No. _____

In The
Supreme Court of the United States

KEITH CHESTER HILL,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal habeas petitioner who alleges that trial counsel was ineffective at a capital sentencing proceeding must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The Fifth Circuit has held that a petitioner who alleges that counsel was ineffective at a state, non-capital, discretionary sentencing proceeding must show a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh." This Court rejected the "significantly less harsh" standard, as applied to a federal sentence, and held that the imposition of any additional jail time as a result of counsel's errors is sufficient to demonstrate prejudice. *Glover v. United States*, 531 U.S. 198, 203 (2001). The Fifth Circuit, while acknowledging that *Glover* abrogated this standard as applied to a federal sentence, continues to apply it to a state, non-capital, discretionary sentence. It held that petitioner failed to show a reasonable probability that, but for counsel's errors, his state sentence would have been "significantly less harsh," and it affirmed the denial of habeas corpus relief.

The question presented is:

> Whether the court of appeals erred in holding that, to demonstrate that counsel was ineffective at a state, non-capital, discretionary

QUESTION PRESENTED—Continued

sentencing proceeding, the petitioner must show a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh."

RELATED CASES

- *State v. Hill*, No. 1103320, 337th District Court of Harris County, Texas. Judgment entered January 15, 2008.
- *Hill v. State*, No. 14-08-00062-CR, Fourteenth Court of Appeals of Texas. Judgment entered July 21, 2009.
- *Hill v. State*, No. PD-1217-09, Texas Court of Criminal Appeals. Judgment entered January 13, 2010.
- *Ex parte Hill*, No. 1103320-A, 337th District Court of Harris County, Texas. Judgment entered September 17, 2014.
- *Ex parte Hill*, No. WR-82,270-01, Texas Court of Criminal Appeals. Judgment entered March 25, 2015.
- *Hill v. Stephens*, No. H-15-0818, United States District Court for the Southern District of Texas. Judgment entered March 31, 2016.
- *Hill v. Davis*, No. 16-20268, United States Court of Appeals for the Fifth Circuit. Judgment entered July 3, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Keith Chester Hill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals (App., *infra*, 1a-11a) is available at 2019 WL 2895008. The judgment of the district court (App., *infra*, 12a-51a) is unreported.

JURISDICTION

The court of appeals entered judgment on July 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT

A. Procedural History

Hill pled not guilty to aggravated sexual assault in Harris County, Texas. A jury convicted him and assessed punishment at 99 years in prison and a $10,000 fine in 2008.

The Fourteenth Court of Appeals affirmed Hill's conviction in an unpublished opinion issued in 2009. The Texas Court of Criminal Appeals (TCCA) refused discretionary review in 2010. *Hill v. State*, 2009 WL 2145833 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

Hill filed a state habeas corpus application in 2011. The trial court recommended that relief be denied in 2014. The TCCA remanded for additional findings of fact and conclusions of law. *Ex parte Hill*, 2014 WL 7188959 (Tex. Crim. App. Dec. 17, 2014). The trial court entered findings and conclusions and again recommended that relief be denied in 2015. The TCCA denied relief without written order in 2015 based on the trial court's findings and conclusions. *Ex parte Hill*, No. WR-82,270-01 (Tex. Crim. App. Mar. 25, 2015).

Hill filed a federal habeas corpus petition in 2015. The district court denied relief and granted a certificate of appealability (COA) on one issue in 2016. *Hill v. Stephens*, 2016 WL 1312152, *15 (S.D. Tex. 2016). The Fifth Circuit remanded in 2017 for the district court to explain why it denied a COA on another issue.

After the district court complied, the Fifth Circuit denied a COA on that issue in 2018. It initially affirmed the judgment on June 4, 2019. In response to Hill's petition for rehearing, it withdrew that opinion and issued another opinion affirming the judgment on July 3, 2019. *Hill v. Davis*, 2019 WL 2895008 (5th Cir. 2019).

B. Summary Of The Issue

This Court has held that a federal habeas petitioner who alleges that trial counsel was ineffective at a capital sentencing proceeding or any federal sentencing proceeding must show a reasonable probability that, but for counsel's errors, the sentence would have been different. It has rejected the argument that a petitioner challenging a federal sentence must show a reasonable probability that, but for counsel's errors, the sentence would have been "significantly less harsh" and has held that an increased sentence of as little as six months has constitutional significance. The Fifth Circuit erred in requiring Hill to show that, but for counsel's errors, his state, non-capital, discretionary sentence would have been "significantly less harsh." Instead, it should have decided whether, under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), the TCCA's decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent. If six months is constitutionally significant for a federal prisoner, it also is for a state prisoner, as the Sixth Amendment applies

equally to state and federal prisoners in capital and non-capital cases.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court by requiring a federal habeas petitioner to show a reasonable probability that, but for counsel's errors, his state, non-capital, discretionary sentence would have been "significantly less harsh" to demonstrate prejudice. This issue cannot be raised in this Court following the denial of state habeas corpus relief because the TCCA does not use the "significantly less harsh" standard in determining whether counsel was ineffective at a sentencing proceeding. The issue can arise only in a federal habeas corpus proceeding. This Court should grant certiorari to resolve this important federal question. SUP. CT. R. 10(C).

A. Development Of The Claim

Hill was convicted of aggravated sexual assault for forcing a young man to perform oral sex at gunpoint. At the sentencing hearing, the State introduced over objection his confession to similar attacks on four other young men. It introduced without objection evidence seized from his computer (contact information for all five victims and nude or sexually explicit photos of other young men) and home (a ring belonging to one victim and newspaper articles regarding the assaults).

The prosecutor emphasized the extraneous offenses during summation in requesting a life sentence for the charged offense. The jury assessed punishment at 99 years in prison and a $10,000 fine.

Hill contended on direct appeal that the trial court erred in admitting his confession to the extraneous offenses because police officers reinitiated contact with him after he requested counsel. The Fourteenth Court of Appeals of Texas held that his confession was inadmissible but harmless because other evidence connected him to the extraneous offenses. *Hill*, 2009 WL 2145833, at *5-6.

Hill filed a state habeas corpus application alleging that the erroneous admission of his confession denied him a fair sentencing proceeding and that counsel was ineffective, *inter alia*, in failing to object to an out-of-court statement made by a non-testifying victim identifying him as the assailant and to the evidence seized from his computer and home.[1]

The state habeas trial court refused to reconsider whether the admission of the confession was harmless. It concluded that counsel performed deficiently in failing to object to the out-of-court statement made by the non-testifying victim identifying Hill as the assailant and to the evidence seized from the computer but held that there was no prejudice because Hill confessed, the

[1] Hill contended that the admission of the confession was harmful because some of the evidence relied on by the Fourteenth Court of Appeals should not have been admitted had counsel objected to it.

extraneous offenses were similar to each other and to the charged offense, and the ring and the newspaper articles connected him to the extraneous offenses.[2] The TCCA denied relief without written order based on the trial court's findings and conclusions.

Hill filed a federal habeas corpus petition. The district court granted summary judgment for the Director and granted Hill a COA on what the proper standard of review is for determining prejudice on an ineffective assistance of counsel claim. The Fifth Circuit held that Hill failed to show a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh," and it affirmed the denial of relief. It did not address his argument that the "significantly less harsh" standard is contrary to or involves an unreasonable application of clearly established Supreme Court precedent.

B. A Habeas Petitioner Need Not Show That His Sentence Would Have Been "Significantly Less Harsh" To Demonstrate That Counsel Was Ineffective At A State, Non-Capital, Discretionary Sentencing Proceeding.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established the standard to determine whether counsel rendered reasonably effective assistance at a capital sentencing proceeding. The defendant first must show that counsel's performance was

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[2] The court relied on the inadmissible confession in concluding that counsel's errors did not prejudice Hill.

deficient under prevailing professional norms. *Id.* at 687-88. He then must show that the deficient performance prejudiced the defense; that counsel's errors were so serious as to deprive him of a fair trial with a reliable result. *Id.* at 687. The Court observed, "We need not consider the role of counsel in an ordinary [non-capital] sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." *Id*. at 686. That said, it is well-settled that the Sixth Amendment right to counsel applies at a state, non-capital sentencing proceeding. *See Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

The Fifth Circuit confronted the issue expressly reserved in *Strickland* in *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993). It acknowledged that, " . . . under a rigid application of *Strickland*'s test, the second prong—requiring a 'reasonable probability' that 'but for' counsel's error the result of the sentencing hearing would have been different—would appear to be more easily met in the non-capital sentencing context than in the capital sentencing context." *Id*. at 88. It also acknowledged that, "when the discretionary sentencing range is great, practically any error committed by counsel could have resulted in a harsher sentence, even if only by a year or two." *Id*. To avoid turning *Strickland* "into an automatic rule of reversal in the non-capital sentencing context," it held that a reviewing court must determine "whether there is a reasonable probability that but for trial counsel's errors the

defendant's non-capital sentence would have been *significantly* less harsh." *Id*. Thus, it crafted the "significantly less harsh" standard to make it easier to deny habeas relief where counsel performed deficiently at a state, non-capital, discretionary sentencing proceeding.[3]

The federal habeas corpus landscape changed dramatically when Congress enacted the AEDPA in 1996. A federal habeas court no longer conducts *de novo* review (except under discrete circumstances that do not exist in Hill's case). Rather, it must defer to a state court adjudication on the merits of a claim unless it was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). A state court decision is "contrary to" this Court's precedent if the state court's conclusion is opposite to that reached by this Court on a question of law or the state court confronts facts that are materially indistinguishable from this Court's relevant precedent and arrives at an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring). A state court unreasonably applies this Court's precedent if it unreasonably applies the correct legal rule to the facts of a particular case or it unreasonably extends the legal principle from this Court's

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[3] The Fifth Circuit acknowledged that, although "significance" is a relative term, "it is arguable that *any* amount of liberty in which a person is unnecessarily deprived is 'significant.'" *Spriggs*, 993 F.2d at 88, n.4.

precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Id*. at 408, 413. The federal court must decide whether the state court's application of the law was objectively unreasonable. *Id*. at 409.

This Court addressed the prejudice prong of an ineffective assistance of counsel claim involving a federal guideline sentence in *Glover v. United States*, 531 U.S. 198 (2001). Counsel did not object to the district court's erroneous calculation that increased the guideline range by six to 21 months. The Seventh Circuit held that a six to 21 month increase is not sufficient to constitute prejudice. This Court unanimously disagreed. "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Id*. at 203. The Seventh Circuit rule was not "well considered" because "there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice." *Id*. at 204.[4]

The following year, the Fifth Circuit acknowledged that *Glover* "arguably casts doubt on the *Spriggs* 'significantly less harsh' rule and may have impliedly

[4] This Court compared *Spriggs*, which requires a showing that a discretionary sentence would have been "*significantly* less harsh," with *United States v. Phillips*, 210 F.3d 345 (5th Cir. 2000), which found prejudice where counsel's failure to object resulted in an increased guideline sentence. *Glover*, 531 U.S. at 204.

rejected it in total." *Daniel v. Cockrell*, 283 F.3d 697, 707 (5th Cir. 2002). Two years later, it expressly held that *Glover* "abrogates the significantly less harsh test, and that *any* additional time in prison has constitutional significance." *United States v. Grammas*, 376 F.3d 433, 438 (5th Cir. 2004).

The Fifth Circuit acknowledges that any additional time in prison has constitutional significance and that *Glover* abrogated *Spriggs* in the context of federal sentences, yet it continues to apply *Spriggs* to state, non-capital, discretionary sentences. Thus, it denied relief because Hill failed to show a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh"—whatever that amorphous term means.

The Fifth Circuit refused to consider the impact of the AEDPA on the rationale of *Spriggs*. The TCCA applies *Strickland* to determine whether prejudice resulted from counsel's deficient performance at the punishment stage of a non-capital trial. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). A habeas applicant in Texas need not show a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh." The issue in a post-AEDPA federal habeas proceeding is whether the TCCA unreasonably applied *Strickland* and *Glover*; *Spriggs* is irrelevant to this determination. Simply stated, a federal habeas court cannot properly apply the harsher *Spriggs* standard, as it is not relevant to whether the TCCA unreasonably applied the less onerous *Strickland* standard.

There is no rational basis to hold that any amount of jail time—even six months—has constitutional significance under a guidelines system but not under a discretionary system. The appropriate standard in either context, based on *Strickland* and *Glover*, is that a federal habeas petitioner demonstrates prejudice if there is a reasonable probability that, but for counsel's errors, his sentence would have been different. He is entitled to a new sentencing proceeding if counsel's errors undermine the reviewing court's confidence in the sentence. This Court should grant certiorari to determine the prejudice standard where counsel performed deficiently in a state, non-capital, discretionary sentencing proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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