*****THIS IS A CAPITAL CASE*****
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 WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER

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REASONS FOR GRANTING THE PETITION

I. The reasons relied upon in federal court in its 2254(d) analysis were not contained in the specific or particular reasons offered by the state court

Instead of focusing on the "specific" or "particular" reasons relied upon by the state court, consistent with Fifth Circuit precedent, the lower federal courts relied upon reasons in the record that "could have supported" the denial of relief.

While this is the form of analysis the Fifth Circuit has employed for well over a decade, it is wholly inconsistent with this Court's instruction in Wilson, provoking the present application.

Respondent is forced to concede that the federal court looked beyond the specific reasons of the state court in applying 28 U.S.C. 2254(d), arguing that the reasons relied upon by the federal court can be found in the state court record, even where they do not appear in the state court reasons. *Brief in Opposition* at 16.[1]

II. Respondent concedes an important question to be resolved, arguing that this Court's rejection of the *Richter* "could have supported" framework where the state court provides a reasoned decision is non-binding dicta

In *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), this Court made crystal clear that Richter's[2] "could have supported" framework does not apply where there is a reasoned

[1] Respondent subsequently attempts to reframe the language of the state court decision as to claim one to encompass the analysis of the federal court but its attempt is contrary to the plain language of the state court judgment and a matter to be addressed on remand. *Brief in Opposition* at 17. As to claim two, Respondent is forced to rely upon material in the record that could have supported the state court conclusion but does not form part of the state court judgment. *Id.* at 24.

[2] *Harrington v. Richter*, 562 U. S. 86 (2011).

state court decision and that, instead, a reviewing court must train its attention on the actual reasons offered by the state court to determine whether clearly established federal law was unreasonably applied. *Wilson*, 138 S.Ct. at 1191-92, 1195-6.

Because Fifth Circuit precedent is directly to the contrary, see *infra*, Respondent is at pains to describe this part of *Wilson's* holding as non-binding dicta. *Brief in Opposition*, pp. 12, 13, 14, 15 and 19.

Respondent's brief in opposition represents a stark admission that the question presented represents an important question of federal law that this Court should resolve. Further, as described below, that the approach in the Fifth Circuit conflicts with the statements of this court and with the approach in other circuits.

III. The Fifth Circuit continues to be controlled by pre-*Wilson* case law requiring federal courts to defer to reasons that "could have supported" the state court decision

Within the Fifth Circuit, district courts and appellate panels are controlled by the *en banc* decision in *Neal* and the panel opinions that are its progeny.[3] Following *Neal*, the Fifth Circuit has focused its review on the results of, not the reasons for the state court action and adopted *Richter's* "could have supported" framework even in the face of a reasoned state court opinion:

> Importantly, whether the state court's decision involved an unreasonable application of Supreme Court precedent does not depend solely on the state habeas court's actual analysis. Section 2254(d) requires us to "determine what arguments or theories supported or, . . . could have supported, the state court's decision." [*Richter*, 562 U.S.] at

[3] *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir 2002) ("we conclude that our focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached . . .the only question for a federal habeas court is whether the state court's determination is objectively unreasonable.").

> 102 (emphasis added). We are therefore tasked with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon. Cf. *Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. 2002) (en banc) (per curiam) (holding that § 2254(d) directs us to review "only a state court's 'decision,' and not the written opinion explaining that decision")

Evans v. Davis, 875 F.3d 210, 216 (5th Cir. 2017).[4]

After *Wilson* was handed down, panels in the Fifth Circuit noted the apparent conflict between *Neal* and its progeny and this Court's opinion in *Wilson*.[5]

On October 11, 2018, the Fifth Circuit granted *en banc* review in *Langley v. Prince* and specifically asked the parties to address this Court's intervening opinion in *Wilson*.[6] The matter was argued on January 23, 2019. The Solicitor General for Texas appeared as amici and explicitly argued that *Wilson* did not overrule *Neal*, that there was no tension between *Wilson* and the existing circuit approach, and that under *Wilson*, AEDPA deference applied even where an intermediate court's

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[4] See also, for example, *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010)("Upon federal habeas review of a state court's adjudication, we ultimately 'review only a state court's decision and not the written opinion explaining that decision.'); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) ("As this Court has explained, 'it seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision.'"); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) ("[W]e review only the state court's decision, not its reasoning or written opinion[.]").

[5] *See Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) (acknowledging that the "continued viability" of the Fifth Circuit's approach was "uncertain" after Wilson); *Langley v. Prince*, 890 F.3d 504, 515 n 14 (5th Cir. 2018) (noting inconsistency between circuit law and *Wilson* but holding "[w]e leave Wilson's impact to be decided another day.") *vacated by, rehearing granted by, en banc Langley v. Prince*, 905 F.3d 924 (5th Cir. La., Oct. 12, 2018); *Freeney v. Davis*, 724 F. App'x 303, 312 (5th Cir. 2018) (applying *Neal* and considering "only the ultimate legal determination by the state court") withdrawn and substituted by 737 Fed. Appx. 198 (5th Cir. 2018) (omitting the reference to the rule in *Neal* but otherwise leaving the opinion unchanged in response to a rehearing application raising *Wilson).*

[6] See *Langley v Prince*, 16-30486, Briefing Order of October 15, 2018.

reasoned opinion was unreasonable when it was apparent from the record that habeas relief should be denied.[7]

On June 6, 2019, the *en banc* handed down its opinion in *Langley*. *Langley v. Prince*, 16-30486, 2019 U.S. App. LEXIS 17082 (5th Cir. June 6, 2019). The majority did not address the apparent conflict between *Wilson* and the circuit's pre-*Wilson* authority at all. The majority cited to *Wilson* to confirm that it should look through to the state intermediate appellate court decision and allowed that "[u]nder AEDPA's relitigation bar, the state court's reasoning *can* matter." *Langley*, *44 (emphasis added). However, the majority did not eschew the "could have supported" approach, nor overrule *Neal* and its progeny.[8]

Indeed, the dissent in *Langley* vehemently protested that the majority's approach "departs from the Supreme Court's recent direction on review of reasoned state-court decisions," "contrived a rationale for the state court's decision that is incompatible with the reasoning that the state court actually gave" and "runs afoul of *Wilson's* direction." *Langley*, *58-9, *73, *74.

Subsequent to the *Langley* opinion being issued, the Texas Solicitor General's Office has taken the position that *Langley* did not alter the standard of review and that *Wilson* "did not change how a state court's decision on the merits is reviewed under AEDPA; it merely determined where a federal habeas court should look for the

[7] *See* Oral Argument at 47:56-50:30; available at http://www.ca5.uscourts.gov/OralArgRecordings/16/16-30486_1-23-2019.mp3 (last checked 7/18/19).

[8] Under the "could have supported" framework, state court reasons "can matter" as they may, on their face, provide a reasonable basis for the denial of relief, thus obviating the need for the reviewing court to examine whether there are other reasons that 'could have supported" the denial of relief.

relevant state court decision." *Respondent's Letter Brief, Sheppard v Davis*, 18-70011 (5 Cir. Tx 6/28/19).

As a result, and pursuant to Fifth Circuit's rule of orderliness,[9] the rule applied in Mr. Hernandez's case remains the prevailing law in the circuit, in conflict with this court's holdings and the holdings in other circuits.

IV. The TCCA explicitly adopted the state trial court reasons in the present case and did not express additional reasons for its decision.

Respondent argues that even if *Wilson* does dictate review of state court reasons, that in Texas, the *Richter* "could have supported" framework should always apply because all Texas Court of Criminal Appeals decisions are both "reasoned and unreasoned".[10]

Respondent's argument is both legally and factually incorrect.

First, the TCCA in Mr. Hernandez's case explicitly adopted a fully reasoned explanation for its decision - - - an explanation that does not include the "could have supported" reasons relied upon to apply 28 U.S.C. §2254(d) deference in federal court.[11]

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[9] The Fifth Circuit applies a firm rule of orderliness that prohibits one panel from disregarding the precedent set by a prior panel even where the earlier decision is perceived to be in error. Further, absent intervening contrary authority from this Court or the Fifth Circuit *en banc*, no panel may disregard that earlier precedent. *See, for example, Wilson v. Taylor*, 658 F.2d 1021, 1034-35 (5th Cir. 1981). This brings in to sharp relief Respondent's argument that the relevant part of *Wilson* is dicta (and thus not intervening authority) and the acceptance by the *en banc* majority in *Langley* of the argument by the State of Texas that no change in Fifth Circuit law was necessitated by *Wilson*.

[10] *Brief in Opposition* at 14.

[11] *Ex parte Hernandez*, 2015 Tex. Crim. App. Unpub. LEXIS 87, at *1-2 (Crim. App. Jan. 28, 2015)("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

Second, it would be Respondent's burden on remand to overcome the *Wilson* presumption by deploying the argument it now offers to assert that *Richter*, not *Wilson*, controls.

Third, Respondent's characterization of TCCA decisions is directly at odds with Texas law and the established practice of the TCCA. Under Texas law, the TCCA is the "ultimate factfinder in habeas corpus proceedings," and the trial judge on habeas is the "original factfinder."[12] The role of the trial judge on habeas is to collect evidence, organize materials, decide what live testimony is necessary, resolve disputed fact issues, enter specific findings of fact and conclusions of law, and make a specific recommendation to grant or deny relief.[13]

TCCA will "afford almost total deference to a trial court's determination of the historical facts that the record supports . . . [and] should afford the same amount of deference to [the] trial court's rulings on application of law to fact questions… if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor."[14] When the CCA's "independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, [it] may exercise [its] authority to make contrary or alternative findings and conclusions."[15]

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we reject. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.")

[12] *Ex parte Reed*, 271 S.W.3d 698, 727 (2008).

[13] *Ex parte Owens*, 515 S.W.3d 891, 895 (2017).

[14] *Guzman v. State*, 955 S.W.2d 85, 89 (1997) (internal quotations omitted).

[15] *Owens*, 515 S.W.3d at 895.

Thus, the TCCA conducts an independent review of the record to determine if the trial court's findings and recommendations are supported. Where it believes the findings and recommendations are supported, the TCCA adopts them and where they are not supported, it rejects them.

This is precisely what occurred in Mr. Hernandez's case.

When the TCCA does not agree with some particular findings, as occurred here, it will say so.[16] When the TCCA believes that additional findings beyond those made by the trial court are required, it will remand to the trial court for further fact-finding.[17] Where the TCCA disagrees with the trial court recommendations and wishes to supply its own reasons, it does so in a reasoned opinion.[18] Finally, when

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[16] *See, e.g.*, *Ex Parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) ("In rendering its findings, conclusions, and recommendation, the trial court focused on whether the testimony was perjured. It concluded that, because the evidence did not show that Cameron and Lewis "intended to provide false testimony or that they thought their trial testimony was inaccurate," applicant had failed to establish a due-process violation "based on the State's unknowing presentation of alleged perjured testimony." These findings, however, misapply the standard for false testimony because a witness's intent in providing false or inaccurate testimony and the State's intent in introducing that testimony are not relevant to false-testimony due-process error analysis."); *Ex parte Roberts*, 2009 Tex. Crim. App. Unpub. LEXIS 836 (Crim. App. May 13, 2009) ("We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions, with the following exceptions: findings paragraphs 7, 10, 111, and 116; and conclusions paragraphs 121, 135, 140, 161, 163, 164, and 181 through 183. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.").

[17] *See, e.g.*, *Ex parte Williams*, No. WR-71,404-01, 2009 WL 1165504, at *1 (Tex. Crim. App. Apr. 29, 2009) ("Applicant presents sixteen allegations, with numerous subsections, in his initial writ. The trial court failed to make findings of fact and conclusions of law on the following allegations: [. . .] . . .Because we have determined that findings and conclusions of the trial court would be helpful to the resolution of these claims, we order the trial court to make findings of fact and conclusions of law in regard to these claims. The initial application is remanded to the trial court to address these issues.") (unpublished).

[18] *See, e.g.*, *Ex Parte Harleston*, 431 S.W.3d 67, 69 (Tex. Crim. App. 2014) ("After independently reviewing the record, we reject the habeas court's findings that the victim's recantations were credible because those findings are not supported by the record, and we hold that Applicant has failed to present clear and convincing evidence that unquestionably establishes his innocence. Therefore, we will deny relief."); *Ex parte Cathey*, 451 S.W.3d 1, 4 (Tex. Crim. App. 2014) ("We

the TCCA wishes to add additional reasons for denial to those included in the trial court's recommendations, it articulates those in a reasoned opinion.[19]

In Mr. Hernandez's case, the trial court adopted all of the proposed findings of fact and conclusions of law of the State of Texas.[20] The TCCA neither requested nor received any additional briefing for the parties nor had offered before it any additional reasons for denying relief. The TCCA adopted the proposed findings of fact and conclusions of law of the trial court in their entirety, save for finding of fact number fifty-one and conclusion of law number forty-six, which it explicitly rejected.[21]

Thus, Respondent's argument about the nature of TCCA decisions is irrelevant to the decision to grant certiorari, is more properly raised under Respondent's burden on remand and is incorrect, in any event.

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conclude that the record does not support the habeas judge's factual findings or legal conclusions. In short, the judge erred in finding," etc.).

[19] *See, for example, Ex parte Woods*, 176 S.W.3d 224, 225 (Tex. Crim. App. 2005). *See also, Woods v. Thaler*, 399 F. App'x 884, 888 (5th Cir. 2010) (noting that the TCCA adopted the trial court findings and also "supplemented Judge Gabriel's findings of fact and legal conclusion with an extended discussion of why the court was denying relief on [the IAC] claim.").

[20] The trial court changed some of the wording and organization of the proposed findings as well as expanding on the reasoning in some areas but ultimately accepted all of the findings and conclusions urged by the State of Texas.

[21] *Ex parte Hernandez*, 2015 Tex. Crim. App. Unpub. LEXIS 87, at *1-2 (Crim. App. Jan. 28, 2015).

V. Respondent seeks to muddy the waters by arguing the merits of an appeal Mr. Hernandez was denied due to the erroneous failure to grant a COA

Respondent seeks to muddy the waters in the present application by arguing in this forum the merits of an appeal that Mr. Hernandez never received because the circuit court erroneously denied a COA.

None of this is necessary to the resolution of the question presented and is more properly addressed on remand by a court charged with conducting a detailed and through review of the underlying issues in an appellate posture.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William S. Harris, the attorney for Petitioner herein and a member of the Bar of this Court, do swear and declare that on this date, August 27, 2019, as required by Supreme Court Rule 29, I have served the enclosed Reply Brief in Opposition on counsel for each party in this proceeding, and on every other person required to be served, by delivering an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid:

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I declare under penalty of perjury that the foregoing is true and correct.

Signed this the 27th day of August 2019.

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