No. _____

(DEATH-PENALTY CASE)

IN THE SUPREME COURT OF THE UNITED STATES

FARYION EDWARD WARDRIP
Petitioner

vs.

BOBBY LUMPKIN, 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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Though Faryion Wardrip's trial counsel failed to present critical evidence supporting his strategy to spare Wardrip from the death penalty, the Texas Court of Criminal Appeals concluded that counsel's performance was not deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The court reasoned that counsel made a strategic decision to point instead to the State's evidence.

   Granting habeas relief, the United States District Court for the Northern District of Texas concluded that the Court of Criminal Appeals's decision was based on unreasonable factual determinations. *See* 28 U.S.C. § 2254(d)(2). Indeed, counsel had made clear that the State's introduction of the evidence was a happy surprise. Over a dissenting opinion, a panel of the United States Court of Appeals for the Fifth Circuit nonetheless reversed the district court's judgment. Were the dissenting judge and district court right?

2. Were the dissenting judge and district court also right that, if counsel presented the critical evidence, it's reasonably likely at least one juror would have voted against imposing the death penalty, and the Court of Criminal Appeals's conclusion otherwise unreasonably applied *Strickland*?

3. After reversing the district court's judgment, the Fifth Circuit remanded the case for consideration of one but not all of Wardrip's still-unresolved challenges. Under *Corcoran v. Levenhagen*, 558 U.S. 1 (2009), is Wardrip entitled to consideration of every unresolved challenge to his death sentence?

LIST OF PARTIES

Petitioner Faryion Wardrip is a prisoner under sentence of death in the custody of Respondent, the Director of the Texas Department of Criminal Justice's Correctional Institutions Division. There are no corporate parties involved in this case.

STATEMENT OF RELATED PROCEEDINGS

In the 30th District Court in Wichita County, Texas:

State v. Wardrip, No. 35,606-A

In the Texas Court of Criminal Appeals:

Wardrip v. State, 56 S.W.3d 588 (Tex. Crim. App. 2001) (direct appeal)

Ex parte Wardrip, WR-49,657-01 (Tex. Crim. App. 2001) (first state habeas application)

Ex parte Wardrip, WR-49,657-02, 2014 WL 12713360 (Tex. Crim. App. Dec. 10, 2014) (second state habeas application)

In the United States District Court for the Northern District of Texas:

Wardrip v. Thaler, 705 F. Supp. 2d 593 (N.D. Tex. 2010) (federal habeas)

Wardrip v. Davis, 7:01-CV-247-G, 2018 WL 1536279 (N.D. Tex. Mar. 29, 2018) (federal habeas on remand)

In the United States Court of Appeals for the Fifth Circuit:

Wardrip v. Thaler, 428 Fed. Appx. 352 (5th Cir. 2011) (federal habeas appeal)

Wardrip v. Lumpkin, 838 Fed. Appx. 99 (5th Cir. 2021) (federal habeas appeal after remand)

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Petitioner Faryion Edward Wardrip 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 Fifth Circuit's opinion on rehearing is attached as Appendix 1 and can be found at 838 Fed. Appx. 99. The Fifth Circuit's original majority and dissenting opinions are attached as Appendix 2 and can be found at 976 F.3d 467. The district court's order granting habeas relief is attached as Appendix 3 and can be found at 2018 WL 1536279.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's February 26, 2021, judgment on rehearing. This petition is timely in light of this Court's March 19, 2020, order in response to the COVID-19 pandemic extending the deadline to file a petition for a writ of certiorari to 150 days.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

3. 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

4. Article 37.0711 § 3 of the Texas Code of Criminal Procedure provides that a person may not be sentenced to death unless a jury unanimously finds there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. art. 37.0711 § 3.

INTRODUCTION

At Faryion Wardrip's capital murder trial, his fate came down to one question: Would he pose a threat if sentenced to life in prison? If the jury unanimously answered yes, Texas would execute him. *See* Tex. Code Crim. Proc. art. 37.0711 § 3. If just one juror answered no, Texas would not. *Id.* Despite this, Wardrip's attorney failed to investigate and present evidence that, over a nearly twelve-year prison

stint Wardrip had just been paroled from, he was a model prisoner. And the Texas Court of Criminal Appeals nonetheless concluded that Wardrip was not denied his Sixth Amendment right to effective assistance.

In March of 2018, the United States District Court for the Northern District of Texas granted habeas relief, concluding that the Court of Criminal Appeals's decision was based on unreasonable factual determinations, and Wardrip's attorney had been ineffective. *See Wardrip v. Davis*, 7:01-CV-247-G-BF, 2017 WL 8677939, at *10 (N.D. Tex. Nov. 29, 2017), *report and recommendation adopted as modified,* 7:01-CV-247-G, 2018 WL 1536279 (N.D. Tex. Mar. 29, 2018); 28 U.S.C. § 2254(d)(2). Over a dissenting opinion, a panel of the Fifth Circuit then reversed. *Wardrip v. Lumpkin*, 976 F.3d 467 (5th Cir. 2020). The court's majority opinion held that the Court of Criminal Appeals's decision was not based on unreasonable factual determinations. *Id.* at 477. And in one sentence, the majority opinion announced that, regardless, Wardrip had not shown *Strickland* prejudice. *Id.* On rehearing, the Fifth Circuit then remanded the case to the district court to consider one but not all of Wardrip's alternative arguments for relief. *Wardrip v. Lumpkin*, 838 Fed. Appx. 99 (5th Cir. 2021).

In all three respects, the Fifth Circuit erred. First, the Court of Criminal Appeals's basis for concluding that counsel did not perform deficiently was directly contrary to an admission in Wardrip's trial counsel's affidavit filed in state court—in other words, the Court of Criminal Appeals's decision was based on an unreasonable factual determination. *See* ROA.6998. Second, evidence of Wardrip's prison

record reasonably likely would have swayed at least one juror. After all, the jurors sent a note during their deliberations making clear that they were torn about Wardrip's future dangerousness. ROA.3727. Third, Wardrip is entitled to consideration of every unresolved challenge to his death sentence, not just one. *See Corcoran v. Levenhagen*, 558 U.S. 1 (2009).

But the Fifth Circuit did not just err. In endorsing the Court of Criminal Appeals's decision ignoring counsel's admission and the jury's note, the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* U.S. Sup. Ct. R. 10 (a); *Kalamazoo County Rd. Comm'n v. Deleon*, 574 U.S. 1104 (2015) (Alito, J., dissenting from denial of certiorari) (explaining that certiorari is appropriate under Supreme Court Rule 10(a) where a United States Court of Appeals's decision is "obvious[ly] erro[neous]" and "clearly wrong"). And in remanding the case to the district court to consider only one of Wardrip's unresolved challenges to his death sentence, the Fifth Circuit decided an important federal question in a way that conflicts with this Court's decision in *Corcoran*. *See* U.S. Sup. Ct. R. 10 (c). This Court should grant the writ of certiorari.

STATEMENT

1. Wardrip pleaded guilty to capital murder, leaving only the question of whether the jury would sentence him to death.

Over a sixteen-month period in the mid-1980s, Wardrip murdered five women in north Texas. *Wardrip v. State*, 56 S.W.3d 588, 591-94 (Tex. Crim. App.

2001). Wardrip was hopelessly addicted to drugs at the time and, it goes without saying, prone to horrible, homicidal outbursts. ROA.2083, 2087, 2091, 2095-96.

One of the victims was Wardrip's friend, Tina Kimbrew. *Wardrip*, 56 S.W.3d at 594. After Wardrip murdered her, he drove to Galveston, Texas, planning to kill himself. *Id.* at n. 6. He instead called the police and confessed to Kimbrew's murder. *Id.* A Wichita County grand jury soon returned an indictment charging him with the crime, and Wardrip pleaded guilty and was sentenced to thirty-five years' imprisonment. *Id.*

Freed from drugs, Wardrip transformed. He committed just two minor infractions over the course of his sentence, and the parole board granted his release less than a dozen years after he arrived. *See Wardrip v. Lumpkin*, 976 F.3d 467, 470 (5th Cir. 2020); *Wardrip*, 56 S.W.3d at 594. Wardrip then became a model citizen of Olney, Texas, joining a church, marrying a fellow congregant, and working an honest job. *Wardrip v. Thaler*, 705 F. Supp. 2d 593, 615 (N.D. Tex. 2010). All the while, of course, law enforcement continued to investigate Wardrip's other victims' killings. And after DNA evidence implicated Wardrip, a Wichita County grand jury returned an indictment charging him with capital murder. *Id.* at 608.

The trial court appointed a public defender, John Curry, to represent Wardrip. *Wardrip*, 976 F.3d at 470. Curry had never handled a capital case on his own, *see id.* at 479 (Higginbotham, J., dissenting), and from the start, it was clear he was overwhelmed. Curry offered no pushback after Wardrip announced on the eve of trial that he would again plead guilty. But Curry settled on a strategy of persuading

at least one juror that Wardrip would not be a danger if sentenced to life in prison. ROA.1643-45; *see* Tex. Code Crim. Proc. art. 37.0711 § 3 (b).

In *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court observed that "deciding the key issue of [future] dangerousness involve[s] an unusual inquiry." *Id.* at 776. Jurors are "not asked to determine a historical fact concerning [the defendant's] conduct, but to render a predictive judgment inevitably entailing a degree of speculation." *Id.* But that was not the case here. Wardrip had just been released from prison; the jury did not have to speculate about how he'd behave once sent back. Yet Curry never obtained Wardrip's prison records or meaningfully investigated Wardrip's time incarcerated. *See Wardrip*, 976 F.3d at 480 (Higginbotham, J., dissenting) ("Curry, however, made no mention of attempts to locate records or witnesses who might speak to Wardrip's time in prison."). And at Wardrip's punishment hearing, Curry called only two witnesses. ROA.1645. Wardrip's parole officer testified that Wardrip was a model parolee. ROA.1645. And Wardrip's employer testified that Wardrip was a solid, reliable worker. ROA.1518-19. Curry presented no evidence of Wardrip's commendable behavior in prison, and Curry failed to call a wealth of witnesses who were willing and able to testify that Wardrip was not the man who had committed those heinous crimes so many years earlier. Tellingly, after Curry finished his brief closing argument—in which he never mentioned Wardrip's boss's testimony, the State's burden of proof, or mitigation in any form—Curry sat down and passed a note to Wardrip: "I'm sorry I failed you." ROA.1526.

Despite Curry's failure, the jury showed a willingness to spare Wardrip from the death penalty. An hour and a half into its deliberations, the jury sent a note to the trial court asking whether, in determining whether Wardrip would be a future danger, a "threat to society" meant in prison or to the public. ROA.6507; *see Wardrip*, 705 F. Supp. 2d at 611. The court responded that there was no specific definition for the terms referenced. ROA.6507. After recessing for lunch, the jury then returned its verdict imposing the death penalty. ROA.6509.

2. The Texas Court of Criminal Appeals overruled Wardrip's direct appeal and denied habeas relief.

On direct appeal, the Court of Criminal Appeals overruled Wardrip's two points of error challenging the sufficiency of the punishment-phase evidence and affirmed Wardrip's death sentence. *Wardrip*, 56 S.W.3d at 589-90. Before the court even announced its decision, however, Wardrip was forced under Texas law to file his state habeas application. *See* Tex. Code Crim. Proc. art. 11.071 § 4. Wardrip raised six grounds of ineffective assistance of trial counsel, among them that Curry provided ineffective assistance in failing to present evidence of his prior prison record. ROA.6954.

The application never stood a chance. There was the time crunch, and there was the trial court's denial of Wardrip's motion for funds with which to hire an investigator. ROA.7031-34. But the trial court also "deprived Wardrip of any opportunity to compel evidence from trial counsel, specifically including whether counsel made a strategic decision to not investigate or present evidence of Wardrip's good prison record." *Wardrip v. Davis*, 7:01-CV-247-G-BF, 2017 WL 8677939, at *6 (N.D.

Tex. Nov. 29, 2017). "Wardrip 'had no meaningful opportunity to challenge *Strickland*'s presumption that trial counsel acted reasonably.'" *Id.* at *7 (quoting *Lambert v. Warden Greene SCI*, 861 F.3d 459, 472 (3d Cir. 2017)). And Wardrip was prevented "from any opportunity to develop essential evidence in support of this claim in the state court, evidence that might not otherwise be obtainable." *Id.* at *10.

Unsurprisingly, then, the Court of Criminal Appeals denied relief, adopting the trial court's findings and conclusions that Curry "made a tactical decision to rely on the State's evidence to show [Wardrip's] prison record." ROA.7078; *see Ex parte Wardrip*, No. 49,657-01 (Tex. Crim. App. November 14, 2001). The court further adopted the trial court's conclusions that, in any event, Wardrip failed to show that Curry's failure was prejudicial under *Strickland*. ROA. 7098-99.

3. Twice the United States District Court for the Northern District of Texas granted habeas relief, and twice the Fifth Circuit reversed.

Represented by his current counsel, Wardrip filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas, again raising a claim that trial counsel was ineffective in failing to introduce evidence of Wardrip's prison record. ROA.45. The district court granted Wardrip's request for an evidentiary hearing, and Curry testified and admitted that he did not attempt to contact any witnesses from the prison system who might be able to testify about Wardrip's time there. *Wardrip*, 705 F. Supp. 2d at 609. But Curry could not remember why he did not contact the witnesses; he did not recall making a conscious decision on the matter. *Id.*

Wardrip submitted additional evidence supporting his claim:

- records from the TDCJ reflecting that Petitioner attended classes while previously in prison, including art, special education, horticulture, and construction classes;
- records indicating that he took and passed the GED exam;
- evidence that he wrote sports-related articles as a unit reporter for the monthly prison newsletter; and
- an affidavit from an investigator, F. David Moore, who spoke with Sergeant Gary Faulkenberg of the Texas Department of Criminal Justice, who remembered Wardrip and recalled that he participated in a fundraiser for a young man in the neighboring community with emergency medical needs.

Wardrip, 705 F. Supp. 2d at 610. Wardrip also stipulated that in the Wichita County District Attorney's files, which were open to Curry, there were notes of an interview the State conducted with a man named Stephen Wood, who was in prison with Wardrip before he was paroled. *Id.* The notes state that Wood described Wardrip as a "con man" and a "freak" with an anger problem who had the guards and counselors fooled. *Id.* at 610-11.

The district court concluded that Wardrip was entitled to relief. *Id*. at 611. Counsel's performance was deficient and prejudicial, the court determined, and in concluding otherwise, the Court of Criminal Appeals unreasonably applied this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). *Wardrip*, 705 F. Supp. 2d at 611-13. Wardrip had thus made *Strickland*'s required showings

and overcome the Antiterrorism and Effective Death Penalty Act's relitigation bar. *Id.*; *see* 28 U.S.C. § 2254(d)(1).

Respondent appealed. Before the Fifth Circuit acted, however, this Court held in *Cullen v. Pinholster*, 563 U.S. 170 (2011), that federal habeas review under Section 2254(d)(1) is limited to the record that was before the state court that originally adjudicated the claim on the merits. *Id.* at 181. Because the district court here held an evidentiary hearing and admitted new evidence, the Fifth Circuit thus remanded Wardrip's case to the district court for reconsideration. *Wardrip v. Thaler*, 428 Fed. Appx. 352 (2011).

Before the district court could do so, this Court announced its opinions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). In *Martinez*, this Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial [brought by a state prisoner] if, in the [state's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17. And in *Trevino*, this Court held that its holding in *Martinez* applied to Texas prisoners. 569 U.S. at 417. Accordingly, the district court stayed the proceedings so that Wardrip could raise his prison-record ineffective-assistance ground in state court once again, this time supported by the evidence adduced in the federal district court. *Wardrip*, 976 F.3d at 472-73.

As expected, the Court of Criminal Appeals concluded that the successive habeas application was procedurally barred. *Ex parte Wardrip*, No. WR-49,657-02

(Tex. Crim. App. December 10, 2014) (citing Tex. Code Crim. Proc. art. 11.071 § 5 (a), (c)). Back in the federal district court, Wardrip thus urged that *Pinholster* aside, *Trevino* allowed for de novo consideration of the ground and all the supporting evidence introduced for the first time in federal court. ROA.2594.

The district court again found and concluded that Wardrip was entitled to relief. *Wardrip v. Davis*, 7:01-CV-247-G, 2018 WL 1536279 (N.D. Tex. Mar. 29, 2018). But not under *Trevino*. Rather, the court concluded that on the state habeas record alone, the Court of Criminal Appeals's denial of the prison-record ineffective-assistance ground was based on unreasonable determinations of the facts in light of the evidence presented in the state habeas proceeding. *Id.* at *2; *see* 28 U.S.C. § 2254(d)(2). The court thus concluded that it could consider the ground de novo, complete with the evidence introduced for the first time in federal court. *Id.*

Respondent again appealed to the Fifth Circuit, and the court again reversed the district court's judgment. Over a dissenting opinion by Judge Higginbotham, a panel of the court concluded that on the state habeas record alone, Wardrip had not overcome AEDPA's relitigation bar under 28 U.S.C. § 2254(d)(2). *Wardrip*, 976 F.3d at 477. The court further concluded over Judge Higginbotham's dissent that "it was reasonable for the [Court of Criminal Appeals] to conclude that whatever else Curry might have done, the failure to take those steps had not prejudiced Wardrip." *Id.* The court rendered judgment denying habeas relief. *Id.* at 478.

4. On rehearing, the Fifth Circuit remanded the case to the district court to consider just one of Wardrip's unresolved challenges to his sentence.

Wardrip petitioned the court for rehearing, explaining that if it was going to reverse the district court's judgment, it should remand the case to the district court to consider his alternative argument that he was entitled to relief under 28 U.S.C. § 2254(d)(1). On February 26, 2021, the Fifth Circuit granted Wardrip's petition, noting that indeed he was "entitled to consideration by the district court of 'unresolved challenges to his death sentence,' or, instead, explanation by this court as to 'why such consideration [is] unnecessary.'" *Wardrip v. Lumpkin*, 838 Fed. Appx. 99, 100 (5th Cir. 2021) (quoting *Corcoran v. Levenhagen*, 558 U.S. 1, 2 (2009)).

In remanding the case to the district court, however, the Fifth Circuit did so with the instruction to consider only "whether Section 2254(d)(1) supports habeas relief." *Id*. This was somewhat understandable—again, that was the unresolved challenge identified in Wardrip's petition for rehearing—but it is not the only unresolved challenge to Wardrip's death sentence. Again, Wardrip also argued in the district court that he was entitled to relief under *Trevino*, 569 U.S. 413. Wardrip thus moved the Fifth Circuit to recall its mandate. On July 1, 2021, the Fifth Circuit declined to do so.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's dissenting judge and the district court were right: The Texas Court of Criminal Appeals's conclusion that Wardrip's trial counsel's performance was not deficient was based on unreasonable factual determinations.

The first reason to grant the writ is simple. In reversing the district court's grant of habeas relief on Wardrip's prison-record ineffective-assistance ground, the Fifth Circuit held that "it was not an 'unreasonable determination of the facts'" for

the Texas Court of Criminal Appeals to find that Wardrip's trial counsel, John Curry, "had conducted a reasonable investigation that made him aware of Wardrip's good conduct while in prison, and based on that investigation that Curry made a reasonable strategic decision regarding what evidence to present." *Wardrip v. Lumpkin*, 976 F.3d 467, 477 (5th Cir. 2020). The Fifth Circuit saw no problem with the Court of Criminal Appeals's finding that Curry made a "tactical decision to rely on the State's evidence" to support his defense. ROA.7078; *see Wardrip*, 976 F.3d at 476.

But Curry did not make a tactical decision to rely on the State's evidence to support his defense. Just look to his affidavit submitted in the state habeas proceeding, in which he described himself as "fortunate" that the State introduced Wardrip's prison disciplinary record. ROA.6998. As the district court and the Fifth Circuit's dissenting judge recognized, Curry's affidavit therefore "suggests that this document being in front of the jury was the result of a favorable accident rather than an intentional decision by trial counsel." *Wardrip*, 976 F.3d at 480 n. 3 (Higginbotham, J., dissenting) (quoting *Wardrip v. Davis*, 7:01-CV-247-G-BF, 2017 WL 8677939, at *8 (N.D. Tex. Nov. 29, 2017)). What's more, though Curry's entire strategy relied on Wardrip's prison record of nonviolence, he said nothing about attempting to locate records or witnesses who might speak to Wardrip's time in prison. ROA.6989-99. The Court of Criminal Appeals's decision thus was based on at least two unreasonable factual determinations: that Curry made a tactical decision to rely on the State's evidence, and that Curry reasonably investigated Wardrip's

behavior in prison. *See* 28 U.S.C. § 2254(d)(2). And they were such flagrantly unreasonable factual determinations that, in sanctioning them, the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* U.S. Sup. Ct. R. 10 (a); *Kalamazoo*, 574 U.S. 1104 (Alito, J., dissenting from denial of certiorari) (explaining that certiorari is appropriate under Supreme Court Rule 10(a) where a United States Court of Appeals's decision is "obvious[ly] erro[neous]" and "clearly wrong").

This Court's exercise of its supervisory power would not be for nothing. Wardrip did not just overcome AEDPA's relitigation bar; counsel's failure to investigate and present evidence of Wardrip's prison record plainly was deficient under *Strickland*. As Judge Higginbotham observed, counsel had a single strategy to save Wardrip from death: persuading at least one juror that Wardrip was not a continuing threat as he "could conform his conduct to the rules and regulations of prison and not be a threat to other inmates or the staff." *Wardrip*, 976 F.3d at 479 (Higginbotham, J., dissenting) (quoting ROA.6998). And "once counsel has narrowed his trial strategy to one specific point, he is obligated to thoroughly investigate that point." *Id.* at 480 (Higginbotham, J., dissenting). "If a defendant's best hope to avoid the death penalty rests on his prison record of nonviolence," Judge Higginbotham explained, "counsel is duty bound to develop and present any evidence in support of that defense." *Id*. Yet Curry "relied on a single piece of evidence: that Wardrip 'had only two minor disciplinary reports' over the course of nearly twelve years in prison." *Id*. Because Curry "made no mention of attempts to locate records or

witnesses who might speak to Wardrip's time in prison"—again, "he was 'fortunate' that the State introduced the disciplinary record itself"—his performance was constitutionally deficient. *Id.* This Court should grant the writ of certiorari.

2. The Fifth Circuit's dissenting judge and the district court also were right that the Court of Criminal Appeals's conclusion that trial counsel's failure was not prejudicial was an unreasonable application of clearly established federal law as determined by this Court.

The Fifth Circuit's majority opinion devoted just one sentence to its *Strickland* prejudice analysis: "Moreover, it was reasonable for the state court to conclude that whatever else Curry might have done, the failure to take those steps had not prejudiced Wardrip." *Wardrip*, 976 F.3d at 477. Again, the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* U.S. Sup. Ct. R. 10 (a).

To satisfy *Strickland*'s prejudice requirement, Wardrip had to show the Court of Criminal Appeals only that there is a reasonable probability that at least one juror would have held out for life imprisonment had the jury learned more about his prison record. Tex. Code Crim. Proc. art. 37.0711 § 3; *see Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (explaining that because Texas's death penalty statute "require[s] a unanimous jury recommendation," a showing of prejudice "requires only a reasonable probability that at least one juror would have struck a different balance...."). But adopting the trial court's findings of fact and conclusions of law, the Court of Criminal Appeals concluded that any evidence of Wardrip's prison record would have been meaningless in light of his crimes. ROA.7099. In *Buck*, however, this Court was confronted with another Texas petitioner who committed horrific crimes

but alleged that his attorney provided ineffective assistance at the sentencing phase of his capital trial. This Court noted that, of course, "a jury may conclude that a crime's vicious nature," alone, "calls for a sentence of death." *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (citing *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam)). But this Court observed that the petitioner's "violent acts had occurred outside of prison, and within the context of romantic relationships with women." *Id.* "If the jury did not impose a death sentence, [the petitioner] would be sentenced to life in prison," this Court reasoned, "and no such romantic relationship would be likely to arise." *Id.* This Court concluded that a jury therefore could have found "that those changes would minimize the prospect of future dangerousness." *Id.*

Here, like in *Buck*, it's reasonably likely that at least one juror would have found that Wardrip would not be a threat in prison despite his crimes. An hour and a half into its deliberations, the jury sent a note to the trial court asking the court to define whether "a threat to society" meant in public or prison. *Wardrip v. Thaler*, 705 F. Supp. 2d 593, 611 (N.D. Tex. 2010). The court responded that there was no specific definition for the terms. *Id.* As Judge Higginbotham recognized in his dissenting opinion, the jury's note thus "makes plain that conduct-inside versus conduct-outside was the fulcrum of the jury's decision." *Wardrip*, 976 F.3d at 481 (Higginbotham, J., dissenting). "Certainly, the note discloses that the jury, 'consistent with the focus of the parties,' was concentrated on the 'key issue of [Wardrip's] dangerousness.'" *Id.* (quoting *Buck*, 137 S. Ct. at 776). "And this distinction—that Wardrip, though a threat to the general public, had a history of compliance in a

structured prison environment such that those around him would be protected by a life sentence—was central." *Id.* In nonetheless concluding that Wardrip's criminal record, alone, made a death sentence a sure thing, the Court of Criminal Appeals therefore unreasonably applied *Strickland*'s prejudice prong. This Court should grant the writ of certiorari.

3. Wardrip is entitled to consideration of every unresolved challenge to his death sentence, not just one.

In remanding the case to the district court, the Fifth Circuit cited this Court's opinion in *Corcoran v. Levenhagen*, 558 U.S. 1 (2009), for the proposition that Wardrip "is entitled to consideration by the district court of 'unresolved challenges to his death sentence,' or, instead, explanation by this court as to 'why such consideration [is] unnecessary.'" *Wardrip v. Lumpkin*, 838 Fed. Appx. 99, 100 (5th Cir. 2021) (quoting *Corcoran*, 558 U.S. at 2). But though the district court never addressed Wardrip's arguments under 28 U.S.C. § 2254(d)(1) or *Trevino v. Thaler*, 569 U.S. 413 (2013), the latter of which would take him out of Section 2254(d)'s orbit altogether, *see Murphy v. Davis*, 732 Fed. Appx. 249, 260 (5th Cir. 2018), the Fifth Circuit remanded the case with an instruction to consider only "whether Section 2254(d)(1) supports habeas relief." *Wardrip*, 838 Fed. Appx. at 100.

In *Corcoran*, like here, the federal district court granted habeas relief to a death-sentenced state prisoner on one of his grounds without addressing his others. 558 U.S. at 2. And in *Corcoran*, like here, the court of appeals reversed and rendered judgment. *Id.* This Court vacated the Seventh Circuit's judgment. *Id.* at 3. The court "should have permitted the District Court to consider Corcoran's

unresolved challenges to his death sentence on remand," this Court explained, "or should have itself explained why such consideration was unnecessary." *Id.* at 2.

Even if this Court does not think the Fifth Circuit's reversal of the district court's order merits the writ of certiorari, then, the Fifth Circuit's too-narrow remand order does. Per this Court's decision in *Corcoran*, the Fifth Circuit should have remanded the case to the district court to consider whether Wardrip is entitled to habeas relief on any unresolved basis argued in the district court. *Id.* In concluding otherwise, the Fifth Circuit decided an important federal question in a way that conflicts with *Corcoran*, a relevant decision of this Court. *Id.*; U.S. Sup. Ct. R. 10 (c).

CONCLUSION

This Court should grant Wardrip's petition for a writ of certiorari.

Respectfully submitted,

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