No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

PABLO LUCIO VASQUEZ
Petitioner

v.

TEXAS
Respondent

ON PETITON FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
Pablo Lucio Vasquez
Petitioner

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QUESTION PRESENTED

Should the holdings of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), be extended to encompass a claim, by a Texas capital murder defendant facing a sentence of death, that ineffective assistance of counsel on direct appeal constitutes cause for the procedural default of a valid claim that the trial court, in violation of *Witherspoon v. Illinois*, 88 S.Ct. 1770 (1968), repeatedly excused prospective jurors with sympathies against the death penalty, or with sympathies against judging others, but qualified to serve as jurors at the defendant's trial for capital murder?

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3. The Judgment of the 206th District Court of Hidalgo County, Texas, in No. CR-1054-98-D, signed on 18 March 1999, is unpublished, and appears as appendix C.

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Pablo Lucio Vasquez prays that a writ of certiorari issue to review the Order of the Court of Criminal Appeals of Texas in No. WR-50,801-03.

OPINIONS BELOW

1. The Order of the Court of Criminal Appeals of Texas in No. WR-50,801-03, delivered on 24 February 2016, is unpublished, and appears as appendix A.

2. The Order of the 206th District Court of Hidalgo County, Texas, directing the District Clerk of Hidalgo County to Send Subsequent Writ to the Court of Criminal Appeals, signed on 26 January 2016, is unpublished, and appears as appendix B.

3. The Judgment of the 206th District Court of Hidalgo County, Texas, in No. CR-1054-98-D, signed on 18 March 1999, is unpublished, and appears as appendix C.

JURISDICTION

The Court of Criminal Appeals of Texas delivered its order on 24 February 2016.

No motion for rehearing was filed.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America

Sixth Amendment – In all criminal prosecutions, the accused shall enjoy the right to a public and speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment – Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code of Criminal Procedure

Article 37.071 § 2(h) – The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

STATEMENT OF THE CASE

Vasquez was charged in No. CR-1054-98-D with capital murder, the indictment alleging, in three paragraphs, that on or about 18 April 1998, in Hidalgo County, Texas, he intentionally caused the death of David Cardenas by striking him with a metal pipe, by striking him with a shovel, or by cutting him with a knife, in the course of committing and attempting to commit the robbery of Cardenas.

Jury voir dire began on 20 October 1998, and concluded on 10 December 1998. Vasquez plead not guilty. The guilt/innocence phase of trial began on 19 January 1999, and on 9 February 1999 the jury found Vasquez guilty of capital murder. The punishment phase of trial began on 10 February 1999, and the next day the jury answered the first punishment phase question in the affirmative, and the second in the negative. On 10 March 1999, the trial court accordingly sentenced Vasquez to death.

Also on 10 March 1999, the trial court appointed an attorney to represent Vasquez on direct appeal to the Texas Court of Criminal Appeals. Vasquez' brief raised 18 points of error, but, in an unpublished opinion delivered on 10 April 2002, the Court of Criminal Appeals affirmed the judgment of the trial court.

In the meantime, an attorney was appointed to represent Vasquez in habeas corpus proceedings pursuant to Texas Code of Criminal Procedure article 11.071. His application, filed on 4 August 2000, raised three grounds for review, but, by an unpublished order delivered on 29 May 2002, the Court of Criminal Appeals denied Vasquez habeas corpus relief.

On 20 June 2002, United States Magistrate Judge Dorina Ramos, in Miscellaneous Action No. M-02-027, appointed attorneys to represent Vasquez in habeas corpus proceedings pursuant to 28 U.S.C. § 2254. On 11 December 2002, Vasquez filed a motion to dismiss Miscellaneous Action No. M-02-027 without prejudice, with the intent of filing a subsequent 11.071 writ application. The motion was granted on 7 February 2003. On 12 March 2003, Vasquez filed a subsequent 11.071 writ application in the 206th District Court of Hidalgo County, but, on 10 March 2004, the Court of Criminal Appeals again denied Vasquez habeas corpus relief.

On 30 April 2004, Vasquez filed in the United States District Court for the Southern District of Texas, McAllen Division, a petition for writ of habeas corpus and brief in support, and the case was referred to Magistrate Judge Ramos. On 5 December 2005, the Magistrate Judge entered her Report and Recommendation that Vasquez' petition be dismissed with prejudice, with the exception of one Ground for Relief, a challenge to the death penalty because

Vasquez is mentally ill, not at issue herein, and that Vasquez be denied a certificate of appealability. On 15 December 2005, Vasquez timely filed his objections.

On 10 February 2014, Chief United States District Judge Ricardo H. Hinojosa referred the case back to the Magistrate Judge for further consideration of the impact of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), on those Grounds for Relief she recommended be dismissed solely for procedural default. On 10 March 2014, the Magistrate Judge entered her Supplemental Report and Recommendation, again recommending that Vasquez' petition be dismissed, and that Vasquez be denied a certificate of appealability. On 23 March 2014, Vasquez timely filed his objections.

On 31 March 2014, Chief Judge Hinojosa entered an Order Adopting Report and Recommendation, and an Order of Dismissal. On 29 April 2014, Vasquez filed his notice of appeal. On 28 July 2014, Chief Judge Hinojosa entered an Order denying Vasquez a certificate of appealability. On 23 January 2015, the United States Court of Appeals for the Fifth Circuit denied Vasquez a certificate of appealability, and affirmed the judgment of Chief Judge Hinojosa. On 5 October 2015, the Supreme Court of the United States denied Vasquez' petition for writ of certiorari.

On 4 December 2015, the 206th District Court of Hidalgo County signed an amended order scheduling Vasquez' execution for 6 April 2016. On 9 December 2015, the Hidalgo County District Clerk issued a death warrant.

On 21 January 2016, pursuant to Texas Code of Criminal Procedure article 11.071, Vasquez filed a subsequent application for a writ of habeas corpus in the 206th District Court. The sole Ground for Relief is the Ground for Relief raised herein. Also on 21 January 2016, Vasquez filed a motion for stay of execution and to withdraw death warrant in the 206th District Court.

On 26 January 2016, the 206th District Court denied as premature Vasquez' motion for stay of execution. On 14 February 2016, Vasquez filed a motion for stay of execution with the Court of Criminal Appeals. On 24 February 2016, the Court of Criminal Appeals denied Vasquez' application for writ of habeas corpus as an abuse of the writ, and denied Vasquez' motion for stay of execution.

On 16 March 2016, Vasquez filed in the United States District Court for the Southern District of Texas, McAllen Division, a petition for writ of habeas corpus, raising as his sole Ground for Relief a challenge to the death penalty because he is mentally ill. Accompanying the petition, Vasquez also filed a motion for stay of execution. The case was again referred to Magistrate Judge Ramos, who, on 22 March 2016, entered her Report and recommendation that

Vasquez' petition for writ of habeas corpus be denied, and dismissed with prejudice; that Vasquez' motion for stay of execution be denied; and that Vasquez be denied a certificate of appealability.

On 29 March 2016, United States District Judge Randy Crane, adopting the Report and Recommendation of the Magistrate Judge, denied, and dismissed with prejudice, Vasquez' petition for writ of habeas corpus; denied his motion for stay of execution; and denied him a certificate of appealability.

QUESTION PRESENTED

Should the holdings of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), be extended to encompass a claim, by a Texas capital murder defendant facing a sentence of death, that ineffective assistance of counsel on direct appeal constitutes cause for the procedural default of a valid claim that the trial court, in violation of *Witherspoon v. Illinois*, 88 S.Ct. 1770 (1968), repeatedly excused prospective jurors with sympathies against the death penalty, or with sympathies against judging others, but qualified to serve as jurors at the defendant's trial for capital murder?

REASONS FOR GRANTING THE WRIT – GROUND FOR RELIEF

The trial court's repeated excusal of prospective jurors with sympathies against the death penalty, or with sympathies against judging others, but qualified to serve as jurors at Vasquez' trial, denied Vasquez the fair and impartial jury, and the due process of law, guaranteed by the 6th and 14th Amendments to the Constitution of the United States of America.

During voir dire for selection of the jury for Vasquez' trial for capital murder, the trial court repeatedly excused prospective jurors with sympathies

against the death penalty, or with sympathies against judging others, who were nevertheless qualified to serve as jurors.

The excused prospective jurors of whom Vasquez complains are as follows: 1. unnamed – Jehovah's Witness and sympathies against judging others (RR10-21); 2. Olivia Molina – Jehovah's Witness and sympathies against judging others (RR10-28); 3. Ruben Herrera – Jehovah's Witness and personal conscience (RR10-49); 4. Maria De Los Santos Cruz – sympathies against judging others (RR10-62); and 5. Consuelo Garza – religion and sympathies against the death penalty (RR10-107-108).

6. Glenda Lorena Dominguez – sympathies against the death penalty (RR24-3-7); 7. Father Vicente Azcotti – State challenge for cause sustained – Catholic and sympathies against the death penalty (RR25-66-90); 8. Maribel Iris Martinez – Catholic and sympathies against the death penalty (RR26-3-7); 9. Javier Ocha – sympathies against the death penalty (RR36-3-9); 10. Roberto Avila – sympathies against the death penalty (RR38-4-14); and 11. Magda Del Carmen Martinez – sympathies against the death penalty (RR40-74-92).

12. Nelda T. Solis – sympathies against the death penalty (RR46-37-41); 13. Irene Smith – sympathies against the death penalty (RR49-4-10); 14. Olga L. Lozoya – sympathies against the death penalty (RR49-10-15); 15. Lisa Louise

Sekula – sympathies against the death penalty (RR-49-15-20); and 16. Giuseppe A. Tarantino – sympathies against the death penalty (RR50-3-8).

17. Jesus Zavala – Catholic and sympathies against judging others (RR56-97-101); 18. Rudy Oranday – Pentecostal and sympathies against judging others (RR57-3-6); 19. Eustolio Gonzalez – sympathies against the death penalty (RR59-10-14); and 20. Mary L. Cavazos – sympathies against the death penalty (RR59-83-88).

The trial court continued to excuse, without objection by the defense, prospective jurors with sympathies against the death penalty during selection of the alternate jurors: 21. Araceli Yadira Marroquin – sympathies against the death penalty (RR61-7-24); 22. Eva Silva – sympathies against the death penalty (RR61-25-57); 23. Herlinda M. Garza – sympathies against the death penalty (RR65-33-48); 24. Rosario J. Rodriguez – sympathies against the death penalty (RR67-4-10); 25. Ruth Ayala – sympathies against the death penalty (RR68-4-8); and 26. Renae Lewis – Jehovah's Witness and sympathies against judging others (RR69-3).

Vasquez would emphasize that the voir dire of these prospective jurors, with the exception of Father Azcotti, was by the trial court, and that the voir dire did not remotely establish that any of them were not qualified to serve as jurors at applicant's trial. For example, the unnamed prospective juror was

excused, without objection, and without any attempt at rehabilitation, upon his assertion that his spiritual beliefs and conscience did not allow him to judge others. RR10-21. The voir dire of Olivia Molina was, in its entirety, as follows:

The Court: Good morning, ma'am, how are you?

Ms. Molina: I'm a Jehovah's Witness, and I just am not able to judge.

The Court: You're Ms. Olivia Molina. Any objections?

Mr. Reyes: No objections.

Mr. Orendain: No objections.

The Court: You may be excused, ma'am. Thank you.

Ms. Molina: Thank you, sir.

RR10-28. Consuelo Garza said she could not give the death penalty (RR10-107), and was excused without objection, and without any attempt at rehabilitation (RR10-108).

Glenda Lorena Dominguez appears to have indicated on her juror questionnaire that she could never, under any circumstances, return a verdict that required assessment of the death penalty. *See* RR24-6. She was excused without objection, but again without any attempt at rehabilitation. RR24-7. Her voir dire was, in relevant part, as follows:

The Court: All right. Ms. Dominguez, in this case, it is called the State of Texas vs. Pablo Lucio Vasquez. It's a capital murder case

where the State is asking that, if Mr. Vasquez is found guilty of capital murder, they're asking for the death sentence, ma'am. Do you understand that?

Prospective Juror: Yes.

The Court: All right. And that explains, Ms. Dominguez, why you're with us alone this morning, as opposed to several hundred people in the same courtroom, ma'am. Do you also understand that?

Prospective Juror: Yes.

The Court: Ms. Dominguez, back on October 20th, I gave all the prospective jurors an oath to answer all questions truthfully and the oath applies this afternoon, ma'am.

Prospective Juror: Uh-huh.

The Court: Or this morning, do you understand that?

Prospective Juror: Yes.

The Court: All right. Ms. Dominguez, I'm going to go straight into the matter of this case. As you well know, this case is a capital murder case and the State is asking for the death penalty. It's a very serious case involving very serious consequences. It is important in a criminal case like this, we have a jury that is willing to keep all the evidence in mind and consider all possible options and that includes the death penalty as a possible sentence, ma'am. Do you understand that?

Prospective Juror: Yes.

The Court: All right. And Ms. Dominguez, in looking at your questionnaire and it's right in front of you, ma'am. If you will turn to page 11, Ms. Dominguez, please.

Prospective Juror: (Complied). Uh-huh.

The Court: And 59 asks, with respect to capital cases which is this one of them, in which the death penalty could be assessed, which of the following statements best reflects your feelings. And you have marked off that you could never under any circumstances return a verdict that requires assessing a death penalty, ma'am. That's the one you marked off, right?

Prospective Juror: Uh-huh.

The Court: And do you feel very strongly about that, Ms. Dominguez?

Prospective Juror: Yes.

The Court: And in light of that, Ms. Dominguez, would it make it very difficult for you to be fair in this case through the statement?

Prospective Juror: Probably.

The Court: All right. And it probably would, right?

Prospective Juror: Uh-huh.

The Court: And it would? Ms. Dominguez, all we ask of prospective juror is to be honest with us.

Prospective Juror: Uh-huh.

The Court: If that's the way you feel, there's nothing wrong with that. And we need to know that and because of that, Ms. Dominguez, I'm going to have to excuse you as a juror in this case, ma'am.

Prospective Juror: Okay.

The Court: But we appreciate for you coming with us back on October 20th and waiting around this morning. But most of all in being very honest and answering these very tough questions. And you'll be excused, ma'am. Thank you.

Prospective Juror: Okay.

The Court: Appreciate it, ma'am.

Prospective Juror: Thank you.

(Whereupon Prospective Juror No. 18, Ms. Glenda Lorena Dominguez, was excused.)

The Bailiff: Morris, Judge?

The Court: Yes. Any objections on excusing Ms. Dominguez, from the State?

Mr. Orendain: None from the State, Your Honor.

The Court: Mr. Reyes or Mr. Valdez?

Mr. Valdez: We'll just defer to the Court's ruling, Your Honor.
The Court: All right.

RR24-4-7. The voir dire of Dominguez did not establish that she could never return a verdict requiring that the death penalty be imposed. The only relevant fact established by her five "Yes"s, her five "Uh-huh"s, her two "Okay"s, her one "Probably", and her one "Thank you", her entire contribution to the voir dire, was that it would "probably" be "difficult" for Dominguez to be fair. Dominguez

did not testify that she could not be fair, and was not subject to excusal simply because being so might be difficult.

Maribel Iris Martinez answered "Yes" when the trial court asked whether her feelings against the death penalty were so strong as to keep her from being a fair juror. RR26-5. She was excused without objection, and without any attempt at rehabilitation. RR26-6. Nelda T. Solis testified that she could never participate in a jury that might recommend the death penalty. RR46-40. She was excused without objection, and without any attempt at rehabilitation. RR46-40-41.

The voir dire of Irene Smith all but established that Smith could have been a fair and impartial juror at a capital murder trial:

> The Court: Ma'am, your full name is Irene Smith; is that correct?
>
> Prospective Juror: Yes, sir.
>
> The Court: You were called in by me, Ms. Smith, back on October 20th, over a month ago, as a prospective juror in this case, ma'am; is that correct?
>
> Prospective Juror: Yes.
>
> The Court: Ms. Smith, this case is called the State vs. Pablo Vasquez. It's a capital murder case and the State is asking for the death penalty in this case, in the event of a conviction for capital murder, ma'am. Do you understand that?
>
> Prospective Juror: Yes.

The Court: All right.

Prospective Juror: Uh-huh.

The Court: Ms. Smith, on October 20th, I gave all the prospective jurors an oath to answer all questions truthfully, and the oath applies as we speak to you this morning, ma'am. All right?

Prospective Juror: Uh-huh.

The Court: All right. Ms. Smith, most of the interviews in this case last approximately an hour and a half to two hours, because it's a capital murder case.

Prospective Juror: Uh-huh.

The Court: We may be able to short-circuit this interview. If you would, Ms. Smith, turn to page 11 in your questionnaire, ma'am.

Prospective Juror: Okay.

The Court: And it will be question number 60.

Prospective Juror: Uh-huh.

The Court: And it's asking you to write down in your own words the – what you feel about the death penalty. And you indicate that you do not feel that people should be penalized through death penalty for minor issues. Killing thousands of people would change my mind, but again, the facts and reviewing the circumstances would make that decision.

Prospective Juror: Right.

The Court: Ms. Smith, this case is a death penalty case.

Prospective Juror: Uh-huh.

The Court: And the jury may be asked to – or will be asked to make a recommendation on the death penalty in this case, ma'am. Based on this, would you find it very difficult to do because of your feelings about the death penalty, ma'am?

Prospective Juror: Yes. I mean, I feel like give it – you know, depending on the issue, I don't know, I have no idea what the issue is.

The Court: Okay.

Prospective Juror: But, I mean, it depends on how crucial, I guess.

The Court: Okay.

Prospective Juror: Or –

The Court: Okay.

Prospective Juror: – whatever it may be. But, again, you know, I also see that we all are people and that sometimes something happens and we go wacko for whatever reason.

The Court: Sure.

Prospective Juror: And I understand that too. So either way, I mean, just depends on the issue.

The Court: Okay.

Prospective Juror: I can't really base anything until I see what was out there.

The Court: Well, in a case like this, Ms. Smith, the State is ask – is alleging that Mr. Pablo Vasquez killed David Cardenas, while in the course of committing or attempting to commit the offense of robbery, ma'am.

Prospective Juror: Robbery?

The Court: Yes, it's robbery. It's the offense of a robbery along with the – the intentional killing somebody. In a case like this, we can't ask about this particular case, obviously, but –

Prospective Juror: Uh-huh.

The Court: – in any given case, alleging robbery and murder –

Prospective Juror: Uh-huh.

The Court: – would you be willing to consider the death penalty as a possibly penalty in that type of a case?

Prospective Juror: A death penalty, yes, for killing someone else for whatever reason I would be able to.

The Court: Okay.

Prospective Juror: But again –

The Court: Yeah.

Prospective Juror: – knowing there's a consensus.

The Court: Okay. And there's an – because it – I get the impression that you may not want to be involved in a case involving the death penalty?

Prospective Juror: I probably wouldn't because, you know, I just –

The Court: Well, it's very difficult?

Prospective Juror: – don't like to. Right. It would be difficult. Right.

The Court: Would you prefer to be excused from this type of a case, Ms. Smith?

Prospective Juror: Yes, I would.

The Court: Because of your attitudes about the death penalty?

Prospective Juror: Right.

The Court: All right. Any objection, Mr. Orendain?

Mr. Orendain: No objection from the State, Your Honor.

The Court: Mr. Reyes?

Mr. Reyes: No objection from the defense.

The Court: Ms. Smith, all we ask of the prospective jurors is to be honest with us. You've been very honest with us. It's a hard case for anyone, but especially a hard case for you in this type of a case. But we'll call you on a different case later on, ma'am.

Prospective Juror: All right.

RR49-4-9. Smith appeared to believe that the appropriateness of the death penalty depended upon the circumstances of the case, and testified that she *would* be willing to consider the death penalty "for killing someone else for whatever reason" (RR49-7). She only testified that she "probably" wouldn't want to be involved in a death penalty case, that it would be difficult, and that

she would prefer to be excused because of her attitudes about the death penalty, in response to leading questions propounded a trial court apparently intent on excusing her.

Olga L. Lozoya preferred that a life sentence, rather than death, be assessed (RR49-13), and also preferred to be excused (RR49-13-14). She was, without objection, and without any attempt at rehabilitation. RR49-14-15. Lisa Louise Sekula believed in the death penalty, but testified that she would not have felt comfortable assessing it. RR49-18. She was excused without real objection, and without any attempt at rehabilitation. RR49-19-20. Vasquez would note, however, that she was also concerned about missing work. RR49-19.

The 6th and 14th Amendments to the Constitution of the United States guarantee a trial by an impartial jury in all criminal prosecutions. The 14th Amendment to the Constitution of the United States guarantees due process of law. A sentence of death can not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. *Witherspoon v. Illinois*, 88

S.Ct. 1770, 1777 (1968). Vasquez was convicted of capital murder, and sentenced to death, by a tribunal so selected.

In *Davis v. Georgia*, 97 S.Ct. 399 (1978), the court suggested that harmless error analysis was not applicable to a capital murder conviction in which one panel member was excluded in violation of *Witherspoon v. Illinois*. In *Gray v. Mississippi*, 107 S.Ct. 2045, 2057 (1987), the court specifically held that, because the *Witherspoon v. Illinois* standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, a harmless error analysis can not apply.

CAUSE FOR PROCEDURAL DEFAULT

This petition raises only one Ground for Relief, challenging the trial court's repeated excusal of prospective jurors with sympathies against the death penalty, or with sympathies against judging others, but qualified to serve as jurors at Vasquez' trial, thereby denying Vasquez the fair and impartial jury, and the due process of law, guaranteed by the 6th and 14th Amendments to the Constitution of the United States. There was no objection at trial; the issue was not raised on direct appeal; and the issue was not raised in either of the earlier writ applications.

The issue of ineffective assistance of counsel at trial for failure to object to the trial court's repeated excusal of the prospective jurors was raised, both

on direct appeal and in the first subsequent writ application. The issue of ineffective assistance of counsel on direct appeal was also raised in the first subsequent writ application, because appellate counsel had so inadequately briefed the issue of ineffective assistance of counsel at trial that the Court of Criminal Appeals found on direct appeal that Vasquez had presented nothing for review.

However, the issue of ineffective assistance of counsel at trial, and the issue of ineffective assistance of counsel on direct appeal, as raised on direct appeal and in the first subsequent writ application, are readily distinguishable from the substantive issue raised herein. That issue is not the effectiveness of Vasquez' attorneys, either at trial or on direct appeal. Rather, Vasquez is directly challenging herein the conduct of the trial court in excusing prospective jurors. This is a distinction with a very meaningful difference.

In order to prevail on a claim of ineffective assistance of counsel at trial, or on a claim of ineffective assistance of counsel on direct appeal, Vasquez was required to demonstrate prejudice – that there is a reasonable probability, a probability sufficient to undermine confidence in the actual outcome, that, but for the unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 104 S.Ct. 2052, 2068 (1984), and *Goodwin v. Johnson*, 132 F.3d 162, 170 (5th Cir. 1998). Vasquez has not been able to

demonstrate, to the satisfaction of the reviewing courts, the required prejudice. On the other hand, Vasquez is not required to demonstrate prejudice to prevail on his claim that the trial court repeatedly excused prospective jurors with sympathies against the death penalty, or with sympathies against judging others, who were nevertheless qualified to serve as jurors at his trial for capital murder.

Ineffective assistance of counsel on direct appeal is, however, cause for Vasquez' procedural default in failing to challenge in either his initial writ application, or in his first subsequent writ application, the trial court's repeated excusal of the qualified prospective jurors. Reasonably effective appellate counsel would have raised the issue on Vasquez' direct appeal. *Witherspoon v. Illinois* was decided in 1976; *Davis v. Georgia* in 1978; and *Gray v. Mississippi* in 1987. The issue was successfully raised in *Adams v. Texas*, 100 S.Ct. 2521 (1980), which appears to have arisen from a direct appeal. See *Adams v. State*, 577 S.W.2d 717 (Tex.Crim.App. 1979).

In *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court held that procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, under state law, the claim must be raised in initial-review collateral proceedings, and if, in the

initial-review collateral proceedings, there was no counsel or counsel was ineffective.

In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court noted that Texas procedure makes it virtually impossible for appellate counsel to adequately present on direct review a claim of ineffective assistance of counsel at trial, and reasoned that a distinction between, on one hand, a State that denies permission to raise on direct appeal a claim of ineffective assistance of counsel at trial, and, on the other, a State that in theory grants permission, but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so, is a distinction without a difference.

The rationale of the holdings of *Martinez v. Ryan* and *Trevino v. Thaler* are directly applicable, but the holdings themselves are not. First, both concern only a claim of ineffective assistance of counsel at trial, and Vasquez is not challenging herein the performance of his attorneys at trial. Nevertheless, *if* procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, under state law, the claim must be raised in initial-review collateral proceedings, and if, in the initial-review collateral proceedings, there was no counsel or counsel was ineffective, *then* procedural default should not bar a federal habeas court from

hearing in the same circumstances a challenge to the erroneous exclusion of prospective jurors by a trial court.

Second, neither *Martinez v. Ryan* nor *Trevino v. Thaler* recognizes ineffective assistance of counsel on direct appeal as cause for procedural default. Rather, both recognize no counsel and/or ineffective assistance of counsel during initial collateral proceedings as cause, and Vasquez is not arguing herein that ineffectiveness of his attorney during his initial writ proceedings is the cause of his procedural default. However, the rationale for recognizing, in certain circumstances, no counsel and/or ineffective assistance of counsel during initial collateral proceedings as cause for procedural default is equally applicable for recognizing, in Texas, and in similar circumstances, ineffective assistance of counsel on direct appeal as cause. The holdings of *Martinez v. Ryan* and *Trevino v. Thaler* should accordingly be so extended.

Texas Code of Criminal Procedure article 11.071 mandates that the initial writ proceedings of a capital murder defendant sentenced to death be conducted almost simultaneously with the direct appeal. Vasquez' brief on direct appeal was filed on 1 March 2000, and his initial writ application on 4 August 2000. On 10 April 2002, the Court of Criminal Appeals affirmed on direct appeal the judgment of the trial court, and on 29 May 2002, denied Vasquez habeas corpus relief. It would have been challenging, at the least, for

Vasquez' attorney during the initial writ proceedings to have recognized, before 10 April 2002, that counsel had been ineffective on direct appeal.

Vasquez filed his first subsequent writ application on 12 March 2003, by which time his attorney can reasonably have recognized that counsel had been ineffective on direct appeal. But *Martinez v. Ryan* and *Trevino v. Thaler* were not decided until 2012 and 2013, respectively.

CONCLUSION

The petition of Pablo Lucio Vasquez for writ of certiorari should be granted.

Respectfully submitted,
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29 May 2016

Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-50,801-03

EX PARTE PABLO LUCIO VASQUEZ

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION TO STAY THE EXECUTION FROM CAUSE NO. CR-1054-98-D(3) IN THE 206TH JUDICIAL DISTRICT COURT HIDALGO COUNTY

Per curiam.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, and a motion to stay applicant's execution.

In February 1999, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at

death. This Court affirmed applicant's conviction and sentence on direct appeal. *Vasquez v. State*, No. AP-73,456 (Tex. Crim. App. Apr. 10, 2002)(not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on August 4, 2000. This Court denied applicant relief. *Ex parte Vasquez*, No. WR-50,801-01 (Tex. Crim. App. May 29, 2002)(not designated for publication). Applicant filed his first subsequent writ application in the trial court on March 12, 2003, and this Court denied relief. *Ex parte Vasquez*, No. WR-50,801-02 (Tex. Crim. App. Mar. 10, 2004)(not designated for publication). Applicant filed this his second subsequent writ application in the trial court on January 21, 2016.

Applicant raises one claim for relief in his application. Because the claim is procedurally barred, applicant has failed to meet the dictates of Article 11.071, § 5. Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claim, and we deny his motion to stay the execution.

IT IS SO ORDERED THIS THE 24th DAY OF FEBRUARY, 2016.

Do Not Publish

Appendix B

CAUSE NO. CR-1054-98-D (3)

EX PARTE	§	IN THE 206TH DISTRICT COURT
PABLO LUCIO VASQUEZ	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

ORDER DIRECTING THE CLERK TO SEND
SUBSEQUENT WRIT TO THE COURT OF CRIMINAL APPEALS

1. Background Facts.

On January 20, 2016, this Court received a copy of an application for writ of habeas corpus filed by attorney James F. Keegan on behalf of Applicant Pablo Lucio Vasquez.

Applicant Pablo Lucio Vasquez was charged in cause number CR-1054-98-D with the offense of Capital Murder; convicted of said offense; and sentenced to death after the jury had answered the special issues in such a way as to call for said sentence.

On April 10, 2002, the Court of Criminal Appeals affirmed Applicant PABLO LUCIO VASQUEZ' capital murder conviction and death sentence.

On May 6, 2002, the Court of Criminal Appeals issued its mandate.

On May 29, 2002, the Texas Court of Criminal Appeals denied an initial state court application for writ of habeas corpus which had been filed on behalf of PABLO LUCIO VASQUEZ pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071.

On March 12, 2003, Mr. Keegan filed a second state court application for writ of habeas corpus, this one asserting an intellectual disability/mental retardation claim.

On May 7, 2003, the Court of Criminal Appeals noted that Pablo Lucio Vasquez had asserted 13 allegations in his subsequent application; concluded that his intellectual disability claim met the requirements for consideration of a claim asserted in a subsequent application for writ; and dismissed Pablo Lucio Vasquez' other 12 claims as an abuse of the writ.

When this court then considered the intellectual disability claim on the merits, it recommended that the relief sought by Pablo Lucio Vasquez be denied.

On March 10, 2004, the Court of Criminal Appeals adopted said recommendation and denied relief in regard to the intellectual disability claim asserted in Pablo Lucio Vasquez' subsequent application for writ.

In April of 2004, Pablo Lucio Vasquez filed a federal application for a writ of habeas corpus in the United States District Court of the Southern District of Texas.

In December of 2005, a United States magistrate judge recommended that certain claims raised by Pablo Lucio Vasquez be dismissed on the basis of procedural default.

Subsequent to this recommendation, but before the district court had acted, the U.S. Supreme Court recognized a limited exception to the procedural default rule for claims of ineffective assistance of trial counsel and determined that this exception applies to Texas capital cases. See Trevino v. Thaler, ___U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013); Martinez v. Ryan, ____U.S.___, 133 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

After receiving supplemental briefing from the parties regarding the applicability of those cases, the magistrate judge concluded that Trevino and Martinez were inapplicable; again recommended that the claims be dismissed as procedurally barred; and, in doing so, reached the merits of Pablo Lucio Vasquez' ineffective assistance of counsel claims.

In March of 2014, the United States district court adopted the magistrate judge's recommendation and granted the State's motion for summary judgment.

Four months later, the United States district court denied Pablo Lucio Vasquez' request for a certificate of appealability to appeal five of the thirteen issues raised in his habeas petition.

When Pablo Lucio Vasquez then appealed to the Fifth Circuit Court of Appeals, said Court denied his request for a certificate of appealability and affirmed the ruling of the federal district court on January 23, 2015.

On October 5, 2015, the U.S. Supreme Court denied a petition for writ of certiorari which Pablo Lucio Vasquez had filed.

On December 4, 2015, this Court entered an Amended Order Setting Date for Execution, setting the date for the execution of Defendant Vasquez for April 6, 2016 (a prior order had contained a typographical error mentioning a date of April 6, 2015).

On December 9, 2015 Deputy District Clerk Alexandra "Sandra" Gomez signed a Death Warrant in this case.

2. Applicable Statutory Provisions.

Section 5 of TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 2015) specifies the requirements for handling of a subsequent application for writ in a death penalty case.

In particular, Section 5 (a) of Article 11.071 provides as follows:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the application guilty beyond a reasonable doubt;

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Section 5 (b) then specifies the duties of the clerk in handling the subsequent application, as follows:

If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

Section 5 (c) clearly demonstrates that the intent of the statute is to have the Court of Criminal Appeals evaluate whether any of the purported grounds for relief asserted in the subsequent application for writ meet the exceptions to the general rule barring consideration of the merits of, or granting of relief based on, contentions contained in a subsequent writ.

After all, said provision states as follows:

> On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

3. This Court's Finding That the Present Application is a Subsequent Writ.

Applicant Pablo Lucio Vasquez filed an application for writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071 on August 4, 2000. The Court of Criminal Appeals denied said application on May 6, 2002.

Applicant Pablo Lucio Vasquez filed a second state court application for writ of habeas corpus on March 12, 2003. The Court of Criminal Appeals denied said application on March 10, 2004.

Therefore, there is no doubt that the application recently filed on behalf of Applicant Pablo Lucio Vasquez is a subsequent application for writ, which this court must deal with pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b).

4. Directives to Criminal Appeals Clerk.

Pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b), Alexandra "Sandra" Gomez, the Criminal Appeals Deputy Clerk

for the Hidalgo County District Clerk's Office is hereby ORDERED to immediately send to the Court of Criminal Appeals certified copies of (1) the application for writ filed on January 20, 2016; (2) Respondent's Motion to Send Subsequent Writ to the Court of Criminal Appeals; (3) this Court's order scheduling Pablo Lucio Vasquez' execution for April 6, 2016; (4) the Motion for Stay of Execution and to Withdraw Death Warrant that Pablo Lucio Vasquez also filed on January 20, 2016; and (5) this order noting that the writ filed on January 20, 2016 is a subsequent writ.

Ms. Gomez is further ORDERED to send a copy of this Order to James F. Keegan, Attorney at Law, 4421 Jim West Street, Bellaire, Texas 77401, the attorney who filed the subsequent state court application for writ on behalf of Pablo Lucio Vasquez and Assistant Criminal District Attorney Theodore C. Hake.

SIGNED and ENTERED on this, the 26th day of January, 2016.

ROSE GUERRA REYNA
Judge Presiding
206th District Court
Hidalgo County, Texas

Appendix C

CAUSE NO. CR-1054-98-D

THE STATE OF TEXAS
VS.
PABLO LUCIO VASQUEZ

IN THE 206TH DISTRICT COURT
OF
HIDALGO COUNTY, TEXAS

JUDGMENT AND SENTENCE ON JURY VERDICT OF GUILTY
PUNISHMENT OF DEATH BEFORE APPEAL - ID-TDCJ

Judge Presiding: FERNANDO G. MANCIAS

Attorney(s) RENE GUERRA, DIST. ATTY.,
for State : JOSEPH L. ORENDAIN & JANE ALONZO, ASSISTANT(S)
and Attorney(s) for Defendant: DANIEL REYES & SERGIO VALDEZ

Offense Convicted of: CAPITAL MURDER
Degree: CAPITAL
Date Offense Committed: APRIL 18, 1998

Charging Instrument: INDICTMENT

Plea: NOT GUILTY
Jury Verdict: GUILTY
Presiding Juror: THERESA MARIE LOERA

Plea to Enhancement Paragraph(s): NONE
Findings on Enhancement: NONE

Findings on Use of Deadly Weapon : NONE

Punishment Assessed by: JURY

Punishment and Place of Confinement: DEATH

Date to Commence: FEBRUARY 8, 1999

Time Credited: 296 DAY(S)

Concurrent Unless Otherwise Specified.

The Defendant having been charged in the above entitled and numbered cause for the felony offense of CAPITAL MURDER, and this cause called for trial, the State appeared by her Criminal District Attorney, Rene Guerra, and Assistant Criminal District Attorney, JOSEPH L. ORENDAIN & JANE ALONZO, and the Defendant, PABLO LUCIO VASQUEZ, appeared in person and by Counsel, DANIEL REYES & SERGIO VALDEZ, and both parties announced ready for trial, and the Defendant was arraigned, and in open court pled NOT GUILTY to the charge contained in the indictment. Thereupon a jury composed of THERESA MARIE LOERA and eleven others was selected, impanelled, and sworn; and after hearing the indictment read, the Defendant's plea of NOT GUILTY thereto, and the evidence submitted; and after having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant; and after hearing the arguments of counsel, they retired in charge of the proper officer and returned into open court on the 9TH day of FEBRUARY, 1999, the following verdict, which was received by the Court and is here entered of record upon the minutes:

We, the Jury find the Defendant, PABLO L. VASQUEZ, GUILTY of the offense of CAPITAL MURDER, as charged in the indictment.

/S/ THERESA MARIE LOREA
PRESIDING JUROR

Thereupon, the Jury, having been elected by the Defendant to assess the punishment in this cause in accordance with law, and after further evidence was heard by them and after having again been charged by the Court, the Jury retired in charge of the proper officer and returned into open court on the 12TH day of FEBRUARY, 1999, the following verdict, which was received by the Court and is here entered of record upon the minutes:

Special Issue No. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, PABLO L. VASQUEZ, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer

We the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

THERESA MARIE LOERA
Presiding Juror

002

Special Issue No. 2

Do you find from the evidence, 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, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death sentence be imposed?

Answer

We, the jury, unanimously find that the answer to this Special Issue is "No."

THERESA MARIE LOERA
Presiding Juror

IT IS THEREFORE ADJUDGED by the Court that the Defendant is guilty of the offense of CAPITAL MURDER, a CAPITAL felony, as found by the jury, which offense was committed on APRIL 18, 1998, and that the Defendant be punished by being put to DEATH, and that the State of Texas do have and recover of the Defendant all costs of prosecution, for which execution will issue.

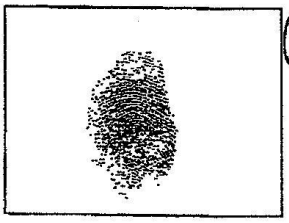
And the Defendant was asked by the Court whether the Defendant had anything to say why sentence should not be pronounced, and the Defendant answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce the sentence as follows, to-wit: "It is the ORDER of the Court that the Defendant, PABLO LUCIO VASQUEZ, who has been adjudged to be guilty of the offense of CAPITAL MURDER and whose punishment has been assessed as: the DEATH PENALTY, be delivered by the Sheriff of Hidalgo County, Texas, immediately to the Director of the Institutional Division of the Texas Department of Criminal Justice or other person legally authorized to receive such convicts, and the Defendant shall be confined in said penitentiary there to await the action of the Court of Criminal Appeals and the further orders of this Court.

A post-sentence investigation is to be done according to the applicable provision of the law.

The Defendant is given jail credit for 296 days and is remanded to the Hidalgo County Adult Detention Center until the Sheriff can obey the directions of this sentence.

Fingerprint from right index finger finger of Defendant:

(Is)



FERNANDO G. MANCIAS
JUDGE PRESIDING

Signed on the 10 day of March, 1999.

Notice of Appeal: _____

DATE 12/9/15
A true copy I certify
LAURA HINOJOSA
District Clerk, Hidalgo County, Texas
By Alejandra Rios Deputy 44