No. 10-10838

In The
Supreme Court of the United States

HECTOR ROLANDO MEDINA,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

CERTIFICATE OF SERVICE

I certify that on September 21, 2011, I served the enclosed REPLY TO RESPONDENT'S BRIEF IN OPPOSITION on Erich Dryden, Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, (512) 936-1400, through the United States Postal Service by first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Attorney General of Texas has regrettably chosen to defend the state court's affirmance of Mr. Medina's death sentence in a case in which even the lead prosecutor could not say under oath that Mr. Medina received a fair trial. This Court should accordingly grant *certiorari* and reverse the decision below.

ARGUMENT

The Attorney General's summary of the case amply demonstrates that the trial court's failure to declare a mistrial, in conjunction with its other activities, rendered Mr. Medina's trial unfair. The narrative relayed by Texas in its Opposition demonstrates how—after the trial court refused to declare a mistrial when it was

confronted with a choice between depriving Mr. Medina of an opportunity to present a defense or depriving him of an impartial jury—the prosecution and trial court persistently interfered with the defense function in an attempt to obscure the fundamental errors they caused and shift blame for them to Mr. Medina's counsel. This tactic—which included extensive *ex parte* contacts by the prosecution and trial court with non-attorney members of the defense team and with witnesses—was successful in the state court below, but should not be rewarded by this Court.

Texas's argument is largely predicated on blaming Ms. Winfield, one of Mr. Medina's lawyers, for not single-handedly performing all the functions of a capital defense team which the trial court had deprived Mr. Medina through its arbitrary rulings and its failure to grant a mistrial when circumstances forced upon it a choice between imposing one of two constitutional violations against Mr. Medina.

Texas argues that it may provide an unfair trial because Ms. Winfield strategized about how to deal with these constitutional violations that were perpetrated against her client. Even if a defense attorney's attempt to strategize somehow gives license for the State of Texas to violate the United States Constitution, the Attorney General has nevertheless confused a strategy for proceeding in a case once the trial court has effectively deprived the defendant of due process, the assistance of counsel, and freedom from cruel, unusual, and arbitrary punishment with a strategy for winning a life sentence during an error-free capital murder trial.

I. MR. MEDINA WAS DEPRIVED OF DUE PROCESS.

Texas contends that the trial court's failure to grant a mistrial once confronted with a choice to deprive Mr. Medina of either (1) a meaningful opportunity to present a defense or (2) an impartial jury did not violate due process because "a recess was appropriate, and [Mr. Medina] never made any reasonable attempt to get his witnesses to court."

Texas argues that a recess was appropriate because it was "the least drastic measures [the trial judge] could take." Respondent's Brief in Opposition at 24 [hereinafter Opposition]. According to Texas, this was necessary in order to avoid depriving Mr. Medina of an impartial jury when the trial court poisoned a juror by leading him to believe that he could go on vacation in the middle of Mr. Medina's capital sentencing phase and when a different juror broke her arm. While a mistrial might have been a more "drastic" action than recess from Texas's perspective, it was anything but that from Mr. Medina's perspective, who repeatedly objected to the granting of a recess as the worst outcome possible.

First, Mr. Medina was born and raised in El Salvador, and Mr. Medina's defense team—primarily his mitigation specialist, who was fluent in Spanish and had special expertise and helpful contacts in El Salvador—had spent the previous week moving heaven and earth to make legal and travel arrangements for lay witnesses from rural El Salvador to come to Texas to testify about Mr. Medina's life history in mitigation of his sentence. Those witnesses could not be kept in the country for another week. Second, Mr. Medina had an out-of-state expert witness who had evaluated him and was prepared to testify but was not available the next

week. Third, Mr. Medina's own counsel had conflicts in other capital cases. The trial judge had all this information about why a recess would be unworkable in front of him.

The court was thus confronting a situation in which it was faced with violating either (1) Mr. Medina's right to an impartial jury by angering a juror the court had already led to believe could travel on vacation or (2) Mr. Medina's right to a meaningful opportunity to be heard by recessing the trial and causing Mr. Medina to lose his defense team and defense witnesses. It was because of this dilemma that Mr. Medina asked for a mistrial and that due process required his request to be granted. If, however, the trial court insisted on violating one of Mr. Medina's constitutional rights, as it did, Mr. Medina was very clear about which right the Court should violate, *i.e.*, which was less drastic ***for him***: Mr. Medina asked the Court to order the traveling juror to remain in Fort Worth and to use the alternate juror to replace the injured one and permit the trial to proceed uninterrupted. S.F. Vol. 58: 10. Thus, Mr. Medina chose to be deprived of his right to an impartial jury rather than be deprived of a meaningful opportunity to be heard.

Texas's argument that Mr. Medina did not request the trial court to order the juror who had been induced by the court to believe he would be permitted to take a vacation to stay in Fort Worth and to replace the injured juror with the alternate is incorrect. Texas relies in its Opposition on the judge's and other's stated recollections *two months later* instead of the court's understanding as expressed in the record *at the time of the ruling*. The record is clear that, when the trial court

refused to appoint the alternate juror in place of the injured juror and proceed with the trial, it fully understood it was doing so over the defense's objection. S.F. Vol. 58: 24 ("I'm going to send the jury home, because we are not going to be proceeding and doing anything today. I – ***and the Defense's exception to that is noted***, but I'm going to send the jury home today." (emphasis supplied)).

The trial court therefore not only forced this choice on Mr. Medina by refusing to declare a mistrial, it also made the decision for Mr. Medina about *which* of his rights it would deprive him. Disregarding Mr. Medina's (involuntary) request to be deprived of his right to an impartial jury, the trial court instead deprived him of a meaningful opportunity to be heard by denying him his defense team and critical defense witnesses. The court's ruling depriving Mr. Medina of due process necessarily could not have been an "appropriate" one.

Texas also argues that due process was not deprived because Mr. Medina's counsel did not attempt to get his witnesses to court when the court arbitrarily rescheduled the trial on a date it knew several members of Mr. Medina's defense team and his primary expert witness had scheduling conflicts. Texas's assertion is false.

First, Texas either does not apprehend or has chosen to ignore that Mr. Medina was deprived not just of witnesses due to the court's failure to grant a continuance, but of ***most of his defense team***. Two of his three lawyers and his mitigation specialist—who was a critical team member for securing the presence of El Salvadoran witnesses—had conflicts with the scheduling of the resumption of

trial after the trial court indefinitely recessed it instead of declaring a mistrial.[1] These conflicts were known to the trial court not only when it denied the continuance, but also *when it scheduled the resumption of the trial in the first place*. C.R. Vol. 2: 491-93; S.F. Vol. 58: 19-20.

Second, even if the only problem with the court's actions were its effect on Mr. Medina's ability to secure the attendance of defense witnesses, Texas wrongly believes that Ms. Winfield had to do more than she did to try to secure the presence of Mr. Medina's most critical defense witness, psychologist Ricardo Weinstein. According to Texas, "Winfield refused any assistance by the court or prosecution to get her witnesses to court on October 27th." Opposition at 27. Ms. Winfield had contacted her expert witness who told her he could not be in Texas for the four-day window during which she required his presence because he was at that time working on a capital military case that was in trial on a military base in North Carolina. Ms. Winfield reported this information to the court when seeking her continuance. Cl.R. Vol. 1: 269-70.

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[1] Texas appears to blame defense counsel for Richard McGough's absence. His unavailability was known to the court when it scheduled the date trial would resume, and his unavailability was explained in the continuance motion (which included a copy of the North Carolina subpoena with which he had been served). Cl.R. Vol. 1: 269-70; Cl.R. Vol. 2: 493. Texas's assertion that "apparently no one communicated with McGough about returning to trial" is false. Opposition at 27. Texas's complaint that the defense did not subpoeana McGough is unavailing. McGough was a member of the defense team, and hence did not require compulsion. Moreover, he was under subpoena in North Carolina as a witness on the date the trial was to resume. Cl.R. Vol. 1: 269-70. That was known to the trial court when it denied Mr. Medina's continuance. *Id*. Mr. McGough's unavailability rendered the El Salvadoran lay witnesses unavailable, because Mr. McGough was the defense team member with the expertise in and responsibility for securing their presence.

Relying on Dr. Weinstein's testimony at the motion for new trial, Texas misleadingly implies that Ms. Winfield lacked diligence because she did not fully explore whether something could have been worked out with the military lawyers trying the capital case on which Dr. Weinstein was consulting that would have allowed Dr. Weinstein to come to Texas for the four-day span that his services were required as a testifying and consulting witness for Mr. Medina's defense. *See* Opposition at 28 ("Clearly, then, there was room for negotiation in Dr. Weinstein's schedule, which Winfield apparently never explored."). A reading of Dr. Weinstein's testimony would not leave any reasonable reader with this impression. Indeed, he was emphatic the opposite was true. *See* S.F. Vol. 66: 22 ("I had constant communication with [the military defense team] and explained to them what the situation was, and they – you know, ***I clearly stated [to Winfield] that that [releasing me for a four-day period of time] was not something they were willing to do***." (emphasis supplied)); *id*. ("***I clearly told [Winfield] that it was not possible*** to [work something out with the military defense team]" (emphasis supplied)); *id*. at 22-23 ("And I'm not sure, what is it that I'm not stating clear what my position, my responsibilities and my obligations were? And that when I approached [the military defense team] to ask them to change that, they said, no. ... ***I made that very clear to Ms. Winfield*** in writing through a document from the – from the, I think, it's Captain Cowen who signed it." (emphasis supplied)). Captain Cowen's letter to Ms. Winfield, which was included in a renewed request for continuance, clearly stated, "***The defense cannot agree to excuse Dr. Weinstein***

for any part of the trial, including a four-day period that, as I understand it, relates to trial in another jurisdiction." Cl.R. Vol. 2: 301. Texas's contention accordingly lacks any arguable merit.[2]

Texas does not bother to explain what additional diligence Ms. Winfield was required to display in the face of a professional expert witness who, corroborated by the military lawyers for whom he was working, had told her that he could not be in Texas during the period requested beyond vague assertions of accepting offers of "help" from the trial court and prosecution. That counsel did not take advantage of these offers hardly establishes a lack of diligence given that those offers were (1) not made in good faith but a concerted effort to shift blame for the constitutional errors to defense counsel and Mr. Medina; (2) unhelpful, in that they caused defense witnesses and defense team members to become hostile to Mr. Medina; and (3) futile. The prosecution's offer to arrest Dr. Weinstein from a United States military

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[2] Texas's assertion that the military tribunal "was willing and able to accommodate Dr. Weinstein's schedule" is (1) based on hearsay testimony of the prosecutor in the military trial; and (2) an inaccurate characterization of that testimony. Major Benson was asked if he was generally "*willing to consider*" a request to coordinate scheduling and to move his witnesses around if necessary, to which he answered that he "absolutely" would consider it, but only to the extent it did not injure the presentation of the government's case. S.F. Vol. 66: 71 (emphasis supplied). He also testified he thought that the military tribunal would make "some level" of accommodation but not if there was "an overriding conflict." *Id*. at 72. Thus, Texas's assertion is both unreliable hearsay and a gross exaggeration of the testimony. More importantly, Ms. Winfield had no control over whether the military defense team sought accommodations with Dr. Weinstein's schedule from the military tribunal. They may well have felt it not in their client's best interest to do so. They told Ms. Winfield they could not agree to release Dr. Weinstein. Reasonable diligence certainly does not require that Ms. Winfield try to personally intervene in a capital military trial.

base and bring him involuntarily to Texas was as unhelpful a gesture as it was futile, for obvious reasons. Cl.R. Vol. 2: 283-84.

Texas's argument that Ms. Winfield should have taken Dr. Weinstein out of turn is irrelevant. Opposition at 29. Dr. Weinstein was unavailable for the four-day window for which his services critical to Mr. Medina's defense were required. Those services included not only testimony, but also consultation with the defense team throughout the sentencing phase. Such services are imminently reasonable—and routine—for a capital trial, and Texas cannot so easily dictate the content and quality of Mr. Medina's defense consistent with due process.

Texas writes that it is "important" that Ms. Winfield "never subpoenaed Dr. Weinstein, apparently considering it more important not to inconvenience the North Carolina trial rather than to provide her client with the intended defense." Opposition at 30. First, Texas does not explain the source of Texas's power to enforce a subpoena against a subject on a federal military base. Second, retained expert witnesses are not typically subpoenaed. Their attendance is customarily secured by private agreement. Third, Texas's position at trial was that, because Dr. Weinstein had already been sworn in, the court had the power to "yank" Dr. Weinstein back to Texas (although it did not explain how it could do so outside its jurisdiction). Cl.R. Vol. 2: 283-84. And, when Dr. Weinstein failed to appear on the day trial was scheduled to resume, Ms. Winfield did request that the trial court attach him. S.F. Vol. 62: 12. The record does not reflect, however, that the trial court made any effort to do so.

In sum, Dr. Weinstein had set aside time in September to testify and provide consulting services to Mr. Medina's defense only to have the proceeding suddenly and indefinitely recessed by the trial court. His work on the capital military trial from October through December had already been scheduled at that time. Dr. Weinstein was then forced by the rescheduling of Mr. Medina's trial on October 27 to choose between professional obligations in two different capital cases. Through no fault of Mr. Medina's counsel, he chose the case which had been scheduled earlier in time, the lawyers for which told him that they could not agree to his leaving to participate in another trial in Texas. Dr. Weinstein's choice, which was precipitated by the trial court's unreasonable recessing and rescheduling of the trial, was detrimental to Mr. Medina.

II. MR. MEDINA WAS DEPRIVED OF COUNSEL.

It is undeniable that Mr. Medina was deprived of a fair trial. Rather than deny this, Texas has instead accepted it, but tried to put the fault for it on Mr. Medina's counsel. Although its arguments in this regard are unpersuasive, it is nevertheless difficult to square the first half of Texas's Opposition with its second half. In the first half, Texas argues that Mr. Medina's counsel deprived Mr. Medina of a fair trial. In the second half, Texas argues that Mr. Medina's counsel did not deprive Mr. Medina of a fair trial.

First, Texas describes Mr. Medina's complaint as one about his counsel's "failure to present mitigating evidence." Opposition at 32. This complaint, the argument goes, is "plainly of the same ilk as other specific attorney errors [courts]

have held subject to *Strickland's* performance and prejudice components." *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 697-98 (2002)). Texas misunderstands the nature of Mr. Medina's complaint. He does not challenge counsel's failure to do anything. He challenges the circumstances imposed on Mr. Medina by the trial court such that the likelihood that any counsel could perform as an effective adversary was so remote as to render the trial inherently unfair. *Alabama v. Powell*, 287 U.S. 45, 58 (1932). This misapprehension renders most of Texas's response in opposition irrelevant.

The only relevant argument that Texas does make is that "this is not a case where the circumstances made it unlikely that any attorney could render effective assistance because counsel was handed a six-week continuance and failed to accept any assistance by the court to procure witnesses." Opposition at 32-33. In short, Texas argues that Mr. Medina was not deprived of the assistance of counsel because his counsel was ineffective. Notwithstanding the problems that Texas's argument creates for itself regarding whether the affirmance of Mr. Medina's judgment was sound, Texas's contention that the trial court's actions in this case did not give rise to circumstances in which the likelihood that any lawyer could perform as an effective adversary is unpersuasive.

As discussed above, the trial court's illusory offer of assistance—after the court had entered an indefinite recess over the defense's objection in full view of the consequences and scheduled the resumption of the trial on dates it knew to be unaccommodating to the defense—does not satisfy Mr. Medina's right to counsel.

The trial court could offer no meaningful assistance under the circumstances it had created, and it in fact afforded none once requested.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari*.

Respectfully submitted,

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