

AUG 24 2021

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No. _____

21-5555

IN THE

SUPREME COURT OF THE UNITED STATES

Ross Allen Hartwell — PETITIONER
(Your Name)

vs.
Bobby Lumpkin-Director, Texas Department of
Criminal Justice, Corr. Inst. Division — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit No. 20-50811
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)
Hartwell v. Lumpkin

PETITION FOR WRIT OF CERTIORARI

Ross Hartwell/TDCJ#1893452
(Your Name)

59 Darrington Road
(Address)

Prosharon, Texas, 77583
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- ① Does the Supreme Courts decision in *Strickland v. Washington* 466 U.S. 668 (1984) allow lower courts to permit defense attorneys to violate a defendants right to a fair and impartial jury?
- ② Does the decision in *Hartwell v. Lumpkin* No. 20-50811 (5TH Cir 2021) conflict with *Virgil v. Dretke* 446 F.3d 598 (5TH Cir 2006)?
- ③ Has a defendant been given a fair trial, as granted by the Sixth Amendment, if one of his jurors claimed, during *Voir dire* (and was left unchallenged), the inability to be fair, impartial, or consider any other evidence in the trial if presented with a particular element or evidence shown at ^{the} trial?

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

- The State of Texas v. Ross Hartwell #DIDC1390431 (Trial Record 03-13-00825CR) in the 390TH District Court, Travis County, Texas. Judgement entered December 16, 2016.
- Ross Allen Hartwell v. The State of Texas (No 13-14-00087-CR) 476 S.W. 3d 523 (Tex App 2015)
- Ex parte Ross Hartwell PD-0955-15 in the Texas Court of Criminal Appeals (P.O.R. denied?) Dec. 2015
- ~~Ex parte Ross Hartwell, WA-88, 980-01 in the Texas Court of Criminal Appeals~~
- Hartwell v. State, No. 13-17-00037-CR, 2018 WL 2440515 (Tex. App - Corpus Christi May 31, 2018)
- Ex parte Ross Hartwell, WA-88, 980-01 in the Texas Court of Criminal Appeals. Judgement - March, 2019 (11.07)
- Hartwell v. Davis (Dir. TX Dept of Cr. Justice) A-19-CV-659-LY in the United States District Court for the Western District of Texas - Austin Division. Judgement September 2nd, 2020. (2254)
- Hartwell v. Lumpkin (Dir. TX Dept of Cr. Justice) No. 20-50811, United States Court of Appeals for the Fifth Circuit. Judgement. May 28, 2021 (C.O.A.)
- Hartwell v. Lumpkin No. 20-50811 U.S. Court of Appeals for the Fifth Circuit.
Judgement July 14, 2021 (Rehearing C.O.A.)

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Irvin v. Dowd 366 U.S. 717, 722 (1961)
Miller-El v. Cockrell 537 U.S. 322 (2003)
Neder v. U.S. 119 S.Ct. 1827 (1999)
Patton v. U.S. 281 U.S. 276, 282 (1930)
Strickland v. Washington 466 U.S. 668 (1984)
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STATUTES AND RULES

Federal Rules of Procedure Rule 28 U.S.C. 2254
Texas Code of Criminal Procedure Art. 11.07
Texas Code of Criminal Proc. (T.C.C.P.) 38.03
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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 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 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 D 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 Court of Appeals of Texas, 13th Dist., Corpus Christi, Texas court appears at Appendix E to the petition and is

☒ reported at Hartwell v. State 476 S.W.2d 523; 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 May 28, 2021.

☐ 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: July 14, 2021, and a copy of the order denying rehearing appears at Appendix A.

☐ 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

U.S. Constitution - Amendment VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation... and to have the assistance of counsel for his defence.

Texas Code of Criminal Procedure (TCCP) Article 38.03 Presumption of Innocence - All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for... the offense gives no rise to no inference of guilt at his trial.

TCCP Article 38.04 The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.

TCCP Article 35.16(a)(9,10)(2) (a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the State or the defence for any one of the following reasons: (9). That the juror has a bias or prejudice in favor or against the defendant, (10)... To ascertain whether this cause (hearsay, or otherwise) of challenge exists, the juror shall be asked whether, in the juror's opinion, the conclusion so established will influence the juror's verdict. If the juror answers in the affirmative, the juror shall be discharged without further interrogation... if the juror states the juror feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence... the Court... may in its discretion admit the juror is competent... if the Court... is not satisfied that the juror is impartial, the juror shall be discharged. (c) A challenge for cause may be made by the defense for any of the following reasons: (2). That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

TCCP Article 35.22 Oath to Jury: When the jury has been selected the following Oath shall be administered them by the Court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God."

TCCP Article 36.13 Jury is Judge of Facts - Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but is bound to receive the law from the court and be governed thereby.

STATEMENT OF THE CASE

On March 27th 2013, Petitioner - Boss Hartwell was indicted for 1st degree aggravated robbery - Texas Penal Code 29.03, in Travis County, Austin, Texas. The accusatory pleading included the following: Hartwell, "did then and there, while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally, knowingly, or recklessly cause serious bodily injury to Christina Morman by operating a motor vehicle he knew did not belong to him while Christina Morman was attempting to stop him from leaving the area." Also, "Boss Hartwell did then and there use or exhibit a deadly weapon, to wit: a motor vehicle, which in the manner of its use or intentional use was capable of causing serious bodily injury or death." [The State of Texas v. Boss Hartwell DIDC13904031, in the 390th District Court, Travis County, Texas.] Hartwell chose a trial by jury. NOTE - Indictment = Appendix F

Jury Voir Dire

NOTE: Approximately 1/3 of voir dire was spent questioning the panel on the subject of partiality versus impartiality if faced with evidence of a serious bodily injury. Also, 1/2 of the trial would be spent presenting exhibits and testimony on the level of culpability, if any, for the serious bodily injury and use of a deadly weapon elements.

Because of the serious bodily injury and use of deadly weapon elements, Hartwell's trial attorney set forth her voir dire strategy with the following: "Sometimes when we look at things and we see bad things that have happened, we jump to conclusions, or we let our passions take the best of us, and that clouds our judgement. What I'm looking for in a jury is someone who can take their passions or their upsetness by things and put those aside and be able to look at the evidence, all of the evidence, before you come up with your decision as to what to do, whether or not Mr. Hartwell is guilty or not." [Trial record 03-13-00 825 CR; Preorders Record (AR) Volume 6: pages 146-7].

When the defense attorney next asked the voir dire panel if anyone would be swayed by personal feelings or passions if shown evidence of injuries, Panelist Number 2, Alberto Rodriguez replied: "I could be overwhelmed by my emotions...

I think it can cloud it and prevent me from being objective in terms of what is being presented to me." The attorney then asked if being shown pictures or blood would keep him from being fair and impartial; Rodriguez replied "yes." The attorney asked for further clarification; Rodriguez stated, "graphic images or verbal, I can easily get overwhelmed by things like that, so then it prevents me from being objective in terms of what they are trying to present to me and so it can cloud my judgement." The attorney then asked if he would be unable to be fair and open-minded about other evidence if presented with graphic photos or verbal testimony of injuries, Rodriguez replied, "yes," indicating he would not be fair and impartial in this type of trial. [PR 6: 146-49]

Additionally, when the attorney asked if other panelists agreed with Rodriguez, six (6) raised their paddles - Five (5) of the six were stricken by the attorney for cause, and one was rehabilitated. Finally, during the prosecutors voir dire, Rodriguez chose the pro-prosecution answer of "Punishment" over correction or rehabilitation as the goal of the criminal justice system. [PR 6: 105-7, 146-149, 169-175]

No attempt was made to challenge, strike, or rehabilitate Venireman Rodriguez and he found his way to the convicting and sentencing jury.

Appeal and Post-Conviction habeas issues:

Immediately after trial, Hartwell's appellate attorney filed a motion for new trial, listing - Not enough evidence to support an aggravated robbery conviction, and ineffective assistance of trial counsel, as the reasons. The Motion was DENIED, without explanation on November 5, 2013. The appellate attorney appealed Hartwell's conviction citing, among several grounds, Ineffective Assistance of Counsel for failing to challenge or strike Juror #2, Rodriguez; that as a result of the attorneys failure, Hartwell's U.S. Constitutional Sixth Amendment Right to effective assistance of counsel as well as the right to a fair and impartial jury.

was violated. The direct appeal Court denied the grand stating; "trial Counsel could have observed Rodriguez's facial expression and attitude during voir dire and determined he was an acceptable juror." [Ross Allen Hartwell v.

The State of Texas No. 13-14-00087-CR; 476 S.W. 3d 523, 533 (Tex. App. 2015).
App. E

Petitioner, Hartwell, filed the state application for petition for writ of habeas corpus (11.07), using the Supreme Court Standard (and the States adopting cases) resolving ineffective assistance of counsel (IAC) claims. [Ex parte Ross Hartwell, No. WR-88,980-01 in the Texas Court of Criminal Appeals, w/ supporting (App. D for error) memorandum of law.] [cf. IAC claims - Strickland v. Washington, 466 U.S. 668 (1984)]. For the error within the IAC claim, petitioner alleged Juror #2 Rodriguez was unfit for service because his bias against particular facts in the case would render him incapable of weighing all of the elements' evidence; that Rodriguez never agreed he could lay aside his impression and render a verdict based upon the evidence in court; that the attorney was obligated to challenge or strike said juror. Hartwell relied upon the Texas Code of Criminal Procedure, articles 38.03; 38.04; 35.16(a)9,10, (c)2; 35.22; and 36.13 as the legal groundwork for jury bias, and impartiality. He also pointed out that when bias is evident and the court nor the attorney questions them further then the juror is biased in fact. Petitioner surmised that the appellate and habeas court could not presume that with this juror, Hartwell's counsel afforded him a fair trial. Finally, with guidance from the Supreme Court, petitioner noted that he does not need to show a reasonable probability that, but for the counsel's errors, he would have been acquitted, but rather the issue is whether he received a fair trial that produced a verdict worthy of confidence. [11.07 Memorandum, Ground I; also, Sup. Ct. reference, Kyles v. Whitley, 514 U.S. 419, 434 (1995)]. More importantly, because of the immense similarities of another case resolved, and considered precedent, within the same state and federal jurisdiction, this petitioner relied heavily on its example, Virgil v. Dretke, 446 F.3d. 598 (5th Cir 2006). Virgil highlights the areas of

interest in Hartwell's complaint of IAC - failure to challenge or strike an unfit juror. Throughout the State and Federal habeas process, petitioner has trusted the authority of the Fifth Circuit's application of Strickland in its Virgil Decision.

The Texas Court of Criminal Appeals (TCCA) remanded the case to the convicting court for a fact finding mission. The State District Court sought affidavits from the parties involved. The complained of defense attorney did not remember the juror, but assured the Court she would have struck him had she believed him to be biased. The attorney also shifted the responsibility back to Hartwell because he was at the trial and signed the jury strike list. The district Court found the attorney's affidavit credible, that Hartwell did not demonstrate that the outcome of the trial would have been different if the juror had been struck, and recommended relief to be denied. The TCCA denied the 11.07 without written order. (Appendix D State District Ct Findings and Crim. Appeal Ct Order)

Again using Strickland, and Virgil as his guiding light, along with the facts surrounding the complaint, Hartwell petitioned the Federal Court, through the Western District in a 2254 writ. There, Hartwell did delve further into how the many elements of the aggravated robbery needed the attention of jurors who would not allow bias surrounding any particular element to distract from considering all of the evidence pertaining to the spoken of element or any other elements. He did show that due to the trial attorney's negligence, there was an unlawful juror on the convicting jury. [Boss Allen Hartwell v. Director, Texas Department of Criminal Justice, no. A-19-cv-695-LY].

In his findings of fact and recommendation, the U.S. Magistrate Judge, indicated that although the State failed to consider some important information as to whether or not the juror was biased, the 2254 Court need not consider if Hartwell has rebutted the State habeas Court findings. The judge recommended denial of the 2254, inferring that even if the juror was impartial, Hartwell did not show that "but for Mr. Rodriguez sitting on the jury, there is a

Substantial likelihood he would not have been found guilty of aggravated robbery."

[Appendix C Rep. and Recommendation of U.S. Magistrate Judge; NO. 1:19-cv-00659, p.11]

~~After Hartwell's written objection, the District Judge agreed with the Magistrate,~~
denying the 2254. [Appendix B].

Hartwell next filed an application for Certificate of Appealability (COA) in the U.S. Court of Appeals for the Fifth Circuit. There the Judge essentially agreed with the district Court "that Hartwell failed to make a substantial showing of prejudice — viz., that but for the juror's service, the result of the trial likely would have been different." The Court found "Jurist's of reason therefore could not debate the district Court's application of 2254 (d) to Hartwell's ineffectiveness claim," and denied the motion for a COA. [Appendix A
Boss Allen Hartwell v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, NO. 20-50811]. Hartwell requested a rehearing which was denied on 7/14/21^{Appx A.}. Hartwell has now filed this Motion for Writ of Certiorari giving the Supreme Court of the United States Jurisdiction.

REASONS FOR GRANTING THE PETITION

The Texas (11.07) and Federal District (2254) courts application of Strickland, to deny Hartwell's case on it's merits is erroneous and conflicts with a similar Fifth Circuit Case (i.e. Virgil v. Dretke, 446 F.3d 598 (5th Cir 2006), and also conflicts with Supreme Court precedent guaranteeing a fair trial by a fair jury. More importantly, the decision to deny COA sheds new light on the Strickland prejudice Standard - in a way the Supreme Court may not have intended.

The Fifth Circuit court's assertion, Hartwell did not explain how the juror effected the outcome of the trial is debatable, as is the 2254 court's like conclusion. Hartwell's quest was to show he does not have to meet the Strickland "reasonable probability/different outcome" model, but only the "Fundamental Fairness" doctrine. [cf. Strickland v. Washington, 466 U.S. 668 (1984)]. The Fifth Circuit, in this regard, has essentially adjudicated the merits through the "reasonable probability/different outcome" projection, thus denying the appeal without jurisdiction. The 2254 court requiring Hartwell to prove his criminal trial would have turned out differently without a particular juror, before determining if the juror was unfit, affords an end-around to the Sixth Amendment right to a fair jury, and as such leaves an unguarded opening for Supreme Court opinions to provide a moving goal post for future inquiries into Constitutional questions of fundamental fairness. Here, Hartwell will show how the Strickland prejudice prong has two projections and how an unbridled court can be arbitrarily unfair in their application of these projections; he will show the conflicting decisions between his and the Fifth Circuit precedent bearing case used as his post-conviction guide requesting habeas relief; he will show how the decision in his case does not reflect the Supreme Courts prior decisions in cases where unfair jurists are present; and, he will show that the State and Federal courts findings in his own case are erroneous, thus

giving evidence to exactly how an attorney and the courts can surreptitiously deprive a defendant of his Sixth Amendment right to a fair trial by a fair jury through the exploitation of existing opinions.

Two Projections of Strickland Prejudice Prong and an Unfair Application

The Supreme Court requires lower courts to square up complaints of ineffective assistance of counsel (IAC) with the two prong measuring stick calibrated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the complainant must prove specific acts or omissions, which trial counsel committed, are results of unreasonable professional judgment. *Ibid*, 690. Second, the complainant must show, "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (i.e., reasonable probability / different outcome) *Ibid* 694. This second prong is the focus, here.

At first glance, the wording of the second prong provides concrete instruction which will resolve almost all IAC claims; especially when applied to possible errors residing outside of the mechanisms the criminal justice system relies upon. The treatment of this simple and time honored standard should be examined more thoroughly; meaning, do the lower courts have licence to reckon all alleged attorney's errors to the "reasonable probability / different outcome" definition even before they decide if it was a constitutional error effecting the fairness of the proceeding? The *Strickland* decision does not seem to say so since it also orients "fundamental fairness" as being the focus of the writ of habeas corpus. *Ibid*, 696. Yet it also does not absolutely require lower courts to deviate from the "reasonable probability / different outcome" prejudice principle before deciding if the alleged attorney error is a constitutional error within itself. This proves to be the road the courts have taken in *Hartwell's* case.

In *Hartwell's* post-conviction action, he complains of a fundamental flaw perpetuating the contamination of the process he depended upon, which the

right to a fair trial grants him. But, instead of focusing on the possible flaw, the lower courts have engrossed themselves with a requirement not required under the present Supreme Court precedent, and in doing so have exposed a weakness in the Strickland decision from that same institution. The 11.07 court found Rodriguez to be a fair juror; the 2254 court then circumvented Hartwell's request to find otherwise, and did what Strickland permits, i.e., deny Hartwell because he did not show whether or not there was a "reasonable probability of a different result" with that the juror. (Appendices D, E, B)

Hartwell's main 2254 claim was that the state court erred in its 11.07 decision to find the juror fair, thus preventing Hartwell from getting past the first Strickland prong, i.e., that his attorney made an error by failing to strike or challenge the juror. Instead of responding to the claim about the juror, the 2254 court moved directly to the second prong, i.e., prejudice; denying the 2254 because "Petitioner has failed to show that, but for Mr. Rodriguez sitting on the jury, there is a substantial likelihood he would not have been found guilty of aggravated robbery." (Appendix C p.11).

This exposes a weakness in Strickland because as the Sup Ct. noted, in that case, the two prongs in Strickland do not have to be approached in any particular order. Yes, the prongs are usually seen as numbered 1 and 2, but the Court is as specific in saying "a (lower) court need not determine whether Counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the deficiencies." Strickland 466 U.S. 668, 697. In Hartwell's case, because the 11.07 court ruled otherwise, he asked the 2254 court to clear up whether or not the attorney's decision was an error at all—viz., did the unchallenged statements during voir dire, that he could not be fair in this case, obligate Hartwell's defense counsel to use a peremptory or for-cause challenge on Mr. Rodriguez? The 2254 court's decision to first move to the "reasonable probability/different outcome" prejudice, before determining

if the juror was or was not fair, impartial, and open-minded, prevents them from weighing whether or not there was an error at all. Had the 2254 Court made a finding on whether or not Hartwell had rebutted the 11.07 Court's findings, which it refused to do on account of beginning with the second prong, then they may have been forced to determine that the "fundamental fairness" prejudice projection would have been put in play. Had they determined that the juror was unfair, partial, or close-minded to begin with, then the focus would have turned to the fundamental fairness of the proceeding whose result was being questioned. The 2254 Court established that the 11.07 Court's application of Strickland was not unreasonable without deciding whether or not Hartwell had rebutted the 11.07 Court's determination that the juror was unfair.

Hartwell's application for a COA to acquire permission to appeal the decision of the 2254 Court centered around the 2254 Court's decision not to decide whether Hartwell rebutted the 11.07 Court's findings. (Appendix C p. 11). Even though the AEDPA/28 U.S.C. 2254(e)(1) rules require the ~~lower~~ Court to decide whether Hartwell rebutted the 11.07 findings, the 2254 Court excused themselves from this requirement in lieu of applying the Strickland "reasonable probability / different outcome" prejudice prong. (Appendix C p. 10, 11). The curious concern, in the 2254 Court's findings of fact, is that the U.S. Magistrate inferred that Hartwell did in fact rebut the 11.07 Court's finding on the juror (Appendix C p. 10). Nevertheless, the Fifth Circuit agreed with the 2254 Court.

The Fifth Circuit's determination that the claim is not "debatable or wrong" only applies to the fact "Hartwell does not explain how the juror's potential problems with graphic pictures could affect the jury's determination that Hartwell knew he hit Mrs. Morman." (Appendix A). Had the 2254 Court fully considered Hartwell's memorandum of law and facts, and had that Court followed, AEDPA/28 U.S.C. 2254(e)(1), guidelines for determining if Hartwell rebutted the 11.07 Court's findings, the 2254 Court would have found the 11.07 Court's determination

debatable, per Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

Conflict Between Hartwell's Case and a Similar Fifth Circuit Decision

The Fifth Circuit case Hartwell used as a guide, with respect to how that court has handled IAC claims (when the error stems from an assertion the attorney failed to challenge or strike an unfair venire person), proves that the Fifth has chosen to apply Strickland prejudice in two different ways to two similar circumstances. During the Fifth Circuit's inquiry into whether or not Frank Virgil's counsel secured him a fair jury, the process leading to Mr. Virgil's judgment and sentence overshadows the questioning of his conviction. [Virgil v. Dretke, 446 F.3d 598, 612 (5th Cir 2006)]. This principle is adopted from the Strickland wording, in that for prejudice, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland 406 U.S. @ 696. The assessment of prejudice in Virgil proceeded on "the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Virgil, at 612. The Court found it could not assume this when it is the decisionmaker who is being complained about. On the other hand, in Hartwell's case the assessment of prejudice was to question whether or not a different outcome of the proceeding would have resulted without the decisionmaker, and not whether the decisionmaker impartially applied the governing standards.

The Fifth, in Virgil's case decided to apply the "fundamental fairness" philosophy of Strickland to presume prejudice resulted from an unfair juror instead of the "reasonable probability/different outcome" doctrine (also in Strickland); which would have asked Virgil to prove how his trial would have turned out differently without the juror. Not once was Virgil asked how his trial may have turned out differently without the jurors in question, nor was he asked how the juror's possible bias would affect the determination of his guilt. In Hartwell's case, he has been asked by the state and federal courts to jump through both hoops. When Strickland prejudice is applied through the "reasonable probability/different outcome" discourse, and the error is grounded in IAC/failure to challenge or strike a bias juror, as evidenced in Hartwell's case, the prejudice test becomes an attorney's protective shield

For the sake of violating a defendant's right to a fair trial by a fair jury.

Decisions in Hartwell's Case do not Reflect Prior Supreme Court Decisions

Since 1961, the Sup. Ct has held that "The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v Dowd*, 366 U.S. 717, 722 (1961). Even before *Irvin*, the Court has recognized, "(a) constitutional jury means twelve men as though that number has been specifically named and it follows that when reduced to eleven, it ceases to be such a jury quite as effectively as the number had been reduced to zero." *Patton v. U.S.*, 281, 276, 292 (1930). Thereafter, if "one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment to an impartial panel." *U.S. v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir 1977).

Because of the copious amount of evidence which could have taken Hartwell's trial down the roads of either guilt or innocence, the State and Federal Courts have asked the impossible by indicating Hartwell's failure to show how the outcome would have differed without the juror. In the State and Federal habeas processes, Hartwell used the tried and true Fifth Circuit case explaining that deciding the facts is the jury's providence and the jury system is founded upon the notion that juries decide facts in accordance with the evidence. [Cf. *Cameron v. Hawk*, 383 F.2d 966 (5th Cir 1967)]. Employing Texas statutes, along with Supreme Court and State Court precedent, Hartwell showed that existing jurisprudence disqualifies jurors who cannot follow their oath as a juror, who cannot be passive listeners willing to remain open minded until the evidence is complete, and who will swear to rendering a true verdict according to the law and evidence. [Cf. TCCP 35.16, 35.22; *Holloway v. State of Texas* 666 S.W. 2d 104 (Tex. Cr. App 1984); *Batson v. Kentucky*, 106 S. Ct 1718 (1986); *Brown v. Texas* 124 S. Ct. 1678 (2003)]. The Supreme Court has never required a person who is tried by a partial judge to prove his innocence in a post-conviction application. The Court is clear in that the presence of a biased decisionmaker is "structural error" subject to automatic reversal, that "a criminal defendant tried by a partial judge is entitled

to have his conviction set aside no matter how strong the evidence against him." [restated from Hartwell's 11.07 and 2254, in accordance with Neder v. U.S., 119 S. Ct. 1827 (1999); Edwards v. Balisok, 117 S. Ct. 1584 (1997)].

State and Federal Courts Findings in Hartwell's Case are Erroneous

As the Fifth has indicated, Hartwell's trial "focused almost exclusively on whether or not Hartwell knew that he hit her (Christina Morman) when he reversed the Van." (Appendix A). There were many elements of which the State would need to prove in this case. (e.g., if Hartwell "knew", Morman was present, then was he intentionally, knowingly, recklessly, or negligently culpable for the obvious, serious bodily injury; or did he know at all? If he knew or did not know, was he using the vehicle in a manner prescribed under the aggravated robbery w/ deadly weapon statute? - see Certiorari table of rules.). Within all of the elements are exculpatory and mitigating language which defaults or at least lessens the burden of the charged offense. Here, a juror adamantly announced and unambiguously affirmed he would not be fair, impartial, nor consider any other evidence if exposed to one of the elements related to the charged offense. The juror insisted he would not fairly weigh any other evidence in this trial if presented with a single particular fact within the realm of the allegation. A conviction for the charged offense would then expose Hartwell to a sentence of 15 yrs to Life in prison.

Expecting an appellant to explain how a juror was not fair under these circumstances is unprecedented. Yes, it is true that Mr. Hartwell did not retry his criminal case on his habeas applications so as to prove that without Rodriguez on the jury, there would have been a different result. The U.S. Constitution's Sixth Amendment right to a fair trial by a fair and impartial jury of his peers, with counsel present is exactly that; period. Requiring someone to prove his case without those protections is a road to perdition which will have vast and longlasting consequences within the American criminal justice system. Allowing the Courts to require a person to prove his case without that protection in place is a rank infringement of that constitutional guarantee. Having this particular juror on the petit jury has restrained Hartwell's liberty. With Rodriguez in the jury box, Hartwell's _{defense} could not have been sifted through the screen of exculpation and

mitigation. Asking Hartwell to prove the results of his case would have been different without this juror, without the benefit of a lawyer and a fair jury to make that decision, flies in the face of rationality.

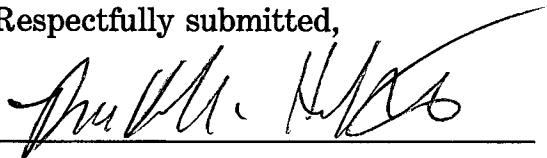
Hartwell's main Constitutional claim on the application for COA was the fact that by "not deciding whether (Hartwell) has rebutted the state habeas findings," as to whether or not the States assertion the juror was fair, the federal district never accurately assessed Hartwell's underlying constitutional claim. (Appendix C p11). Avoiding that question, then using the typical Strickland prejudice model (ie, no proof that the trial would have been decided differently) to strike down the COA, creates a Catch 22 for future constitutional claims of this sort. Had the Fifth Circuit's Virgil decision required the "reasonable probability / different outcome" prejudice standard, and had Strickland not been ambiguous in the choice between "Fundamental Fairness" and "reasonable probability / different outcome" prejudice definition, Hartwell would have attempted to prove how his trial may have been decided differently. But existing standards, statutes, and laws upholding the 6th Amend. do not seem to say as much. Therefore, the Fifth's decision to deny Hartwell's COA not only conflicts with the decision in Virgil, but it also failed to reach the underlying claims while still denying on the merits.

Finally, this petition for writ of certiorari should be granted in order to ask the Supreme Court to correct the conflicting decisions in the Fifth Circuit, reconcile Hartwell's case to reflect the Supreme Court's prior decisions in cases where unfair jurors are present, re-interpret the Strickland prejudice prong in a manner restricting arbitrariness in application, and reinstate Hartwell's Sixth Amendment right which was stripped by his ineffective trial lawyer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Ross Hartwell
TDCJ # 1893452
Darrington Unit
59 Darrington Road
Posharon, Texas
77583-5057