
No. 12A173

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2011 TERM

JOHN LEZELL BALENTINE,
Petitioner,

vs.

RICK THALER, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

On Petition for a Writ of *Certiorari* to
the United States Court of Appeals for the Fifth Circuit

**MOTION FOR STAY OF EXECUTION PENDING CONSIDERATION AND
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI**

CAPITAL CASE

*Mr. Balentine is currently scheduled to be executed
on Wednesday, August 22, 2012, after 6:00 p.m.*

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Mr. Balentine requests that the Court grant him a stay of execution pending the Court's consideration and disposition of his petition for writ of *certiorari*.

Texas is scheduled to execute Mr. Balentine by lethal injection after 6:00 p.m. on Wednesday, August 22, 2012. It is poised to execute him despite no court ever having considered his substantial claim that his death sentence was the result of his trial counsel's complete abdication of their duty to conduct a thorough investigation into their client's background. Texas asked Mr. Balentine's jury if there were any mitigating circumstances that warranted a life sentence, but his jury was not made aware of any information about Mr. Balentine or his life history. Had trial counsel conducted even a modicum of investigation, the jury would have learned that:

(1) Balentine's impoverished background did not meet his basic needs; (2) Balentine's neighborhood was poor, dangerous and filled with racism against African-Americans, and his environment growing up was overflowing with crime, drugs and racial tension; (3) Balentine's mother had limited abilities, married abusive husbands, suffered head injuries in a car wreck resulting in mental problems, and struggled to support her children requiring her to be absent from home in order to work; (4) Balentine's father and stepfather were violent and abusive with his mother, his stepfather was verbally, emotionally and physically abusive with both his wife and the children, and other family members committed acts of violence in his presence; (5) the men in Balentine's life were negative role models, one of which attempted to sexually abuse Balentine when he was seven or eight years old; (6) Balentine suffered an untreated head injury when he was six years old, wet the bed until he was ten years old, and was hit in the head by a rock while mowing the lawn; (7) Balentine suffered from learning problems, including difficulty with his speech, math and reading, demonstrated impulsivity, poor decision making, and difficulty thinking about the consequences of his actions, felt stupid because he was in Special Education and dropped out of high school in the eleventh grade; (8) Balentine's siblings demonstrated learning disabilities that were not properly addressed; (9) Balentine suffered from emotional problems, such as inappropriate emotions, a strange sense of humor, sudden unexplained panic, seeing ghosts, and believing that the ghost of his father sometimes inhabited his body; (10) Balentine's family distrusted official authority, such as the police, whom they regarded as racist and unhelpful, and his family frequently took the law into their own hands to deal with crimes rather than reporting anything to the police; and (11) Balentine developed an exaggerated sense of justice and desire to deal with perceived injustices. Petitioner

contends there was mitigation evidence regarding the threats that precipitated these murders that he claims were not adequately investigated and presented to the jury.

In addition to the classic mitigation elements identified above, petitioner contends there was positive character evidence available that was not presented at his trial, such as (1) petitioner's skills as a mechanic and handy-man, which he used to help others without compensation, (2) his friendly nature, good sense of humor, and kindheartedness towards others, (3) his respectfulness towards others, (4) his honesty, and (5) his good conduct in class.

Report and Recommendation to Deny Petition for Writ of Habeas Corpus at 27-29, *Balentine v. Thaler*, No. 2:03-cv-00039 (N.D. Tex. Sep. 27, 2007) (Document 53) (citations omitted), adopted by Order Overruling Objections and Adopting Findings and Recommendations of Magistrate Judge (Mar. 31, 2008) (Document 66). No court, state or federal, has ever reviewed whether the jury's decision lacking such information may have affected its decision to sentence Mr. Balentine to death.

A stay of execution is warranted where there is: (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). These criteria are met in the present case.

First, a reasonable probability exists that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari*. Seven members of this Court recently sought to fill a gap in habeas corpus jurisprudence to "ensure that proper consideration [i]s given to [] substantial claim[s]" of ineffective assistance of trial counsel ("*Strickland* claim") by federal reviewing courts. *Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (2012). In *Martinez*, this Court held that habeas petitioners may in some circumstances establish cause for procedural default of a *Strickland* claim by establishing that counsel whose duty under state law it was to litigate *Strickland*

claims in state court was ineffective. In the course of adjudicating a motion for certificate of appealability, the Fifth Circuit made quick work of the landmark decision, deciding after a mere threshold inquiry that *Martinez* was universally unavailable to all federal habeas corpus cases brought by Texas prisoners to establish cause for procedural default of *Strickland* claims. *See Ibarra v. Thaler*, ___ F.3d ___, 2012 U.S. App. LEXIS 13777 (5th Cir. 2012). Mr. Balentine’s panel relied on the *Ibarra* decision to affirm the district court in this case. The *Ibarra* decision eviscerates this Court’s attempt in *Martinez* to ensure federal review of *Strickland* claims that are defaulted in state court due to inadequate assistance of counsel and fails to give due respect to Texas’s legitimate interests in channeling the resolution of constitutional claims to the most appropriate forum and in the integrity of its judicial procedural regime, which clearly assign the duty to litigate *Strickland* claims to counsel appointed to represent capital defendants in collateral proceedings. The decision must be reversed to accomplish the equitable aims this Court intended in *Martinez*.

A significant possibility of reversal exists. The Fifth Circuit’s *Ibarra* decision, decided in a threshold inquiry but nevertheless now recognized as binding circuit precedent on the question, was premised on a shallow understanding of Texas law and an extremely narrow reading of *Martinez*. *Ibarra* now threatens the federal courts’ ability to vindicate the “bedrock principle in our justice system” that is the right to counsel during criminal trials for all Texas prisoners. 132 S.Ct. at 1315.

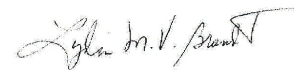
Finally, irreparable harm will result absent a stay. Mr. Balentine will be executed by Texas absent a stay, and his execution will occur despite a judgment procured in violation of the federal constitution. Moreover, it will occur without any court ever having reviewed the merits of his substantial claim that his death sentence resulted from Texas’s appointment of counsel to him who was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Strickland*

v. Washington, 466 US 668, 687 (1984).

CONCLUSION

For the foregoing reasons, the Court should stay Mr. Balentine's execution pending consideration and disposition of his petition for writ of *certiorari*.

Respectfully submitted,



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MOTION FOR STAY OF EXECUTION

CERTIFICATE OF SERVICE

I certify that on August 21, 2012, I have served Petitioner's MOTION FOR STAY OF EXECUTION on Ms. Katherine D. Hayes (katherine.hayes@oag.state.tx.us), Assistant Attorney General Office of the Attorney General, 300 West 15th Street, Suite 800, Austin, Texas, 78701, (512) 936-1400 by electronic mail. All parties required to be served have been served. I am a member of the Bar of this Court.

Respectfully submitted,



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