No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS LYNN KIRK
Petitioner

vs.

THE STATE OF TEXAS
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court held that a criminal-defense attorney who investigated mitigating evidence but failed to find valuable public records provided ineffective assistance. If a criminal-defense attorney requests critical defensive evidence from a government agency but then fails to subpoena the evidence after the request is denied or ignored, has counsel provided effective assistance?

LIST OF PARTIES

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

STATEMENT OF RELATED PROCEEDINGS

1. *State of Texas v. Kirk*, 1299757D (Criminal District Court No. 1, Tarrant County) (judgment entered February 16, 2012)
2. *Kirk v. State*, 421 S.W.3d 772 (Tex. App.—Fort Worth 2014, pet. ref'd)
3. *Kirk v. State*, PD-0200-14 (Tex. Crim. App. 2014)
4. *Ex parte Kirk*, WR-89,870-01 (Tex. Crim. App. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Lynn Kirk respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The Court of Criminal Appeals's January 8, 2020, order denying Kirk's application for a writ of habeas corpus is unpublished but can be found on the court's website's "Case Search" page, case number WR-89,870-01. It is also included as Appendix 1.

JURISDICTION

The Court of Criminal Appeals, the highest court of Texas in which a decision could be had, denied Kirk's application for a writ of habeas corpus on January 8, 2020. *See Ex parte Kirk*, WR-89,870-01 (Tex. Crim. App. 2020). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari for any petition due on or after that date to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Fourteenth Amendment to the Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

In an exceptionally close capital-murder case—Kirk's first trial ended in a hung jury, and his second ended with the jury finding him guilty only of murder—Kirk admitted shooting and killing Alphonso Beza and Pedro Diaz. But Kirk explained that he did so in self-defense and defense of property. *See* Tex. Pen. Code §§ 9.32 & 9.42.

Though the key issue at trial thus was the reasonableness of Kirk's belief that deadly force was immediately necessary to defend himself and his property, *see id.*, Kirk's trial attorney did not introduce evidence of Beza's and Diaz's reputations and character traits for violence and property crimes to demonstrate that they were in fact the first aggressors and stealing Kirk's property. *See, e.g., Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009) (holding that such evidence is admissible). Counsel would have loved to, he explained later—he tried to find such evidence—and counsel believed it would have made a difference. But trial counsel, unlike habeas counsel, did not subpoena Beza's and Diaz's parole records and uncover all the fruits within.

The Texas Court of Criminal Appeals nonetheless adopted the habeas court's findings and conclusions that trial counsel's performance was neither deficient nor prejudicial. In *Rompilla v. Beard*, 545 U.S. 374 (2005), however, this Court held

that a criminal-defense attorney performed deficiently in failing to find mitigating evidence available as public records. In *Marr v. State*, 163 Idaho 33, 408 P.3d 31 (2017), the Idaho Supreme Court concluded that a criminal-defense attorney performed deficiently in "just miss[ing]" evidence supporting that the defendant acted in self-defense. *Id.* at 36. And in *Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005), another Texas self-defense murder case, the Fifth Circuit held that a criminal-defense attorney's failure to call witnesses to testify as to the alleged victim's character for violence was prejudicial. This Court thus should grant this petition to resolve these conflicts. *See* U.S. Sup. Ct. R. 10 (in determining whether to grant review on a writ of certiorari, this Court will consider whether a state court of last resort has decided an important federal question in a way that conflicts with the relevant decisions of this Court, a United States court of appeals, or another state court of last resort).

STATEMENT

In April of 2010, Kirk moved from one Fort Worth, Texas, home to another. As he and a friend unloaded his things at the new home, neighbor Alphonso Beza approached and volunteered to help. Kirk accepted Beza's offer, and Beza then invited Pedro Diaz to further assist.

After finishing, the men got extremely drunk (Beza and Diaz had been drinking even before joining Kirk). Eventually, Kirk announced that it was time to call it a night, but Beza and Diaz—both covered in prison tattoos—refused to leave. They then physically threatened Kirk and tried to steal from him.

Kirk ran into a bedroom closet and found his rifle. Hearing the men coming down the hallway toward him, shouting expletives, he feared for his life. Kirk remembered that he had unpacked loaded guns in other rooms of the house and, believing that the men had armed themselves, fired three or four warning shots into the closet ceiling. He then moved across the bedroom and got down on one knee. Seeing Beza and Diaz facing him in the hallway leading to the front bedroom, Kirk shot at both men, killing them. At trial, Kirk explained that he was afraid for his life and safety and shot the men to keep them from hurting and robbing him.

Kirk did not call the police. Instead, he fled from the scene, and after Beza's and Diaz's bodies were discovered, Kirk was arrested and charged in a three-count indictment with capital murder (murdering both men), murder (murdering Beza), and murder (murdering Diaz). *See* Tex. Pen. Code §§ 19.02 & 19.03. After his first trial ended in a hung jury, a second was held in February 2012. Pursuant to Kirk's testimony, the jury was instructed to find Kirk not guilty if it believed that he killed Beza and Diaz in defense of himself or his property. *See* Tex. Pen. Code §§ 9.32 & 9.42. But Kirk's trial attorney having failed to present evidence of Beza's and Diaz's characters for violence and property crimes, the jury found Kirk guilty as to the count alleging Diaz's murder. The court granted a mistrial on the remaining counts, and the jury then assessed punishment at 47 years' imprisonment. Texas's Second Court of Appeals affirmed the trial court's judgment, *Kirk v. State*, 421 S.W.3d 772 (Tex. App.—Fort Worth 2014, pet. ref'd), and the Court of Criminal Appeals refused

Kirk's petition for discretionary review. *Kirk v. State*, PD-0200-14 (Tex. Crim. App. 2014).

In a habeas application (and then several amended habeas applications) filed back in the trial court, *see* Tex. Code Crim. Proc. art. 11.07, Kirk explained that he is illegally confined and restrained of his liberty because his trial attorney did not provide the effective assistance the United States Constitution guarantees. Appendix 2; *see* U.S. Const. amend. VI & XIV. Among other things, counsel failed to introduce evidence of Beza's and Diaz's reputations and character traits for violence and property crimes—both men had long criminal records—to demonstrate that they were in fact the first aggressors and stealing Kirk's property.

In a hearing in the trial court, Kirk's trial attorney appeared and testified. Counsel did not hesitate to affirm that, if he had uncovered all that present counsel uncovered about Beza and Diaz, he would have introduced it at trial. Transcript at 21-23, 26, 35, 75-77. And counsel further affirmed that it could have made a difference in Kirk's extremely close trial. Transcript at 35-36. But counsel explained that, having failed to subpoena Beza's and Diaz's parole records, he and his investigator simply "didn't find anybody that would say that" Beza and Diaz had reputations in the community as violent burglars and thieves. Transcript at 29.

The trial court nonetheless adopted in full the State's proposed findings of fact and conclusions of law denying relief on each ground. Appendix 3. The Court of Criminal Appeals then denied Kirk's habeas application "without written order on

the findings of the trial court." Appendix 1; *see Ex parte Kirk*, WR-89,870-01 (Tex. Crim. App. 2020).

REASONS FOR GRANTING THE WRIT

1. A criminal-defense attorney who requests critical defensive evidence from a government agency but then fails to subpoena the evidence after the request is denied or ignored has provided ineffective assistance

a. Under Texas law, a defendant may—but Kirk's attorney didn't—offer reputation and opinion testimony of victims' characters to demonstrate that victims were in fact the first aggressors and stealing.

When a defendant stands trial in Texas for an assaultive offense, he may offer evidence of the victim's character trait for violence to demonstrate that the victim was the first aggressor, regardless of whether the defendant was aware of the victim's violent character, so long as a witness testifies about the victim's character for violence only through reputation and opinion testimony. *Ex parte Miller*, 330 S.W.3d 610, 618-22 (Tex. Crim. App. 2009) (citing Tex. R. Evid. 405(a)). In *Miller,* for example, the Court of Criminal Appeals approved of a defendant's attorney's introduction of evidence of the victim's character for aggression through four witnesses who testified as to the victim's violence, especially when drinking. *Id.* at 619.

Alphonso Beza and Pedro Diaz had long and, at least in the case of Beza, violent criminal histories. Beza was convicted twice for aggravated assault, twice for burglary, and once for robbery. Police reports show that he slashed a man with a knife, fired shots indiscriminately at people near an apartment complex, robbed and "badly stab[bed]" a man named Cirilo Cruz Guillen, was involved in another affray

where he himself ended up stabbed, robbed and stabbed a man named Augustine Marmolejo, and threatened his own sister with a knife. What's more, Beza was involved in the murder of a man named Leonard Carl Grimm and, just like with Kirk, Beza and an accomplice had been friendly and drinking with Grimm before murdering him and stealing his property. Diaz, for his part, was convicted twice for burglary and once for trespassing. Both men were members of the violent Mexican Mafia street gang.

At trial, Kirk thus could have introduced reputation and opinion evidence of Beza's and Diaz's characters for violence. And indeed, in addition to Beza's and Diaz's victims, witnesses to their crimes, and prison officials—all of whom would be able to testify to as much—Jaime De La Garza, a former Seguin, Texas, police officer, explained in affidavits attached to Kirk's habeas applications that he knew both men well and could have attested to the fact that both men "had bad reputations for violence and their reputations in the community were that they were violent persons." Similarly, De La Garza could have offered reputation and opinion testimony of Beza's and Diaz's character for property crimes to demonstrate that they were in fact stealing from Kirk: both men "were known burglars [and] thieves" and "had reputations for being thieves and burglars." That, too, would have been admissible—nothing in *Miller* (or *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999), the case on which it principally relies) restricts evidence of a victim's character to that for violence. *See also* Tex. R. Evid. 404(a)(3)(A) ("In a criminal case… a defendant may offer evidence of a victim's pertinent trait…."). Kirk's jury didn't

hear anything about Beza's and Diaz's characters for violence or property crimes, though. The only evidence that even remotely touched on the subject was that the men were on parole and had prison tattoos.

At the hearing on Kirk's habeas application, trial counsel acknowledged that he "need[ed] to find out whatever [he could]… to show… [the victims] were the first aggressors in terms of trying to steal [Kirk's] property." Transcript at 16-17. Counsel further affirmed that "had [he] gotten details about the burglaries"—"to the extent to show that these were the kind of men who broke into people's houses and stole their property"—he would "have been able to use that in [his] defense of Mr. Kirk." Transcript at 26. But counsel testified that he and his investigator "didn't find anybody that would say that" Beza and Diaz "had bad reputations for violence." Transcript at 29-30. And he was not aware that they had reputations for being thieves and burglars. Transcript at 30-31.

b. Kirk's counsel's failure to subpoena the supposed victims' parole records fell below an objective standard of reasonableness

The Sixth Amendment guarantees criminal defendants "the right… to have the Assistance of Counsel for [their] defence." The right to counsel includes "'the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687–688, and (2) that any such deficiency was "prejudicial to the defense." *Id*. at 692.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id*. at 688. This Court has declined to articulate specific guidelines for appropriate attorney conduct, instead emphasizing that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. Essentially, counsel is obliged to fulfill "certain basic duties," including "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*.

Here, though Kirk's defense entirely relied on the reasonableness of his belief that deadly force was immediately necessary to defend himself and his property, *see* Tex. Pen. Code §§ 9.32 & 9.42, the Texas courts concluded that Kirk's trial attorney did not perform deficiently in failing to introduce evidence of Beza's and Diaz's reputations and character traits for violence and property crimes to demonstrate that they were in fact the first aggressors and stealing Kirk's property. The courts acknowledged that counsel's failure was not strategic—he "wanted to uncover the victims' history to formulate the defense that the victims were the first aggressors." Appendix 3, Finding 36. But the courts nonetheless concluded that "[t]he extent of counsel's investigation into the victims' personal and criminal histories was reasonable." Appendix 3, Conclusion 14. Counsel subpoenaed and received the victims' penitentiary packets from the Texas Department of Criminal Justice, the courts noted, and had access to the victims' Texas Department of Public Safety criminal history, Texas Crime Information Center records, and National Crime Information

Center records. Appendix 3, Findings 30-32. Counsel unsuccessfully attempted to get the parole records from the Texas Board of Pardons and Paroles. Appendix 3, Finding 33. And counsel instructed his investigators "to uncover everything they could about the victims, including finding out what they could from Seguin." Appendix 3, Finding 35. Counsel's investigation was reasonable, then, the courts concluded. It did not matter that counsel's investigator was unable to get any information from law enforcement in Seguin regarding the victims' criminal histories and background. Appendix 3, Finding 43. And it did not matter that, when counsel's attempt to get Beza's and Diaz's parole records was unsuccessful, counsel failed to subpoena the records, as he had with their penitentiary packets.

Had trial counsel, like habeas counsel, subpoenaed Beza's and Diaz's parole records, he would have quickly uncovered the evidence that Beza had stabbed Cruz-Guillen and Grimm and that both Beza and Diaz were members of the Mexican Mafia. Indeed, as detailed in the affidavits filed by habeas counsel and his investigator in the state-habeas proceedings, it was Beza's and Diaz's parole records—making clear that they had criminal histories in Guadalupe County, that they were members of violent street gangs, and that Beza was suspected of stabbing Cruz-Guillen—that prompted habeas counsel to send his investigator to the county and to issue open records requests to the authorities there; it didn't then take long to find former Seguin Police Officer Jaime De La Garza, who could have attested to the fact that Beza's and Diaz's "reputations in the community were that they were violent persons" and "known burglars [and] thieves."

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court considered whether criminal-defense attorneys provided ineffective assistance in failing to uncover mitigating evidence in a capital case. This Court noted that the defendant's counsel had conducted some investigation, which "includ[ed] interviews with [the defendant] and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." *Id.* at 381. "[C]ounsel spoke to the relatives in a 'detailed manner,' attempting to unearth mitigating information." *Id*. (quotation omitted). But this Court held that the defendant's counsel were deficient because they failed to consult available public records relating to the defendant's prior convictions. *Id*. at 382–90. In particular, this Court faulted the defendant's counsel for failing to review records relating to a conviction for rape and assault given the prosecutor's announced plan to use that conviction as a central part of the state's attempt to prove an aggravating factor. *Id*. at 383–84, 388–89. This Court emphasized that the file had been "sitting in the trial courthouse, open for the asking." *Id*. at 389.

Similarly, in *Marr v. State*, 163 Idaho 33, 408 P.3d 31 (2017), a criminal battery case in which the defendant claimed that he acted in self-defense, the Idaho Supreme Court concluded that counsel's failure to investigate the victim's character and to call a state trooper to testify to the victim's character for belligerence when intoxicated was not "reasonable[ ] under prevailing professional norms." *Id.* at 37 (citing *Wurdemann v. State*, 161 Idaho 713, 717, 390 P.3d 439, 443 (2017)). The State had argued that the defendant's trial counsel engaged in a reasonable

investigation, "and a reasonable investigation is all that the law requires." *Id.* at 36. There, like here, however, counsel did not make a strategic or tactical decision to exclude evidence of the victim's character and reputation—she "just missed it." *Id.* As counsel testified at the post-conviction hearing, "it wouldn't have been hard for me to get it if I had just, um, tried to get it. So I think I should have had that information." *Id.*

Here, like in those cases, defense counsel's failure to discover critical evidence was the result of simply missing easily available records. Counsel subpoenaed the supposed victims' penitentiary packets—he just didn't subpoena their parole records. Here, like in those cases, then, counsel's failure thus amounted to deficient performance. In concluding otherwise, the Texas courts decided an important federal question in a way that conflicts with the relevant decisions of this Court and another state court of last resort. *See* U.S. Sup. Ct. R. 10.

c. Had counsel introduced evidence of the victims' characters, it's reasonably likely the jury would have found Kirk not guilty.

As to *Strickland* prejudice, a defendant generally must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "[*Strickland*] specifically rejected the proposition that the [applicant] had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). A "reasonable probability" of a different outcome is but a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 692-94. And a reviewing court's adjudication of an ineffective-assistance claim should

ultimately focus on "the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

Here, the Texas courts concluded "no reasonable likelihood exists that the outcome of the proceeding would have been different but for the alleged misconduct" because Kirk was convicted only of Diaz's murder and because trial counsel "repeatedly remind the jury, through testimony and argument, that the victims were 'thugs,' 'parolees,' on 'parole,' had been to 'prison,' were 'inmates,' and had prison tattoos." Appendix 3, Findings 48, 66. In so concluding, the Texas courts ignored that this was about as close of a case imaginable—Kirk's conviction came only in a second trial after the first ended in a hung jury, the jury found Kirk guilty of murdering only Diaz, and the jury did so only after this Court submitted an *Allen* charge. And indeed, "where the record evidence in support of a guilty verdict is thin, as it is here, there is more likely to be prejudice." *Gersten v. Senkowski*, 426 F.3d 588, 614 (2nd Cir. 2005). But the courts also ignored the Fifth Circuit's directly on-point opinion in *Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005).

In *Smith*, another Texas self-defense murder case, the court granted habeas relief under the "difficult to meet," "highly deferential" AEDPA standard for evaluating state-court rulings where trial counsel failed to call witnesses to testify as to the alleged victim's character for violence. *Id.* at 442; *see Cullen v. Pinholster*, 563

U.S. 170, 181 (2011) (describing the difficult-to-meet AEDPA standard). The court reasoned that, though the defendant testified that he acted in self-defense, without corroboration in the form of evidence that the victim had a character for violence, the defendant's "entire line of defense was easily discounted and disparaged by the prosecuting attorney." *Id.* at 443-44. The court thus concluded that "[c]learly, not having testimony strengthening a belief that [the victim] was the first aggressor or that [the defendant] reasonably feared for his life prejudiced [the defendant] in this case." *Id.* Counsel's "[f]ailure to present the readily available testimony bearing on both the violence of [the victim] and [the defendant's] reasonable apprehension of danger seriously undermines our faith in the outcome of the state court proceeding." *Id.*

Here, like in *Smith*, because Kirk's testimony was not corroborated with evidence of the victims' characters for violence and property crimes, the prosecutor in closing was able to wave off Kirk's testimony—first as "lying" to "fit the castle doctrine," and then as a "story of self-defense made up," "a fabrication" and "in fact a lie." RR6: 48, 63-64. In light of this, there is a reasonable probability that the result of the proceeding would have been different had Kirk's trial attorney demonstrated that Beza and Diaz were in fact the first aggressors by introducing evidence of their character traits for violence and stealing Kirk's property by introducing evidence of their character traits for property crimes. *See Strickland*, 466 U.S. at 694. Kirk's counsel's deficient performance was therefore prejudicial and his assistance ineffective, and in concluding otherwise, the Texas courts decided an important federal

question in a way that conflicts with the relevant decisions of a United States court of appeals. *See* U.S. Sup. Ct. R. 10.

2. The conflict between the Texas courts' decisions and other state and federal courts' decisions warrants this Court's review, and this case is an excellent vehicle by which to resolve the conflict.

This Court should grant this petition to resolve this conflict among state and federal courts concerning the Sixth Amendment's guarantee of the right to the assistance of defense counsel. U.S. Const. amend. VI; *see Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); U.S. Sup. Ct. R. 10 (in determining whether to grant review on a writ of certiorari, this Court will consider whether a state court of last resort has decided an important federal question in a way that conflicts with the relevant decisions of this Court, a United States court of appeals, or another state court of last resort). Indeed, this case is a particularly good vehicle for addressing the question presented. Unlike some habeas cases, in which this Court is left to guess the state courts' reasoning, *see, e.g., Harrington v. Richter*, 562 U.S. 86, 98 (2011), the Texas courts here explained why they concluded that counsel's investigation was reasonable and that his failure to introduce evidence of Beza's and Diaz's reputations and character traits for violence and property crimes was not prejudicial. And the question presented is necessarily outcome-determinative in this case: if Kirk's trial counsel provided ineffective assistance, his conviction must be

reversed. *See Strickland*, 466 U.S. at 687. This case is thus an excellent vehicle by which to resolve the question presented.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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