IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8066

CESAR ROBERTO FIERRO,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(90-CA-248 H)

(May 13, 1994)

Before KING, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

Petitioner appeals the denial of his latest claims for federal habeas corpus relief from a death sentence imposed over thirteen years ago. First, the petitioner contends that the Texas statutory scheme is unconstitutional because it did not allow the jury to give effect to his mitigating evidence. Second, the petitioner

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

contends that the state's use of unadjudicated offenses during the sentencing phase of his trial violated the Eighth and Fourteenth Amendments to the Constitution. Because granting relief on either ground would require us to announce a "new rule" in a habeas proceeding, we must reject each of the petitioner's claims. Thus, we affirm the district court and vacate our previous stay of Fierro's execution.

I

The facts underlying Fierro's conviction are reported in Fierro v. State, 706 S.W.2d 310, 312 (Tex. Crim. App. 1986). Briefly, Fierro and Geraldo Olague hailed a taxi early in the morning on February 27, 1979, in El Paso, Texas. The taxi was driven by Nicolas Castanon. Olague sat in the front and Fierro sat in the back. Fierro told Castanon to take Olague to an address in El Paso. As they neared the first stop, Fierro yelled, "Stop." Castanon started to turn around, and Fierro shot him in the back of the head. Fierro then drove the taxi to Modesto Gomez Park in El Paso. Fierro dragged Castanon into the park, shot him again, and took his wallet, watch, and jacket. Fierro discarded the watch and jacket on the way to Juarez and abandoned the taxi.

In July 1979, Olague contacted the El Paso police and told his story. Shortly thereafter, Fierro confessed.

II

In February 1980, a jury found Fierro guilty of murder. At the sentencing phase of the trial, both sides submitted substantial

evidence. After hearing all of the evidence, the jury answered the Texas special issues in the affirmative, and the trial court sentenced Fierro to death. On January 8, 1986, the Texas Court of Criminal Appeals affirmed Fierro's conviction. Fierro did not file a petition for a writ of certiorari, and, thus, his conviction became final on direct review on March 10, 1986.

III

In 1987, Fierro filed his first application for a writ of habeas corpus. After the Texas courts denied relief, Fierro filed a habeas petition in federal district court. Eventually, both the district court and this court denied Fierro relief, Fierro v. Lynaugh, 879 F.2d 1276 (5th Cir. 1989), as did the Supreme Court, Fierro v. Collins, 494 U.S. 1060, 110 S.Ct. 1537, 108 L.Ed.2d 776 (1990).

On May 14, 1990, Fierro filed another application for writ of habeas corpus in state court. The Texas courts denied relief. Fierro then filed a petition for a writ of habeas corpus in the district court. On May 29, 1991, the Texas Court of Criminal Appeals held that a petitioner did not have to object at trial in order to raise a claim that the Texas capital sentencing scheme was applied unconstitutionally under Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Selvage v. Collins, 816 S.W.2d 390 (Tex. Crim. App. 1991). After allowing the parties to submit additional briefs, the district court again denied relief, and Fierro brought this appeal. While on appeal, we granted Fierro

a stay of execution to allow us time to evaluate his arguments in the light of Motley v. Collins, No. 92-2610, slip op. 3579 (5th Cir. April 1, 1994).

IV

Fierro first contends that the Texas statutory scheme is unconstitutional under Penry, because it did not allow the jury to give full effect to the mitigating evidence of his growing up in a poor and broken home with little education, his drug and alcohol abuse, his good family relationships, and his artistic talent. Fierro argues that his evidence had relevance beyond the scope of the Texas special issues.[1]

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[1]At the time of Fierro's trial, Texas required the sentencing jury to answer the following questions affirmatively in order to impose the death penalty:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result;
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> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
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> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981).

Texas amended its special issue scheme in 1991 to require the trial court to instruct the sentencing jury to consider all the evidence in determining if sufficient mitigating circumstances warrant the imposition of a sentence of life imprisonment instead of the death penalty. Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e) (Vernon Supp. 1994).

A

Unlike a request for relief on direct review, we cannot grant relief on collateral review if such relief would constitute a "new rule" of constitutional criminal procedure. Teague v. Lane, 489 U.S. 288, 310, 109 S.Ct. 1060, 1075, 103 L.Ed.2d 334 (1989) (per curiam). In general, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 301, 109 S.Ct. at 1070 (emphasis in the original). When reviewing the same Texas capital sentencing scheme at issue in this case, the Supreme Court has held that under Teague, the "determinative question" is:

> [W]hether reasonable jurists reading the case law that existed [at the time the petitioner's conviction became final] could have concluded that [the petitioner's] sentencing was not constitutionally infirm.

Graham v. Collins, ___ U.S. ___, ___, 113 S.Ct. 892, 903, 122 L.Ed.2d 260 (1993) (first and third emphases added).

Simply put, if reasonable jurists could have found that Fierro's capital sentence was constitutionally adequate under the case law that existed in 1986 (when his conviction became final), we would declare an impermissible "new rule" if we were now to hold that sentence unconstitutional.

B

Because our "new rule" inquiry in this case focuses on the Texas capital sentencing scheme as interpreted by case law existing when Fierro's conviction became final in March 1986, we must look

to the cases decided prior to March 1986 and those cases decided thereafter that reflect on the law as it existed in March 1986.

In its landmark Eighth Amendment case addressing the death penalty, Furman v. Georgia, 408 U.S. 238, 256-57, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972), the Supreme Court held that the Georgia and Texas[2] capital sentencing schemes violated the Eighth and Fourteenth Amendments because of the unbridled discretion they allowed the sentencer. In response to Furman, the Texas legislature enacted a new capital sentencing scheme. The Supreme Court upheld that statute in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Court held that the Texas statute sufficiently narrowed the discretion of the sentencer. Id. at 272-73, 96 S.Ct. at 2956-57. Further, the Texas scheme still allowed the jury to consider all the mitigating evidence presented through the special issue concerning the defendant's future dangerousness. Id.[3]

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[2]The Supreme Court dealt with the old Texas capital sentencing scheme in Branch v. Texas, which the Court decided with Furman v. Georgia, 408 U.S. at 239, 92 S.Ct. at 2727.

[3]The Supreme Court stated:

> . . . Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

Jurek, 428 U.S. at 273, 96 S.Ct. at 2957.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Supreme Court emphasized that the sentencer must be allowed to give effect to the mitigating evidence presented. Then followed Penry. In Penry, 492 U.S. at 323-24, 109 S.Ct. at 2949, the petitioner's evidence of child abuse and mental retardation had aggravating qualities, in that Penry's mental retardation prevented him from learning from his mistakes and thus beneficially modifying his behavior. This evidence also had mitigating qualities in that it reduced Penry's moral culpability for his crime. Id. Although the jury heard the aggravating-mitigating evidence, the Supreme Court held that the aggravating quality of this evidence prevented the sentencing jury from considering and giving effect to the mitigating quality of this--or other--evidence. Id. Because of the unchanging aggravating factor, Penry's Texas jury could only answer the future dangerousness special issue in the affirmative. Thus, the jury could not fully consider and give effect to the mitigating qualities of Penry's mental retardation under the Texas special issues as required by the Lockett-Eddings cases.[4] Accordingly, the Court ruled that the Texas capital sentencing scheme, although

[4]The Supreme Court has stated in retrospect, "Lockett and Eddings command[ed] that the State allow the jury to give effect to mitigating evidence in making the sentencing decision . . . ." Saffle v. Parks, 494 U.S. 484, 491, 110 S.Ct. 1257, 1261-62, 108 L.Ed.2d 415 (1990) (emphasis added).

facially constitutional, was unconstitutional as applied to Penry. Id. at ___, 109 S.Ct. at 2952.

Next, in Graham, ___ U.S. at ___, 113 S.Ct. at 902, the petitioner attempted to broaden the scope of Penry. Graham claimed that evidence of his youth, an unstable childhood, and positive character traits had mitigating relevance beyond the reach of the Texas special issues. Id. The Court explained that Lockett, Eddings, and Penry required that the sentencing jury be able to consider and give effect to the mitigating evidence in some way, but did not require more consideration than provided in the Texas special issues. Id. at ___-___, 113 S.Ct. at 899-901. To require more, would go beyond the scope of Lockett, Eddings, and Penry and constitute an impermissible "new rule." Id. at ___-___, 113 S.Ct. at 901-02. The Graham Court concluded its new rule analysis by stating:

> We cannot say that all reasonable jurists would have deemed themselves compelled to accept Graham's claim in 1984. Nor can we say, even with the benefit of the Court's subsequent decision in Penry, that reasonable jurists would be of one mind in ruling on Graham's claim today. The ruling Graham seeks, therefore, would be a "new rule" under Teague.

Id. at ___, 113 S.Ct. at 903.[5]

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[5]In Johnson v. Texas, ___ U.S. ___, ___, 113 S.Ct. 2658, 2668, 125 L.Ed.2d 290 (1993), the Supreme Court dealt with a Penry challenge on direct review and thus, was not fettered with Teague considerations. Even so, the Court refused to rule that the Texas sentencing jury could not consider and give effect to the defendant's youth under the future dangerousness special issue. The Court reasoned that Johnson's youth, unlike Penry's mental retardation, left Johnson with the ability to change his

In Motley, slip op. at 3593, we held that the aggravating quality of a petitioner's evidence of child abuse did not preclude the jury from considering and giving effect to the mitigating quality of that same evidence. We explained that unlike Penry's mental retardation that prevented positive behavioral modification, Motley's psychological condition, which resulted from his abusive childhood, did not preclude the possibility of positive behavioral change. Id. at 3592-93. Thus, because a jury could conclude that Motley might become a less dangerous person, his evidence of child abuse did not mandate an affirmative answer to the special issue of whether he would pose a future danger to society. Consequently, to hold that the Texas capital sentencing scheme was unconstitutional as applied to Motley would have required us to go beyond the dictates of Lockett, Eddings, and Penry and, thus, was barred by Teague as a "new rule." Id. at 3593.

C

In the instant case, Fierro argues that because the evidence showed that he had a violent nature, the jury had to return an affirmative answer to the second special issue of whether he posed a future danger to society. Thus, Fierro contends, the jury was not allowed to give mitigating effect to his evidence of a poor family background, good family relations, and artistic talent.

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future behavior. Id. at ___, 113 S.Ct. at 2669-70. Thus, the sentencing jury could consider and give effect to Johnson's evidence of youth when contemplating and answering the future dangerousness special issue. Id.

Fierro further argues that the evidence of his drug and alcohol abuse and his difficult childhood is both mitigating--it reduces his moral culpability--and aggravating--it increases the likelihood that he will be dangerous in the future. Fierro's arguments fail, however, because neither his violent nature nor his alcohol or drug abuse--unlike Penry's mental retardation--preclude the possibility of positive behavioral change. Accordingly, this evidence did not prevent the jury from considering and giving effect to the mitigating qualities of Fierro's evidence by mandating an affirmative answer to the future dangerousness special issue.[6] Thus, under the case law in existence in March 1986--Furman, Jurek, Lockett, and Eddings--and the subsequent consideration of that law reflected in Penry, Graham, and Motley, we cannot say that "all reasonable jurists would have deemed themselves compelled to accept [Fierro's] claim . . . ." Graham, ___ U.S. at ___, 113 S.Ct. at 903. Consequently, Fierro seeks relief that was not dictated by precedent when his conviction became final on direct review. To grant such relief in this habeas proceeding would thus constitute an impermissible "new rule" under Teague.

[6]Fierro's reliance on Mayo v. Lynaugh, 893 F.2d 683 (5th Cir.), modified on other grounds sub nom. Mayo v. Collins, 920 F.2d 251 (5th Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 272, 116 L.Ed.2d 225 (1991), is unavailing because Mayo was not the law at the time Fierro's conviction became final and was effectively overruled by the Supreme Court in Johnson. Motley, slip op. at 3595.

V

Finally, we now turn to Fierro's contention that his death sentence violates the Eighth and Fourteenth Amendments because, during the sentencing phase of his trial, the state introduced evidence of unadjudicated offenses in order to prove that he had a high probability of future dangerousness. The state's evidence showed that: Fierro's probation for a prior burglary offense had been revoked when he was arrested, but not convicted, of trying to smuggle marijuana into prison; Fierro had been arrested for battery; Fierro had assaulted his wife; Fierro had physically threatened two jailers while he was in jail; and Fierro had a discipline problem while in jail.[7] Fierro argues that the state's use of evidence of criminal acts that were not adjudicated deprived his sentencing process of reliability in violation of the Eighth and Fourteenth Amendments.

Again, we are required to examine as a threshold matter whether the Teague's "new rule" bar applies to this claim for relief. Teague, 489 U.S. at 300, 109 S.Ct. at 1070. We have

[7]The state introduced a certified copy of the order revoking Fierro's probation for burglary of a vehicle, and the assistant district attorney who handled the proceedings identified Fierro as the defendant. The arresting officer testified that Fierro had attempted to smuggle marijuana into the jail. Further, two jailers testified that Fierro had made threats of physical injury to them while he was in the jail and that Fierro had been a discipline problem while in the jail. For example, jailers found a knife hidden under Fierro's bunk. Moreover, Fierro testified at the punishment hearing and admitted his attempt to smuggle marijuana into jail.

previously upheld the use of evidence of prior unadjudicated criminal activity as relevant to the Texas future dangerousness special issue.[8] Williams v. Lynaugh, 814 F.2d 205 (5th Cir.), cert. denied, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); Milton v. Procunier, 744 F.2d 1091, 1097 (5th Cir. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985). Consequently, the relief Fierro seeks was not "dictated by precedent existing at the time [his] conviction became final" in March 1986. Teague, 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis in the original). Thus, we hold that providing such relief would constitute an impermissible "new rule."

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[8]The district court held that Fierro abused the writ by raising a new argument in his second habeas petition when that argument was available to him when he filed his first habeas petition. To the extent that he did not challenge the use of unadjudicated offenses in his first habeas petition, Fierro abused the writ under Rule 9(b). Fierro asserts, however, that he did challenge the use of unadjudicated offenses at the sentencing phase of his trial by questioning the use of lay witnesses to opine on his future dangerousness. Even if this is so, Fierro may have abused the writ by failing to argue the previously available grounds he now offers in support of his claim. Fierro counters by asserting that even if he abused the writ, the inclusion of the challenged evidence resulted in a "fundamental miscarriage of justice" under McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), because it resulted in his death sentence when, without the constitutionally infirm evidence, he would have been sentenced to life in prison. We need not address this assertion, however, because even if we could overrule years of case law allowing the use of unadjudicated offenses at the sentencing phase of a capital trial, Teague would bar such a result in a habeas proceeding.

VI

For the foregoing reasons, the district court's denial of Fierro's petition for a writ of habeas corpus is AFFIRMED and our previous order staying Fierro's execution is VACATED.

STAY VACATED; JUDGMENT AFFIRMED.