ORIGINAL

NO. 18-8063

IN THE

SUPREME COURT OF THE UNITED STATES

SHAUN MARK LAWLER,
Petitioner,

v.

LORIE DAVIS, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Texas, a person who commits aggravated assault - family violence by causing serious bodily injury to his girlfriend with a deadly weapon is subject to a punishment range of five years to life imprisonment. A person who commits murder by intentionally killing his girlfriend with a deadly weapon under the immediate influence of sudden passion arising from an adequate cause is subject to a punishment range of two to 20 years imprisonment. These statutory punishment schemes subjected Petitioner, whom seriously injured his girlfriend with a deadly weapon - in the heat of passion -, to a sentence 35 years longer than if he had killed her in the heat of passion.

Petitioner's trial counsel did not advise Petitioner that a constitutional challenge could be made to the statutory punishment scheme for aggravated assault - family violence.

This case therefore presents the following questions:

1. **Is it unconstitutional for the Texas Legislature to authorize a greater punishment range and maximum punishment for aggravated assault - family violence than for the greater offense of murder committed in the heat of passion?**

2. **Could reasonable jurists disagree whether Petitioner's trial counsel was ineffective for failing to advise Petitioner that a constitutional challenge could be made to the statutory punishment scheme for aggravated assault - family violence and for failing to file a motion and preserve the issue for appeal?**

3. **Was Petitioner's guilty plea involuntary as a result of inadequate advice of trial counsel?**

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Petitioner, Shaun Mark Lawler, was the Petitioner before the United States District Court for the Eastern District of Texas, Tyler Division, as well as the Applicant and the Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Lawler is a prisoner sentenced to 55 years' imprisonment and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("Director"). The Director and her predecessors were the Respondents before the United States District Court, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Lawler asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Shaun Mark Lawler, Petitioner, is not a corporate entity.

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Petitioner Shaun Mark Lawler respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

On June 28, 2018, the United States Court of Appeals issued an opinion refusing to certify an appeal from the district court order denying Sixth Amendment ineffective-assistance-of-counsel ("IAC") relief. The June 28, 2018, opinion is unpublished and attached as Appendix A.

On August 2, 2017, the United States District Court for the Eastern District of Texas issued an order dismissing Mr. Lawler's petition for a writ of habeas corpus. The August 2, 2017, order is unpublished and attached as Appendix B. On July 14, 2017, the United States District Court issued a report and recommendation of the United States magistrate judge recommending that Mr. Lawler's petition for a writ of habeas corpus be denied and the case dismissed. The July 14, 2017, report and recommendation is unpublished and attached as Appendix C.

On May 7, 2014, the Court of Criminal Appeals of Texas denied Mr. Lawler's application for a writ of habeas corpus without written order. The May 7, 2014, denial is unpublished and attached as Appendix D.

JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 and 2254. Under 28 U.S.C. § 2253, the

Fifth Circuit had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), over all issues presented to the Fifth Circuit under 28 U.S.C. § 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides that "No state shall make or enforce any law which shall ...deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2253(c) provides that "A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right."

Section 22.02(a) of the Texas Penal Code provides that "A person commits an offense if the person commits assault...and the person causes serious bodily injury to another, including the person's spouse, or uses or exhibits a deadly weapon during the commission of the assault."

Section 22.02(b)(1) of the Texas Penal Code provides that "An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if the actor

uses a deadly weapon during the commission of the assault and causes serious bodily injury to a person whose relationship to or associated with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code."

Section 12.32 of the Texas Penal Code provides that "An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years."

Section 19.02(b) of the Texas Penal Code provides that "A person commits an offense if he intentionally or knowingly causes the death of an individual."

Section 19.02(d) of the Texas Penal Code provides that "At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree."

Section 12.33 of the Texas Penal Code provides that "An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years."

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of a guilty plea, this Court has recognized that a defendant can satisfy the prejudice prong by demonstrating that, but for counsel's deficient performance, a reasonable probability exists that the defendant would not have pleaded guilty and instead insisted on a different proceeding. *Cf. Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Kimmelman v. Morrison*. 477 U.S. 365, 387-91 (1986) (counsel ineffective if he failed to file a motion to supress that probably would have been granted). This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (citing *Smith v. Robbins*, 528 U.S. 259 (2000)); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984)). Because an attorney who fails to advise his client that he could challenge the facial constitutionality of the applicable penal statute deprives his client not only of "a *fair* judicial proceeding," but of the proceeding altogether, his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

The decisions below are wrong and troubling. While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the *legality* of the sentence imposed. It is undisputed on this record that Petitioner's counsel did not discuss with Petitioner that he could file a motion contending that the statutory punishment scheme for aggravated assault - family violence is facially unconstitutional because it subjects persons to greater punishment for causing serious bodily injury to a spouse or girlfriend with a deadly weapon than for *killing* her in the heat of passion.

The Court should grant certiorari.

STATEMENT OF THE CASE

On June 25, 2012, Petitioner entered an open plea of guilty to aggravated assault - family violence. The trial court sentenced Petitioner to 55 years' imprionsment in the Texas Department of Criminal Justice - Correctional Institutions Division.

Petitioner filed a state application for a writ of habeas corpus asserting that his guilty plea was involuntary as a result of inadequate advice of counsel. In support, Petitioner submitted an affidavit from his trial counsel, in which trial counsel admitted that he "did not discuss with [Petitioner] that he could file a motion contending that the statutory punishment scheme for aggravated assault - family violence is facially unconstitutional because it subjects persons to greater punishment for causing

serious bodily injury to a spouse or girlfriend with a deadly weapon than for killing her in the heat of passion." *See* Appendix E. In addition, Petitioner further supported his claim with an unsworn declaration confirming that his trial counsel never advised him that he could make a constitutional challenge to the punishment scheme, as well as that had he known that aggravated assault - family violence carried a punishment range disproportionate to the greater offense of murder he would have instructed his counsel to make the challenge. The Court of Criminal Appeals of Texas subsequently denied Petitioner's application without written order on the findings of the trial court without a hearing. *See* Appendix D.

The federal district court also denied Petitioner's claim. *See* Appendix C. The sole issue addressed by the district court on this claim was whether Petitioner's plea was involuntarily and unknowingly entered. When conducting an analysis of the evidence, the district court erroneously ignored counsel's affidavit and Petitioner's declaration. Pet. App. 7c. The district court's assertion was that "[t]the record, however, does not support [Petitioner's] claim." Pet. App. 8c.

The United States Court of Appeals for the Fifth Circuit entered a judgment consisting of a blanket denial of Petitioner's Application for a Certificate of Appealability. *See* Appendix A.

REASONS FOR GRANTING THE PETITION

In overruling the involuntary guilty plea issue raised by Mr. Lawler, the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not, but should be, settled by this Court *and* has decided important federal questions in a way that conflicts with relevant decisions of this Court.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS UNCONSTITUTIONAL FOR THE TEXAS LEGISLATURE TO AUTHORIZE A GREATER PUNISHMENT RANGE AND MAXIMUM PUNISHMENT FOR AGGRAVATED ASSAULT - FAMILY VIOLENCE THAN FOR THE GREATER OFFENSE OF MURDER COMMITTED IN THE HEAT OF PASSION.

A person who commits aggravated assault - family violence by causing serious bodily injury to his spouse or girlfriend with a deadly weapon is subject to a punishment range of five years to life imprisonment. TEX. PENAL CODE §§ 12.32, 22.02(b)(1). A person who commits murder by intentionally killing his spouse or girlfriend with a deadly weapon under the immediate influence of sudden passion arising from an adequate cause is subject to a punishment range of two to 20 years' imprisonment. TEX. PENAL CODE §§ 12.33, 19.02(d) (West 2014).

It is unconstitutional for the Texas Legislature to authorize a greater punishment range and maximum punishment for aggravated assault - family violence than for the greater offense of murder committed in the heat of passion. The statutory punishment scheme for aggravated assault - family violence is facially unconstitutional because it deprives convicted persons of due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and because

it subjects them to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Caselaw existed when Petitioner pled guilty to aggravated assault - family violence. Said caselaw held that the legislature acts unconstitutionally in authorizing a greater punishment range and maximum punishment for a lesser offense than for the more serious offense. *See Cannon v. Gladden*, 281 P.2d 233, 235 (Or. 1955) (statute authorizing life sentence for assault with intent to commit rape unconstitutional where maximum punishment for rape is 20 years); *State v. Blackmon*, 132 S.E.2d 880, 884 (N.C. 1963) (punishment range of 20 to 30 years for possession of burglary tools unconstitutional where maximum punishment for burglary is ten years); *Dembowski v. State*, 240 N.E.2d 815, 816-17 (Ind. 1968) (sentence of 25 years for robbery unconstitutional where maximum sentence for armed robbery is 20 years); *Roberts v. Collins*, 544 F.2d 168, 169 (4th Cir. 1976) (sentence of 20 years for assault unconstitutional where maximum punishment for assault with intent to murder is 15 years); *United States v. Garcia*, 755 F.2d 984, 990 (2d Cir. 1985) (sentence of nine years for criminal contempt for refusing to testify before grand jury under grant of immunity unconstitutional where maximum sentence for perjury is five years); *cf. State v. Shumway*, 630 P.2d 796, 802 (Or. 1981) (unconstitutional to require defendant to serve 25 years before becoming eligible for parole for murder where he would have become eligible for parole in 15 or 20 years had he been convicted of aggravated murder).

A commentator has observed that having the same punishment

range for disparate crimes is contrary to the goal of deterrence and creates an incentive to commit the more serious crime. *The Eighth Amendment, Proportionality, and the Changing Meaning of Punishments*, 122 HARV. L. REV. 960, 978 (2009).

No argument could be made that this issue requires further percolation. Had a court agreed, the maximum sentence for aggravated assault - family violence could not exceed the statutory maximum of 20 years for murder committed in the heat of passion. *See Roberts*, 544 F.2d at 169. This Court should take the time to settle this important question of federal law by granting this petition for writ of certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DISAGREE WHETHER PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE PETITIONER THAT A CONSTITUTIONAL CHALLENGE COULD BE MADE TO THE STATUTORY PUNISHMENT SCHEME FOR AGGRAVATED ASSAULT - FAMILY VIOLENCE AND FOR FAILING TO FILE A MOTION AND PRESERVE THE ISSUE FOR APPEAL.

A. The Standard of Review

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam). This right to the assistance of counsel has long been understood to include a "right to the effective assistance of counsel." *See McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *see also Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010) (6th Amendment right to counsel is right to effective counsel). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. *See United States v. Morrison*, 449 U.S.

361, 364 (1981). Absent the effective assistance of counsel "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See Anders v. California*, 386 U.S. 738, 743 (1967).

This Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established the federal standard for determining whether an attorney rendered effective assistance of counsel. Pursuant to that test:

> ...the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The Sixth Amendment requires defense counsel to conduct a reasonably thorough pretrial investigation into the defenses that might be offered. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Where a habeas applicant contends that he pled guilty without challenging the facial constitutionality of the applicable penal statute based on inadequate advice of counsel, he must show that counsel's advice fell below an objective standard of reasonableness and that, had he received adequate advice, there is a reasonable probability that he would have instructed counsel to challenge the facial constitutionality of the statute, and that a court probably would have sustained the challenge. *cf. Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Kimmelman v. Morrison*, 477 U.S. 365,

387-91 (1986) (counsel ineffective if he failed to file motion to suppress that probably would have been granted).

B. Deficient Performance

Petitioner's indictment alleged that, on July 18, 2011, Petitioner intentionally, knowingly, or recklessly caused serious bodily injury to Jessica Wimpee with a knife, and that they were in a dating relationship as described by sections 71.0021(b) and 71.003 of the Texas Family Code. Petitioner pled guilty without an agreed recommendation on punishment and was admonished that the range of punishment was five to 99 years or life. The trial court sentenced Petitioner to 55 years in prison and entered an affirmative finding of a deadly weapon in the judgment. Petitioner did not challenge the facial constitutionality of the statutory punishment scheme for aggravated assault - family violence.

A person commits the offense of aggravated assault pursuant to section 22.02(a) of the Texas Penal Code if he intentionally, knowingly, or recklessly causes serious bodily injury to another or he uses or exhibits a deadly weapon during the commission of an assault. Aggravated assault is ordinarily a second degree felony pursuant to section 22.02(b). However, section 22.02(b)(1) was added in 2005 to provide that the offense is a first degree felony if the actor uses a deadly weapon and causes serious bodily injury to a person with whom he is or has been in a household or dating relationship as described by sections 71.0021(b), 71.003, or 71.005 of the Family Code. Thus, a person who uses a deadly weapon and causes serious bodily injury to his girlfriend is subject to a punishment range of five years to life in prison

pursuant to section 12.32 of the Texas Penal Code.

A person commits the offense of murder pursuant to section 19.02(b) of the Penal Code if he intentionally or knowingly causes the death of an individual; intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or commits or attempts to commit a felony other than manslaughter, and in the course of and in the furtherance of the commission or attempt, or in the immediate flight therefrom, he commits an act clearly dangerous to human life that causes the death of an individual. Murder is a first degree felony pursuant to section 19.02(c). However, if the defendant proves by a preponderance of the evidence at the punishment stage that he caused the death under the immediate influence of sudden passion arising from an adequate cause, the offense is a second degree felony pursuant to section 19.02(d). Thus, a person who intentionally kills his girlfriend with a deadly weapon in the heat of passion is subject to a punishment range of two to 20 years pursuant to section 12.33 of the Penal Code.

The statutory punishment schemes for murder and aggravated assault - family violence support Petitioner's position that it is unconstitutional for the legislature to authorize a greater punishment range and maximum punishment for aggravated assault - family violence than for the greater offense of murder committed in the heat of passion. The statutory punishment scheme for aggravated assault - family violence is facially unconstitutional because it deprives convicted persons of due process and equal protection of the law in violation of the Fifth and Fourteenth

Amendments to the United States Constitution and because it subjects them to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Petitioner incorporates the caselaw cited in section I. above here in this issue.

Trial counsel did not advise Petitioner that a constitutional challenge could be made to the statutory punsihment scheme for aggravated assault - family violence. Petitioner did not know that the maximum punishment for causing serious bodily injury to his girlfriend with a deadly weapon (life) is greater than the maximum punishment for killing her under the immediate influence of sudden passion arising from an adequate cause (20 years). Counsel certainly performed deficiently in failing to advise Petitioner of this available constitutional challenge and in failing to file a motion and preserve the issue for appeal. No sound strategy justified this omission.

C. Prejudice

Had counsel informed Petitioner that a constitutional challenge could be made to the statutory punishment scheme for aggravated assault - family violence, he would have instructed counsel to make it; and, had the trial court rejected it, he would have raised the issue on appeal. Petitioner would not have pled guilty and knowingly waived his right to challenge the facial constitutionality of the statutory punishment scheme. Because counsel did not so advise him and did not preserve error in the trial court, Petitioner could not raise the issue on appeal or in a habeas corpus proceeding. Counsel's deficient performance deprived Peti-

tioner of the opportunity to make a viable constitutional challenge that should have been sustained.

In sum, reasonable jurists could easily disagree whether Petitioner's trial counsel was ineffective for failing to advise Petitioner that a constitutional challenge could be made to the statutory punishment scheme for aggravated assault - family violence and for failing to file a motion and preserve the issue for appeal. Counsel's ineffectiveness violated Petitioner's rights under the United States Constitution. Mr. Lawler respectfully asks the Supreme Court of the United States to grant this petition for a writ of certiorari.

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S GUILTY PLEA WAS INVOLUNTARY AS A RESULT OF INADEQUATE ADVICE OF TRIAL COUNSEL.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant is entitled to postconviction relief on an ineffective assistance of trial counsel claim if he can demonstrate by a preponderance of the evidence that: (1) trial counsel's performance was deficient and; (2) the applicant was prejudiced because of that deficient performance. Trial counsel's performance is deficient if it falls below an objective standard of reasonableness.

To be likely to render reasonably effective assistance to his client, "a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand" because Sixth Amendment rights guarantee a defendant the benefit of trial counsel who is familiar with the applicable law. Thus, ignorance of well-defined general laws, statutes, and legal propositions is not excusable, and if it prejudices a client, ineffective assist-

ance of trial counsel may be found.

The prejudice prong of *Strickland* requires a habeas applicant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In this guilty plea context, this amounts to no more than a showing that there is a reasonable probability that, but for counsel's errors, Petitioner would not have pleaded guilty and would have insisted that counsel file a motion challenging the constitutionality of the punishment scheme for aggravated assault - family violence.

Based on this Court's holding in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), Petitioner was entitled to the effective assistance of trial counsel in the guilty plea context.

When a defendant receives bad advice or no advice about the constitutionality of a statute, the defendant must show a reasonable likelihood that he would have opted for his trial counsel to challenge that statute if his attorney had correctly advised him.

As shown above, Petitioner received ineffective assistance of trial counsel. Counsel's ignorance of the applicable law was deficient. Petitioner was prejudiced when he received a sentence that was 35 years higher than the maximum for the greater offense of murder committed in the heat of passion.

As a result, Petitioner respectfully suggests that some guidance from the Supreme Court of the United States is warranted.

CONCLUSION AND PRAYER FOR RELIEF

Shaun Mark Lawler respectfully prays that this Court grant this petition for a writ of certiorari to resolve the Questions Presented.

Dated: February 5, 2019

Respectfully submitted,

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