No. 18-9674

(Capital Case)

In The

Supreme Court of the United States

Terence Tramaine Andrus,

Petitioner,

vs.

Texas,

Respondent

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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Opposition to Petition for a Writ of Certiorari

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QUESTION PRESENTED

(Capital Case)

Petitioner presents the following question for review:

Does the standard for assessing ineffective assistance of counsel claims, announced in *Strickland v. Washington*, fail to protect the Sixth Amendment right to a fair trial and the Fourteenth Amendment right to due process when, in death-penalty cases involving flagrantly deficient performance, courts can deny relief following a truncated "no prejudice" analysis that does not account for the evidence amassed in a habeas proceeding and relies on a trial record shaped by trial counsel's ineffective representation?

TABLE OF CONTENTS

SECTION	PAGE
QUESTION PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
FACTUAL AND PROCEDURAL HISTORY	6
SUMMARY OF THE ARGUMENT	11
ARGUMENT	
The Court of Criminal Appeals' denial of relief on Petitioner's state writ was a straightforward application of the law set down by this Court in *Strickland* and *Wiggins* and does not present new or novel questions of law or fact which would justify wholly revamping the *Strickland* analysis	11
Petitioner's Proposal to "reboot" the *Strickland* standard with his own standard for reviewing ineffective assistance of counsel claims should be rejected because it relies on heretofore undefined terms in the law which would create a mass of litigation to define what they mean in practice, and even after this mass of litigation resolved, might very well result in no substantive change in outcomes	17
CONCLUSION	22

TABLE OF AUTHORITIES

Cases ..... **Page**

Bobby v. Van Hook, 558 U.S. 4, 11-12 (2009) 14

Brown v. Thaler, 684 F.3d 482, 499 (5th Cir. 2012) 14, 21

Burger v. Kemp, 483 U.S. 776, 793-95 (1987) 20

Draughon v. Dretke, 427 F.3d 286 (5th Cir. 2005) 16

Harrison v. Richter, 562 U.S. 86, 110 (2011) 15

Martinez v. Quarterman, 481 F.3d 249, 255 (5th Cir. 2007) 21

Porter v. McCollum, 558 U.S. 30 (2009) 15

Rompilla v. Beard, 545 U.S. 374 (2005) 15

Santellan v. Cockrell, 271 F.3d 190, 198 (5th Cir. 2001) 14

Strickland v. Washington, 466 U.S. 668 (1984) ..... passim

Trevino v. Davis, 861 F.3d 545, 550-51 (5th Cir. 2017) 14

Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017) 16

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

Williams v. Stirling, 914 F.3d 302 (4th Cir. 2019) 16

Williams v. Taylor, 529 U.S. 362 (2000) 15

Wong v. Belmontes, 558 U.S. 15, 26-28 (2009) 14

Statutes

Tex. Pen. Code §19.03(a). 6

Introduction

Petitioner brings this petition for certiorari arguing that this Court should reexamine and "reboot" Strickland and its progeny so that prejudice is "presumed" any time trial counsel is ineffective. Petition at pp. 18, 23. In this vein, Petitioner firstly presumes his trial counsel was ineffective and effectively discounts the prejudice prong of *Strickland*. The basis for this proposed "reboot" is simply that, in his view, not enough convictions and sentences are being reversed on ineffective assistance of counsel grounds.

Petitioner's request for relief is based on the faulty premise that because Petitioner was unable to obtain relief on his claim that his trial counsel was ineffective and he was prejudiced thereby under *Strickland*, *ipso facto*, the *Strickland* standard must be flawed. Petitioner simply chooses to ignore the fact that substantively, his crime, his criminal history, and his behavior while incarcerated awaiting trial were all particularly egregious and he had little in the way of mitigation evidence that his trial counsel did not present to rebut those aggravating factors – i.e., he proposes doing away with the prejudice prong of *Strickland* in all death penalty cases because he recognizes that he cannot obtain relief on his own case if it persists.

Petitioner's claim that his trial counsel "failed to investigate or subject the State's case to any adversarial testing, failed to investigate or present a reasonable case in mitigation, and otherwise failed to function as an advocate for his client" is faulty because Petitioner's problem in securing a life sentence rather than death

was that Petitioner had very little in the way of mitigation evidence to present, and the facts of the underlying offense, his criminal history, and his behavior while incarcerated awaiting trial were all particularly egregious. Petitioner's counsel nonetheless pursued a reasonable legal strategy as recognized by *Strickland* and its progeny taking into account the egregious nature of Petitioner's behavior and the lack of mitigating factors.

With regard to the guilt/innocence portion of the trial, Petitioner's trial counsel moved to suppress Petitioner's confessions, but this effort was unsuccessful. While it is true that Petitioner's counsel, by his own admission, did not vigorously contest the State's evidence of guilt[1], this was a strategic decision based on his having preserved the issue of the admissibility of his client's confessions for appellate purposes, and the fact that it was, as Petitioner's expert witness on effectiveness of counsel put it, "a longshot" that any jury would have found Petitioner not guilty of an offense to which he had confessed three times.[2]

In the punishment phase, where Petitioner's counsel concentrated their efforts, Petitioner's trial counsel put on evidence of Petitioner's difficult childhood by way of testimony from his parents and Petitioner himself, and put on evidence of

[1] Petitioner claims that his trial counsel conceded the future dangerousness issue at trial. Petition at p. 17. This is incorrect. Petitioner's counsel conceded the State's future dangerousness case was strong and that it was likely the defense would lose on that point. He did not concede that the defense should lose or had lost. This was in keeping with the overall defense strategy of arguing mitigation rather than contesting the aggravating nature of the case because the facts in aggravation were overwhelming. (3RR78).

[2] While Petitioner claimed that he committed the murders in self-defense, this was not consistent with the physical evidence as the Court of Criminal Appeals noted in its opinion at page 2. The defense expert's agreement that the chances of a not guilty verdict were a long shot can be found at volume four, page 172 of the State habeas record.

the effect of Petitioner's narcotics use by way of a pharmacological expert and also put on evidence of Petitioner's remorse for his crimes by way of a jail counselor.

Petitioner's trial counsel also made a reasonable strategic decision not to put on the testimony of two other experts whom he had retained for trial – a psychiatric expert and a jail classification expert because the testimony of the psychiatric expert would reveal numerous aspects of Petitioner's past which a jury might well find particularly inflammatory – the expert would testify about Petitioner's penchant for torturing animals, for example. The jail classification expert was not called because he told trial counsel that he did not believe he would be a good witness for the defense because he would testify that Petitioner was "one of the worst guys I have ever seen." (4RR96).[3]

Petitioner's claim that he was first exposed to drugs as a child was when his mother left them lying around the house was admitted at trial – he testified to this. His claim of being diagnosed with various psychiatric conditions was the subject of considerable dispute and he in fact presented no testimony at the postconviction writ hearing that he had a severe mental illness. The records of his diagnosis were often contradictory and there were multiple opinions by experts in Petitioner's medical records that Petitioner did not have any significant mental health problems (there were, however, multiple opinions that Petitioner feigned serious mental health problems in order to seek drugs, as he himself admitted, or to avoid consequences of his behavior).

[3] Facts asserted herein are drawn from the Texas Court of Criminal Appeals opinion except where noted by volume and page in which case they refer to the trial court reporter's record of the state habeas hearing.

Petitioner's claims that his trial counsel should have argued that his behavior was caused by the Texas Youth Commission was belied by the evidence at the hearing wherein the records showed that Petitioner was a gang leader in TYC and that despite his expert's claims of inadequate food in TYC, the records indicated he weighed over 200 pounds by the time he left TYC. (5RR205, 222).

Petitioner's claim that "extensive time was devoted to an extraneous offense that he did not commit" is false. The victim of the robbery to which Petitioner apparently refers testified that Petitioner beat him, threatened him with a knife and robbed him. Petitioner presented an affidavit at the postconviction writ hearing from Petitioner's then girlfriend stating that she never told the police Petitioner committed this offense. Petitioner's counsel then moved to withdraw that affidavit after the State made counsel aware that there was an audio recording of this girlfriend telling the police that Petitioner committed this offense. (8RR5). This audiotape was admitted during the hearing and the girlfriend conceded that it was a true and accurate recording. (8RR49). Inexplicably, despite the evidence presented at trial of Petitioner's guilt, and his postconviction evidence being proven false, Petitioner persists in claiming that his trial counsel should have argued that he did not commit this offense.

In short, Petitioner's trial counsel acted in a reasonable and defensible manner under the *Strickland* standard and the Texas Court of Criminal Appeals applied that standard in keeping with precedent (as Petitioner all but concedes by virtue of his argument that it is the *Strickland* standard that is the problem). Even

assuming, *arguendo*, this trial counsel was ineffective, Petitioner was not prejudiced by such ineffectiveness because the mitigating evidence he complains of not being introduced was "largely duplicative, double-edged, and not particularly helpful" per the concurring opinion in the Texas Court of Criminal Appeals.

The mere fact that a defendant charged with capital murder of multiple persons who has an extensive criminal history and a history of violence receives the death penalty is hardly a basis for overturning the entire body of law embodied in *Strickland* and *Wiggins*.

Setting aside Petitioner's failure to sustain a claim under existing law, Petitioner's request to wholly revamp the *Strickland* standard should be rejected because it is unworkable broadly and would still not provide relief in his case. Petitioner seems to suggest that *Strickland* should be revamped so that, at least in capital cases, where trial counsel's representation is "patently deficient," prejudice should be "presumed." Petition at pp. 15, 18. Petitioner does not define how one would distinguish between Strickland's current language referring to trial counsel's effectiveness through the lens of objective reasonableness versus this new standard of patently deficient – defining what that means in practice would necessarily result in confusion in the lower courts and masses of litigation to define the term.

Further, even were a presumption of prejudice applied to this case, it would nonetheless not provide Petitioner with relief. This is because, as has been shown above, the facts in aggravation were overwhelming, and the evidence Petitioner now

argues should have been presented in mitigation was "largely duplicative, double-edged, and not particularly helpful."

Because Petitioner's case presents merely a straightforward application of existing and well understood precedent, and his proposed changes to that precedent would create a mass of confusion and litigation with no clear benefit even to himself, this Court should deny the Petition for Certiorari.

Factual and Procedural History

In November of 2012, a jury convicted Petitioner of capital murder for the murders of Avelino Diaz and Kim-Phuong Vu Bui by shooting them with a firearm during the same criminal transaction.[4] See Tex. Pen. Code §19.03(a).

The trial evidence generally showed that, on October 15, 2008, a then-unidentified African American man shot Avelino Diaz while trying to "carjack" Diaz in a grocery store parking lot. The assailant then shot at two occupants of a car which was entering the grocery store parking lot. The passenger, Kim-Phuong Vu Bui was killed and her husband, Steve Bui, was wounded.

Petitioner was identified as the suspect through surveillance videos and Crime Stoppers tips, and the police went to New Orleans to interview Petitioner, where he had been arrested on an unrelated charge. The officers then drove Petitioner back to Texas after he waived extradition on an outstanding charge.

[4] The recitation of the factual and procedural history of the case is drawn from the Texas Court of Criminal Appeals opinion (and concurring opinion) on Petitioner's state application for writ of habeas corpus, a copy of which is attached to the Petition as Appendix A.

Petitioner initially denied involvement in the killings, but ultimately confessed to the officers that he had shot the victims in a recorded statement on his back to Texas from Louisiana. Petitioner also gave a written statement in which he asserted that he was high on various drugs and alcohol at the time of the commission of the offense.

Petitioner also essentially contended that he killed the victims in self-defense. Petitioner admitted trying to steal Diaz's car, but asserted that he tried to abandon that attempt after realizing the car was a stick-shift, which he could not drive. Petitioner claimed that Diaz got out of the car, trying to pull a pistol, at which time Petitioner shot Diaz. Petitioner also claimed that as he was trying to flee the scene of Diaz's murder, the Buis tried to run him over with their car, and so Petitioner shot them to protect himself. Petitioner's claims of the defensive nature of the shooting were contradicted by the physical and testimonial evidence.

The jury found Petitioner guilty.

During the punishment phase, the State presented evidence of Petitioner's significant history of criminality and violence. This included juvenile adjudications for felony possession of a controlled substance in a drug-free zone and criminal solicitation to commit felony aggravated robbery with a firearm. This also included testimony that Petitioner committed an aggravated robbery less than a month before the commission of these murders wherein he kicked, beat and threatened his victim with a knife before robbing him. The State also presented evidence of Petitioner's many gang tattoos, which Petitioner, when he later testified, admitted

was accurate in that he was a member of the "59 Bounty Hunter Bloods" criminal street gang.

The State also presented evidence that Petitioner, while he was confined in the Texas Youth Commission facility as a result of his juvenile adjudication for criminal solicitation of aggravated robbery, had numerous behavior problems including aggressive and assaultive behavior towards youth and staff. The State also presented evidence that Petitioner was eventually transferred to the adult prison system to complete his sentence because he did not progress in rehabilitation and because he was so violent and disruptive.

The State also presented significant evidence of Petitioner's disruptive, violent and threatening behavior in the Harris County and Fort Bend County jails while awaiting trial for this offense.

The defense's punishment case presentation included evidence of Petitioner's difficult socioeconomic history, his long standing substance abuse problem and the effect this had on his brain development, and Petitioner's remorse for his crime.

Petitioner's mother, father and Petitioner testified in the punishment phase. The testimony showed that Petitioner was raised by a single mother who sold drugs. Petitioner was left unattended for extended periods of time and left to raise his little brothers and sisters. Petitioner's father was incarcerated through most of his childhood.

Petitioner testified that he had been exposed to drugs as early as age six because his mother sold drugs from their home. Petitioner testified that he rarely

had any supervision at home and never had a stable male role model. Petitioner testified that he began using drugs regularly when he was 15. Petitioner testified that he did not like confined spaces or being told what to do, and that he previously acted out when feeling agitated. Petitioner testified that he had recently given his life to God and would no longer act out. Petitioner also testified that he wanted to use his life as an example to help other inmates avoid making the mistakes he had made.

Dr. John Roache, a pharmacologist and professor of psychiatry who specialized in the effect of alcohol and drug addiction on the human brain and behavior testified about the effect of Petitioner's drug use on his mental development. Dr. Roache testified that by age eleven, Petitioner had begun using marijuana, and that his drug use increased in his teenage years. By nineteen, Petitioner was regularly using PCP and ecstasy and was sporadically using cocaine. Dr. Roache testified that drugs impair the adolescent brain development in the areas of judgment and impulse control, and that these effects are long lasting. Dr. Roache also testified that an unstable family environment and a lack of role models can adversely affect the development of good judgment and the ability to self-regulate one's emotions.

The defense also presented the testimony of James Martin, a licensed professional counselor at the Fort Bend County Jail who testified that he assisted Petitioner with his behavioral issues at the jail and noted that Petitioner had hallucinations and a poor history of complying with his medication schedule.

Martin testified that, although Applicant met all the criteria of antisocial personality disorder, he had been making progress and showing remorse for the murders.

The special issues enshrined in article 37.071 of the Texas Code of Criminal Procedure were submitted to the jury, and the jury accordingly set punishment at death. Petitioner filed a direct appeal and his conviction and sentence were affirmed on direct appeal.

Petitioner then filed an application for writ of habeas corpus on which the trial court held a hearing. Petitioner raised seven grounds in that application. The trial court entered findings of fact and conclusions of law in which it recommended that the Texas Court of Criminal Appeals grant relief on Petitioner's first ground (namely that his trial counsel was ineffective in their investigation and presentation of mitigating evidence), and deny relief on all other grounds.

The Court of Criminal Appeals denied relief on all grounds, and declined to adopt any of the trial court's findings of fact and conclusions of law as to Petitioner's first ground for relief as they were not supported by the record.

Petitioner argued in the postconviction proceedings that trial counsel was ineffective in its investigation and presentation of mitigating evidence because they could have presented further lay witness testimony which would have painted Petitioner's childhood in a less "sanitized" version and because they could have presented more evidence of the psychological problems Petitioner reported. In this vein, the concurring opinion at the Texas Court of Criminal Appeals noted that

although there were records of various psychological diagnoses over the years, "the professionals who had a longer opportunity to observe [Petitioner] generally concluded that [Petitioner] suffered instead from antisocial personality disorder.

Summary of the Argument

Petitioner's argument is essentially that because the rule for evaluating ineffective assistance of counsel claims announced in *Strickland* and its progeny did not afford him relief, the rule must be flawed and *Strickland* should be overturned. In particular, Petitioner argues for mandatory review of trial counsel's effectiveness by habeas courts and a presumption of prejudice when trial counsel's representation was "patently deficient." Petitioner's petition should be denied because this case does not present new or novel questions of law, but rather the Texas Court of Criminal Appeals' denial of relief was a straightforward application of this Court's precedents, nor does this case, by virtue of its facts, present an apt vehicle for wholly revamping the analysis of ineffective assistance of counsel claims. Further, a wholesale revamping of *Strickland* would result in multitudinous litigation without even the promise of affording Petitioner relief.

Argument

The Court of Criminal Appeals' denial of relief on Petitioner's state writ was a straightforward application of the law set down by this Court in *Strickland* and *Wiggins* and does not present new or novel questions of law or fact which would justify wholly revamping the *Strickland* analysis

The Texas Court of Criminal Appeals rejected Petitioner's claim that his trial counsel was ineffective and that he was prejudiced thereby in terms of trial counsel's investigation and presentation of mitigating evidence. While it is true

that the *per curiam* opinion does not expound in any great detail on its rationale for denying relief, the concurring opinion does expound on that rationale and applies this Court's precedent in *Strickland* and *Wiggins*. Evaluating this case against this Court's precedents in *Strickland* and *Wiggins* shows that the Texas Court of Criminal Appeals' denial of relief was a straightforward application of the precedents in *Strickland* and *Wiggins* and should therefore not be disturbed.

This Court established the now well-known principle for examining claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to obtain relief on such a claim, the petitioner must show that his counsel's performance was deficient and that deficiency prejudiced his defense. *Id.* at 687. Deficient performance is that which falls below an objective standard of reasonableness. *Id.* at 688.

This Court has since applied the *Strickland* standard to claims of ineffective assistance based on alleged deficiencies of counsel in the investigation and presentation of mitigating evidence, most notably in *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, which the concurrence below relied on as a guide, this Court held that trial counsel's lack of awareness of and subsequent failure to present evidence of the petitioner's "severe privation … physical torment, sexual molestation, and repeated rape" as a child, constituted deficient performance which prejudiced the defense under the *Strickland* standard. *Id.* at 535-38. In so holding, this Court noted the marked lack of any meaningful mitigation evidence uncovered

or presented to the jury by trial counsel (trial counsel presented only the fact that the petitioner had no prior criminal history). *Id.* at 537.

In considering this claim, this Court held that the totality of the evidence should be considered including that adduced at trial and during the habeas proceedings. *Id.* at 536. This Court noted that in evaluating the utility of mitigating evidence which was not introduced, its nature as potentially "double edged" should also be taken into consideration. *Id.* at 535. This Court also, in that vein, held that a "record of violent conduct … could have been introduced by the State to offset" a mitigating narrative would also have been relevant (and was lacking in that case). *Id.* at 537.

In this case, aside from the aggravated nature of the underlying offense, Petitioner had a lengthy history of violence and criminal offenses of the type lacking in *Wiggins*. The Texas Court of Criminal Appeals noted that fact in its concurrence in contrasting this case against the facts in *Wiggins*.

Also in contrast to *Wiggins*, Petitioner's trial counsel did put on a mitigation case – they put on testimony of Petitioner's difficult childhood through his mother, father and himself. They further put on testimony of the harmful effects of narcotics on him and on his brain development having been exposed to narcotics from a young age. They also put on the testimony of a jail counselor who testified to Petitioner's expressions of remorse for his crime.

Trial counsel also had Petitioner examined by a clinical psychologist. They then made a reasoned, strategic decision not to call that clinical psychologist

because his testimony could have been "double edged" as it was put in *Wiggins*, namely because although he would have testified to Petitioner's mental health problems, he would also have testified to numerous inflammatory facts, including Petitioner's penchant for torturing animals.

Trial counsel also consulted with a prison classification expert whom they again made a strategic decision not to call because he told them that he would describe Petitioner as "one of the worst" prisoners he had ever seen. This testimony would have been "double edged" at best and likely more harmful than helpful.

The Texas Court of Criminal Appeals decision in this case was in keeping with a significant body of precedent both from this Court and the Fifth Circuit and should therefore be undisturbed on that basis. *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 11-12 (2009) (rejecting claim that trial counsel who presented mitigation evidence of defendant's troubled childhood were ineffective for not presenting more evidence of defendant's troubled childhood); *Wong v. Belmontes*, 558 U.S. 15, 26-28 (2009) (holding defendant could not establish prejudice (assuming without deciding trial counsel was ineffective) where trial counsel put on mitigation case but limited it to attempt to avoid introduction of extraneous murder defendant committed); *Trevino v. Davis*, 861 F.3d 545, 550-51 (5th Cir. 2017) (denying claim of ineffective assistance on grounds defendant did not show prejudice from lack of expert testimony on defendant's fetal alcohol syndrome); *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (denying claim of ineffective assistance where trial counsel presented only one witness and school records in punishment phase); *Santellan v.*

Cockrell, 271 F.3d 190, 198 (5th Cir. 2001) (rejecting ineffective assistance claim based on trial counsel's not introducing evidence defendant had brain damage because evidence in aggravation was so overwhelming of any potential mitigating effects of potential brain damage claim); see also *Harrison v. Richter*, 562 U.S. 86, 110 (2011) (rejecting claim of ineffective assistance where trial counsel did not consult forensic blood experts in developing defensive strategy because rationale for this forensic evidence became apparent only in hindsight and its admission could have been double edged).

Of course, it is the fact that the Court of Criminal Appeals decision is in keeping with precedent which is the basis for Petitioner's claim that the precedent in question should be overturned. However, Petitioner's claim is self-contradicting because he claims on one hand that convictions and sentences are too often upheld despite claims of ineffective assistance on the one hand, but cites numerous cases in which they were reversed both by this Court and lower courts. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (reversing death sentence where counsel did not interview witnesses or review documents and presented no mitigation though defendant was a war hero with mental health problems) (cited at page 23 of the petition); *Williams v. Taylor*, 529 U.S. 362 (2000) (reversing death sentence where trial counsel's failure to investigate and present mitigation evidence was due to a mistaken belief he could not do so and lower courts applied the wrong standard in reviewing the case) (cited at page 22 of the petition); *Rompilla v. Beard*, 545 U.S. 374 (2005) (reversing a death sentence on ineffective assistance grounds where

defendant and his family were unhelpful in finding mitigating evidence and counsel did not review prior convictions before trial) (cited at page 22 of the petition); *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019) (reversing on basis trial counsel did not effectively investigate defendant's fetal alcohol syndrome) (cited at page 28 of the petition); *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005) (granting relief where trial counsel did not present evidence that fatal shot ricocheted off the ground rather than being shot directly at the victim) (cited at page 24 of the petition).

Further, Petitioner explicitly points out that this Court has already done that which he requests (if that were not already clear enough) – make clear that the prejudice prong of the *Strickland* analysis should be considered on a case-by-case basis and not applied in a mechanical fashion. For this proposition he cites this Court's holding in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (cited at page 27 of the petition).

Petitioner would doubtless point out that he has likewise cited numerous cases where the convictions and sentences were undisturbed despite claims of ineffective assistance of counsel. Indeed this is true. But does that not weigh in favor of a finding that the courts are already engaging in the kind of nuanced evaluations of these claims that he demands? After all, the facts of each case are necessarily individual and not applicable to all other cases. As such, it should be no surprise that applying a single legal standard to widely disparate fact scenarios does not result in the same outcome in every case.

The resolution of this case turned on a straightforward application of this Court's precedents in *Strickland* and *Wiggins*. Petitioner's complaint is merely that the resolution of that application of the law to the facts was not resolved in his favor. This is hardly a reason to reverse decades of precedent which is well understood by bench and bar and has served its purpose well.

Were this Court to adopt Petitioner's proposed "reboot" of the *Strickland* standard, this would also work untold chaos in the system of review of ineffective assistance of counsel claims and not even procure relief for Petitioner.

Petitioner's Proposal to "reboot" the *Strickland* standard with his own standard for reviewing ineffective assistance of counsel claims should be rejected because it relies on heretofore undefined terms in the law which would create a mass of litigation to define what they mean in practice, and even after this mass of litigation resolved, might very well result in no substantive change in outcomes

This Court ruled in *Strickland* that the petitioner must show that his counsel's performance was deficient and that deficiency prejudiced his defense in order to obtain relief on a claim of ineffective assistance of counsel. *Id.* at 687. This Court defined deficient performance as that which falls below an objective standard of reasonableness. *Id.* at 688. The case law has since developed in the intervening 35 years such that the meaning of *Strickland's* standard is well understood by the bench and bar.

Petitioner proposes to substitute a new standard for evaluating the effectiveness of trial counsel in that habeas courts would be required to evaluate trial counsel's effectiveness in all cases, and where trial counsel's representation is "patently deficient," the reviewing court should "presume" prejudice. Petition at pp.

15, 18. This proposal would necessarily involve imposing a greater workload on habeas courts in that they must now delve deeply into the effectiveness (or lack thereof) of trial counsel. Petitioner suggests this is desirable. However, implicit in Petitioner's request is the presumption that habeas courts will, merely by virtue of being required to delve deeply into the effectiveness of trial counsel's representation, more regularly find that trial counsel are ineffective. Petitioner then presumes again that this will, merely by virtue of having occurred, result in more regular findings of prejudice and relief for petitioners. These are all presumptions with no actual evidence. In fact, Petitioner's presumptions could well turn out to operate quite differently in practice than he presumes they will in theory.

There is no guarantee that habeas courts will find trial counsels' representation ineffective more often by the mere fact of being ordered to review it specifically. Further, even if they were to do so, there is no telling whether habeas courts would then find *Strickland's* prejudice prong satisfied. In fact, it is perfectly possible that this would not occur because under the previous analysis, habeas courts essentially presumed ineffectiveness in order to directly consider the prejudice prong. Were they to cease so doing, perhaps they would simply end up disposing of far more claims of ineffective assistance of counsel by not finding counsel ineffective. The only certainty in "rebooting" *Strickland* is the certainty that a great mass of litigation will ensue.

It also bears mention that, Petitioner's request to "reboot" *Strickland* is being made based on his dissatisfaction with ultimate outcomes, not any underlying problem with the process – Petitioner claims that not enough convictions and sentences are overturned, therefore the process must be flawed. Conversely, if more convictions and sentences are overturned, the process will be proper. Outcomes (as viewed by parties who have an interest in them) cannot be used to determine the propriety (and indeed the constitutionality) of process. The one certain effect on the process of analyzing ineffective assistance claims that would derive from adopting Petitioner's proposal is the certainty of more litigation to determine what all of this means in practice.

Petitioner's proposal, were it to be adopted, would result in significant confusion amongst the lower courts and practitioners as to what the difference is between "patently deficient" as proposed by Petitioner, and "deficient" representation as considered by *Strickland*. Determining what this means in practice will necessarily involve a mass of litigation as prosecution and defense argue over whether trial counsel's conduct is "deficient" or "patently deficient." Even where a trial counsel's representation was found "patently deficient," the prospect of then "presuming" prejudice from such patent deficiency yields no obvious positive results other than further litigation.

Were prejudice presumed following a finding of "patently deficient" representation, this would necessarily involve an opportunity to rebut that presumption. This of course guarantees further litigation as the prosecution would

then be obliged to rebut the presumption of prejudice. Presumptions, being rebuttable, could of course then be rebutted, and the parties would likely end up right back where they started – arguing about the habeas court's application of the patently deficient standard versus a deficient standard (or a finding that trial counsel was effective) and whether prejudice was shown or rebutted. Again, the only guarantee from adopting such a "reboot" of *Strickland* as Petitioner proposes is increased litigation.

Petitioner argues on the one hand that a review of the potential impact of mitigating evidence that, in his view, should have been introduced should be considered based on "what might have been." Petition at p. 25 But on the other hand Petitioner argues that courts should not be able to consider whether the proposed mitigating evidence could potentially have been viewed as aggravating by the jury – instead they should be required to consider it only as mitigating. Petition at p. 28. This is not only self-serving and illogical, but adopting this framework would not only require a "reboot" of *Strickland* itself, but also the overturning of all of the precedent which has heretofore allowed courts to engage in this holistic review of the potential impact of proposed mitigating evidence.

This body of law is considerable and longstanding. *See, e.g.*, *Wiggins*, 539 U.S. at 535 (recognizing potential negative impact of "double edge" mitigation evidence, but holding the mitigating evidence in Wiggins' case was not of a doubled edged nature); *Burger v. Kemp*, 483 U.S. 776, 793-95 (1987) (recognizing potentially harmful impact of introducing evidence of defendant's troubled background and lack

of impulse control in that it could have showed his prior encounters with law enforcement and "violent tendencies that are at odds with the defense's strategy"); *Brown*, 684 F.3d at 499 (rejecting claim that fetal alcohol syndrome evidence should have been introduced because while it could have been viewed as mitigating, it could also have given the impression to the jury that the defendant would always be violent and therefore be viewed as aggravating); *Martinez v. Quarterman*, 481 F.3d 249, 255 (5th Cir. 2007) (rejecting ineffective assistance claim where trial counsel did not put on evidence from experts where their testimony could have established medical component to defendant's aggressive behavior but which also might have indicated defendant was incapable of controlling his "savage" aggressiveness and thereby made him appear more dangerous to the jury). Overturning this significant body of case law would mark a sea change in the litigation of ineffective assistance of counsel claims, and would do so with no guarantee of any substantive change with the exception of the guaranteed litigation it would create.

Petitioner's case was one which, factually, was exceptionally long on aggravating factors and the mitigating facts Petitioner now suggests his trial counsel should have introduced was of limited utility and often double-edged. This, combined with the lack of an overarching reason to "reboot" the *Strickland* analysis beyond Petitioner's claim that not enough claims of ineffective assistance are sustained, weigh heavily in favor of denying Petitioner's Petition for Certiorari.

Petitioner's proposal to "reboot" *Strickland* should be rejected.

Conclusion

It is respectfully submitted that Petitioner's petition for certiorari should be denied.

Respectfully submitted,

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