

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

2019 OCT 28 PM 4:52
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY

ROSA ESTELLA OLVERA JIMENEZ,
PETITIONER,

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V.

CAUSE NO. A:12-CV-00373-LY

LORIE DAVIS,

RESPONDENT.

ORDER

Before the court is Rosa Estella Olvera Jimenez's Amended Application for Writ of Habeas Corpus brought under 28 U.S.C. § 2254 (Doc. #27), Respondent's Answer (Doc. #32), and Jimenez's Reply (Doc. #35). The amended application was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended. The magistrate judge filed a Report and Recommendation on September 10, 2018, recommending that this court grant the Amended Application for Writ of Habeas Corpus (Doc. #39). The magistrate judge further recommends that this court order the State of Texas to grant Jimenez a new trial within 120 days of the final judgment in this case or to release Jimenez from custody.

Petitioner's Objections to Report and Recommendation of United States Magistrate Judge were filed on October 8, 2018 (Doc. #43). Respondent Davis's Objections to Report and Recommendation with Brief in Support were also filed on October 8, 2018 (Doc. #42). Petitioner's Response to Objection to Report and Recommendation was filed on November 5, 2018 (Doc. #46). In light of the objections of both parties, the court has conducted a *de novo*

review of the entire case file in this action. The court concludes that the Report and Recommendation is correct and should be accepted and adopted by the court for substantially the reasons stated therein.

In her objections, Petitioner seeks relief for three of her claims that the magistrate judge declined to consider. They include her claim of actual innocence, of additional instances of alleged ineffective assistance, and of the cumulative effect of the errors during her trial that she contends led to a fundamentally unfair trial in violation of her due-process rights. Having concluded that Jimenez is entitled to habeas relief, however, the court's consideration of these additional claims is unnecessary. Therefore, the court will overrule Jimenez's objections.

Respondent's objections dispute the magistrate judge's interpretation of the determination made by the Texas Court of Criminal Appeals. Respondent argues that, based on the facts of the case, it was not unreasonable for the Court of Criminal Appeals to decide that Jimenez was not prejudiced by her attorney's alleged errors. Respondent further asserts that Jimenez's counsel was not ineffective in failing to document a request for experts, and that the Court of Criminal Appeals was correct in finding that Jimenez's claim under *Ake v. Oklahoma*, 470 U.S. 68 (1985), was defaulted. Respondent also asserts that Jimenez's claim is barred by *Teague v. Lane*, 489 U.S. 288 (1989), because it relies on a new constitutional rule of procedure that is not made retroactive.

In response, Jimenez asserts that Respondent's objections mischaracterize Jimenez's claim, specifically concerning the scope of the ineffective-counsel claim. The response also seeks to clarify how her *Ake* claim was not defaulted. The magistrate judge determined that Jimenez properly exhausted an ineffective assistance-of-counsel claim based on her counsel's failure to preserve her *Ake* claim in her state habeas proceeding, overcoming the argument that

her *Ake* claim was defaulted. Jimenez also argues that her claim is not barred by *Teague* because the application of the *Ake* rule to the request for medical experts does not violate the non-retroactivity principle given that, as found by the magistrate judge, both the Texas courts and the Fifth Circuit have applied *Ake* outside the context of psychiatric experts prior to when Jimenez's conviction was finalized. The court agrees. Therefore, the court will overrule Respondent's objections.

IT IS THEREFORE ORDERED that Petitioner Rosa Estella Olvera Jimenez's Objections to Report and Recommendation of United States Magistrate Judge (Doc. #43) are **OVERRULED**.

IT IS FURTHER ORDERED that Respondent Davis's Objections to Report and Recommendation with Brief in Support (Doc. #42) are **OVERRULED**.

IT IS FURTHER ORDERED that that the United States Magistrate Judge's Report and Recommendation filed September 10, 2018 (Doc. #39), is hereby **APPROVED** and **ACCEPTED**.

IT IS FURTHER ORDERED that Rosa Estella Olvera Jimenez's Amended Application for Writ of Habeas Corpus is **GRANTED**.

IT IS FINALLY ORDERED that the State of Texas retry Rosa Estella Olvera Jimenez or release her from custody not later than February 25, 2020.

SIGNED this 28th day of October, 2019.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE