth Circuit provided an analytical framework for doing in *Sowell*. To fail to do this, and to declare the uninvestigated evidence "cumulative," Appendix 1, at 1, without any analysis demonstrates beyond dispute that the Fifth Circuit did not engage in the kind of appellate review of Mr. Reynoso's case that due process contemplates.

C. The uninvestigated evidence was not "too double-edged to show prejudice."

The Fifth Circuit held that "the proffered new evidence that trauma caused Reynoso to suffer 'extreme reactivity to perceived threat' is too double-edged to show prejudice." Appendix 1, at 2. While acknowledging that the evidence of trauma might reduce his moral culpability for his violent behavior, *id*., the court observed that the evidence also showed Mr. Reynoso "'is likely to continue to be dangerous in the future.'" *Id*. (quoting *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002)). This latter observation – which was key to rejecting the uninvestigated evidence of trauma under the prejudice prong of the ineffectiveness analysis – could not have been made had the Fifth Circuit acknowledged the argument presented by Mr. Reynoso in his reply brief.

The case of *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), discussed at length in Mr. Reynoso's Fifth Circuit reply brief, at 10-12, provided a blueprint for the analysis of this issue. Mr. Littlejohn's history of criminal behavior was even worse than Mr. Reynoso's.

> Petitioner [Littlejohn] ... learned to hot wire cars at the age of 15 and stole countless cars before being institutionalized in a juvenile facility. Released at age 18, Petitioner committed a robbery just two weeks later. Armed with an Uzi, Petitioner shot at his victim several times before hitting him in the head with the Uzi and taking his money. Petitioner also burglarized an automobile, and because he committed these crimes as an adult, he was sent to the penitentiary. Because of his bad behavior, [he] served almost all of his 24–month sentence.... [After being released in 1992], [he] started selling dope. He and Bethany robbed the Root–N–Scoot [during which he murdered a person, resulting in his death sentence] ... on June 20, 1992.

Id. at 864.

On Littlejohn's appeal, the Tenth Circuit examined an ineffectiveness claim in which, as in Mr. Reynoso's case, the interplay between omitted evidence of mental disorder and "continuing threat" (i.e., future dangerousness) was at issue. The court explained that "[e]vidence of organic mental deficits ranks among the most powerful types of mitigation evidence available," *id*. at 864, because it helps the defense "'connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question.'" *Id*. (citation omitted.) That such serious

mental disorders were "a substantial factor in engendering Mr. Littlejohn's life of deviance probably would have been a significant favorable input for Mr. Littlejohn in the jury's decisionmaking calculus." *Id*. In Littlejohn's case, like Reynoso's, "the jury received virtually no explanation of how Mr. Littlejohn's alleged mental problems played into the murder…." *Id*.[7] And in Littlejohn's case, like Reynoso's, "[t]he potential prejudice flowing from this omission was heightened ... by the fact that a considerable portion of the State's case in aggravation related to the continuing-threat aggravator." *Id*. at 865. In these circumstances, evidence that Littlejohn's extensive history of criminal behavior and violence was associated with serious mental disorders "would have offered a less blameworthy explanation of [that] history." *Id*. Critically, such evidence "could have strongly militated against" a finding of future dangerousness, particularly where the underlying mental disorders "'are *treatable*.'" *Id*. (emphasis in original).

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[7]Because of a similar absence of information from the defense in Mr. Reynoso's case, the prosecutor in Reynoso's case was able to argue that one of the mental health problems suffered by Mr. Reynoso, paranoia, supported a finding future dangerousness:

> His temper. Does anybody doubt that Juan Reynosa [sic] has a short fuse? His paranoia and persecution complex. He thinks everybody is after him. Even a girlfriend said that he's always running from someone. He thinks the world is out to get him. That's why he got the F you now, F you forever [tattoo] on his eyelids.

ROA.3301(37) (penalty phase closing argument by the prosecutor). The defense was unable to present expert testimony to explain that Mr. Reynoso's paranoia was a mental health disorder associated at least in part with his years-long exposure to severe trauma and could be treated, because the defense failed to investigate Mr. Reynoso's mental health disorders effectively.

Everything the Tenth Circuit concluded in *Littlejohn* about the relationship between mental disorders and future dangerousness is fully applicable to Mr. Reynoso – including, significantly, that the basis for Mr. Reynoso's disorders, lifelong exposure to severe trauma, is also treatable. *See* Reply Brief, at 12-14.

Accordingly, by ignoring *Littlejohn* and the argument that Mr. Reynoso's trauma-related disorders were similarly treatable, the Fifth Circuit ignored the very reasons it could *not* reasonably conclude that the uninvestigated evidence of trauma was "too double-edged to show prejudice."

D. The mitigation evidence, in totality, is not dwarfed by the State's case in aggravation.

The Fifth Circuit held that the prejudice prong of the ineffectiveness claim could not be met, because "Reynoso's mitigation case is dwarfed by the State's aggravation case," and "Reynoso has made no substantial argument that his new mitigation case could have altered the balance against this aggravation case." Appendix 1, at 2.

Neither conclusion is accurate. Both reflect a failure on the part of the court to consider the arguments presented by Mr. Reynoso and the evidence tendered to the District Court.

In Mr. Reynoso's opening brief in the Fifth Circuit, at 53-55, he *did* make a "substantial argument that his new mitigation case could have altered the balance

against this aggravation case," and that the mitigation case *was not* "dwarfed by the State's aggravation case." Here is the gist of what he argued.

No fair reading of the evidence of Juan Reynoso's years-long exposure to violence, and Dr. Dudley's evaluation in light of it, could lead to the conclusion that the uninvestigated evidence would have made no difference in the penalty phase of the trial. Counsel's deficient investigation left the jury with no knowledge about the most important information about Mr. Reynoso. *The jury did not know that Mr. Reynoso was exposed to severe violence and trauma at all, much less for the many years that it occurred.* The jury did not know that Mr. Reynoso's abuse of drugs and alcohol was the direct result of his years-long exposure to violence and trauma, and that it was an unrelenting addiction not the voluntary choice to use drugs and alcohol that even Mr. Reynoso thought it was. *Cf.* ROA.3249 (on cross-examination, Reynoso testified that he knew "it's a person's own choice to take drugs and alcohol," and that even though he made this choice, "you're still responsible for your actions"). The jury did not know the severity of Mr. Reynoso's depression and how it made him devalue his and others' lives. And, the jury did not know how any event that triggered the deep reservoir of life-threatening fear stored in him through his exposure to so much violence could

cause outbursts of self-protective violence for no apparent reason, as it did when Tonya Riedel failed to do what he told her to do.

The evidence that went un-investigated and un-presented and ignored could, plainly, have change the outcome of Mr. Reynoso's sentencing trial. It could have provided insight into the question that trial counsel asked of the mitigation witnesses, but that none could answer: How could the Juan Reynoso that family and friends thought they knew – who could be genuinely loving, kind, and compassionate – do such hateful things? The insight this evidence could have provided is not that Reynoso was not the kind of person they thought he was. It is that they did not know the violence he had experienced from others and how those experiences had overwhelmed his better, and just as real, character and nature. Mr. Reynoso's grasping to return to that better version of himself was an indication of the anguish he felt and the overwhelming obstacles he faced. *See* ROA.3169(RR 237) (call from Reynoso to his cousin Isabel Perez just before the murder of Ms. Riedel, crying and upset, saying he has "been doing this ... shit ... and I'm tired. I want to go to church"); ROA.3168 (Ms. Perez recounting that Reynoso had also talked with her son at the same time, and her son told her to pray for him, because "he's got a lot of hurts and he's not opening up").

This is the story that counsel's deficient performance failed to find and tell, and this is the story that would "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...." *Strickland v. Washington*, 466 U.S. at 695-96.

Both the murder and the "unremitting and escalating" violence, ROA.923 (district court opinion), engaged in by Mr. Reynoso in the days before and after the murder stemmed from the same underlying conditions. What was escalating was his inability to cope with the rigors and profound suffering in his life because of trauma-related mental illness and addiction. This spilled into violence, but it arose out of anguish and mental illness, not a malign character.

For the Fifth Circuit to conclude what it did about the mitigating evidence being "dwarfed" by the aggravating evidence, and there being no substantial argument that the uninvestigated mitigating evidence could have altered the balance between mitigation and aggravation, makes no sense in the face of the very arguments Mr. Reynoso presented. There could be no stronger evidence that the Fifth Circuit failed to consider what Mr. Reynoso argued.

CONCLUSION

From the foregoing, it is plain that Mr. Reynoso has satisfied the merit-of-the-underlying-claim portion of the cause and prejudice test of *Martinez v. Ryan*.[8] What remains is for the Fifth Circuit to determine whether state habeas counsel provided ineffectiveness assistance when he failed to raise the claim of trial counsel's ineffectiveness.

For these reasons, Mr. Reynoso requests that the Court grant his Petition, vacate the judgment of the Fifth Circuit, and remand for further consideration of the procedural default question under *Martinez v. Ryan*.

Respectfully submitted,

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By 

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[8] "[T]he prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14.

Appendix 1

854 Fed.Appx. 605 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Juan Jose REYNOSO, Petitioner,
v.
Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.
No. 20-70023

|
FILED July 29, 2021

Application for a Certificate of Appealability from the United States District Court for the Southern District of Texas, USDC No. 4:09-CV-2103

Attorneys and Law Firms

Richard H. Burr, III, Esq., Burr & Welch, P.C., Leggett, TX, Edward A. Mallett, Esq., Mallett Saper Berg, L.L.P., Houston, TX, for Petitioner-Appellant.

Garrett M. Greene, Office of the Attorney General for the State of Texas, Austin, TX, for Respondent-Appellee.
Before Willett, Ho, and Duncan, Circuit Judges.

Opinion

Per Curiam:*

A Texas jury convicted Juan Reynoso in 2004 of murdering Tonya Riedel and sentenced him to death. Reynoso claims his counsel rendered ineffective assistance during the punishment phase by doing too little to prepare mitigation witnesses. The district court, finding the claim both procedurally barred and meritless, denied Reynoso a certificate of appealability (COA). We also agree that Reynoso's constitutional claim is meritless and so deny him a COA.

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). "Where a district court has rejected the constitutional claims on the merits, ... [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).[1]

An ineffective assistance of counsel claim requires a petitioner to show (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The second prong requires showing "that but for his counsel's deficiency, there is a reasonable probability [petitioner] would have received a different sentence." *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

Reynoso fails to make a substantial showing on at least the second *Strickland* *606 prong, *i.e.*, that trial counsel's performance prejudiced his case for a life sentence. He claims that in preparing his mitigation case, his attorneys began too late, relied on an investigator to interview witnesses, and took the witnesses' testimony in court based only on the investigator's notes. With more thorough preparation, Reynoso argues the witnesses' testimony could have been more powerful and persuaded the jury to spare him the death penalty. But we have a rejected a similar claim before, in a case where counsel delegated pre-testimony witness interviews to an investigator, and the petitioner argued that "these witnesses would have been 'more effective' if they had been better prepared." *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007). We held this did "not come close to suggesting that but for counsel's errors, the result of the proceeding would have been different." *Ibid.* (internal quotation marks omitted). Likewise, by arguing better preparation might have elicited "qualitatively greater" mitigation testimony, Reynoso also fails to make a substantial showing of prejudice.

Furthermore, the "new evidence" Reynoso claims counsel ought to have elicited from mitigation witnesses is cumulative and double-edged. Almost all this evidence—such as his mother's abandonment of the family and his subsequent substance abuse, depression, and self-harm—concerns aspects of Reynoso's history to which thirteen mitigation witnesses, including Reynoso himself, testified at trial. Failure to present more of the same evidence cannot support a finding of prejudice. *See* *Bobby v. Van Hook*, 558 U.S. 4, 12, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (finding no prejudice where "[o]nly two witnesses even arguably would have added new, relevant information"); *Wong v. Belmontes*, 558 U.S. 15,

22–23, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (after nine witnesses offered a range of evidence to "humanize" the defendant, "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all"). Likewise, the proffered new evidence that trauma caused Reynoso to suffer "extreme reactivity to perceived threat" is too double-edged to show prejudice. Although this evidence "might permit an inference that he is not as morally culpable for his behavior, it also might suggest [Reynoso], as a product of his environment, is likely to continue to be dangerous in the future." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002).

Finally, the new evidence does not change the fact that Reynoso's mitigation evidence is dwarfed by the State's aggravation case. A prejudice analysis must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (cleaned up). During the punishment phase, the State presented extensive aggravating evidence: Reynoso's string of armed robberies (including one in which he shot his victim in both legs) in the weeks before the murder; prior convictions for burglary of a vehicle, drug possession, and contempt of court; numerous juvenile offenses; his attempted shooting of a fellow marijuana dealer over a drug debt, days after the murder; and his remorseless "bragging" about the murder in its aftermath. The brutality of the murder—shooting a homeless woman point-blank after she resisted Reynoso's demands for money—was offered as an additional aggravator. Reynoso has made no substantial argument that his new mitigation evidence could have altered the balance against this aggravation case.

Motion for COA DENIED.

All Citations

854 Fed.Appx. 605 (Mem)

Footnotes

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

1 Reynoso procedurally defaulted his ineffective assistance claim by failing to raise it in his original state habeas proceeding. Rather than untangling whether he can overcome this default because of the alleged ineffectiveness of his state habeas counsel—*see* *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler*, 569 U.S. 413, 421–23, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013)—we "cut to the core of the case" and deny COA based on his failure to show a substantial constitutional claim. *King v. Davis*, 883 F.3d 577, 585 (5th Cir. 2018); *see also* *Murphy v. Davis*, 901 F.3d 578, 589 n.4 (5th Cir. 2018) ("[I]nstead of deciding if [petitioner] can overcome his procedural default ... we will cut straight to the merits to deny his claim"); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011) ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues.").

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Appendix 2

United States Court of Appeals for the Fifth Circuit

No. 20-70023

JUAN JOSE REYNOSO,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2103
USDC No. 4:08-MC-415

ON PETITION FOR REHEARING

Before WILLETT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix 3

2020 WL 2596785
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas.

Juan Jose REYNOSO, Petitioner,
v.
Lorie DAVIS, Respondent.
Civil Action H-09-2103

|
Signed 05/21/2020

Attorneys and Law Firms

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Edward Larry Marshall, Garrett Mitchell Greene, George A. d'Hemecourt, Stephen Matthew Hoffman, Thomas M. Jones, Laura Grant Turbin, Office of the Texas Attorney General, Austin, TX, for Respondent.

Opinion on Summary Judgment

Lynn N. Hughes, United States District Judge

1. Introduction.

*1 Juan Jose Reynoso killed a homeless woman during a robbery because she would not give him any money. He confessed to the crime. A jury convicted him of capital murder. In a separate punishment phase, the prosecution presented evidence of Reynoso's extensive lawlessness. He was sentenced to death. After unsuccessfully seeking state remedies, Reynoso now sues for federal habeas corpus relief. Reynoso's federal habeas petition raises four claims. The state appellate court competently dismissed three of Reynoso's federal claims. Reynoso's fourth claim complains about his trial attorneys' representation. Because Reynoso never gave the state courts a fair opportunity to consider that argument, federal review is barred. Alternatively, the court finds that Reynoso's trial attorneys made an adequate attempt to defend against a death sentence. Any new evidence is either cumulative of the trial evidence or unpersuasive in comparison to aggravating evidence. The court will deny habeas relief.

2. Habeas Corpus Review.

The state of Texas has the power to kill a person as punishment. The writ of habeas corpus allows him to challenge his custody on the grounds that his conviction and sentence violate federal law. A federal court's narrow, yet careful, review exists only to ensure that the state afforded full constitutional protection to a man it has sentenced to die.

The respondent has moved for summary judgment. The Anti-Terrorism and Effective Death Penalty Act overrides ordinary summary judgment rules.[1] Under AEDPA, if a state court has adjudicated an inmate's legal claims, he must show that its decision conflicts with, or unreasonably applies, clearly established federal law.[2]

3. *Routinely Denied Claims.*

Reynoso's first three claims relate to Texas's method of assessing a death sentence. Reynoso says that (1) the prosecution should have to prove the absence of mitigating evidence beyond a reasonable doubt; (2) a state appellate court should reweigh the jury's decision regarding mitigating evidence; and (3) Texas's statutorily required jury instructions are vague. The Texas Court of Criminal Appeals denied all three claims on direct appeal.[3] Other federal petitioners have repeatedly raised similar attacks to Texas's capital sentencing scheme. Courts have consistently denied each of those claims.[4] Reynoso concedes that controlling authority has rejected his arguments.[5] The state court's denial of Reynoso's first three claims was not contrary to, or an unreasonable application of, federal law.

4. Failure to Present Mitigating Evidence.

*2 Ronald N. Hayes and Robert Scott represented Reynoso at trial. In his fourth claim Reynoso says that his trial attorneys ineptly defended him against a death sentence. Reynoso's trial attorneys faced a difficult challenge in seeking a life sentence. The state called numerous witnesses to describe Reynoso's long history of lawlessness and violence. To counter that evidence, the defense called 12 witnesses, including close family members, to describe Reynoso's background. Reynoso himself also testified. The defense said that Reynoso had been a well-behaved child until age 13 when his mother abandoned the family. His father was not attentive and abused his children. Reynoso's behavior deteriorated. He threw himself into gang life. He used drugs, suffered anxiety, and attempted suicide. Still, Reynoso eventually became a loving father.

Reynoso now says that his trial attorneys did not do enough. Reynoso relies on affidavits alleging that his trial attorneys should have presented evidence that he: (1) grew up in poverty; (2) experienced violence in his neighborhood and in his home, both from watching his parents fight and from his older brother's hitting; (3) only found refuge in a mother who later abandoned her family; (4) had a father who was not attentive; (5) found security in gang life; (6) witnessed extreme gang violence and later became the victim of it himself; (7) abused substances to cope with his troubled life; and (8) had mental illness that, when combined with drug use and the constant need for drug money, led to explosive anger and indifference to others.[6]

Reynoso first raised this claim on federal habeas review. This court stayed and administratively closed the federal action so that Reynoso could present his *Strickland*[7] claim to the state courts. Texas's stringent abuse-of-the-writ doctrine (codified at Tex. Code Crim. Pro. art. 11.071 § 5) only allows inmates to file a successive habeas application under limited circumstances. The Texas Court of Criminal Appeals dismissed Reynoso's successive application because he did not meet the statutory requirements.[8]

This court reopened its case. Respondent now says that the state court's dismissal of the *Strickland* claim bars federal review. How an inmate has litigated his claims determines what issues a federal court can adjudicate. If an inmate does not follow well-established state procedural rules, and the state court thereby finds that he has defaulted judicial review, a procedural bar forecloses federal review.[9] Reynoso admits that he defaulted his claim in state court.[10]

The court will decide if Reynoso can overcome the procedural bar before considering the claim in the alternative.

5. Procedural Bar.

An inmate can overcome a procedural bar if he "can demonstrate *cause* for the default and *actual prejudice* as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a *fundamental miscarriage of justice*."[11] Reynoso excuses his default by relying on *Martinez v. Ryan*,[12] in which the Supreme Court found that deficient performance by a state habeas attorney can be cause.

A. Background.

On May 12, 2004, the trial court sentenced Reynoso to death. One week later, the trial court appointed Stephen R. Rosen to represent Reynoso on state habeas review. Reynoso alleges that Rosen should have made a robust investigation into mitigating evidence. The Court looks at Rosen's duty during three time periods: (1) when he was first appointed, (2) when Reynoso subsequently represented himself, and (3) when only a short time remained to prepare a habeas application.

*3 The question of whether Reynoso was competent to waive habeas review clouded the first period of Rosen's representation. Less than a week after Rosen's appointment, Reynoso wrote a letter to the trial court saying that he did not wish to proceed with his appeals and that he wanted to be executed. Over the next few months, Reynoso made several efforts to remove Rosen and to request the setting of an execution date. Reynoso repeatedly told the court in letters and in hearings that he wanted to waive habeas review. The Texas Court of Criminal Appeals abated Reynoso's action and ordered the trial court to decide whether he waived his rights competently and knowingly. The trial court appointed two mental-health experts who found Reynoso competent to dismiss his attorney and waive state habeas review. On November 8, 2004, the trial court withdrew Rosen's appointment.

For the next several months, Reynoso represented himself. During this second period, Rosen had no legal obligation to investigate potential habeas claims. Reynoso repeatedly thereafter wrote letters to the trial court asking for an execution date. Under state law, Reynoso had until April 9, 2005, to file a state habeas application.

On March 2, 2005, Reynoso wrote a letter saying he had changed his mind and wanted to proceed with habeas review. Even though he was no longer counsel of record, Rosen filed a motion asking for an extension of time to file a habeas application. In an April 4, 2005, hearing, the trial court reappointed Rosen and extended deadlines for filing a habeas application.

Reynoso's dithering affected Rosen's duty and ability to file a habeas application in the third time period. On May 1, 2005, Reynoso sent the trial court a letter saying "again, once and for all, I DO NOT want [Rosen] to represent me. I wish to waive my appeals. I would like an execution date immediately."[13] In a May 19, 2005, face-to-face meeting with an associate of Rosen's, Reynoso reiterated that he wanted to waive state review.

On June 22, 2005, however, Reynoso wrote a letter to the trial court again saying that he wished to proceed with habeas review. At that point, state law prevented Rosen from seeking any additional extension of time.[14] Reynoso left counsel only days to investigate and prepare a habeas application.

Rosen filed a state habeas application on July 11, 2005, raising only one issue that had already been presented on direct appeal. The state habeas court denied relief.[15]

B. State Habeas Representation as Cause.

To establish cause, a petitioner must show that some external impediment frustrated his or her ability to comply with the state's procedural rule.[16] Ineffective assistance of counsel can serve as cause to excuse a procedural default. The mere fact that petitioner or his counsel did not recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. "To meet the cause exception under *Martinez*, an inmate must: (1) prove that his habeas attorney's representation fell below the standards established in *Strickland* and (2) show that his underlying ineffective-assistance claim "has some merit[.]"[17]

Finding cause to overcome a procedural bar requires the exercise of equity.[18] Less than a week after Rosen's first appointment, Reynoso indicated that he wished to die. He insistently continued his efforts until the courts removed Rosen as counsel of record. Reynoso alone was responsible for developing habeas claims during the time between Rosen's removal and his reappointment on April 4, 2005. Rosen had no obligation to investigate habeas claims when he did not represent Reynoso.

*4 Even after that, Reynoso's waffling blurred Rosen's responsibilities[19] On habeas review, a petitioner's "conduct in relation to the matter at hand may disentitle him to the relief he seeks."[20] Reynoso's belligerent and mercurial actions during habeas review cut against the operation of equity in his favor. Simply, a defendant cannot "block[ ] his attorney's efforts to defend him ... [and then] later claim ineffective assistance of counsel."[21] Reynoso cannot show cause.

As an additional reason for which Reynoso has not shown cause, "[t]he mitigation evidence presented at trial, in terms of both quantity and quality, would not suggest to a reasonable habeas attorney that [Reynoso's] trial counsel rendered ineffective assistance."[22]

C. Prejudice.

Alternatively, Reynoso must also show "actual prejudice as a result of the alleged constitutional violations" before federal review becomes available.[23] When reviewing "whether state habeas counsel was ineffective in failing to present the trial court ineffectiveness claim in the state habeas proceeding," actual prejudice "means that [a petitioner] must show a reasonable probability that he would have been granted state habeas relief had his habeas counsel's performance not been deficient."[24]

Reynoso says actual prejudice exists because Rosen did not develop the evidence contained in his habeas petition: that Reynoso grew up in poor, violence-ridden neighborhoods, had parents who fought constantly, experienced violence at home, was mistreated by an aggressive older brother, and was traumatized by his gang experiences. Also, Reynoso argues that his trial attorneys should have called a mental-health expert to put his evidence into a psychological context.[25]

Much of the habeas evidence came before the jury, though perhaps not in the detail Reynoso now wishes.[26] Some of Reynoso's new evidence conflicts with his own trial testimony, such as that he came from a "middle class background"[27] and was not "abused on any kind of ongoing

basis."[28] Some of Reynoso's new evidence may support greater insight into his background. That said, Reynoso relies on witnesses who have come forward years after trial, yet who can only give testimony about circumstances that Reynoso knew himself. The witnesses Reynoso is insisting his counsel should have "investigated" were all people whom Reynoso knew. Counsel are not normally required to discover witnesses that the defendant has withheld, especially when, as here, they are duplicative. Reynoso's trial attorneys gave the jury insight into the same general subjects as Reynoso presents on federal review.

*5 This is not a case where Reynoso's trial attorneys abdicated their duty to present mitigating evidence. The defense called numerous witnesses. Their testimony followed the same themes, even if lacking in detail, as the information now presented on federal review. Reynoso takes issue with his trial attorneys' choice of questions and depth of examination, but his argument "boils down to a matter of degrees - [he]wanted these witnesses to testify in greater detail about similar events and traits[.]"[29] The new evidence differs little in substance or mitigating thrust from that his trial attorneys put before the jury. Actual prejudice does not exist for evidence that is "in the main cumulative" to that from trial.[30]

Against that evidence, the State showed Reynoso's extremely violent history of offenses. Reynoso committed numerous crimes as a juvenile: unlawfully carrying a weapon, stealing cars, evading arrest. He absconded from parole. As an adult, he was convicted of burglary of a vehicle, possession of drugs, and contempt of court. Reynoso sold drugs and threatened to kill other drug dealers. Reynoso shot a man after stealing his drugs. In the weeks before the murder and attempted robbery of his homeless victim, Reynoso engaged in other violent robberies. With accomplices, Reynoso robbed several people, threatening to shoot them. Reynoso robbed several stores. He stole cars. After his arrest for capital murder, Reynoso assaulted another inmate. The State argued that violence was an unremitting and escalating theme in Reynoso's life.

Even if habeas counsel's representation amounted to cause, Reynoso has not shown that there is a reasonable probability that he would have been granted state habeas relief had the new evidence been presented in the state habeas proceedings. Adequate and independent state procedural grounds prevent this court from reaching the merits of Reynoso's fourth claim for relief.

6. Alternative Review of the Merits.

For the same reasons that Reynoso has not shown actual prejudice, an alternative review of the merits shows that Reynoso is not entitled to federal habeas relief on his *Strickland* claim.

7. Certificate of Appealability.

This court may deny a certificate of appealability on its own motion. A certificate will issue only if the petitioner has made a "substantial showing of the denial of a constitutional right."[31] Binding precedent forecloses relief on all Reynoso's claims. No certificate is justified.

8. Conclusion.

"Though the penalty is great and our responsibility heavy, our duty is clear."[32] The court grants respondent's motion for summary judgment and denies Reynoso's habeas petition. The court will dismiss his petition. The court will not certify any issue for review on appeal.

All Citations

Slip Copy, 2020 WL 2596785

Footnotes

1 *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (overruled on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004)).

2 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000).

3 *Reynoso v. State*, 2005 WL 3418293, at *4-5 (Tex. Crim. App. 2005) (unpublished).

4 *Blue v. Thaler*, 665 F.3d 647, 668-69 (5th Cir. 2011); *Druery v. Thaler*, 647 F.3d 535, 546-47 (5th Cir. 2011); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007); *Woods v. Cockrell*, 307 F.3d 353, 358-59 (5th Cir. 2002).

5 Dkt. 36 at 3, n.4.

6 Dkt.57 at 14-15.

7 *Strickland v. Washington*, 466 U.S. 668 (1984).

8 *Ex parte Reynoso*, 2010 WL 2524571 (Tex. Crim. App. June 16, 2010).

9 *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001).

10 Dkt. 44 at 1-3.

11 *Coleman*, 501 U.S. at 750 (emphasis added); *see also* *Garza v. Stephens*, 738 F.3d 669, 675-76 (5th Cir. 2013).

12 132 S. Ct. 1309 (2012). *Martinez* applies to cases arising from Texas courts. *Trevino v. Thaler*, —— U.S. ——, 133 S. Ct. 1911 (2013).

13 *Ex parte Reynoso*, 228 S.W.3d 163, 164 (Tex. Crim. App. 2007).

14 *See* TEX. CODE CRIM. PRO. 11.071 § 4(b).

15 *Ex parte Reynoso*, 257 S.W.3d 715 (Tex. Crim. App. 2008). Confusion about the timeliness of the filing caused the Court of Criminal Appeals first to dismiss as untimely, and then later to deny the merits of, Reynoso's habeas application.

16 *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

17 *Martinez*, —— U.S. ——, 132 S. Ct. at 1318; *see also* *Crutsinger v. Stephens*, 540 F. App'x 310, 317 (5th Cir. 2013); *In re Sepulvado*, 707 F.3d 550, 556 n.12 (5th Cir. 2013).

18 *Martinez*, —— U.S. ——, 132 S. Ct. at 1318.

19 On state habeas review, Rosen filed an affidavit. He explained:
I was ordered to file a writ on [Reynoso's] behalf. I did the best I could under the circumstances. Mr. Reynoso did not want to cooperate and did not want my assistance in pursuing any post-conviction relief in this case. [Another attorney] and I reviewed the trial record in this cause. Under the circumstances we did everything we could to represent Mr. Reynoso.

20 *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (quotation omitted).

21 *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004); *see also* *Strickland, 466 U.S. at 691* ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir.1984) ("By no measure can [defendant] block his attorney's efforts and later claim the resulting performance was constitutionally deficient.").

22 *Matthews v. Davis*, No. 15-70028, 2016 WL 6543501, at *6 (5th Cir. Nov. 3, 2016).

23 *Coleman*, 501 U.S. at 745; *see also* *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013) (requiring an inmate who had shown cause under *Martinez* to show actual prejudice).

24 *Martinez v. Davis*, 653 F. App'x 308, 318 (5th Cir. 2016); *see also* *Newbury v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014).

25 A psychiatrist, who has not met Reynoso, reviewed his life history and submitted a federal affidavit saying that Reynoso's exposure to violence left him distrustful of others, easily subject to substance abuse, depressed, and possibly suffering from other mental disorders. Without the veneer of psychological speculation, the jury had before it sufficient information to reach the same conclusions.

26 For instance, Reynoso testified at trial that his older brother abused him "[p]hysically. He would ... beat [him] up." Tr. Vol. 16 at 179. Reynoso also described receiving beatings from his older cousins. Tr. Vol. 16 at 179. Witnesses described how Reynoso's alcoholic father was "never a very kind of nurturing type of father[.]" Tr. Vol. 15 at 129; *see also* Tr. Vol. 15 at 201; Vol. 16 at 44, 79. Witnesses testified that Reynoso's father physically abused him and an older brother beat him up. Tr. Vol. 15 at 201; Tr. Vol. 16 at 43, 69, 84. His behavior changed drastically when his mother abandoned her family, leading to his anxiety, drug abuse, and gang involvement. Tr. Vol. 13 at 122; Tr. Vol. 15 at 96, 101-102, 204; Vol. 16 at 77, 113-14. Records from his incarceration as a juvenile showed that he suffered from depression, anxiety, and suicidal ideation Tr. Vol. 16 at 147-49.

27 Tr. Vol. 16 at 193.

28 Tr. Vol. 16 at 193. Reynoso's father would occasionally spank or whip him, though his mother was stricter as a parent. Tr. Vol. 16 at 189-90. Reynoso testified that his father only "absused [him] on one occasion" after his mother left. Tr. Vol. 16 at 178. However, Reynoso also recounted hitting his father and leaving him doubled over on the floor on that occasion. Tr. Vol. 16 at 215.

29 *Carty v. Thaler*, 583 F.3d 244, 264 (5th Cir. 2009); *see also* *Neal v. Puckett*, 286 F.3d 230, 247 (5th Cir. 2002) ("[A]lthough the additional mitigating evidence was of a significantly better quality than that actually presented, much of it was similar in nature to the original evidence.").

30 *Banks v. Dretke*, 540 U.S. 668, 700 (2004).

31 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

32 *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.).

Appendix 4

UNITED STATES DISTRICT COURT **SOUTHERN DISTRICT OF TEXAS**

Juan Jose Reynoso,	§	
	§	
Petitioner,	§	
Versus	§	Civil Action H-09-2103
	§	
Bobby Lumpkin,	§	
	§	
Respondent.	§	

Order

The court denied Reynoso's federal habeas petition on May 21, 2020. (69) Reynoso has filed motion to alter or amend the judgment. (73) Reynoso has not shown any manifest error of law or fact. Reynoso merely disagrees with the result.

The court denies Reynoso's motion. (73)

Signed on Oct-27, 2020, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Appendix 5

2010 WL 2524571
Only the Westlaw citation is currently available.

ORDER

Do Not Publish
Court of Criminal Appeals of Texas.

Ex parte Juan Jose REYNOSO.

No. WR–66,260–02.

|
June 16, 2010.

On Application for Writ of Habeas Corpus, Cause No. 941651, In the 263rd Judicial District Court, Harris County.

ORDER

PER CURIAM.

*1 This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was convicted of the offense of capital murder in May 2004. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Reynoso v. State,* No. AP–74,952 (Tex.Crim.App. December 14, 2005). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Reynoso,* 257 S.W .3d 715 (Tex.Crim.App.2008). Applicant's instant post-conviction application for writ of habeas corpus was received in this Court on March 29, 2010.

The record reflects that Applicant is currently challenging his conviction in Cause No. 4:09–cv–02103, styled *Juan Jose Reynoso v. Rick Thaler,* in the United States District Court for the Southern District of Texas, Houston Division. The record also reflects that the federal district court has entered an order staying its proceedings for Applicant to return to state court to consider his current unexhausted claims. Therefore, this Court may exercise jurisdiction to consider this subsequent state application. *See* *Ex parte Soffar,* 143 S.W.3d 804 (Tex.Crim.App.2004).

Applicant presents one allegation in the instant application. We have reviewed the application, and we find that the allegation fails to satisfy the requirements of Article 11.071, § 5(a). Accordingly, the application is dismissed as an abuse of the writ. Tex.Code Crim. Proc. Art. 11.071, § 5(c).

IT IS SO ORDERED.

All Citations

Not Reported in S.W.3d, 2010 WL 2524571