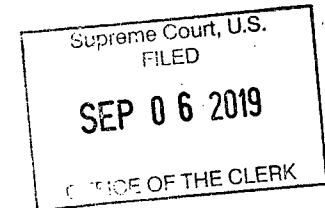


19-5920 No. ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

\* \* \* \* \*



MICHAEL DON POGUE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

\* \* \* \* \*

ON PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF CRIMINAL APPEALS OF TEXAS

\* \* \* \* \*

PETITION FOR WRIT OF CERTIORARI

\* \* \* \* \*

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## QUESTION PRESENTED

Mr. Pogue alleged that his trial counsel, William G. Mason, was ineffective and presented 18 specific points of ineffective assistance of counsel to the habeas court. (See Appendix A). Some which were Mr. Mason's failure to investigate, strike bias juror, prepare witnesses to testify, object to several acts of prosecutorial misconduct, and the jury charge error, etc. The Court of Criminal Appeals has the practice of denying state habeas writs that are not based upon any law, or any law relevant in making a prejudice analysis under the Strickland prejudice standard for its determination for ineffective assistance of counsel claims. This question is presented to this Court.

Did the Court of Criminal Appeals of Texas err in denying the Petitioner's state habeas writ by deferring to the state habeas court's findings that Petitioner was not denied effective assistance of counsel—when that decision is not based upon any law, but solely on Mr. Mason's opinion that he was not ineffective?

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PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF CRIMINAL APPEALS OF TEXAS

The Petitioner, Michael D. Pogue, respectfully asks that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, rendered in the proceedings on June 19, 2019.

OPINION BELOW-

The Court of Criminal Appeals of Texas denied without written order Petitioner's state habeas corpus in Cause No. WR-89,667-01. The opinion is unpublished, and is attached in the appendix of this petition at appendix E, infra.

JURISDICTION

The original opinion of the Court of Criminal Appeals of Texas was entered June 19, 2019. No motion for rehearing was filed as the Court of Criminal Appeals does not allow for a motion for rehearing to be filed, see Texas Rules of Appellate Procedures Rule 79.2 (d).

This Court's jurisdiction is invoked under Rule 10 (b) of the United States Supreme Court Rules.

## CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are involved in the case.

### U.S CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No 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 any person within its jurisdiction the equal protection of the laws.

TEXAS CODE CRIM. PROC. ART. 11.07

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec 3. (a) After a final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of the court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, by secure electronic mail, or by personal service to the attorney representing the state in that court, who shall answer the application no later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for the purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided

in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. On completion of the transcript, the reporter shall immediately transmit the transcript to the clerk of the convicting court. After the convicting court makes finding of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

## STATEMENT OF THE CASE

Petitioner was indicted for twelve counts of sexual assault of a child and indecency with a child. On May 5, 2019, the State abandoned counts one, two, three, four, eight, eleven, leaving six counts. (R.R.Vol.3,pp.4-5). After one day of jury selection, there were not enough potential jury members on the venire panel and the court dismissed the panel. (R.R.Vol.3,p.251).

On May 8, 2014, Petitioner had a hearing on his motion to suppress claiming his statement was involuntary. The court denied the motion to suppress. (R.R.Vol.4,p.63).

On May 19, 2014, Petitioner requested that the venire panel be dismissed for the conduct of the transport officers in front of venire panel which indicted that the Petitioner was in custody. The court denied the request. (R.R.Vol.5,pp.175-78).

The trial began on May 20, 2014, after the jury selection the previous day. Petitioner plead not guilty to all counts in the indictment. (R.R.Vol.6,pp.8-11).

During the trial, the State called four witnesses. Petitioner called two witnesses and each side gave their closing arguments. Petitioner made an objection to improper jury argument by the State which was overruled. (R.R.Vol.7,p.46). The jury found Petitioner guilty of five counts of sexual assault of a child and one count of indecency with a child as set out in the amended indictment on May 21, 2014. (R.R.Vol.7,pp.51-52)

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Note: R.R. refers to the Reporter's Records.

C.R. refers to the Clerk's Records.

AX refers to Petitioner's State Habeas Corpus.

Habeas Court is the 413th District Court, the convicting court.

The same day, the State called one witness in the punishment phase of the trial and Petitioner called four. Petitioner requested that the jury be given instructions regarding the motion to cumulative sentences, which the court denied. The jury assessed punishment at fifteen years in the Texas Department of Criminal Justice and a \$5,000 fine on each count. (R.R.Vol.7, pp.128-130).

On May 22, 2014, the State presented its motion to cumulative sentences. Petitioner objected stating it was a jury issue. The court granted the motion in part and made sentences on counts one through five cumulative and the sentence on count six to run concurrently with counts one, two, and three. (R.R.Vol.8,pp.8-9).

Petitioner filed a notice of appeal with the Tenth Court of Appeals in Waco, Texas raising four issues claiming, (1) the trial improperly denied Petitioner's request to dismiss the venire panel, (2) the trial court improperly denied the Petitioner's motion to suppress, (3) the trial court improperly overruled Petitioner's objection to the state shifting the burden of proof to the Petitioner, and (4) the trial court lacked authority to stack Petitioner's sentences the day after he was sentenced.

On September 17, 2015, the Tenth Court of Appeals affirmed Petitioner's conviction. Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals on December 28, 2015. The Texas Court of Criminal Appeals refused the petition on March 17, 2016. Petitioner filed a motion for rehearing and the court denied the motion on April 13, 2016.

Petitioner filed his state habeas corpus on December 4, 2018. On December 13, 2018, the habeas court issued an order

for Petitioner's trial counsel, William G. Mason, to respond by affidavit responding to Petitioner's claims of ineffective assistance of counsel.

On March 13, 2019, Mr. Mason filed his affidavit with the habeas court denying Petitioner's allegation of ineffective assistance of counsel. On March 21, 2019, the State filed an answer to Petitioner's State Habeas Corpus, adopting Mr. Mason's affidavit and recommending relief be denied. On the same day, the habeas court issued an order stating that after its review of Petitioner's writ of habeas corpus and the state's answer, it recommended that relief be denied.

On June 19, 2019, the Texas Court of Criminal Appeals denied without written order Petitioner's application for writ of habeas corpus. The Texas Court of Criminal Appeals does not accept a motion for rehearing on state habeas corpus.

The State's answer that adopted Mr. Mason's affidavit, the habeas court's order recommending relief be denied, and the denied without written order are not based on any law that is relevant to make a determination of a prejudice analysis, the habeas court and the Texas Court of Criminal Appeals relied soley on Mr. Mason's opinion of his performance at trial.

## REASONS FOR GRANTING THE WRIT

### I. The Texas Court of Criminal Appeals Non-Application of the Prejudice Standard of Strickland Warrants This Court's Attention.

The Texas Court of Criminal Appeals non-application of the prejudice standard in Strickland V. Washington, 466 U.S. 668, 687-88 (1984) is important for two reasons. First, the habeas court failed to have Mr. Mason respond to all the allegations Petitioner set forth in his state habeas writ. Petitioner alleged that Mr. Mason failed to challenge that the petitioner's statement was obtained in violation of the law, specifically Texas Penal Code § 37.09. The court also failed to have Mr. Mason respond to the allegation that he failed to object to the prosecution vouching for the complainant when the prosecutor told the jury no one would go through this entire process if it wasn't true, and the complainant told the truth. And to have Mr. Mason respond to the allegation for failing to object to the prosecution's remark that the petitioner did not call his sons because they had nothing good to say about the Petitioner.

Second, the habeas court did not make a finding that is based upon any law that is relevant in making a prejudice analysis under Strickland. This Court requires in making the prejudice analysis under Strickland, that the reviewing court consider all of the evidence in the record, both which was admitted at trial and that which was developed at the post-conviction stage. See Strickland V. Washington, 466 U.S. 668, 687-88 (1984); Rompilla V. Bread, 545 U.S. 374 (2005); Wiggins V. Smith, 539 U.S. 510 (2003); Williams (Terry) V. Taylor, 529 U.S. 362 (2000). Under

this test, it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the state habeas court disregarded this principle.

The state habeas court adopted the state's answer which adopteded Mr. Mason's affidavit. In doing so the state habeas court held that Mr. Mason's failure to investigate did not harm the Petitioner. Specifically, Mr. Mason told the trial judge at the start of the trial that he "thinks" he has been given all of the documented or recorded evidence the state intended to use. (R.R. Vol.5,p.10). Mr. Mason failed to investigate that the state had text messages that indicted that the Petitioner and his then 20 year old step-daughter were discussing having a romantic relationship. These messages were inadmissible, and Mr. Mason's failure to prepare defense witness Renee Pogue (Petitioner's wife) to not go into matters that could open the door to the extraneous offense. Mr. Mason's failure to investigate caused him to have to request to review the text messages in the punishment phase, where they are admissible. (R.R.Vol.7,p.43). He did not file any discovery motions, he stated that the prosecutor has an "open file" policy and there was no need for any discovery motions. There is no open file policy statute in the State of Texas. Mr. Mason could have discovered the text messages and file an in limine motion to ensure that the messages did not come in before the jury in the guilt-innocence phase.

In Mr. Mason's failure to investigate, he took no notes of the recorded interview of the complainant at the Child Advocacy center where she gave her statement of the alleged sexual abuse she suffered at the house of the Petitioner. Mr. Mason did not

investigate the complainant's background, had he done so, he would have discovered that the complainant was seeing a psychiatrist before and during the alleged sexual abuse. Mr. Mason could have interviewed the treating doctor and could investigate for possible exculpatory evidence for the Petitioner to have presented at trial for the jury to consider. Mr. Mason claims he had no knowledge of the complainant being treated. App. nC (Mr. Mason's affidavit).

Mr. Mason also failed to interview character witnesses that would have testified on behalf of the Petitioner that his character was inconsistant with the charged offense, and for his moral and ethical treatment of children, and Petitioner's service as a volunteer fire-fighter in the community. Mr. Mason's failure to investigate deprived Petitioner his right to present witnesses on his behalf. The witnesses provided affidavits to the state habeas court.

Mr. Mason failed to interview and investigate what Donna Pogue (Petitioner's mother) knew about the alleged offenses. Donna Pogue was an eye-witness, because she was present at the time the alleged abused occurred and was willing to testify that she never saw or heard anything to corroborate the complainant's allegations. Donna Pogue provided an affidavit to the habeas court.

Petitioner gave a limited confession to the police directly after a failed polygraph test. Mr. Mason failed to discover that Petitioner was under the influence of several types of medication during the polygraph and the statement. The lack of Mr. Mason's investigation deprived Petitioner to present all the

evidence surrounding the circumstances—that were involved when Petitioner gave his confession—to be presented in the suppression hearing. Petitioner also was told by the police that the polygraph was evidence when it was not, and Mr. Mason failed to raise this issue at the suppression hearing that Petitioner's statement was obtained in violation of Texas Penal Code § 37.09 and was inadmissible at trial. Petitioner would have prevailed if Mr. Mason would have done a proper investigation.

The state habeas court and the Court of Criminal Appeals decision to deny relief based upon Mr. Mason's opinion that he was effective violates this Court's standard for effective assistance of counsel in Strickland.

The habeas court also held that Mr. Mason's failure to strike or challenge for cause juror Norwood for stating that she would try to be fair and impartial and that her experience of her sister being sexually abused as a child would have some bearing on her deliberations. Twice she said she was unsure if she could be fair, and never stated that she would be fair and impartial. (R.R.Vol.5,pp.84-85,164-65).

The habeas court also went on to hold that Mr. Mason's failure to use an expert during the voir dire to ensure that someone like Norwood would not make the jury and Mr. Mason stating he had assistance from his wife during the voir dire was sufficient.

The habeas court held that Mr. Mason failure to use an expert during the trial was sufficient. Mr. Mason's failure to use an expert deprived the Petitioner the right to have an expert explain to the jury what could cause someone to make false allegations, and the difference between those who make

false allegations and those who don't. Mr. Mason said in his affidavit that he believed that the general public already knows this information and no need for an expert was required.

The habeas court held that the several failures to object to prosecutorial misconduct did not deprive Petitioner of a fair trial. Mr. Mason failed to object to the prosecutor telling the jury that (1) the complainant's testimony was painful to watch because it was like someone being tortured with the Petitioner staring her in the eyes. (R.R.Vol.7,pp.38-39). The prosecutor was referring to the cross-examination of the complainant, (2) the Petitioner did not call his sons because they had nothing good to say about the Petitioner. (R.R.Vol.7,pp.45,46). The prosecutor was implying to the jury that they had knowledge of Petitioner's guilty, (3) asking the jury to put themselves in the complainant's shoes. (R.R.Vol.7,p.38). The prosecutor's remark was asking the jury to depart from neutrality and to base their verdict on bias and personal interest, and (4) improperly questioning Renee Pogue if she believed the Petitioner was guilty, which she stated yes. (R.R.Vol.6,p.143). This questioning invaded the province of the jury to determine the credibility of the witnesses.

The habeas court held the failure of the jury instruction on voluntariness of the Petitioner's statement to police did not deprive Petitioner of a fair trial. Under state law the court was to instruct the jury that if they did not believe beyond a reasonable doubt that Petitioner's statement was voluntary, it should not consider the statement. This issue of voluntariness was raised before the jury and an instruction was required. (R.R.Vol.6,pp.21,38-39,42-43,46-47,176,178-79;R.R.Vol.7,p.20-21.34,

37).

The habeas court held that Mr. Mason's failure to call mitigating witnesses in the punishment did not deprive Petitioner of a fair trial. Petitioner provided affidavits for several people that would have testified on Petitioner's behalf at the punishment. The court also held that Mr. Mason's failure to use an expert at punishment did not harm Petitioner. Mr. Mason should have used an expert to explain to the jury the suitable treatment for a sex offender and do a risk factor evaluation on the Petitioner over recidivism.

The Court of Criminal Appeals and the habeas court's findings merit this Court's review. The Texas Court of Criminal Appeals and the habeas court has the practice of ignoring evidence while performing a prejudice standard that is not based upon any law or law relevant to determine prejudice, they just simple adopt the attorney's affidavit that claims they were effective, and deny without written order the writ for habeas corpus. This is the type of practice this Court condemned in Williams (Terry) V. Taylor, 529 U.S. 362, 397-98 (2000).

Because the Texas Court of Criminal Appeals and the habeas court have a practice of the non-application of Strickland V. Washington, 466 U.S. 668, 687-88 (1984), prejudice review, this Court must grant certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Texas Court Court of Criminal Appeals.

Respectfully Submitted,



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