

No. \_\_\_\_\_

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In the

# Supreme Court of the United States

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DAVID MEJIA,  
*Petitioner,*

v.

LORIE DAVIS, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,  
*Respondent.*

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

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### PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Has the Fifth Circuit erred in holding, that in an ineffective assistance of counsel claim under AEDPA, a court may indulge “post hoc rationalization” for counsel’s decision making that contradicts the available evidence of counsel's actions?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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## **PRAYER**

Petitioner David Mejia respectfully prays that a writ of *certiorari* be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on October 11, 2018.

## **OPINIONS BELOW**

The Fifth Circuit's opinion in *Mejia v. Davis*, 906 F.3d 307 (5th Cir. 2018), is reprinted at pages 1a–14a of the Appendix. The underlying federal habeas court decision (*Mejia v. Stephens*, 289 F.Supp.3d 799 (S.D. Tex. 2017)) is reprinted at pages 15a–32a of the Appendix. The underlying state habeas court order in *Ex Parte: David Mejia*, Cause No. 98-5-17,336-D-2, 377th Judicial District Court, Victoria County, Texas, denying all relief is unreported and is reprinted at page 33a of the Appendix.

## **JURISDICTION**

The decision of the Fifth Circuit Court of Appeals was entered on October 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(e) as Petitioner asserts a deprivation of his rights secured by the Constitution of the United States, as well as Supreme Court Rule 11, permitting certiorari to a United States court of appeals before judgment.

## **STATUTUTORY PROVISIONS INVOLVED**

28 U.S.C. § 2254 provides in pertinent part:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
  - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
  - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

### A. Procedural History

David Mejia was convicted of murder in Victoria County, Texas, and assessed punishment of life imprisonment in cause no. 98-5-17,336-D-1. Mejia's conviction was affirmed by the Thirteenth Court of Appeals of Texas.

Mejia filed an application for state writ of habeas corpus challenging his conviction and his sentence. The application raised seven grounds; in the second, Mejia alleged that his attorney rendered ineffective assistance of counsel by failing to request a lesser-included-offense instruction, and by failing to request a "sudden passion" instruction at the sentencing phase. On December 3, 2012, the state habeas court denied Mejia's habeas petition. Mejia's habeas application was then forwarded to the Texas Court of Criminal Appeals, which denied the writ without a written opinion.

Mejia then filed his federal habeas corpus petition. The district court issued its opinion and final judgment ordering that Petitioner's Amendment to Petition for Writ of Habeas Corpus, deemed a motion for summary judgment, was granted in part as to Petitioner's claim that counsel rendered constitutionally ineffective assistance when he failed to request additional jury instructions. *See Mejia v. Stephens*, 289 F.Supp.3d 799 (S.D. Tex. 2017). On November 5, 2017, the State filed its notice of appeal. ROA.456-57.

On October 11, 2018, the Fifth Circuit vacated the district court's judgment and rendered judgment for the State. *See Mejia v. Davis*, 906 F.3d 307 (5th Cir. 2018). The Fifth Circuit concluded “that (1) given [defense counsel’s] all-or-nothing strategy, he reasonably declined a ‘double-edged’ manslaughter instruction that could have lowered Mejia’s chances of an acquittal; (2) even assuming [defense counsel] should have sought a sudden passion instruction, it is unlikely that the instruction would have changed Mejia’s sentence; and (3) crucially, neither conclusion would have been an objectively unreasonable application of *Strickland* by the state habeas court.” App., *infra*, 5a.

This Petition follows.

## **B. Statement of Relevant Facts**

During a bar fight in 1998, Mejia stabbed Torres in the heart with a steak knife. The state appellate court summarized the facts of the murder as follows:

The State’s evidence showed that [Mejia] went with Johnny Arce to a bar in order to help him fight some people. A fight resulted including several people, including [Mejia] and the victim, Marcos Torres. During the fight Marcos Torres was stabbed in the heart and killed. Minutes later [Mejia] told his sister, “I cut him,” and “[H]e had a gun.” “It was either my life or his.” Afterwards he went to an apartment where he told John Gomez that he had “stabbed some dude.” [Mejia] showed Gomez how he had stabbed the victim; he reached back with his left hand and pulled the knife out of his left, rear pants pocket and stabbed forward. [Mejia] indicated that he had stabbed him in the middle of the chest. Lorenzo Dominguez was present when [Mejia] arrived at the apartment. He heard [Mejia] say, “I got the mother f----. I stabbed him.”

The medical examiner's testimony showed that Torres died from a stab wound to the heart. He testified that the knife used to kill Torres was capable of causing death or serious bodily injury.

[Mejia] testified that when the fight started Torres swung at him, and he pushed Torres back twice. Torres lifted up his shirt, revealing a gun. As Torres approached him and started pulling out the gun [Mejia] pulled out a knife and stabbed him. His testimony was that he did not mean to stab him. He admitted that he could have turned and run away from Torres without pulling the knife.

On June 20, 1998, the 377th District Court of Victoria County, Texas, appointed Alex Luna to represent Mejia. At Mejia's trial for murder, Luna did not request, and the trial court did not give, any jury instructions regarding lesser included offense of manslaughter, which would have carried a maximum prison sentence of twenty years. Rather, he relied entirely on the argument that Mejia had acted in self-defense. At the charging conference for the guilt-innocence phase, when the court explicitly noted that the charge did not submit any lesser included offenses to the jury, Luna confirmed that he wanted to submit the charge without any such instructions:

THE COURT: Do you have any further requested instructions?

MR. LUNA: No further requested instructions.

THE COURT: This does not include submission of any lesser—anything on any lesser included offenses to the jury, based upon the testimony and the position—and the self-defense instruction. This is the Charge of the Court that you want to submit; is that correct?

MR. LUNA: That is correct.

The jury rejected self-defense and returned a verdict of murder.

After Mejia's conviction was affirmed on direct appeal, Mejia filed a state habeas petition claiming that Luna rendered ineffective assistance of counsel when he failed to request jury instructions on manslaughter and sudden passion. Luna provided an affidavit stating that his exclusive theory of the case was self-defense:

GROUND TWO: Trial counsel rendered ineffective assistance by failing to request lesser included instructions on criminal negligent homicide, manslaughter, and sudden passion in support [of] the evidence presented during trial.

RESPONSE: The strategy of the whole trial was self-defense. This was brought out in voir dire and in questioning of all the witnesses. The testimony of the whole trial centered around applicant's contention that the deceased had a gun. My recollection was that applicant's position was that he was not guilty of any thing [sic] because of his self defense strategy. That was why he plead[ed] not guilty and agreed to testify on his behalf on this contention of self-defense. There was no evidence of any provocation on behalf of the deceased. Applicant had gone to the confrontation with the knowledge of the purpose and had armed himself with the weapon, a knife.

The state habeas court rejected Mejia's claim. The habeas court's opinion read, in its entirety, as follows:

On the 3rd day of December, 2012, the Trial Court determines as follow after having reviewed the pleadings and papers filed in this application, the Reporter's Record of the trial, after viewing State's Exhibit (videotape statement of David Mejia) admitted at trial, and after using the Court's personal recollection:

[T]he affidavit of Applicant's trial attorney ALEX LUNA is credible; Applicant's attorney provided effective assistance of counsel;

Applicant's ground 3 claim should alternatively be barred by the doctrine of laches if it is determined that ALEX LUNA's response in his affidavit is not specific enough.

The District Clerk is ORDERED to now forward the application and other filed documents to the Court of Criminal Appeals with the Trial Court's Findings of Facts and Conclusions of Law.

The Texas Court of Criminal Appeals denied the writ without written order.

## **REASONS FOR GRANTING THE WRIT**

### **The Decision Below Contravenes this Court's Holdings in *Wiggins v. Smith***

To establish ineffective assistance of counsel, a petitioner must show that defense counsel's performance was objectively deficient and prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner must also show that the state court adjudication was objectively unreasonable. 28 U.S.C. § 2254(d). Where counsel has provided the reason for his conduct, and a court has no reason to doubt the validity of that explanation, the relevant inquiry is whether the stated reason was objectively unreasonable. Significantly, this Court has repeatedly declared that courts are not to "indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109, 131 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). However, the court of appeals failed to apply this holding in the case below.

In *Wiggins*, trial counsel did not put on any mental health mitigation or life history evidence, such as evidence of defendant Wiggin’s physical and sexual abuse, because counsel decided before trial to focus their efforts on retrying the factual case and disputing Wiggins’s direct responsibility for the crime. *See Wiggins*, 539 U.S. at 516–17. Although trial counsel in *Wiggins* retained a mental health expert who evaluated the defendant, counsel did not compile a life history with the assistance of a forensic social worker. Acknowledging these facts, the state court denied relief, stating, “when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel.” *Id.* at 517–18 (quotation marks omitted).

The state appellate court affirmed the denial of relief, concluding that trial counsel had made “a deliberate, tactical decision to concentrate their effort at convincing the jury” that Wiggins was not directly responsible. *Id.* at 518 (quotation marks omitted). The state court specifically found that trial counsel “knew of Wiggins’[s] unfortunate childhood” because they had available to them the PSI, as well as “more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline mental retardation.” *Id.* (quotation marks and citations omitted). While the state court acknowledged that the information counsel had was not as graphic or as detailed as the information developed by a forensic social worker in the postconviction hearing, the state court found “counsel did investigate and were aware of appellant’s background.” *Id.* (quotation marks omitted). As a result, the state court concluded that

counsel made a reasoned choice to proceed with what they perceived was their best defense. *Id.* at 518.

Notwithstanding the state court's conclusion about the strategy of Wiggins's counsel, this Court found that the state court unreasonably applied *Strickland* and made an unreasonable determination of the facts, within the meaning of AEDPA. *Id.* at 527. In doing so, the Court emphasized that: (1) “[Wiggin’s] claim stems from counsel’s decision to limit the scope of their investigation into potential mitigating evidence;” and (2) that trial counsel attempted to justify their limited investigation as reflecting a tactical decision. *Id.* at 521. In rejecting the contention that trial counsel made a reasonable tactical decision, which is substantially the same as the argument advanced by the state in petitioner’s case here, this Court in *Wiggins* emphasized an aspect of *Strickland* that bears repeating:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

*Id.* at 521–22 (quoting *Strickland v. Washington*, 466 U. S. 668, 690–91 (1984) (emphasis added)). The Court in *Wiggins* ultimately concluded, “[w]hen viewed in this light, the ‘strategic decision’ the state courts and respondents all invoke to justify

counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526–527.

This Court's reasoning and conclusion in *Wiggins* apply equally to the petitioner's case here. On appeal, petitioner argued that the court of appeals should consider only counsel's stated reason for his challenged conduct, rather than that State's hypothetical strategic reasons that could have supported counsel's decision to not request a manslaughter instruction. For instance, the State claimed that counsel may have pursued an all-or-nothing strategy. App., *infra*, 9a. In addition, the State suggested that counsel may have been concerned about the double-edged consequences that a manslaughter instruction might have. However, because counsel stated exactly why he did not request a manslaughter instruction, i.e., "[t]he strategy of the whole trial was self-defense," petitioner argued that this Court may not consider these hypothetical strategic reasons. *Harrington* 562 U.S. at ("courts may not indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions" (quoting *Wiggins*, 539 U.S. at 526-27)).

Significantly, the court of appeals did not apply the Court's holding in *Wiggins*. According to the court of appeals, "[t]he state habeas court could have reasonably concluded that Luna made an informed choice to pursue an all-or-nothing strategy and thus reasonably declined a double edged manslaughter instruction." App., *infra*, 9a. In making this conclusion, the court of appeals ignored this Court's holdings in

*Wiggins* that courts may not indulge “post hoc rationalization” for counsel’s decision making that contradicts the available evidence of counsel’s actions.

Had the court of appeals applied this Court’s holdings in *Wiggins*, it could not have found that the state court’s application of the *Strickland* standard was objectively reasonable. After all, petitioner’s counsel stated exactly why he failed to request a manslaughter instruction: “The strategy of the whole trial was self-defense.” App., *infra*, 7a. The State did not suggest any credible basis for doubting the truth of counsel’s statement. Under these circumstances, the court of appeals should have only considered counsel’s stated reasons for the challenged course of conduct.

In sum, the decision below reflects a basic misunderstanding about this Court’s holdings in *Wiggins*. That misunderstanding had a direct impact on the outcome of the case. Accordingly, this Court should grant review to reiterate that courts may not indulge “post hoc rationalization” for counsel’s decision making that contradicts the available evidence of counsel’s actions.

## **CONCLUSION**

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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