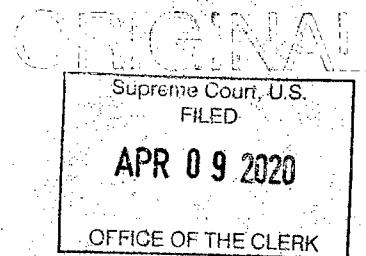


No. 10-8324



IN THE  
SUPREME COURT OF THE UNITED STATES

JAMES WILLIAM HORNSBY — PETITIONER  
(Your Name)

vs.

LORIE DAVIS, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES WILLIAM HORNSBY #1072184

(Your Name)

French Robertson Unit

12071 FM 3522

(Address)

Abilene, TX 79601

(City, State, Zip Code)

N/A

(Phone Number)

**QUESTION(S) PRESENTED**

- (1) Whether the district court's denial of relief and determination, of whether a breakdown in the adversarial process was created by the trial courts denial of defense counsels motion for continuance, resulted from the district courts' incorrect interpretation of 'Assistance' as set forth in the right to effective Assistance of Counsel guaranteed by the Sixth Amendment to the U.S. Constitution?
- (2) Whether the district courts denial of relief and determination, of whether defense counsel was either constructively-ineffective or constitutionally-ineffective for failing to investigate the defendants brain injury and craniotomy, resulted from the district courts incorrect interpretation of 'Assistance' as set forth in the right to effective Assistance of Counsel guaranteed by the Sixth Amendment to the U.S. Constitution?
- (3) Whether the district courts' incorrect interpretation of 'Assistance' as set forth in the right to effective Assistance of Counsel guaranteed by the Sixth Amendment to the U.S. Constitution effectively sanctioned the state-courts' objectively unreasonable application of Federal law as set forth within U.S. V. Cronic, Strickland V. Washington, Wiggins V. Smith, and Brecht V. Abrahamson?

## LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

- 1) State V. Hornsby, No. 84675, Criminal District Court, Jefferson County, Texas. Judgement Entered Oct. 24, 2001.
- 2) Hornsby V. State, No. 84675-A, Criminal District Court, Jefferson County Texas. Fact Findings Made on application for writ of habeas corpus.
- 3) Hornsby V. State, 84675-B, Criminal District Court, Jefferson County, Texas. Fact Findings Made on application for writ of habeas corpus.
- 4) Hornsby V. State, No. 84675-C, Criminal District Court, Jefferson County, Texas. Fact findings made on application for writ of habeas corpus.
- 5) Hornsby V. State, No. 09-06-00273-CR (Tex. App. Beaumont 2008 pet, ref'd). judgement entered Jan. 16, 2008. Discretionary Review refused Dec. 16, 2009.
- 6) Ex Parte James William Hornsby, No. WR-60537-01 Texas Court of Criminal Appeals. Judgement entered (Application Dismissed).

RELATED CASES CONTINUED

- 7) Ex Parte James William Hornsby, WR-60537-02, Texas Court of Criminal Appeals judgement entered (Habeas Relief Granted)
- 8) Ex Parte James William Hornsby, No. WR-60537-03, Texas Court of Criminal Appeals Judgement entered (Habeas relief Granted)
- 9) Ex Parte James William Hornsby, No. 60537-04, Texas Court of Criminal Appeals Judgement entered Mar. 09, 2011. (Habeas Relief Denied).
- 10) Hornsby V. Thaler, Director T.D.C.J., No. 1:11cv501, U.S. District Court for the Eastern District of Texas. Judgement entered Mar. 22, 2018.
- 11) Hornsby V. Davis, Director T.D.C.J., No. 18-40351, U.S. Court of Appeals for the Fifth Circuit, Judgement entered Oct. 29, 2019.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-1 to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B,C,D to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Criminal District Trial court appears at Appendix F to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 10-29-2019.

[ ] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2-7-2020, and a copy of the order denying rehearing appears at Appendix A-2.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

"In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.: Amendment VI  
United States Constitution.

"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." Amendment XIV, United States Constitution.

### STATEMENT OF THE CASE

Trial counsel, William Laird (Laird), filed his first and only motion for continuance when this case was 85 days old. In that motion Laird set forth his trial strategy of investigating petitioners head injuries in order to gather medical evidence from hospitals and to interview expert witnesses for use as mitigating and/or exculpatory evidence during the suppression hearing, trial on merits, and punishment (See Appendix G). The trial court denied the motion. At the on-set of trial, and after being asked by the trial judge if he was ready for trial, Laird stated that "due to the denial of [his] request for continuance, [he] had no choice but to be ready" (See Appendix H; RR-III-2). During punishment Laird elicited testimony from petitioner concerning the adverse effects upon his person and mental condition during the six months after his brain injuries. Post trial, Laird filed a motion for new trial admitting explicitly, and unambiguously blaming, his lack of preparation and investigation in this case on the trial courts' denial of his motion for continuance. The motion for new trial also implicitly sets forth that the denial prevented Laird from his trial strategy as set forth in the request for continuance. The motion for new trial shows Laird explicitly conceding that his inadequate investigation and inability to follow his original strategy severely harmed and prejudiced petitioners defense to the relevant issues (See Appendix I). Laird filed an affidavit on 2-27-06 in Trial Court habeas cause 84675-A clearly and unambiguously setting forth that he made a strategic decision to omit medical records from the suppression hearing due to his belief that petitioner gave a statement

to police on 7-14-01 before being re-injured and that therefore, Laird believed, those records would not have had any influence on the court when determining the voluntariness of the petitioners waiver of Miranda rights. The affidavit also depicts Laird explicitly lying by stating that he did not find out about petitioners' brain injury or craniotomy until after trial began even though Laird's motion for continuance and motion for new trial each tell a different tale (See Appendix J). States Exhibit 23 clearly shows that the statement given to police was made on 7-17-01, two days after the re-injury depicted in Appendix O.

Petitioner submitted records from St. Marys' Hospital, located in Port Arthur, TX, setting forth specific facts surrounding petitioners brain injury, to wit: (1) petitioner did receive a traumatic brain injury, namely an acute subdural hematoma, and that the injury required him to undergo a life-saving craniotomy which resulted in 3 metal plates in his head; (2) that the evacuation of the subdural hematoma took place six months before the offense on 12-22-00; (3) that the original brain injury compressed the tissue of the brain so severly that there was a 1.5cm (5/8 inch) shift of the midline structure of petitioners brain from left to right; (4) that the re-injury, noted by Laird in Appendix J, occurred on 7-15-01; (5) that the police were notified of the re-injury; (6) that the re-injury required emergency treatment at the hospital; (7) that the re-injury required 3 staples to close the wound; (8) that Vicodin Ex was prescribed for pain; and, (9) that the staples were not to be removed for 7 days, that is, until 7-22-01 (See Appendix K, L, M, and N). The two photographs submitted by petitioner of his person indicate

the condition in which he was found by his neighbor (grandfather) on the day of the re-injury which was two days before custodial interrogation (See Appendix O).

The following medical documents evidence facts mixed with expert medical opinion from medically accredited sources and doctors concerning the specific type of traumatic brain injury (TBI) and craniotomy applicable to this case and petitioners' condition.

One document is an illustration depicting the mid-line structure of a human brain along with a subdural hematoma which would support or amplify the facts contained in Appendix L outlining the 1.5cm (5/8 inch) shift of the midline structure in petitioners brain (See Appendix P). Another illustrated document shows the compression of brain tissue, caused by extreme pressures, prevalent in TBI's such as petitioners injury (See Appendix Q). The next document, constitutes an expert opinion listed on WebMD Medical Reference, © 2015 WebMD, LLC, and reviewed by Dr. Richard Senelick, M.D. on 2-24-15, outlines that subdural hematomas are usually caused by severe head injuries, that the bleeding and increased pressure on the brain caused by the injury can be life threatening, and that more severe or dangerous subdural hematomas require surgery such as the craniotomy described therein and performed on petitioner to save his life (See Appendix R). The next document shows that acute subdural hematomas, resulting from a serious head injury, are among the deadliest of all head injuries often resulting in brain injury and leading to death (See Appendix S).

The next document reiterates the facts contained in Appendix S and further explains that the injury is an emergency condition, with high rates of death and injury, where rehabilitation is

often needed to assist the person back to his or her usual level of functioning. This document also constitutes an expert opinion listed on the N.Y. Times Health Guide, set forth by A.D.A.M. Inc., an accredited JURAC, also known as the American Accreditation Health-care Commission and reviewed by Jacob L. Heller, M.D., M.H.A., Emergency Medicine, Virginia Mason Medical Center, Seattle, Washington and by David Zieve, M.D., M.H.A., Medical Director, A.D.A.M. health Solution, Ebix, Inc., on 7-04-12 (See Appendix T). The next document outlines the craniotomy procedure as well as the evacuation of a subdural hematoma including the reasons for a craniotomy as well as possible long term effects. This document constitutes an expert opinion listed on St. Vincents Campus, Melbourne, Vincents Brain and Spine Center (V.B.S.C.) and reviewed by Associate Professor Michael Murphy, M.D. (See Appendix U). The next document illustrates and outlines facts of the procedural process of a craniotomy for subdural hematoma in an expert opinion from the Methodist Health System (See Appendix V). Finally, the next document, found at 'Brain and Spinal Cord.org' outlines facts and conditions pertaining to the recovery from brain injury and craniotomy (which itself constitute injury in many instances) and shows, amongst other relevant information, that patients with TBI may experience personality changes such as lashing out easily in anger or becoming withdrawn and that depression is common. Specifically, this document sets forth that "frequently a person with TBI may become easily angered at the slightest provocation" and calls this condition "quick-trigger-anger." It goes on to explain that "the anger associated with a TBI can come from both physical changes and psychological adjustment because the center

of the brain which allows [people] to keep [their] emotions in check and respond in a socially appropriate manner is frequently injured by a TBI; not only do brain-injured people tend to become easily angered, they also tend to exhibit other emotions more freely". (See Appendix W).

Detectives Ron Robertson and Rodney Harrison arrested petitioner and conducted a custodial interrogation on 7-17-01, the detectives admitted to having fore-knowledge of the facts of petitioners re-injury two days before on 7-15-01 because they were also assigned to the case in which petitioner was felony-assaulted, with a weapon, in his home by a co-defendant (See Appendix X; also, RR-III-182-84). The detectives admitted that they failed to perform any type of sobriety examination upon petitioner prior to the interrogation or even question him as to his sobriety despite their knowledge of the facts of the re-injury which, as petitioner has demonstrated afore, evidences he was prescribed the narcotic Vicodin EX for pain only two days prior, still had staples in his head during interrogation, and was reasonably likely to be using, and under the influence of, the narcotic prior to and during custodial interrogation due to the significant brutality of the beating he suffered in his sleep as depicted in Appendix O (See Appendix Y; also RR-III-114-17; 188-89).

One of the only two witnesses used by the State to help prove the elements of the indictment (intentionally and knowingly) has made two affidavits unequivocally admitting that his testimony during petitioners trial constituted perjury (See Appendix Z and AA), These affidavits were also submitted during state-court proceedings.

Defendants' Exhibit 2 is a 4x6 inch photo depicting petitioner,

post-TBI and post-craniotomy, with 54 staples in his head from the craniotomy procedures after he was released from Hermann Memorial Hospital in Houston TX (See RR-II-Defendants Exhibit 2).

In order to highlight the trial courts' interference with Lairds' representation in this case, petitioner submits Lairds' Response To Court Order in which Laird states that the courts clerk interfered with his representation during the motion for new trial process causing him to fail to have witnesses present for the motion (See Appendix BB).

## REASONS FOR GRANTING THE PETITION

### Reasons for Review:

The U.S. Court of Appeals failure to issue a COA on these issues effectively sanctioned and sustained the U.S. District Court's extreme departure from the traditionally accepted and historical course of judicial proceedings relevant to the U.S. Supreme Court's interpretation and enforcement of the Sixth Amendment to the U.S. Constitution, which guarantees the actual effective 'Assistance' of Counsel and not merely an empty formal compliance with that requirement.

Also, the state-court determination has decided an important federal question, and interpreted the Sixth Amendment to the U.S. Constitution, in a way that conflicts with the relevant decisions of the U.S. Supreme Court on a set of materially indistinguishable facts and the U.S. District Court has sustained and sanctioned that state-court determination. That question is, - did the trial court's discretionary action on defense counsel's motion for continuance constitute and create the circumstances which caused a breakdown in the adversarial process; and, if so, does this case present a set of facts and circumstances so unfair to the defendant that inquiry into harm is unnecessary because prejudice should be presumed? Further, petitioner urges that the U.S. Court of Appeal's denial of a COA effectively sustained both the district court's and the state-court's erroneous determination of that question and their incorrect interpretation of the Sixth Amendment.

The determinations of those court's call for an exercise of the Supreme Courts supervisory powers because those determinations could adversely effect the manner in which the Sixth Amendment right to counsel is interpreted, applied, and analyzed in all postcollateral proceedings and therefore potentially effect each and every criminal defendant within Texas and other Fifth Circuit jurisdictions. The manner in which the district court interpreted the Sixth Amendment and decided the important question of Federal Law presented by this case are subject to public ridicule because the society in which we live has long believed in the concept of providing real and meaningful 'Assistance' of counsel, subject to reasonable professional norms and free from government interference, to all criminal defendants who cannot afford to pay for counsel out of their own pockets and that concept is based on the ideology that real and true 'Assistance' of counsel is a fundamental basis to a fair and reliable criminal process in a free democratic society.

Petitioner here seeks to support these statements with argument and evidence, that in this case there has been either a constructive denial or a constitutional denial of the Sixth Amendment right that has caused the adversarial process itself to be presumptively unreliable because the denial of the motion for continuance prevented trial counsel from pursuing his strategy of presenting mitigating and exculpatory evidence during the suppression hearing, trial on merits, and punishment. Petitioner will show that said prevention ensued and blossomed to full force when the denial prevented counsel from investigating; that is,

from gathering medical records surrounding petitioners traumatic brain injury, craniotomy, and re-injury from local hospitals and interviewing potential expert witnesses concerning the brain injuries. Petitioner will show that by being prevented from pursuing his strategy and investigation, counsel was effectively prevented from submitting any potential fruit of such investigation during any of the proceedings and thus, from subjecting the State's case to any meaningful adversarial process, resulting in a constructive denial of effective 'Assistance of Counsel' or, in the alternative, a constitutional denial of effective Assistance of Counsel.

Petitioner believes that those arguments will demonstrate that the state-court determinations, as well as the U.S. District Court's analysis, stemmed from an incorrect interpretation of the Sixth Amendment and resulted in a decision in conflict with, or contrary to, the relevant decisions of the Supreme Court; further, petitioner believes that those arguments will evidence that the state-court determination(s) should not have been afforded the normal 'deference' or 'presumption of correctness' mandated by 28 USC § 2254(e) and that petitioner has rebutted that determination through clear and convincing evidence.

#### Standard of Review

"In all criminal prosecutions, the accused shall enjoy the right.. to have compulsory process for obtaining witnesses in his favor and to have Assistance of Counsel for his defense," United States Constitution, Amendment VI.

The U.S. Supreme Court has set forth in United States V.

Cronic, 466 U.S. 648 (1984) that the "right to the effective assistance of counsel is the right of the accused to require the prosecutions case to survive the crucible of meaningful adversarial testing." See Cronic, ID. "The core purpose of the counsel guarantee was to assure 'Assistance' at trial," Cronic, 466 U.S. at 653, and if "no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated" and "[t]o hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the constitutions requirement that an accused be given the assistance of counsel. The Constitutions guarantee of assistance of counsel cannot be satisfied by mere formal appointment. "Cronic, 466 U.S. 654-55 (citing Avery V. Alabama, 308 U.S. 444, 446 (1940) (footnote omitted)). "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland V. Washington, 466 U.S. 668, 686 (1984).

Adding to these principles, the U.S. Supreme Court has determined that there are "circumstances that are likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified", Cronic, 466 U.S. at 658; and, one of the most obvious circumstances likely to prejudice the accused is when "counsel entirely fails to subject the prosecutions case to meaningful adversarial testing. "Cronic, 466 U.S. at 659. When that happens, "there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." Cronic, ID. "Circumstances of that magnitude may be present on some occasions when although counsel is available to

assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. "Cronic, 466 U.S. 659-60.

The dispositive question in a case such as the one at hand therefore is, whether the circumstances surrounding trial counsel's representation - and in particular whether the trial courts denial of counsels motion for continuance caused the appointment of counsel to become an empty formality - justifies a presumption of prejudice where the State's theory of guilt, as alleged in the indictment, was not subjected to any meaningful adversarial process. Compare to Cronic, 466 U.S. at 662. Further at question is whether the denial of the motion rendered the trial and material proceedings fundamentally unfair, permeated the entire trial with undue prejudice, and had a substantial and injurious effect or influence in determining the jurys verdict. Compare to Brecht V. Abrahamson, 507 U.S. 619, 637 (1993).

If the Supreme Court reviews counsels actions for 'constitutional ineffectiveness' then "first, the defendant must show that counsels performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland V. Washington, 466 U.S. 668, 687 (1984). In Strickland and Wiggins V. Smith, 539 U.S.

510 (2003) the Supreme Court defined the deference owed to supposed or alleged strategic judgements in terms of the adequacy of the investigations supporting those judgements. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances; applying a heavy measure of deference to counsels judgements." Wiggins, 539 U.S. at 521-22 (citing Strickland, 466 U.S. at 690-91). The Court must "conduct an objective review" of counsels performance, "measured for reasonableness under prevailing professional norms," Wiggins, 539 U.S. at 523 (citing Strickland, 466 U.S. at 689), "which includes a context-dependant consideration of the challenged conduct as seen from counsels perspective at the time." Wiggins, Id. (citing Strickland, Id.)

#### Relevant Determinations of the U.S. District Court

The U.S. District Court has made the following determinations in its assessment of petitioners claims concerning the denial of the continuance and ineffective assistance of trial counsel:

- (A) "The state-court denied each of petitioners grounds for relief. While counsel sought a continuance, he testified at the state habeas hearing that he did not believe his performance was affected by the denial of his motion for continuance. The court found petitioner failed to prove the underlying claim for requesting the continuance has merit. See Appendix D, pg 11.

(B) "Petitioner has failed to show how any of the grounds harmed his defense or made his trial fundamentally unfair. Given the circumstances of this case, petitioner has failed to show the alleged errors so infected the trial with unfairness as to make the resulting conviction a denial of due process. See Gonzales, 643 F.3d at 429. Accordingly, petitioners grounds are without merit. See Appendix D pg. 11; and,

(C) "Further as set forth above, petitioner has failed to show that the trial court's denial of his motion for continuance harmed his defense or rendered his trial fundamentally unfair. Thus he has failed to show an underlying constitutional violation. Moreover petitioner has failed to show how the denial of his motion for a continuance rendered trial counsel unprepared for trial. Therefore petitioner has failed to establish that the state court determination that counsel's assistance was not ineffective was objectively unreasonable." See Appendix D, pg 20.

The above-quoted determinations of the district court are hardly anything more than reiterations of the state-court determinations found at Appendix F, Sections I and II, pg. 4: Section VI, pg. 7 and Section X, pg. 13.

Petitioner urges that the following Arguments will effectively rebutt the presumption of correctness afforded the state-court determination of the factual issues relevant to this claim so as to show that the state-court decision was an objectively unreasonable application of well-settled Federal law and was an unreasonable determination of the facts in light of the evidence submitted during state-court proceedings and will aide the Supreme Court in determining that the district court's deference to the state-court determination could only be the result of an incorrect interpretation of the meaning of 'Assistance' found in the right to effective Assistance of Counsel.

## Arguments

It is petitioners stance that the state-court determination and the district courts assessment of his claim incorrectly interpreted the meaning of effective assistance of counsel as set forth by the Sixth Amendment to the U.S. Constitution and that, by doing so, upheld the conversion of petitioners constitutional right into a sham and nothing more than a mere formal compliance with the constitutions requirement that an accused be given the assistance of counsel. Petitioner contends that the circumstances created by the denial of the continuance are of the magnitude that, even though trial counsel William Laird's (Laird) availability to assist petitioner was there by his mere presence, the likelihood that any lawyer, even a fully competent one, could subject the State's theory that the petitioner caused the victim's death intentionally and knowingly as alleged in the indictment to any meaningful adversarial process is so small that a presumption of prejudice would be appropriate in this case.

Lairds motion for continuance sets forth his original trial strategy to investigate petitioners traumatic brain injury (TBI) and craniotomy, gather medical records from hospitals, interview experts and present that information during the suppression hearing, trial on merits and punishment. See Appendix G. That motion and the strategy implied therein, clearly and unambiguously sets forth Laird's intention to use medical evidence and expert testimony in order to subject the State's case to meaningful adversarial process by way of a mitigation-style defense.

Laird's strategy as set forth in the motion was reasonable trial strategy in light of reasonable professional norms because

the bona fide jury issues open to competent defense counsel on the facts of this case was whether petitioners culpability rose to the level alleged in the indictment, whether petitioners criminal culpability was negated or minimalized by the facts surrounding the TBI and craniotomy, whether petitioner was much less morally culpable for his criminal actions and whether petitioners waiver of his Miranda rights during custodial interrogation was made voluntarily.

Petitioner has shown with specificity that Laird's investigation into the facts of the TBI and craniotomy would have revealed the medical documents submitted to the state-courts and currently attached hereto as Appendix K, L, M, and N, and sufficiently described in detail in the STATEMENT OF THE CASE paragraph listed afore. Those documents were on file at nearby St. Mary's Hospital located in Port Arthur, TX; a distance of only 5-10 miles from the Beaumont courthouse. It is petitioner's stance that the medical information contained in those documents would have lead a reasonable attorney to investigate further, where he or she would have discovered that the craniotomy took place in nearby Houston, TX where he or she would have discovered the name of the neuro-surgeon, Dr. William Maggio, whose office was across the street from Herman Memorial Hospital, in Houston, where the craniotomy was performed. Petitioner urges that an interview with that expert, or others of the field, would have revealed the facts and information provided by Appendix P, Q, R, S, T, U, V, and W. Appendix R, T, U, and V provide expert opinion favorable to support Lairds request for continuance and trial strategy of conducting a mitigation-style defence.

Petitioner contends that the denial of the motion prevented Laird from discharging his most vital duty in this case, which was his duty to investigate the facts surrounding the TBI, craniotomy, and re-injury. Such became Laird's duty after learning from petitioners family prior to trial of the existence of those conditions and after demonstrating within his motion for continuance his awareness that facts surrounding those issues constituted mitigating, and possibly exculpatory evidence. Compare to Miller V. Dretke, 420 F.3d 356, 361-66; also Footnotes 30, 31, and 32 (5th Cir. 2005)(citing Wiggins V. Smith, 539 U.S. 510, 523; also 536(2003)(quoting Strickland V. Washington, 466 U.S. 668, 688 (1984)). In comparison to reasonable professional norms a reasonable attorney would have chosen to combat the States' theory of guilt with the medical records that he or she would have discovered only minutes away at the hospital and with expert testimony (such as that provided by and reviewed by doctors in Appendix R, T, U, and V) because such would have effectively mitigated and/or exculpated the elements intentionally or knowingly as set forth in the indictment. Petitioner believes that the prejudice is obvious and a harmless error inquiry need not be conducted because the facts contained in the medical records submitted during state-court proceedings would have given the jury a firm basis on which to conclude that petitioner was either not criminally culpable for his actions or that he was much less morally culpable for his actions than the jury could have concluded without such evidence.

The information contained in Appendix W is the exact type of information which demonstrates a nexus between petitioners'

bizarre and unacceptable reaction, to the alleged provocations made by the victim, which resulted in the victim's death. It is only reasonable to infer that Laird would have used that information, had he known about it, in order to provide the jury a firm basis to conclude that petitioner could not and did not, as a result of his brain injuries, possess the required culpable mental state at the time of and during the course of the offense which would have given the jury a reasonable basis to conclude that petitioner was not guilty as alleged in the indictment.

Like the life of a fruit tree, the breakdown in the adversarial process began with the trial court's denial of the continuance, flowered when Laird was prevented from investigating and following his trial strategy of presenting the mitigating evidence, and produced its fruit when the mitigation strategy that would have subjected the State's<sup>1</sup> theory of guilt to meaningful adversarial process was entirely forfeit.

It is clear, and the evidence submitted by petitioner during the state-court proceedings is overwhelming, that Laird himself has filed no less than two documents explicitly stating that the defense needed the continuance and explaining how the denial prevented a constitutionally adequate investigation and thus, prevented Laird from following his strategy of subjecting the State's case to meaningful adversarial process by way of a mitigation-style defense. See Appendix G and I. Further, Laird's opening response to the trial court implicitly concedes that he was not ready or prepared for trial and explicitly states cause for that condition as the direct result of the denial.

See Appendix H; also RR-III-2. This evidence clearly and

convincingly rebuts the presumption of correctness afforded the state-court determination by the district court, which relied on Lairds' 2010 state habeas testimony that he, "did not believe his performance was affected by the denial", through Lairds own statements. See above, "(A)" and "(C)"; see also, Appendix D, pg.11 and 20. As such, the state-court determination is not entitled to the 'deference' or 'presumption of correctness' normally afforded by 28 USC § 2254(e)(1). Lairds earlier sworn statements are more reflective of the truth and accuracy surrounding the denial and his lack of preparation because those statements were made closer to the time of the trial whereas Lairds 2010 testimony was made over ten years later. Likewise, although Lairds 2010 testimony does suggest that he is lying in defense to petitioners claim, now that he himself is an assistant district attorney in Jefferson County, Texas, petitioner points out and concedes that the 2010 testimony may simply reflect a mistaken memory shaped by the passage of time. After all, the state postconviction proceeding took place over ten years after trial and punishment. Nevertheless, the state-court determination and next the district courts' analysis seem to totally ignore the compelling evidence wherein Laird both explicitly and implicitly concedes and alleges that the denial adversely effected his ability to investigate, prepare for trial, and follow his original strategy of conducting a mitigation defense. Those concessions demonstrate and acknowledge the breakdown of the adversarial process during trial.

It is clear and unambiguous that Lairds motion for continuance has underlying merit. In that motion Laird sets forth his knowledge that he was aware prior to trial that petitioner

received head injuries, one of which required brain-surgery, after discovering that information from petitioners family. Laird demonstrates his knowledge that medical evidence and expert opinion concerning those injuries would constitute mitigating and possibly exculpatory evidence and demonstrates his intended trial strategy of conducting a mitigation-style defense. The facts and information contained in Appendix K, L, M, and N, all fairly presented to the state-courts by petitioner, show that petitioner did receive a TBI, namely a subdural hematoma, that petitioner did undergo a craniotomy, that those injuries occurred six months prior to the date of the offense, that petitioner has 3 metal plates in his head, and provide a fairly detailed description of the severity of the brain injury where the mid-line structure of petitioners brain was moved 1.5 cm (5/8 inch) from left to right due to the extreme compression of brain tissue. Those facts clearly evidence that Lairds' motion for continuance had underlying merit because it is well-settled by both State and Federal law that evidence of brain injuries or other mental defects constitute mitigating evidence. See Miller V. Dretke, 420 F.3d 356, Footnotes 30, 31 and 32 (5th Cir.2005)(citing Bouchillion V. Collins, 907 F.2d 589, 597 (5th Cir. 1990); Profitt V. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987; and Beavers V. Balkcom, 636 F.2d 114, 116 (5th Cir.1981)). Those facts clearly rebutt the presumption of correctness afforded the state-court determination by the district court which found that "petitioner failed to prove the underlying claim for requesting the continuance has merit." See above, "(A)" and "(C)"; see also, Appendix D, pg. 11 and 20. For this reason also the state-court determination is not entitled to the

'deference' and 'presumption of correctness' normally afforded by 28 USC § 2254 (e)(1).

In deciding to deny petitioner habeas relief, the state-court determination, as well as the district courts analysis, necessarily had to have presumed that Lairds' failure to investigate, be prepared for trial, or present mitigating evidence and expert testimony was a 'strategic choice' based on some decision by Laird to abandon his original strategy of putting on a mitigation defense; however, this reasoning is objectively unreasonable because during trial Laird still demonstrated his desire to follow that strategy when he submitted Defense Exhibit B depicting petitioner with 54 staples in his head from the craniotomy and ill-elicited testimony, during punishment, from petitioner seeking to describe for the jury petitioners post-TBI and post-craniotomy disabilities and impairments. Further, post-trial, Laird still exhibited in his motion for new trial his need to rely on a mitigation-style defense in this case. In conjunction with that presumed 'strategic choice', the state-court determination and district courts' analysis, also would have necessarily had to rely on the 'presumption of correctness' or 'reasonable trial strategy' principles so often applied to and afforded a trial attorney's omission of evidence or witness testimony. However, petitioner contends that the 'deference to' and 'presumption of correctness' of, the normally claimed 'reasonable trial strategy' or 'reasonable strategic choice' does not and cannot apply in this case because Lairds' own explicit and implicit statements, as evidenced afore, provide the Supreme Court with the sound and firm basis to conclude that Lairds' investigation was

constitutionally inadequate to support any supposed 'reasonable strategic choice'. Laird has always blamed the trial courts' denial for his failure to investigate, and Laird has never offered any true reasonable trial strategy to support the omission of the evidence but for the textbook statement or claim of 'reasonable strategic choice'. The question instantly is- was Lairds' ineffective assistance caused by the trial court, his own failure, or a combination of both? That is,-was Laird constructively ineffective, constitutionally ineffective, or a combination of both?

Along these same lines, and based on the facts, circumstances and evidence submitted by petitioner during state-court proceedings, the state-court had to determine that the mere appointment of counsel, Lairds' mere presence during trial and Lairds cross-examination of State witnesses constituted the effective 'Assistance' guaranteed by the Sixth Amendment and that Lairds' deficencies, viewed in unity, at each stage of trial which stemmed from his inadequate investigation, did not constitute a breakdown of the most rudimentary adversarial process during trial in a manner so as to create fundamental unfairness and undue prejudice.

Petitioner urges the Supreme Court to find that the state-court determination of these issues was an objectively unreasonable application of U.S. V. Cronic and Brecht V. Abrahamson OR Strickland V. Washington and Wiggins V. Smith (or both) and constituted an unreasonable determination of the facts in light of the evidence submitted during state-court proceedings. Further, petitioner urges the Supreme Court to conclude that the district courts analysis, sanctioning and upholding the state-court objectively unreasonable application of Federal law and unreasonable

determination of the facts occurred as a result of the district courts' incorrect and erroneous interpretation of the meaning of 'Assistance' of Counsel as set forth in the Sixth Amendment.

Prejudice

In anticipation that the Supreme Court might determine that the afore-shown issues are subject to harmless analysis or the prejudice prong of Strickland, supra, petitioner makes the following showing.

The medical evidence available to Laird would have caused the entire case to be cast in a substantially different light had the trial judge himself not, in effect, suppressed petitioners most crucial adversarial evidence showing that he was a physically and psychologically sick man, that he did not possess or develop the requisite culpability as described in the indictment due to his head injuries, and that he was much less morally culpable for his criminal actions. The denial ended Laird's investigation into the vital medical evidence before the investigation even began; that is, before it had a chance to produce any meaningful fruit,-said fruit being , firstly the documents Laird would have discovered at St. Marys' Hospital which, in turn, would have lead Laird to investigate further.

The petitioner, who was young, ignorant, illiterate, surrounded by hostile sentiment, hauled back and forth under guard of armed Sheriff Deputies, charged with an atrocious crime regarded with especial horror in the community where he was to be tried, and was suffering from the post-traumatic and post-concussive physical and psychological side-effects stemming from

a brain injury, craniotomy, and re-injury, was thus put in peril of spending 5-99 years or LIFE in prison after being in jail just 85 days after the denial of his trial counsels first and only request for continance seeking time to gather the mitigating evidence and expert opinion necessary to subject the States' case to meanful adversarial testing. After the denial, petitioner was caused to enter a 1-day trial, begining Oct. 23, 2001 with punishment commencing Oct. 24, and face a jury of his peers without any evidence on his side of the scale which would have allowed Laird to (A) follow his original trial strategy of presenting a mitigation defense; and, (B) subject the States' case to meaningful adversarial testing.

Lairds own words have demonstrated how the denial prevented him from investigating and pursuing his strategy of presenting a mitigation case. If the denial prevented him from pursuing that strategy then it is equally clear or demonstrated that the denial created the circumstances whereby Laird could not subject the States' case to meaningful adversarial testing, thereby causing unfairness and undue prejudice. This was further highlighted and exacerbated by the fact that Laird produced absolutely no evidence in this trial but for a single photo of petitioner with 54 staples in his head (Defendants Exhibit B) and petitioners own self-serving testimony during punishment which the State negated before the jury by implying that petitioner was an opportunistic liar.

In this case, the entire proceeding was permeated with fundamental unfairness because Laird was prevented from investigating and caused the defense to 'put-on' no defense at all.

Lairds' inability to investigate and pursue his mitigation strategy caused him to be unable to present the medical information or any expert testimony and that failure was a forfeiture of petitioners only hope or defense in presenting himself as an emotionally, physically, and psychologically sick man who was not culpable, or at least much less morally so, for his actions than was alleged by the State, the indictment, and the States' only two self-serving witnesses. See Appendix Z and AA. The jury was prevented from hearing and reviewing petitioners' most significant and compelling sources of exculpatory and mitigating evidence. Had the jury been able to appreciate the facts set forth in Appendix K, L, M, and N and hear doctors with no personal interest in the outcome of the trial explain the data contained therein, there is a reasonable probability that the outcome of the trial or punishment would have been different when the jury considered that evidence in conjunction with the fact that the offense occurred only six months after those injuries while petitioner was still in the recovery process and petitioner had never previously been charged, accused, or convicted of any violent offense or other felony. Further, there is a reasonable probability that had the jury still found petitioner guilty, it would have assessed punishment at much less than 50 years because the information provided by the medical records and the reviewing experts would have given the jury a firm basis on which to conclude that petitioner was much less morally culpable for his crime than the jury could have concluded without such evidence.

Likewise, had Laird been able to investigate and present those facts during the suppression hearing, there is a reasonable

probability that the determination of the admissibility of petitioner's statement would have been different. The trial judge, as fact-finder, would have been able to appreciate the facts contained in the medical documents, as well as information inline with the relevant expert opinions, given in Appendix R, T, U, and V, of the original brain injury, craniotomy, and re-injury in conjunction with the photographs (Appendix O) depicting the gruesome felony assault petitioner was subjected to only two days prior to custodial interrogation. Further, that evidence would have been viewed in conjunction with the fact that the interrogating officers had first hand knowledge of that felony-assault prior to interrogation as evidenced by their own testimony in Appendix X (RR-III-182-84), but falsely stated to the court that petitioner had no injuries present or noticeable during the interrogation. Such would have given the fact-finder a firm basis to conclude that the circumstances surrounding the interrogation and the waiver of petitioner's rights reeked of 'police coercion' and 'police overreach' thus allowing the waiver to be found involuntary and the statement inadmissible. Any reasonable attorney would have attempted to use that evidence because it is materially compelling and relevant to the issues presented in the suppression hearing.

It is clear, and the evidence submitted by petitioner during state-court proceedings is unambiguous, that Laird himself has made the allegation that his inability to investigate those issues caused petitioner prejudice as he explicitly stated so in his motion for new trial. See Appendix I. Those statements, along with the reasoning set forth above, and the fact that petitioner

was denied the very basic foundational purpose of a criminal trial-to have at least some favorable evidence brought, before the jury-clearly and convincingly rebuts the presumption of correctness afforded the state-court determination by the district court, which found that petitioner "failed to show how the denial of continuance had a prejudicial and injurious effect on the outcome of the jury verdict." See above "(B)" and "(C)"; also Appendix D, pg. 11 and 20. As such, the state-court determination is not entitled to the 'deference' or 'presumption of correctness' normally afforded by 28 USC § 2254(e)(1).

In coming to that conclusion, the state-court and district court would necessarily have had to determine that Laird's mere formal appointment was sufficient to satisfy the constitutional provision entitling petitioner to effective 'Assistance' of Counsel and would have had to determine that Laird's failure to produce any evidence, other than the one 4x6 inch photo, precluded any prejudice that stemmed from his failure to investigate or produce any other evidence in this case. Petitioner urges the Supreme Court to find that the state-court determination was an objectively unreasonable application of the 'prejudice prong' outlined in Strickland V. Washington and constituted an unreasonable determination of the facts in light of the evidence submitted during state-court proceedings. Further, petitioner urges the Supreme Court to conclude that the district court determination, sanctioning and upholding the state-court objectively unreasonable application of Federal law, was only possible if and when the district court incorrectly and erroneously interpreted the meaning of 'Assistance' of Counsel as set-forth in the Sixth

Amendment.

### Counsels Failure To Investigate

It is the petitioners' stance that if the Court cannot find that the denial of the continuance cause Laird to be 'constructively ineffective' or caused fundamental unfairness resulting in undue prejudice, the Court can find that Lairds' failure to investigate, in this circumstance, resulted in 'constitutional ineffectiveness.'

The Supreme Court found in Wiggins that the guarantee of effective assistance of counsel entails actual 'Assistance' and not mere appointment. Further, applying the principles outlined in Wiggins to the instant case, Laird could not make a decision considered to be sound or reasonable trial strategy, such as a decision to omit mitigating evidence and expert testimony, without first performing a constitutionally adequate investigation into the facts surrounding petitioners brain injury and brain-surgery.

The question presents itself here,-was Lairds' failure to investigate an unavoidable outcome of the denial or was it a decision, albeit a poor one, consciously or strategically made by Laird himself?

The performance inquiry here must be whether Lairds' assistance was reasonable considering all the circumstances; however, based on the facts of this particular case, the petitioner contends that the circumstances overwhelmingly lead to a conclusion that no reasonable attorney would have chosen to forego or abandon an investigation into their clients medical and psychological

condition(s) after discovering from their clients family members that the defendant was the victim of a traumatic brain injury, requiring a life-saving crariotomy, only six months prior to the offense.

The mitigating evidence Laird failed to discover and present in this case is powerful and petitioner has the kind of medical and psychological history the Supreme Court has decided relevant to assessing a defendant's moral culpability. Compare to Wiggins, 539 U.S. at 534-35 (citing Penry V. Lynaugh, 492 U.S. 302, 319 (1989)).

Throughout collateral proceedings, Lairds only reason for not investigating was based on the denial of his motion; however, Lairds' motion for new trial also set forth he was ready for trial on two other cases. Perhaps Lairds failure to investigate also resulted from inattention, not reasoned strategic judgement, where Laird was focussed on the other two cases in which he WAS prepared for trial. Laird has never produced any evidence or made any such claim to suggest that a mitigation-style case, as was his obvious strategy (See Appendix G and I), in its own right, would have been counterproductive or that further investigation would have been fruitless. This case is therefore materially indistinguishable from Wiggins as well as Miller V. Dretke except for the fact that here, Laird has always blamed the 'denial' for his failure to investigate.

The only implications an objectively reasonable fact-finder could come to based on Appendix G, H, and I, is that, prior to trial, Laird never actually abandoned the possibility and original strategy that he would present a mitigation defense. Until the

court denied Lairds motion, then, he had every reason to develop the most powerful mitigation case possible. When viewed in this light, the strategic decesion' the state-court and Federal district court invoke to justify, Lairds lack of pursuit of mitigating evidence resembles more a post hoc rationalization of Lairds conduct than an accurate description of his trial strategy prior to the denial. Petitioner contends that rationalization is an unreasonable determination in light of the facts presented during state-court proceedings as well as an objectively unreasonable application of the Wiggins and Strickland principles. Also it is petitioners' stance that the district court would have had to inaccurately interpret the meaning of 'Assistance' of Counsel as set forth by the Sixth Amendment, in order to determine that the state-court decision should be afforded the deference outlined in 28 USC § 2254 (e)(1).

In rejecting petitioners claim, it appears the courts have assumed that because Laird had some information from petitioners family with respect to the brain injuries, Laird was in a position to make a tactical choice not to present a mitigation case as originally intended. Compare Wiggins, 539 U.S. at 526-27. However, when the district court upheld that state-court determination, it could do so only by incorrectly interpreting the meaning of 'Assistance' because, in "assessing the reasonableness of [Lairds] investigation," the reviewing court must consider "not only the quantum of evidence already known to [Laird], but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527. "[A] reviewing court must consider the reasonableness of the investigation said to support

that strategy." Wiggins, Id. (citing Strickland, 466 U.S. at 691). That state-court determination was, therefore, also an objectively unreasonable application of Federal law, which was sustained by the district courts incorrect interpretation of 'Assistance'.

Here, as in Wiggins and Strickland, the state-court attempted to justify Lairds limited investigation as reflecting a tactical judgement not to produce evidence of petitioners' brain injuries and to pursue some other, non-disclosed and unclaimed, strategy instead. The state-court merely assumed that Lairds' investigation was adequate; however, in actuality, and in light of what Lairds investigation would have revealed, the failure to investigate prevented a fully informed decision from being realised. The state-court never analyzed the adequacy of Lairds investigation and its' determination was thus, contrary to the Wiggins principle. As a result, the state-court and district court deference to a supposed or presumed 'strategic decision' not to present every conceivable mitigation defense, was an objectively unreasonable application of Wiggins. Compare to Wiggins, 539 U.S. at 528. Further, the state-court failed to make any finding that Lairds' investigation extended beyond petitioners family's notification of his brain injuries. The record, as a whole, does not reflect that Laird conducted any more thorough investigation than that described in his own motions.

Again, the only way the district court could properly defer to the objectively unreasonable determinations and applications of federal law made by the state-court was when the district court erroneously found that Lairds presumed strategic choice to abandon the mitigation strategy based on facts he failed to

discover as a result of a constitutionally adequate investigation, met or satisfied the meaning and standard of 'Assistance' as outlined in the Sixth Amendment. Petitioner asserts that was an incorrect and erroneous interpretation.

Petitioner urges that if the Court here finds that counsel was 'constitutionally deficient', requesting petitioner to show prejudice, that the afore stated prejudice applies the same instantly. In other words, had the jury been able to place petitioners braininjury, craniotomy, and the common adverse side-effects thereof, on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Further, petitioner does not have a record of violent conduct or felony convictions that could have been introduced by the State to affect the powerful mitigating medical and psychological narrative. Petitioner asks, the Court to find, as in the Wiggins case, that the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of petitioners' moral culpability. Compare to Wiggins, 539 U.S. at 538.

#### Final Argument

The district courts' deference to the state-court decisions and determination that petitioner should be denied Federal habeas relief was error and the incorrect manner in which the district court interpreted the meaning of the Sixth Amendment right to 'Assistance' has been interpreted and applied by the Supreme Court, so as to leave the government and U.S. legal-process subject to public ridicule. Further, if this excessive variation and incorrect interpretation were allowed to remain, such would actually

be a step backwards from the now traditional and historic principles set forth in such cases as Cronic, Brecht, Strickland, and Wiggins.

Along those same lines of reasoning, petitioner believes that the U.S. Court of Appeals for the Fifth Circuit erred when it failed to issue a COA on those issues because it is clear that these claims are of constitutional magnitude and that reasonable jurists could debate the correctness of the district courts determination and find that the issues could have, and should have, been resolved in a different manner. As such, the Fifth Circuit itself has substantially migrated from its own traditional and historic application of Federal law by effectively upholding and sanctioning the district courts' incorrect interpretation of the 'Assistance' guaranteed by the Sixth Amendment.

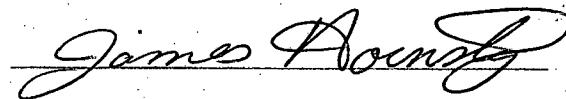
For these reasons, petitioner requests the Court to grant certiorari on those issues because they present exceptional circumstances that warrant the excercise of the Supreme Courts' discretionary powers and adequate relief cannot be obtained in any other form from any other court.

Finally, petitioner requests the Court to review and answer the dispositive questions to these issues, found at Appendix CC, because petitioner believes that the Courts' answer to those questions will affirmatively demonstrate that the district courts' interpretation of 'Assistance', as guaranteed by the Sixth Amendment was clearly incorrect. See Appendix CC.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James R. Dooly". The signature is fluid and cursive, with "James" and "R." on the first line and "Dooly" on the second line.

Date: April 6 2020