No. 18-8419

IN THE
# Supreme Court of the United States

FABIAN HERNANDEZ,
*Petitioner*,
v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
*Respondent*.

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

## BRIEF IN OPPOSITION

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**CAPITAL CASE**

## QUESTION PRESENTED

Fabian Hernandez was found guilty of capital murder and sentenced to death. In state habeas proceedings, he asserted that appellate counsel was ineffective because he did not assert two claims of trial court error. After allowing Hernandez to develop his claims at an evidentiary hearing, the state habeas court recommended the denial of relief. The Texas Court of Criminal Appeals (CCA) denied relief based on the state habeas court's findings and its independent review of the record.

Hernandez then asserted his ineffective-assistance-of-appellate counsel claims in federal habeas proceedings. The federal district court and the Fifth Circuit reviewed the state habeas court's findings and explained why they were reasonable, and, respectively, denied relief and a certificate of appealability (COA). Because their analyses included discussion of cases that the state habeas court did not provide citations for in its findings, Hernandez argues that the lower courts violated *Wilson v. Sellers*.[1]

The question before the Court is thus:

Does *Wilson* prohibit federal courts in their review of Texas postconviction proceedings from considering anything beyond the state habeas court's express findings?

[1] 138 S. Ct. 1188 (2018).

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## BRIEF IN OPPOSITION

Petitioner Fabian Hernandez has unsuccessfully challenged his conviction and sentence in state and federal courts. He now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of a COA. But Hernandez fails to identify any compelling reasons for this Court to review the decision of the court below. Moreover, the CCA reasonably applied this Court's precedent when it found that Hernandez failed to demonstrate that appellate counsel was ineffective for declining to challenge the trial court's (1) interlocutory ruling regarding Dr. Richard Coons and (2) exclusion of Frank AuBuchon's general opinion on future dangerousness. This Court should deny Hernandez's petition.

## STATEMENT OF THE CASE

### I. Facts of the Crime

The CCA summarized the relevant evidence presented during guilt-innocence in its opinion on direct appeal:

> [Hernandez] and Renee Urbina Hernandez ["Renee"] were married with two children. They both drank heavily, and their marriage was tumultuous. The couple separated and reunited several times. In April 2006, they appeared to permanently separate. [Renee] and the children moved in with her mother. [Renee] worked at McDonald's with Arturo Fonseca, a friend with whom she would go out partying.
>
> On the night of November 2, 2006, [Hernandez] met his long-time friend Diesta Torres at a local bar. [Hernandez] told Torres that he had "messed up" with [Renee] and the children and that he missed

them. According to Torres, [Hernandez] was not acting normally, and he appeared to be drunk. At around 10:30 p.m., Torres agreed to drive [Hernandez] to a nearby motel, but he asked to be dropped off before arriving there. Torres let [Hernandez] out a short distance from Pyrite Street, approximately a four-minute walk from [Renee's] mother's house.

At around 2:30 a.m. on November 3, 2006, [Renee's] sister, Cynthia Estevez, heard arguing outside their mother's home followed by three gunshots. Estevez saw a white two-door car drive away slowly. Outside, she found a male body, later identified as that of Fonseca, lying between two family vehicles, and she went back inside to call 9-1-1. Meanwhile, their mother found [Renee's] body lying nearby. A neighbor, who also heard the gunshots, saw a white two-door Honda driving away. She also called 9-1-1.

[Hernandez] appeared at the home of his friend Sergio Carrasco around 4:00 a.m. asking for a place to stay. [Hernandez] borrowed some "blankets and covers" and, later, Carrasco's car, returning it before Carrasco needed to leave for work that morning. [Hernandez's] girlfriend picked him up and took him to his father's house. When Carrasco returned home for his lunch, he noticed a car with blankets on it parked behind his house.

Police found a white two-door Honda, subsequently identified as belonging to Fonseca, hidden behind Carrasco's home. Investigators processed the Honda for evidence and found, on an envelope, a latent fingerprint that was later determined to match [Hernandez's] left thumb. Police also searched [Hernandez's] father's home, where they collected a .380 semi-automatic handgun and five bullets. Testing showed that the handgun and bullets matched the three shell casings found at the crime scene.

Autopsies of [Renee] and Fonseca revealed that the two died from gunshot wounds to their heads. [Renee's] wound was located on her left forehead, and Fonseca's was at the back of his head. Evidence indicated that the gun barrel was approximately 10-12 inches away when each was shot. At the times of their deaths, both had alcohol, but no illegal drugs, in their systems.

*Hernandez v. State*, 390 S.W.3d 310, 313–14 (Tex. Crim. App. 2012).

## II. Course of State and Federal Proceedings as They Relate to Hernandez's Claims

### A. Pretrial and trial

#### 1. The trial court's interlocutory ruling regarding Dr. Coons and the State's case for future dangerousness

The State retained Dr. Richard Coons as its mental health expert. Three months before the trial, the trial court conducted a hearing to determine the admissibility of Dr. Coons's expert testimony on future dangerousness. 34 Reporter's Record (RR) 5–82, 125–47. The trial court entered an interlocutory ruling that Dr. Coons's methodology and opinion were sufficiently reliable. *Id.* at 145–46. Hernandez then asserted his Fifth Amendment right and refused to submit to Dr. Coons's examination. 53 RR 919–22. Accordingly, Dr. Coons did not testify.

Instead, the State presented evidence that Hernandez had a prior conviction for manslaughter,[2] was a member of the notoriously violent Barrio Azteca prison gang[3] and, while awaiting trial, had attempted to have two of the State's witnesses (his longtime friends) killed.[4]

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[2] 70 RR 124; 71 RR 41–49; 72 RR 89–90, 109, 116, 124–33, 173.

[3] 68 RR 63–73; 70 RR 114–15.

[4] 69 RR 81–91; 70 RR 7, 27–35, 150–56.

### 2. Hernandez's rebuttal of the State's case for future dangerousness and the trial court's ruling on AuBuchon's answer to the first special issue

Inmate classification and security expert, Frank AuBuchon testified for the defense during the punishment phase. He testified that, if sentenced to life in prison, Hernandez would be placed in a maximum-security prison unit in administrative segregation security detention. 73 RR 31–34. He explained that Hernandez would automatically be assigned to security detention because of his membership in the Barrio Azteca prison gang. *Id.* at 80–81, 105–06, 125–26. In administrative segregation, Hernandez would be isolated from other inmates twenty-four hours a day. *Id.* at 82.

AuBuchon then narrated while the jury was shown a video of the conditions and security procedures in maximum-security units. *Id.* at 34–62. He described the relatively low rate of violent incidents in the Texas prison system, including in administrative segregation. *Id.* at 62–79. AuBuchon concluded his direct-examination by stating that, based upon the security procedures in place, TDCJ would be able to control Hernandez such that he would not be a continuing threat to the prison population.

> [Defense counsel]: Based on the confirmed gang membership and what you know of Fabian from the information that you have looked at, the way he behaved in New Mexico prison, his disciplinary record here at the county jail and social history and so forth, is TDCJ going to be able to control this man?
>
> [AuBuchon]: Yes, sir.

> [Defense counsel]: In admin seg?
>
> [AuBuchon]: In admin seg, yes, sir.
>
> [Defense counsel]: Are they going to be able to control him to the point where he would not be a continuing threat to the prison population?
>
> [AuBuchon]: In ad seg, yes, sir.

*Id.* at 83–84. On redirect examination, AuBuchon again described the security measures in place that would keep an inmate like Hernandez from being a threat while in prison. *Id.* at 127–34. AuBuchon went on to testify that Hernandez would be in prison the rest of his life, *id.* at 129–30, such that he would never be free from TDCJ's security measures and procedures.

The final question defense counsel asked AuBuchon tracked the language of the future-dangerousness issue that the jury would answer:

> [Defense counsel]: Mr. AuBuchon, the jury is going to have to answer a question that goes: Is the defendant—will the defendant commit criminal acts of violence that—will he probably commit criminal acts of violence that constitute a continuing threat to society?

*Id.* at 135–36. The prosecutor objected, arguing that, as a classification expert, AuBuchon was not qualified to answer the question as phrased by counsel. *Id.* at 137–38.

AuBuchon's voir dire testimony demonstrated that his opinion regarding Hernandez's future dangerousness was based on his gang membership and

institutional behavior, which would ensure that he was kept in administrative segregation where TDCJ would be able to control him and prevent him from being violent. *Id.* at 156–57. The trial court concluded that AuBuchon did not have the background or experience to answer the question defense counsel had posed. *Id.* at 161–62.

Hernandez's trial counsel continued the theme that Hernandez would not be a future danger while in prison through the testimony of Dr. Cunningham, who testified that the structure and supervision of prison would prevent Hernandez from continuing to make bad choices. 74 RR 217–19. Dr. Cunningham testified in detail about factors that showed that Hernandez would not commit acts of violence while in prison. *Id.* at 274–306. Specifically, Dr. Cunningham testified that based on his research, studies, and statistics, as well as Hernandez's age, disciplinary record, relationship with his family, and future in administrative segregation, significantly reduced the risk that he would be violent in prison. *Id.* at 222–29. Dr. Cunningham opined that there was a 2.5% chance that Hernandez would engage in violent behavior. *Id.* at 223.

Although Hernandez had attempted to have witnesses killed, Dr. Cunningham testified his motivation for such conduct would be eliminated after he was convicted. *Id.* at 224–26. And because Hernandez would not have the capability to carry out such violence while in prison, *id.* at 226–29, Dr.

Cunningham testified that the likelihood that he would order violence in the community was "very low" and that the risk of such conduct was "quite manageable." *Id.* at 274.

After describing the statistics regarding actual rates of violence in TDCJ, including the rates for those inmates in administrative segregation, Dr. Cunningham testified that based on his scientific analysis, Hernandez's risk of violence was even lower than the general rate of violence in TDCJ. *Id.* at 299–306. Specifically, he testified that the risk of Hernandez being a continuing threat to society was "very low."

> [Defense counsel]: Has your evaluation of Fabian, Fabian Hernandez, in terms of risk of being a continuing threat to society when he goes to prison, has it led to you informing [sic] an opinion of what that likelihood is?
>
> [Dr. Cunningham]: Yes, sir.
>
> [Defense counsel]: What is your opinion?
>
> [Dr. Cunningham]: That his likelihood of serious violence is very low. That risk becomes even lower the more serious the violence is.

*Id.* at 305–06.

Based on the testimony of AuBuchon and Dr. Cunningham, Hernandez's trial counsel argued to the jury that the State failed to prove that Hernandez would be a continuing threat to society, since he would be locked up in administrative segregation for the rest of his life. 75 RR 93–96, 106–11, 119–22, 129–31.

**B. Direct appeal**

Bruce Ponder represented Hernandez on direct appeal. He filed a fifty-three-page brief, raising twelve points of error. The CCA affirmed Hernandez's conviction and sentence. *Hernandez v. State*, 390 S.W.3d 310 (Tex. Crim. App. 2012), *cert. denied*, 134 S. Ct. 823 (2013).

**C. State habeas proceedings**

While his direct appeal was pending, Hernandez filed an application for state habeas relief. SHCR 22–96.[5] Among other claims, he asserted that appellate counsel was ineffective. He faulted Ponder for not asserting as a point of error that: the trial court erred (1) in its interlocutory ruling on the admissibility of Dr. Coons's conclusions on future dangerousness; and (2) in its exclusion of AuBuchon's answer to the future dangerousness question. *Id.* at 45–50, 67–70. The state habeas court held an evidentiary hearing to allow Hernandez to develop his claims. The court specifically indicated the need to resolve (1) "the reasoning and/or strategic motivation, if any, for [Ponder's] decision not to raise a point of error on appeal concerning the trial court's pretrial ruling regarding the admissibility of Dr. Coons's expert opinion on future dangerousness"; and (2) "the reasoning and/or strategic motivation, if any for [Ponder's] decision not to raise a point of error on direct appeal

[5] "SHCR" refers to the state habeas clerk's record, the transcript of documents and pleadings in Hernandez's state habeas proceedings, No. WR-81,577-01.

complaining of the trial court's ruling precluding trial counsel from asking Frank AuBuchon . . . whether applicant would "probably commit criminal acts of violence that constitute a continuing threat to society." SHCR 573–74 (¶¶2, 4). But Hernandez declined to call Ponder at the hearing. Instead, he conceded that Ponder was only ineffective if the proposed appellate claims of trial court error "*would have* resulted in a reversal of conviction or the sentence." SHCR 490–91 (emphasis added).

Despite Hernandez's failure to substantiate his allegations of Ponder's deficiency, the State prudently set out the reasons why Ponder was not deficient. With respect to Hernandez's complaint about Ponder's failure to challenge the trial court's interlocutory ruling on Dr. Coons, the State argued that Ponder was not ineffective because the proposed trial-court-error claim was foreclosed under state law. It cited *Herron v. State*, 86 S.W.3d 621, 628 (Tex. Crim. App. 2002) and *Saldano v. State*, 232 S.W.3d 77, 89 (Tex. Crim. App. 2007). SHCR 142.

The state habeas court issued the following findings and recommended that relief be denied:

1. Dr. Coon[s] did not testify as to [Hernandez's] future dangerousness before the jury. Had he testified, he would have testified to the specific evidence of [Hernandez's] proven dangerousness both in prison and in free society.

2. The Court's ruling was an interlocutory ruling as the admissibility opinion testimony and is not a point of error on appeal.

3. The Court's interlocutory ruling does not show that [Hernandez] was denied effective assistance of his appellate counsel.

4. During the trial, the State did not call Dr. Coons to testify nor was any such argument presented to the jury; the issue did not in any way contribute to the jury's finding of future dangerousness.

5. The State presented specific evidence of [Hernandez's] proven dangerousness, both in prison and in free society.

6. [Hernandez] presented substantial rebuttal testimony from his own experts that [Hernandez] would not be a future danger while in prison.

7. [Hernandez] has not shown that any appellate complaint regarding the Court's pretrial, interlocutory admissibility ruling would have resulted in a reversal of his death sentence and has also failed to show he was denied the effective assistance of appellate counsel.

8. Ground for Relief One should be denied.

SHCR 581 (¶¶1–8); Pet. App. B at 10.

With respect to Hernandez's complaint about Ponder's failing to challenge the trial court's exclusion of AuBuchon's answer to the first special issue, the State argued that Ponder was not ineffective for several reasons: (1) The trial court did not err in its exclusion because AuBuchon was not a mental health expert and, thus, not qualified to answer the first special issue; (2) assuming error, the error would have been found harmless on appeal; and (3) because Ponder had previously raised the same claim on direct appeal in

*Renteria*[6] and lost, he could have reasonably decided not to raise it in Hernandez's direct appeal. SHCR at 204–07.

The state habeas court issued the following findings and recommended that relief be denied:

> 33. Frank AuBuchon was qualified as an expert on inmate classification and security and his opinion testimony went to the witness' qualifications and that opinion.
>
> 34. Frank AuBuchon was not admitted as a mental-health expert nor was he familiar with [Hernandez] or his personal history.
>
> 35. Frank AuBuchon was not qualified to express an opinion as to [Hernandez's] general future dangerousness or whether [Hernandez] would commit criminal acts of violence that constitute a continuing threat to society.
>
> 36. The Court's limitation of Frank AuBuchon's opinion testimony on the issue of future dangerousness while in prison and exclusion of his opinion testimony on the issue of general future dangerousness is not an abuse of discretion and further [Hernandez] was not denied the effective assistance of his appellate counsel.

SHCR 584 (¶¶33–36); Pet. App. B at 13.

The CCA reviewed the state habeas record and denied relief on Hernandez's claims:

> This Court has reviewed the record with respect to the allegations made by the applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions except for finding of fact number fifty-one and conclusion of law number forty-six, which we reject. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

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6 *Renteria v. Texas*, No. 74,829, 2011 WL 1734067 (Tex. Crim. App. 2011).

*Ex parte Hernandez*, No. WR-81-577-01, 2015 WL 376357 (Tex. Crim. App. 2015); Pet. App. C at 2.

**D. Federal habeas proceedings**

Hernandez filed his federal petition for writ of habeas corpus. ROA.123–193, 196–272, 305–81. Among other claims, he asserted that the CCA's denial of relief on his ineffective-assistance-of-appellate-counsel claims was unreasonable. ROA.351–61. The district court reviewed the state habeas court's findings on those claims and explained why they were, in fact, reasonable. ROA.635–41, 642–46. Then on his application for COA, the Fifth Circuit did the same. *Hernandez v. Davis*, 750 F. App'x 378, 381–382 (5th Cir. 2018); Pet. App. A at 4–8. After the Fifth Circuit denied a COA, Hernandez filed this petition for writ of certiorari with the Court.

## REASONS FOR DENYING THE WRIT

### I. Hernandez Provides No Compelling Reason to Grant Certiorari.

The question Hernandez presents for review is unworthy of the Court's attention. Hernandez has failed to provide a single "compelling reason" to grant review. There is no conflict among the circuits, nor important issue proposed, nor similar case pending. Hernandez did not raise his *Wilson* argument in the lower courts, but now complains of the lower courts' failure to preemptively apply dicta from that case. Even if Hernandez is correct that

*Wilson*'s dicta binds federal courts in their review of Texas postconviction proceedings, it is not dispositive to his case, as he still fails to identify any state court finding that was unreasonable. There is not even any error to correct. Respondent respectfully suggests that certiorari be denied.

## II. The Lower Courts Did Not Violate *Wilson*.

Hernandez asserts that the Fifth Circuit's application of § 2254(d) contravenes this Court's holding in *Wilson*. To get there, he misrepresents *Wilson*'s dicta as its holding, ignores that the CCA's denial of his claims was based on its independent review of the record, and omits several of the state habeas court's findings. His arguments are not only flawed; they are misleading.

### A. Section 2254(d)'s application to state court decisions

Federal courts are tasked with reviewing state court adjudications to determine whether they contravene or unreasonably apply this Court's precedent. 28 U.S.C. § 2254(d)(1). The inquiry is not always straightforward, as state orders vary widely: Some deny relief and say nothing. Others support their denials with barebones legal conclusions. Others support their legal conclusions with an exhaustive list of rationales, piling alternative finding on top of alternative finding. Because of this variation, the § 2254(d) inquiry also varies.

In *Richter*, this Court held that when a final state court decision is unaccompanied by an explanation, a federal habeas court must consider any argument or theories that could have supported the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). If there is *any* reasonable basis for the state court's denial, a federal court cannot disturb it. *Id.* While it did not so hold,[7] this Court suggested in *Wilson* that a federal court's inquiry is different when a state court decision is accompanied by an explanation: In such a case, a federal court is to review the state court's reasons "and defer[] to those reasons if they are reasonable." 138 S. Ct. at 1192. In making that determination, though, a federal court may also consider arguments raised in the parties' submissions that are apparent from the record. *Id.*

### B. *Richter*'s could-have-supported framework is best suited to federal courts' review of Texas postconviction proceedings.

Hernandez assumes that *Wilson*'s dicta provides the best framework for reviewing Texas's postconviction proceedings. Cert. Pet. at 4. But it does not. In Texas, the CCA's denial of habeas relief is mixed: it is both reasoned and unreasoned. The CCA adopts (and/or rejects) a lower court's findings, providing one possible explanation for its denial. But at the same time, the CCA indicates

[7] *See Wilson*, 138 S. Ct. at 1192 ("The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits, say a state supreme court decision, does not come accompanied with those reasons."); *id.* at 1195 ("*Richter* did not directly concern the issue before us—whether to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision.").

that the lower court's findings are not the exclusive basis for its denial. *See, e.g.*, *Ex parte Hernandez*, 2015 WL 376357. ("Based upon the trial court's findings and conclusions *and our own review of the record*, relief is denied.") (emphasis added). Because the CCA's order does not contain an exhaustive list of its reasons for denying relief, *Richter*'s could-have-supported standard is better suited to review of Texas's postconviction proceedings than is *Wilson*'s defer-to-the-state-court-reasons dicta.

### C. If *Wilson*'s dicta binds federal courts' review of Texas postconviction proceedings, then federal courts must train their attention to the state habeas court's findings and the record.

Whether this Court's holding or dicta binds federal courts in their review of Texas's postconviction proceedings does not matter: If the CCA's explicit indication—that its denial was based on its independent review of the record—is insufficient to invoke *Richter*'s could-have-supported framework, then *Wilson*'s dicta applies and the result is the same. *Wilson* asks federal courts to train their attention to the state court's reasons for rejecting a petitioner's claims. 138 S. Ct. at 1191–92. Here, the CCA provided two reasons: the state habeas court's findings and the record. *Ex parte Hernandez*, No. WR-81-577-01, at *1. The lower courts' analyses reflect thorough consideration of both.

### 1. The lower courts reviewed the state habeas court's reasons and deferred to them because they were reasonable.

Hernandez asserts that, in their application of § 2254(d), the lower courts relied on their own reasoning instead of those provided by the state court. As support, he directs the Court to the district court's pre-*Wilson* citation to pre-*Wilson* cases in its recitation of the standard of review. Pet. Cert. 11, 15. As he reaches the lower courts' analyses, it appears that he interprets *Wilson* to confine federal courts to verbatim recitations of state court findings. *See* Pet. Cert. 12–13. *Wilson* does not make federal courts parrots. It asks them to ascertain whether the CCA's reasons—i.e., the state habeas court's reasons and the record—reasonably support its denial of relief. While the answer to the question may be found within the state habeas court's reasons themselves, it may also be found in the record that informed those reasons. The lower courts reviewed the state habeas court's reasons alongside the record and explained why the CCA's denial of relief was reasonable. Notably, the state court record contains all the legal theories and authorities that Hernandez attributes to "the mind of the circuit court." *See* Cert. Pet. 13.

#### a. The lower courts' application of § 2254(d) to Hernandez's first claim

As noted above, Hernandez complained in state habeas proceedings that appellate counsel, Ponder, was ineffective because he did not challenge the trial court's interlocutory ruling on the admissibility of Dr. Coons's testimony.

The State responded, asserting that Dr. Coons did not testify, and, under Texas law, "a pretrial ruling that certain evidence is admissible provides no basis for a point of error on appeal unless and until that evidence is actually offered and admitted into evidence at trial." SHCR 141.

The state habeas court's findings tracked the State's arguments:

> 1. Dr. Coon[s] did not testify as to [Hernandez's] future dangerousness before the jury. . . .
>
> 2. ***The court's ruling was an interlocutory ruling as the admissibility of opinion testimony and is not a point of error on appeal.***

SHCR 581 (¶¶ 1–2); Pet. App B at 10 (¶¶1–2).

The district court reviewed the state habeas court's findings and explained why they were reasonable: Under Texas law, pretrial admissibility rulings are not appealable if evidence is not admitted during trial. ROA.639. Because Dr. Coons did not testify at trial, the claim was foreclosed by state law. Appellate counsel was not ineffective for declining to raise a futile claim. ROA.640.

The Fifth Circuit's analysis was similar. It summarized the state court's rationale for denying relief as follows:

> [T]he [CCA] held that because Dr. Coons did not testify, his hypothetical opinion did not contribute to the jury's verdict on Hernandez's future dangerousness. Thus, it denied Hernandez's ineffective-assistance claim since he could not show how this issue would have resulted in a reversal on appeal.

*Hernandez*, 750 Fed. App'x at 381; Pet App. A at 5. It then explained why the state court's reasons were reasonable:

> Under Texas law, any error in a pretrial evidentiary ruling is rendered moot if the evidence is never admitted at trial. *See Herron*, 86 S.W.3d at 628. This is so even in capital cases. For example, in *Saldano* . . . , the defendant wished to call his mental health expert to testify that he had suffered psychological deterioration while on death row. 232 S.W.3d at 82–83. In a pretrial ruling, the trial court held that the defendant could do so only if he submitted to an examination by the prosecutor's mental-health expert. He refused. On appeal, the defendant attempted to challenge that pretrial ruling, but the TCCA ruled that to be entitled to appellate review, the defendant "was required to submit to the [psychiatric] examination and suffer any actual use by the State of the results of t[he] examination. Without doing so, any appellate review would be "practically impossible" and "wholly speculative."
>
> *Herron* and *Saldano* are fatal to Hernandez's claim. Because Dr. Coons never testified, evaluating any harm caused by the trial court's ruling is speculative and not subject to appellate review. If Hernandez wanted to preserve his challenge to Dr. Coons's methodology, then, as in *Saldano*, he was required to submit to the examination and suffer actual prejudice from Dr. Coons's testimony. Because he did not do so, appellate counsel acted reasonably by choosing not to raise the argument on appeal—an argument that would have been frivolous under controlling law.
>
> Thus, we conclude that no reasonable jurist could debate the district court's determination that the TCCA did not unreasonably apply *Strickland*[8] to this claim.

Pet. App. A at 5–6.

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[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

Hernandez interprets the Fifth Circuit's explanation of why the state court's conclusions were reasonable as a distinct legal theory. *See* Cert. Pet. 12. But that is because he misses (or omits) most of the state court's conclusions. Significantly, the state habeas court explained in paragraph 2 that a pretrial admissibility ruling is not appealable for evidence not admitted at trial. While the state habeas court did not cite legal authority,[9] its conclusions were informed by a long list of it, including *Herron* and *Saldano*. *See* SHCR 141–43 (State's brief asserting that the appellate claim was foreclosed by *Herron* and *Saldano*). That federal courts must train their attention to a state court's reasons does not require them to disregard the legal authority that informed those reasons—especially where the legal authority is included in the state court record.

The lower courts properly trained their attention to the CCA's reasons for denying relief—which again were the state habeas court's reasons and the record. Both courts explained why the state habeas court's reasons and the record provided a reasonable basis for the CCA's denial of Hernandez's claim. Their review was consistent with *Wilson*'s dicta.

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[9] That the state court did not cite to legal authority does not mean its findings are unreasonable or stripped of deference. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2002) (explaining that a state court's failure to cite controlling federal precedent is immaterial to § 2254(d) inquiry).

While Hernandez does not explicitly so argue, he seems to imply through his use of italics that the state court's rejection of his claim was somehow unreasonable. He asserts that the state court denied his claim because he failed to show that an appellate complaint "*would have* resulted in a reversal of his death sentence." Cert Pet. 10. But the state court's language came directly from his concession that the claim would rise or fall on whether the proposed appellate complaint would have been successful—or as he put it, "*would have* resulted in a reversal of conviction or the sentence." SHCR 490–91 (emphasis added). In any event, the state court did not unreasonably apply this Court's precedent when it found that Hernandez failed to establish appellate counsel's ineffectiveness: He did not proffer any evidence of deficiency, but instead hung his hat on the strength of his proposed appellate claim—which turned out to be futile. The state habeas court's preceding six findings explain why the proposed claim was futile. Instead of arguing that those findings were unreasonable, as § 2254(d) requires,[10] Hernandez omits them. When they are all considered, though, the state habeas court's findings reflect a reasonable application of *Strickland*.

[10] *See, e.g.*, *Parker v. Matthews*, 567 U.S. 37, 42 (2012) (per curium) ("That ground was also sufficient to reject Matthews' claim, so it is irrelevant that the court also invoked a ground of questionable validity.").

### 2. The lower courts' application of § 2254(d) to Hernandez's second claim

As noted above, Hernandez argued in state habeas proceedings that Ponder was ineffective because he did not assert that the trial court abused its discretion when it excluded AuBuchon's general opinion on future dangerousness. Among other arguments, the State asserted that because AuBuchon was not qualified to testify to future dangerousness, the trial court did not err in excluding his opinion on same. SHCR 204–07. It further asserted that Hernandez failed to demonstrate that Ponder was ineffective because he had previously raised "virtually the same complaint" on direct appeal in *Renteria* and lost. *Id.* at 208.

The state habeas court found that the trial court did not abuse its discretion in excluding AuBuchon, as he was not a mental health expert and thus not qualified to answer the future-dangerousness special issue. It further found that Hernandez had not shown that he had been denied effective assistance of appellate counsel. SHCR 584 (¶¶33–36).

Reviewing these findings, the federal district court noted the state habeas court's conclusion that AuBuchon was not qualified to answer the first special issue under state law. ROA.645–46. It further explained that the state habeas court's finding—that Hernandez failed to demonstrate that appellate

counsel was ineffective—was reasonable because appellate counsel raised an almost identical claim in *Renteria* and lost. ROA.646.

In denying a COA on Hernandez's claim, the Fifth Circuit echoed the second part of the district court's analysis:

> Two weeks before Hernandez's appellate brief was due, the TCCA, in a separate case, rejected an identical argument to the one Hernandez now argues his appellate counsel should have raised. In *Renteria*, the trial court refused to let Dr. AuBuchon testify whether "there was a probability that [the defendant] will commit criminal acts of violence so that he constitutes [a] continuing threat to society in the future." 2011 WL 1734067, at *40 (Tex. Crim. App. 2011) (unpublished) (second alteration in original). Assuming error, the TCCA still found that the trial court's ruling was harmless given the other testimony allowed: Dr. AuBuchon had already stated that he believed the defendant would not be a future danger in prison, and Dr. Cunningham said that "there was 'not a probability' that [the defendant] would commit acts of violence in prison." *Id.*
>
> Hernandez's appellate counsel was also on the appellate team in *Renteria*. Given that fact, it was reasonable for him not to raise the same argument again in Hernandez's case. In both cases, Dr. AuBuchon was allowed to testify that he did not think the defendants would commit acts of violence in prison. In both cases, the trial court refused to let Dr. AuBuchon opine generally on the defendants' future dangerousness outside of prison. And in both cases, Dr. Cunningham testified that the defendants had a low probability of committing future acts of violence in prison. We rarely see such identical facts.
>
> As with the first ineffective-assistance claim, we hold that no reasonable jurist could debate the district court's conclusion that the TCCA did not unreasonably apply *Strickland* to this claim. A COA is properly denied.

Pet. App. A at 7–8.[11]

Hernandez suggests that the lower courts' discussion of *Renteria* contravenes *Wilson* because the state court's focus was on AuBuchon's qualification under state law. Cert. Pet. 13. But, in fact, the district court explained why it did not devote much ink to the state habeas court's application of state law: It was following this Court's precedent, which says that "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." ROA.645 (citing *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Instead of second guessing the state habeas court's application of its own law, the lower courts focused on the clearly established law of *Strickland*—as required by § 2254(d).

While the state habeas court's reasons for denying relief on this claim were not as self-contained as the last, they were still reasonable when viewed against the record. In addition to its findings on AuBuchon's qualifications, the state habeas court found that Hernandez failed to demonstrate that he was deprived of effective assistance of appellate counsel. SHCR 584 (¶36). When

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[11] Hernandez attempts to distinguish *Renteria* because AuBuchon was allowed to state an opinion that Renteria would not pose a danger in prison and was prevented only from stating an opinion when the word "probability" was used. Cert. Pet. 13. But in this case, too, AuBuchon testified that he did not believe Hernandez would be a future danger in prison. The only testimony that was excluded was on redirect in response to the general question whether AuBuchon believed Hernandez would "*probably* commit criminal acts of violence that constitute a continuing threat to society." *Id.* at 135–36 (emphasis added).

the lower courts reviewed this finding under § 2254(d), they discussed *Renteria* to explain why the finding was, in fact, reasonable. *Renteria* not was not a distinct legal theory imagined by the federal courts but was before the state court and supported its conclusion that Hernandez failed to demonstrate the merits of his claim.

It is also worth noting that the state habeas court did not cite to much case law at all in its findings on this claim. Its cursory findings on Ponder's deficiency likely had to do with Hernandez's abandonment of that part of the claim.[12] Because there was no evidence of deficiency, there was no need for the state court to write into its findings the State's detailed and preemptive arguments for why Hernandez failed to establish it. That does not make the state habeas court's reasons unreasonable. Nor does it make them contrary to, or an unreasonable application of, this Court's precedent. Hernandez should not be permitted to use his facially inadequate claim as a vehicle to overcome deference to the state court.

He tries, though. Hernandez asks this Court to grant certiorari because the lower courts did more than parrot the state habeas court. But even under Hernandez's interpretation of *Wilson*—which would require state courts to support their denials of relief with perfectly self-contained findings—

[12] Despite the state court's holding a hearing to resolve whether Ponder was deficient, Hernandez declined to call Ponder to testify. SHCR 490–91.

Hernandez still fails to demonstrate that the state court unreasonably applied this Court's precedent. That is because it did not.

## IV. The Lower Courts Denial of Relief Does Not Conflict with *Panetti* Because There Is No Unreasonable Application—Antecedent or Otherwise.

Hernandez claims that *Panetti v. Quarterman*, 551 U.S. 930 (2007), stands for the proposition that an antecedent unreasonable determination vitiates all deference due a state court decision under 28 U.S.C. § 2254 (d). Cert. Pet. 16–20. He supports his broad reading of *Panetti* with *Williams*[13] and *Wiggins*[14]. But again, Hernandez's facts do not fit his legal theory.

In the cases Hernandez relies upon, the state courts made unreasonable determinations: In *Panetti*, the state court failed to afford constitutionally adequate process. In *Williams*, the state court overrode *Strickland*'s prejudice analysis. In *Wiggins*, the state court unreasonably applied *Strickland*'s deficiency analysis. In this case, the state court did not do anything unreasonable. Aside from Hernandez's selective inclusion of the state court's findings, he says nothing about the state court's adjudication of his claims. His complaint is about what the federal courts did. And while the district court may have cited to pre-*Wilson* caselaw in pre-*Wilson* times, neither it nor the

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13 *Williams v. Taylor*, 529 U.S. 362 (2000).

14 *Wiggins v. Smith*, 539 U.S. 510 (2003).

Fifth Circuit overlooked the state court's denial of process or unreasonable application of federal law. The lower courts did not apply *Panetti*, *Williams*, or *Wiggins* because they do not apply to these facts (and because Hernandez did not raise them). This Court should deny certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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