SUPREME COURT OF THE UNITED STATES

CARLOS TREVINO *v.* LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 17–6883. Decided June 4, 2018

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting from the denial of certiorari.

The first time this Court considered petitioner Carlos Trevino's case, it held pursuant to *Martinez* v. *Ryan*, 566 U. S. 1 (2012), that a "'procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective,'" and if, as in Texas, the "state procedural framework . . . makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino* v. *Thaler*, 569 U. S. 413, 429 (2013) (quoting *Martinez*, 566 U. S., at 17). Having emphasized that the right to adequate assistance of trial counsel is "critically important," 569 U. S., at 428, the Court remanded Trevino's case with the expectation that, if Trevino could establish that his underlying ineffective-assistance-of-trial-counsel claim was substantial and that his initial-review counsel was ineffective, courts would afford him meaningful review of the underlying claim.

Unfortunately, that is not what happened. When the Court of Appeals for the Fifth Circuit ultimately considered whether Trevino was prejudiced by his trial counsel's failure to investigate and present evidence of his fetal

DOCKET ALARM

Find authenticated court documents without watermarks at docketalarm.com.

alcohol spectrum disorder (FASD), the panel majority did not properly "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003). Rather, the majority dismissed the new FASD evidence because it purportedly created a "significant double-edged problem" in that it had both mitigating and aggravating aspects, and stopped its analysis short without reweighing the totality of all the evidence. 861 F. 3d 545, 551 (2017). That truncated approach is in direct contravention of this Court's precedent, which has long recognized that a court cannot simply conclude that new evidence in aggravation cancels out new evidence in mitigation; the true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew.

Although this Court is not usually in the business of error correction, this case warrants our intervention and summary disposition. I respectfully dissent from the Court's refusal to correct the Fifth Circuit's flagrant error.

I

A

Under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to establish that trial counsel's "deficient performance prejudiced the defense," a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 687, 694. For purposes of a mitigation-investigation claim like this one, a court 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." *Sears* v. *Upton*, 561 U. S. 945, 955–956 (2010) (*per curiam*) (internal quotation marks and alteration omitted); *Wiggins*, 539 U. S., at 534.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

Where, as here, new evidence presented during postconviction proceedings includes both mitigating and aggravating factors, a court still must consider all of the mitigating evidence alongside all of the aggravating evidence. The new evidence must not be evaluated in isolation. Moreover, the court must step into the shoes of the jury, and review the evidence as the jury would have in the first instance. See *Williams* v. *Taylor*, 529 U. S. 362, 398 (2000); *Rompilla* v. *Beard*, 545 U. S. 374, 393 (2005).

In Texas, a jury at the penalty phase of a capital trial first considers whether there is a probability that the defendant will be a future threat to society, Tex. Code Crim. Proc. Ann., Art. 37.071, §(2)(b)(1) (Vernon Cum. Supp. 2017), and whether the defendant caused, intended to cause, or anticipated a death, §2(b)(2). Only if the state has proved those two issues beyond a reasonable doubt will the jury then consider the effect of mitigating evidence on the sentence. §§2(c), (g).[1] If even one juror decides that, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed," the court must impose a life sentence. §§2(e)(1), (f)(2), (g).

B

With that framework in mind, consider the facts of this case.[2] During the penalty-phase proceedings, the State

---

[1] If at least one juror decides either of those two issues in the negative, the court must impose a life sentence regardless of the effect of mitigating circumstances. See Tex. Code Crim. Proc. Ann., Art. 37.071, §2(g).

[2] The procedural history of this case is complex. For present purposes, it is sufficient to note that after this Court's remand, Trevino filed a

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

presented evidence of Trevino's juvenile criminal record and adult convictions. The jury also heard uncontroverted testimony that Trevino was a member of a street gang and a violent prison gang, and, needless to say, the jurors were aware that they had just convicted Trevino of capital murder.

With respect to mitigation, Trevino's counsel presented just one witness, Trevino's aunt, who testified that

> "'(1) she had known [Trevino] all his life, (2) [his] father was largely absent throughout [his] life, (3) [his] mother "has alcohol problems right now," (4) [his] family was on welfare during his childhood, (5) [Trevino] was a loner in school, (6) [Trevino] dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) [Trevino] is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows [he] is incapable of committing capital murder.'" 861 F. 3d, at 547.

With only that mitigation before them, the jury deliberated for approximately eight hours before it unanimously concluded that the State satisfied its burden of showing that Trevino was a continuing threat to society; that he had caused, intended to cause, or anticipated the death of a person; and that the mitigating circumstances were insufficient to warrant a life sentence instead of a death sentence. *Ibid.*

In addition to this evidence presented at trial, Trevino

---

second amended federal habeas petition. The District Court denied relief. *Trevino* v. *Stephens*, 2015 WL 3651534 (WD Tex., June 11, 2015). The Fifth Circuit granted a certificate of appealability and affirmed the District Court's denial of relief solely on the basis that, on the merits, Trevino could not establish that he was prejudiced by his trial counsel's failure to introduce additional mitigating evidence. See 861 F. 3d 545, 548–551 (2017). Judge Dennis dissented from that decision. *Id.,* at 551–557.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

offered new mitigating evidence in support of his habeas petition, including testimony from expert and lay witnesses, relating to his fetal alcohol spectrum disorder. Dr. Rebecca H. Dyer, Ph. D., a clinical and forensic psychologist, reported that Trevino "functions 'within the low average range of intellectual functioning,' and has a 'history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse.'" *Id.,* at 553 (Dennis, J., dissenting). She further stated:

> "'[Trevino's] history of [FASD] clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to [Trevino's] ability to make appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger.'" *Ibid.* (alterations in original).

She concluded that Trevino's FASD "'would . . . have impacted any of [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges,'" *ibid.* (ellipsis and alterations in original), even if the condition "'would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense,'" *id.,* at 549.

Dr. Paul Conner, Ph. D., a clinical neurologist, further reported that "Trevino demonstrated deficiencies in eight cognitive domains, where only three are necessary for a diagnosis of FASD."[3] *Id.,* at 549–550. Trevino's "'daily

---

[3] Trevino showed deficits in "academics, especially math; verbal and

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.