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

No. 21-6846

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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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD BURR*
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 (fax)
dick.burrandwelch@gmail.com

EDWARD MALLETT
4306 Yoakum Blvd, Suite 400
Houston, Texas 7006
(713) 236-1900
(713) 228-0321 (fax)
edward@msblawyers.com

Counsel for Petitioner

***Member, Bar of the Supreme Court, Counsel of Record**

THIS IS A CAPITAL CASE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Petitioner's Reply Brief

The reason Juan Reynoso's case is worthy of this Court's full review is that no court has ever accorded constitutionally meaningful review of the claim of ineffective assistance of trial counsel presented by Reynoso. In capital cases, which this Court has said for five decades are entitled to a heightened standard of decisionmaking and review, this cannot be allowed to become the practice.

The history of the courts affording no meaningful review of Reynoso's claim review is readily stated. The state courts refused any merits review, because the claim was presented for the first time in a subsequent state habeas application, having been waived by ineffective state habeas counsel's failure to present it in Reynoso's first state habeas application. The federal district court purported to review the claim, but it simply recited aphorisms generally recited in denying an ineffectiveness claim after the claim has been fairly appraised in light of the evidence and arguments made by the petitioner. However, the district court never provided a fair appraisal of the claim in light of the petitioner's presentation. It never even accurately set out the evidence and arguments, much less reasoned why they failed. The Fifth Circuit's review was much worse. It considered a claim Reynoso did not present, instead of the one he presented, and then strung together the same aphorisms to reject it.

Respondent's brief in opposition simply repeats the lower courts' short shrift analyses and never once engages with the arguments Reynoso makes about why the lower courts' review was so flawed. Reynoso's reply to Respondent's arguments makes this point and serves as his plea to this Court to use his case as an opportunity to remind the lower federal courts that the case of a death-sentenced person cannot be meaningfully reviewed without engaging accurately, fully, and transparently with the arguments in support of his or her claims.

1. Did Reynoso present a claim of inadequate investigation or inadequate presentation of mitigating evidence?

Reynoso shows in his petition for writ of certiorari that the Fifth Circuit mis-construed the claim he presented – trial counsel conducted a deficient investigation of mitigating evidence – as a claim that counsel failed to present that evidence adequately. Respondent dismisses the significance of this by arguing that "an in-depth parsing of his claim would be inappropriate on COA." BIO at 16. That is plainly wrong, because the two claims are fundamentally different. The deference due to counsel's decision not to investigate is exponentially less than the deference due to counsel's virtually unchallengeable decision about how to present evidence. *See* Cert. Pet. at 13-15.

2. The record is plain that Reynoso complained of a failure to investigate, not a failure to present, mitigating evidence.

Respondent says that "Reynoso argued that his counsel performed a tardy and inadequate investigation that failed to uncover individuals who could have testified favorably for him *and* failed to prepare those that did testify because counsel relied on an investigator to interview witnesses." BIO at 16 (emphasis supplied). Respondent then uses this to segue into an argument that the Fifth Circuit's reliance on *Coble v. Quarterman*, 496 F.3d 430 (5tth Cir. 2007) – a case involving an IATC claim of inadequate presentation – is appropriate. But Reynoso did not claim that counsel presented the evidence inadequately. Cert. Pet. at 13-15. He complained solely about inadequate investigation. His mention that counsel did not even interview the witnesses he put on was entirely related to not investigating the evidence. Respondent's repetition of a falsehood does not make it true.

3. Did Reynoso fail to demonstrate that the investigation that should have been undertaken would have produced qualitatively different and stronger mitigating evidence?

Respondent says, "the Fifth Circuit held that Reynoso failed to demonstrate how his proposed investigation would not simply be duplicative." BIO at 17. It is true that the Fifth Circuit said this, but the court's assertion is false, and Respondent's repetition of it does not make the assertion true.

The heart of Reynoso's claim is that an effective investigation of mitigating evidence would have uncovered evidence that Reynoso "'was repeatedly subjected to violent, traumatic events throughout the entire course of his life,'" Cert. Pet. at 6 (quoting Dr. Richard Dudley), and that Reynoso suffered "the multitude of psychiatric impairments and vulnerabilities 'that often result from such ... events.'" *Id*. at 7 (quoting Dr. Dudley). None of this evidence had been investigated before trial, and none of this evidence was presented. Cert. Pet. at 16-20.

In addition, this evidence could have changed the outcome of his trial, as we have shown in the petition for writ of certiorari. Cert. Pet. at 23-26. The evidence would have allowed counsel to answer the question he posed to witnesses – often the central question in a capital case – but that no one could answer because of counsel's inadequate investigation: "[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).

4. Did the record demonstrate that counsel conducted "a robust investigation" of mitigating evidence, and that further investigation would have been redundant?

The Respondent says that the record does show this. BIO at 19-20. It is not true.

Counsel did not conduct a robust investigation. The mitigation specialist conducting the investigation had perfunctory interviews with the mitigation witnesses just before they testified. Cert. Pet. at 13-15. That was the entirety of the investigation. *Id*. As the mitigation specialist said, "'There was no time, and no direction, instruction or opportunity to engage in a proper investigation of matters raised by the initial family interviews.... I did not conduct the kind of investigation for mitigating evidence appropriate to a death penalty case....'" *Id*. at 13-14. In the face of this evidence, Respondent – and the courts – could not declare that counsel conducted a robust investigation.

And as we noted above, further investigation would *not* have been redundant. There can be no reasonable dispute about this.

5. Was trial counsel's reliance on a pretrial psychiatric evaluation by Dr. Floyd Jennings reasonable?

Respondent says it was. BIO at 22. It was not.

"Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived." *Baldwin v. Maggio*,

704 F.2d 1325, 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984). The use of a mental health expert to explore potential mental health-based defenses is one means of investigating potential penalty phase defenses. For the use of a mental health expert to be a "reasonably substantial" means of investigation, however, defense counsel must provide the expert enough information about the client's life history, mental health problems, and the case against the client for the expert to undertake a reliable evaluation. Where defense counsel fails to provide this kind of information to a mental health expert, the client is "effectively left without the assistance of any expert…." *Doe v. Ayers*, 782 F.3d 425, 440 (9th Cir. 2015). In these circumstances, "it [i]s patently unreasonable for counsel to rely solely on [the expert's] uninformed opinion in deciding not to investigate [the client's] mental health history further." *Jacobs v. Horn*, 395 F.3d 92, 104 & n.7 (3d Cir.), *cert. denied sub nom.*, *Jacobs v. Beard*, 546 U.S. 962 (2005).

Here, counsel failed to conduct any life history investigation in time to provide the fruits of the investigation to Dr. Jennings. Because he had no such information, Dr. Jennings alerted counsel that information "from collateral sources such as family members," ROA 298, could lead to a different opinion. By the time counsel did have some limited information from family members, counsel were already putting on testimony from these same witnesses. Because of this sequence

of events, counsel could not circle back to Dr. Jennings with more information from the "collateral sources" whom Dr. Jennings indicated could alter his opinions and conclusions. For these reasons, it is clear that trial counsel's reliance on Dr. Jennings' report was not reasonable.

6. Was the evidence of Reynoso's lifelong exposure to severe trauma and its devastating mental health consequences too double-edged to demonstrate prejudice resulting from trial counsel's deficient investigation?

Respondent and the Fifth Circuit say this evidence was too double-edged. BIO at 23-25. It was not.

The evidence of Reynoso's lifelong exposure to severe trauma and the devastating consequences it had for his functioning in the world would not have ushered in any additional aggravating evidence against Reynoso. All the available aggravating evidence – the senselessness and seeming callowness of the capital murder, the violent crimes that preceded and followed it, and Reynoso's troubled juvenile history – was in full display for the jury. What was missing was the *other* edge of that evidence, the mitigating edge. Without the mitigating evidence that could help the jury understand why Reynoso had committed violent crimes, the trial evidence pointed in only one way: Reynoso was likely to pose a danger to others.

The trauma-related history and ensuing mental health disorders that plagued Reynoso would have offered a powerful mitigating counterweight to the evidence of violence and dangerousness. *See* Cert. Pet. at 20-23. As the Tenth Circuit explained in the case that the Fifth Circuit ignored and the Respondent tries to no avail to distinguish, *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), evidence that a capital defendant'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*. at 865. And 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), as both Littlejohn's and Reynoso's underlying mental disorders were.

Thus, the lower courts' reliance on the aphorism that the uninvestigated mitigating evidence would have been double-edged makes no sense here. The uninvestigated evidence would have mitigated the aggravating evidence, not ushered in more aggravating evidence or enhanced the weight of the aggravating evidence that was presented.

7. Did Reynoso decline to balance the new mitigating evidence against all the aggravating evidence?

Respondent and the lower courts say he failed to do this, but that is not true.

In the petition for writ of certiorari, at 23-24, Reynoso notes that in his opening brief in the Fifth Circuit, he did make a "'substantial argument that his new mitigation case could have altered the balance against this aggravation case.'" (Quoting the Fifth Circuit opinion). In sum, this is what Reynoso argued to the lower courts:

Reynoso's lifelong history of exposure to severe trauma led to a growing addiction to alcohol, marijuana, and sedatives that clouded his ability to think, constrain his emotions, and refrain from impulsive behaviors. Coupled with the depression that was associated with the trauma he endured, Reynoso came to devalue his own life and the lives of others. The confluence of these factors led to violence when Reynoso encountered situations in which he felt threatened or opposed, even where no rational person would have felt so – situations such as a homeless person like Ms. Riedel rejecting his demand for money, which triggered a vastly disproportionate, violent, explosive reaction.

This evidence obviously would have answered the question that trial counsel posed but that the evidence could not answer at trial: How could the person Reynoso's family loved and saw as kind-hearted do such a hateful thing as killing Ms. Riedel? The answer, had counsel's investigation been reasonable,

would have been that he did it because he was broken by unrelenting exposure to trauma that led to acts of violence, and no one recognized this, much less offered to help him find the readily-available and effective treatment that he desperately needed.

In the face of this showing, neither the courts nor respondent can truthfully assert that Reynoso declined to balance the uninvestigated mitigating evidence against the aggravating evidence. The uninvestigated evidence offered a mitigating explanation for the aggravating evidence that could have changed the outcome of the sentencing phase of trial. When that test is met, *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984), requires a new sentencing trial.

8. Has Reynoso failed to overcome the default of his IATC claim?

Respondent says he has not. BIO at 30-34. The Fifth Circuit says he has not, but for only one of the reasons Respondent sets forth. Neither is accurate.

The Fifth Circuit examined only the merits of the ineffectiveness claim and determined it had no merit and was therefore defaulted under *Martinez v. Ryan*, 566 U.S. 1, 15-16 (2012) (permitting the courts to resolve the question of whether state habeas counsel's ineffectiveness amounts to cause if "the ineffective-assistance-of-trial-counsel claim is insubstantial"). *See* App. 1 to Cert. Pet. The

Fifth Circuit did not examine whether Reynoso's state habeas counsel had performed deficiently in failing to raise the IATC claim. *Id*.

Respondent argues that state habeas counsel did not perform deficiently and thus there was no cause for the default under *Martinez*. BIO at 31-33. To the extent that argument is based on the lack of merit of the IATC claim, as was the Fifth Circuit's determination, Reynoso has answered that argument in the preceding sections of this brief and in the petition for writ of certiorari. To the extent that argument is based on Respondent's accusation that Reynoso was at fault for counsel's failure to investigate the IATC claim because he wavered about pursuing state habeas remedies, Reynoso answered this argument fully in the briefing before the Fifth Circuit. *See* Petitioner-Appellant's Brief in Support of Application for Certificate of Appealability, at 26-36 (arguing that habeas counsel's total neglect of Reynoso during this period of time violated multiple standards of care for the representation of a person in habeas proceeding who wavers between pursuing remedies and seeking his own execution). As with all Respondent's other arguments in the BIO, he does not even attempt to respond to the arguments presented by Reynoso.

9. Did Reynoso introduce new evidence in the district court in support of his IATC claim that would be precluded by 28 U.S.C. § 2254(e)(2)?

Respondent argues that Reynoso introduced new evidence in the district court that had not been presented to the state courts. BIO at 34-35. This assertion is inaccurate.

The district court stayed the federal habeas proceeding in 2009 to allow Reynoso to file a subsequent habeas corpus application in the state courts. ROA.152. Reynoso returned to federal court with the filing of an amended habeas corpus petition in early 2011. ROA.188-478. Reynoso presented in his amended federal petition the very same claims and supporting documents that he had presented to the state courts while his federal proceeding was stayed. Respondent acknowledged this in his response to the amended federal habeas petition, while at the same time mis-characterizing (as he does here) the IATC claim as a failure to present rather than a failure to investigate mitigating evidence:

> In his second state application, Reynoso alleged that he received ineffective assistance at sentencing when counsel failed to offer certain mitigating evidence. (2 SHCR9 12–65.) To that application he appended much of that evidence presented to this Court, specifically, affidavits from Gina Vitale (2 SHCR 90–92), Roxanne Aguirre (2 SHCR 95–100), Velma Vella (2 SHCR 103–09), Juan Reynoso, Sr. (2 SHCR 111–16), and Greg Bean (2 SHCR 133–40), and reports from Drs. Jennings (2 SHCR 143–46) and Dudley (2 SHCR 149–54).

ROA.510.

Reynoso did not introduce new evidence in the district court in support of his IATC claim that would be precluded by 28 U.S.C. § 2254(e)(2).

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FOR THESE REASONS, in addition to the reasons set forth in the Petition for Writ of Certiorari, the Court should grant certiorari in Reynoso's case.

Respectfully submitted,

RICHARD BURR
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 (fax)
dick.burrandwelch@gmail.com
Counsel of Record

EDWARD MALLETT
4306 Yoakum Blvd, Suite 400
Houston, Texas 7006
(713) 236-1900
(713) 228-0321 (fax)
edward@msblawyers.com

By 
Counsel for Petitioner