Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RYAN ANTONIO MATTHEWS,
PETITIONER,

-V-

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
RESPONDENT.

On petition for writ of certiorari from the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Bryan W.L. Garris
Attorney for Ryan Matthews

300 Main Street, Suite 300
Houston, Texas
Phone: 713-655-9000
Fax: 713-655-1812
Bryan@txdefense.net
Member of the Supreme Court Bar

QUESTION PRESENTED FOR REVIEW

1. Did Petitioner establish that jurists of reason could debate whether he was deprived of his right to the effective assistance of counsel at his juvenile certification hearing, and did the Fifth Circuit Court of Appeals apply an improper and unduly burdensome standard that contravenes this Court's precedent in analyzing this issue?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner:	Ryan Antonio Matthews
Petitioner's Counsel:	Bryan W.L. Garris 300 Main Street, Suite 300 Houston, Texas 77002
Respondent:	Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Respondent's Counsel:	Sarah Harp Assistant Attorney General Office of the Attorney General – Texas P.O. Box 12548, Capitol Station Austin, Texas 78711
Federal District Court:	United States District Court – Southern District of Texas, Galveston Division Honorable Jeffrey V. Brown United States Post Office and Courthouse 601 Rosenberg, Room 411 Galveston, Texas 77550

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

Original Proceedings and Direct Appeal

Juvenile Proceedings: *In the Matter of R.A.M.*, Brazoria County Court at Law #2, Brazoria County, Texas; Cause No. JV19869H; Juvenile certification hearing resulted in judgment transferring the case for adult criminal proceedings on July 8, 2014.

Trial Court: *State v. Ryan Antonio Matthews*, 239th District Court, Brazoria County, Texas; Cause Nos. 73841, 73573; Criminal trial resulting in judgment of conviction entered on April 23, 2015.

Court of Appeals: *Ryan Antonio Matthews v. State*, 14th Court of Appeals of Texas; Case Nos. 14-15-00452-CR; No. 14-15-00577-CV; 14-15-00616-CV; Affirming judgment of the trial court, entered on November 6, 2016. Rehearing Overruled December 20, 2016.

Texas Court of Criminal Appeals: *Ryan Antonio Matthews v. State*; Case. No. PD-0042-17; Denying petition for discretionary review, entered on May 17, 2017.

U.S. Supreme Court: *Ryan Antonio Matthews v. Texas*; Case No. 17-5629; Petition for writ of certiorari denied on October 2, 2017.

State Collateral Review Proceedings (State Writ of Habeas Corpus)

Trial Court: *Ex parte Ryan Antonio Matthews*, 239th District Court, Brazoria County, Texas; Cause No. 73841-B; entered findings of fact and conclusions of law recommending denying relief on Matthews' filed application for writ of habeas corpus, entered on March 25, 2019.

Texas Court of Criminal Appeals: *Ex parte Ryan Antonio Matthews*; Case No. WR-89,712-01; denying relief on Matthews' filed application for writ of habeas corpus on the findings of the trial court, judgment entered on June 12, 2019.

Federal Collateral Review Proceedings (Federal Writ of Habeas Corpus)

United States District Court for the Southern District of Texas – Galveston Division: *Ryan Antonio Matthews v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; Case No. 3:19-CV-192, denying relief on Matthews' filed application for writ of habeas corpus and denying application for certificate of appealability, judgment entered on October 26, 2020.

United States Court of Appeals for the Fifth Circuit; *Ryan Antonio Matthews v. Bobby Lumpkin, Ryan Antonio Matthews v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; Case No. 20-40799; denying application for certificate of appealability, judgment entered on October 27, 2021.

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TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Secondary Sources

CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

Federal Writ Proceedings

The October 27, 2021 order of the Fifth Circuit Court of Appeals denying Petitioner's application for a certificate of appealability is currently not yet reported on Westlaw, but is attached as Appendix A.

The October 26, 2020 Memorandum Opinion and Order of the United States District Court for the Southern District of Texas – Galveston Division, denying Petitioner's application for a writ of habeas corpus and denying Petitioner's request for a certificate of appealability, is available at *Matthews v. Lumpkin*, 3:19-CV-0192, 2020 WL 6271212, at *1 (S.D. Tex. Oct. 26, 2020). A copy of this opinion is attached as Appendix B.

State Writ Proceedings

The June 12, 2019 order of the Texas Court of Criminal Appeals, denying Petitioner's state application for a writ of habeas corpus, and adopting the Findings of Fact and Conclusions of Law of the trial court, is currently not yet reported on Westlaw, but is attached as Appendix C.

The March 25, 2019 trial court order entering Findings of Fact and Conclusions of Law regarding Petitioner's state application for a writ of habeas corpus, is not available on Westlaw. A copy of these Findings of Fact and Conclusions of Law are attached as Appendix D.

Original Trial Level and Juvenile Proceedings

The October 2, 2017 order of this Court, denying Petitioner's Petition for Writ of Certiorari, is available at *Matthews v. Tex.*, 138 S. Ct. 279, 199 L. Ed. 2d 179 (2017), and is attached as Appendix E.

The May 17, 2017 order of the Texas Court of Criminal Appeals, denying Petitioner's Petition for Discretionary Review is not available on Westlaw, but is attached as Appendix F.

The November 6, 2016 opinion of the 14th Court of Appeals of Texas, affirming the judgment of conviction in Petitioner's case, is available at *Matthews v. State*, 513 S.W.3d 45 (Tex.App.—Houston [14th Dist.] 2016, pet. ref'd), and is attached as Appendix G.

A copy of the trial court's judgment of conviction, entered on April 23, 2015, are not available on Westlaw, but is attached as Appendix H.

A copy of the order transferring Petitioner's original juvenile case to adult criminal court, entered on July 8, 2014, is not available on Westlaw, but is attached as Appendix J.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals denied Petitioner's Application for a Certificate of Appealability on October 27, 2021. *See* Appendix A. Pursuant to Rule 13(1) of the Rules of the Supreme Court of the United States, the deadline for filing this Petition for Writ of Certiorari is 90 days from the date of entry of that judgment, and is January 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2253(c) provides in pertinent part:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 1254 provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

TEX. FAM. CODE 51.17(c) provides in pertinent part:

> "Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.

TEX. FAM. CODE 54.02 is also cited throughout this Petitioner. Because the citations here involved are lengthy, that statute is attached as Appendix I in accordance with Rule 14(f) of the Rules of the Supreme Court.

TEX. PEN. CODE 12.31(a) provides in pertinent part:

> ". . . An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for:
>
> (1) life, if the individual committed the offense when younger than 18 years of age . . . ."

STATEMENT OF THE CASE

Petitioner was detained, as a juvenile, with two counts of capital murder, alleged to have been committed on his girlfriend, A.H., and their unborn twins. The State of Texas filed a petition seeking to transfer Petitioner's case from juvenile court to face adult criminal proceedings. Pursuant to § 54.02 of the Texas Family Code, the juvenile court conducted a hearing on the State's petition. TEX. FAM. CODE § 54.02.

As related to Petitioner's case, TEX. FAM. CODE § 54.02(a) permits a juvenile court to waive its exclusive original jurisdiction and transfer a case to adult court for criminal proceedings if:

> " 1) the child is alleged to have violated a penal law of the grade of felony;
>
> 2) the child was . . . 14 years of age or older at the time he is alleged to have committed the offense . . . ; and
>
> 3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings."

TEX. FAM. CODE § 54.02(a).

Prior to the hearing, juvenile courts are required to order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. TEX. FAM. CODE 54.02(d). Finally, in making the determination of whether the transfer the juvenile

to face adult criminal proceedings, the juvenile court is required to consider a number of statutory factors, including:

> "1) whether the alleged offense was against persons or property, with greater weight in favor of transfer given to offenses against the person;
>
> 2) the sophistication and maturity of the child;
>
> 3) the record and previous history of the child; and
>
> 4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

TEX. FAM. CODE § 54.02(f).

The evaluation of these factors, and the juvenile court's determination whether to keep Petitioner's case in juvenile court or waive jurisdiction and transfer the case to adult criminal court, was of paramount importance for Petitioner. If Petitioner's case remained in juvenile court, the maximum sentence Petitioner could face if adjudicated was 40 years. However, if transferred to adult criminal court and then convicted, Texas law fixed punishment at a mandatory life sentence, with the possibility of parole after 40 years. TEX. PEN. CODE 12.31(a). Thus, the only opportunity for Petitioner to mitigate his sentence was through the juvenile certification hearing.

During the certification hearing, the State presented documentary evidence and testimony of four witnesses: Brazoria County juvenile probation officers Martha Mosshart and Victoria Gardinza; appointed psychiatrist Dr. Michael Fuller; and Pearland Police Department Detective Cecil Arnold.

Believing that the Texas Rules of Evidence did not apply during juvenile transfer proceedings, Petitioner's counsel did not object to the offered documentary evidence, which included police reports, lab reports, search warrant affidavits, and other records. *See* Appendix K at 10-14. Counsel also did not object when the State offered hearsay testimony through Mosshart and Arnold during the hearing. Mosshart testified about the lack of rehabilitative treatment options available in the juvenile system, that she learned about after speaking with officials at the Giddings State juvenile unit. *Id.* at 14-23, 28-29. Arnold testified about alleged extraneous bad acts he heard were committed by Petitioner, and about the results of forensic testing which he did not conduct. *Id.* at 51-58. Dr. Fuller testified that, based on reviewing records and interviewing Petitioner, that Petitioner had no significant psychiatric issues and was capable of assisting in his defense, and that certification would be appropriate. *Id.* at 30-37. The State offered their testimony in support of the certification factors the court was required to consider under TEX. FAM. CODE 54.02(a), (f).

By contrast, Petitioner's counsel conducted little to no investigation or mitigation investigation prior to the hearing, called no witnesses, presented virtually no evidence, and presented little to no argument – stating as his entire closing argument: [redacted] *Id.* at 61.

Critical mitigation evidence was available. In advance of the July 8, 2014 certification hearing, Petitioner's trial counsel told Petitioner's parents that he needed both background information regarding Petitioner and also the names of persons that could provide character testimony in support of him – stating these people would be interviewed. *See* Appendix L. Weeks before the certification hearing, Petitioner's parents sent back the names of David White, Rhonda White, LeiRoi Daniels, Veronica Endsley, George Delce, Pierre Tannous, and April LaChiusa. *See* Appendix M. Counsel never contacted any of these witnesses, or any others who could have provided significant testimony in favor of the certification factors. *See* Appendix Q.

A subsequent letter from counsel to his retained investigator illustrates that he directed the investigator to not spend time on mitigation or punishment witnesses, because the charge carried a fixed punishment. *See* Appendix P.

Counsel told Petitioner's parents he would be employing a psychologist (Dr. Kristi Compton) to do various testing, and also requesting an investigator. *See* Appendix N. Counsel received funding for both, but only after the certification hearing – and did not retain either an investigator or psychologist in advance of the hearing. Ultimately, he never sent full discovery to Dr. Compton, nor contacted her to interview Petitioner. See Appendix O.

Favorable evidence regarding the certification factors was available.

Had counsel interviewed those who knew Petitioner, they could have testified about his potential for rehabilitation; his overall lack of maturity and

sophistication; and regarding the safety of the community were he to remain in the juvenile system. They would have testified that Petitioner: struggled as a kid; was born in a jail; never knew his birth mother; only learned his step-mother was not his birth mother at 11-12 years old; struggled watching his parents fight at home; struggled when his older siblings left; would do immature and irresponsible things like steal from his mother – that overall he had a great heart; cared for his family; loved animals; and did things to help in the community, like volunteering; helped teach others; wasn't very sophisticated; struggled after learning about the death of his grandmother; struggled after learning his brother had been murdered; would curl into a ball and cry; would show remorse for his actions; would take steps to grow from his mistakes; worked to make improvement in school, but was in the low percentiles of his class. *See* Appendix Q.

Had counsel consulted and retained a psychologist for the certification hearing, counsel could have contested the inadequate findings of Dr. Michael Fuller, and presented that Petitioner's records showed that as far back as 5th grade, teachers reported Petitioner as having very elevated levels of depression; his behavior included him crying and becoming very emotional; he exhibited ADHD-type symptoms, including impulsivity, problems completing tasks, and problems maintaining focus; that records showed he was in the bottom 0-25% range in terms of social relationships and age-appropriateness. *See* Appendix R.

A forensic interview conducted by Dr. Thorne (retained by Petitioner's appellate counsel as part of that counsel's filed motion for new trial) following

Petitioner's conviction, revealed that Petitioner did not exhibit age-appropriate maturity or sophistication; was psychologically and emotionally immature with impulsive tendencies; had an IQ placing him in the 30th percentile for his age group; was elevated on some depression scales; had mild to moderate periods of depression and sadness for a significant period of his developmental life; had mild to moderate anxiety; worried a lot; was very self-conscious; more stressed than not; and dealt with issues of substance abuse. *Id.* Dr. Thorne found that counseling record reflected that Petitioner's parents identified him as being excessively dependent on them and immature. *Id.* Dr. Thorne found that Dr. Fuller gathered inadequate data, that Dr. Fuller's report was incomplete, and that his conclusions failed to properly reflect the available data. *Id.* Dr. Thorne also found that Dr. Fuller used a standard assessment questionnaire aimed at determining competency to stand trial, which was insufficient for properly assessing the juvenile certification factors. *Id.*

Dr. Thorne also found that Petitioner would have been a good candidate for a juvenile rehabilitation program – including the Capital and Serious Violent Offender Treatment Program ("CSVOTP") offered by the Texas Juvenile Justice Department. *Id.*; *see also* Appendix S.

Petitioner's counsel also should have investigated and presented information about this CSVOTP program, which contrary to the testimony of Mosshart, was an available specialized treatment and rehabilitation program offered by the Texas Juvenile Justice Department for youths committed for capital murder, murder, and other violent crimes. *See* Appendix S. The program is designed to impact

emotional, social, behavioral, and cognitive developmental processes by integrating psychodynamic techniques, social learning, and cognitive-behavioral therapy to create an intense therapeutic approach aiming to reduce individual risk factors and build upon the unique strengths of each youth participant. *Id.*

TJJD research has shown that participation in the program has markedly reduced recidivism rates. *Id.* Most importantly -- and directly refuting Mosshart's testimony that no programs were available for Petitioner on account of program space and inmate population – in the year prior to Petitioner's certification hearing, the Texas Juvenile Justice Department successfully placed 98.1% of the youth demonstrating need into the program, with 91.8% of youth completing the program. *Id.*

Ultimately, the juvenile court was only presented with evidence against Petitioner. The juvenile court never learned about any of the above mitigating evidence, never learned any of this evidence critical to a proper determination of the juvenile certification factors the court was statutorily required to consider – all because Petitioner's counsel failed to investigate and present it.

The juvenile court waived jurisdiction and ordered the case transferred to criminal court. *See* Appendix J. Petitioner was convicted at the criminal trial and given a mandatory life sentence. *See* Appendix H.

Petitioner raised ineffective assistance of counsel claims related to trial counsel's failures to object to the inadmissible evidence at the juvenile certification hearing, and his failure to investigate and present mitigating evidence at that

certification hearing, in his Application for Writ of Habeas Corpus before the State Court.

The State District Court entered Findings of Fact and Conclusions of Law, adopted by the Texas Court of Criminal Appeals, which denied these ineffective assistance of counsel claims. *See* Appendices C and D. Though the State court designated "findings of fact" regarding these claims, the State court did not actually enumerate any factual findings – merely making legal conclusions that Petitioner did not establish his asserted ineffective assistance of counsel claims. *See* Appendix D.

Petitioner raised these identical claims in his filed Petition for Writ of Habeas Corpus in federal court, pursuant to 28 U.S.C. § 2254. The U.S. District Court denied these claims in its written Memorandum Opinion and Order, and also denied Petitioner a certificate of appealability related to these claims. *See* Appendix B.

Petitioner appealed the denial of his request for a certificate of appealability regarding these and other claims to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied Petitioner's request for a certificate of appealability, finding that Petitioner could not meet the applicable legal standard, that the district court carefully considered and rejected each of Petitioner's claims, and that Petitioner had not shown or argued that the District Court's application of the relitigation bar was debatable or wrong. *See* Appendix A.

ARGUMENT: REASONS FOR GRANTING RELIEF

I. Did Petitioner establish that jurists of reason could debate whether he was deprived of his right to the effective assistance of counsel at his juvenile certification hearing, and did the Fifth Circuit Court of Appeals apply an improper and unduly burdensome standard that contravenes this Court's precedent in analyzing this issue?

Petitioner established that jurists of reason could debate whether he was deprived of his right to the effective assistance of counsel at his juvenile certification hearing – where trial counsel failed to investigate and present mitigating evidence critical to a proper analysis of the juvenile certification factors, and failed to object to inadmissible documentary and hearsay evidence the State offered to prove those factors weighed in favor of transfer.

This Court's precedent is clear and well-established: a state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a certificate of appealability ("COA") from a circuit justice or judge. 28 U.S.C. § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

The COA inquiry, as this Court has emphasized, is not coextensive with a merits analysis. *Id.* At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further. *Id.* Restated, where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

These threshold questions are decided without full consideration of the factual or legal bases adduced in support of the claims. When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. *Id.*

A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *Id.* at 774. The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then – if it is – an appeal in normal course. *Id.*

Petitioner meets the COA standard for his asserted claims that he was deprived of his right to the effective assistance of counsel at his juvenile certification hearing based on counsel's failure to investigate and present available mitigating evidence critical to a proper analysis of the juvenile certification factors, and counsel's failure to object to inadmissible and harmful documentary evidence and testimony. These claims, and the Fifth Circuit's erroneous analysis of each, are discussed in turn.

A. Jurists of reason would debate whether counsel was ineffective for his complete failure to investigate and present available mitigating evidence critical to a proper analysis of the juvenile certification factors – and a COA should issue.

Petitioner substantially shows that he was denied his Sixth Amendment right to the effective assistance of counsel (applicable to the States through the Fourteenth Amendment) at his juvenile certification hearing, on account of trial counsel's failure to investigate and present available evidence critical to a complete and proper analysis of the juvenile certification factors of TEX. FAM. CODE § 54.02. U.S. CONST. amend. VI; XIV. Jurists of reason could disagree with the District Court's resolution of this constitutional claim, which Petitioner has consistently showed contravened federal law, as determined by this Court in a number of cases. Moreover, the Fifth Circuit's denial of Petitioner's COA on this claim illustrates that it misapplied the applicable COA standard.

As outlined *supra* and incorporated herein, trial counsel's performance was deficient for: 1) failing to interview and present mitigating and favorable testimony from those who knew Petitioner and could provide testimony regarding his potential

for rehabilitation; his overall lack of maturity and sophistication; and regarding the safety of the community should he remain in the juvenile system (*see* Appendix Q); 2) failing to investigate, consult with, and present mitigating evidence and favorable testimony from a psychiatrist or psychologist (*see* Appendix R); and 3) failing to present information regarding the CSVOTP – an available rehabilitative treatment program (see Appendix S).

Each of these failures went directly to the certification factors, and Petitioner was prejudiced as a result of counsel's failure to present this information.

This Court has long recognized that juvenile transfer proceedings are the most critical stage of the juvenile court process, as the stakes in transfer proceedings are exceedingly high. *Kent v. U.S.*, 383 U.S. 541 (1966). And this Court has long held that counsel has a duty to uncover and present mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Indeed, counsel has a duty in every case to make a reasonable investigation or a reasonable decision that an investigation is unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Counsel failed in these duties, which constituted deficient performance, and which prejudiced Petitioner – in violation of the Sixth Amendment's right to counsel, as this Court set out in *Strickland v. Washington*. *See generally id.*

An abundance of mitigating evidence was readily available had counsel simply contacted the witnesses Petitioner's parents had given him to contact; utilized a mental health expert (that counsel sought funding for only after

Petitioner was certified, and yet still never utilized); or researched the available rehabilitative programs.

Counsel's failure to investigate, uncover, and present this evidence deprived the juvenile court of favorable and mitigating evidence about the full background of Petitioner, his circumstances, his social background, his sophistication and maturity, his potential for rehabilitation, and the prospect of adequate protection of the public if he were allowed to remain within the juvenile system and face a forty-year sentence. Each failure went to the certification factors and also allowed the State's presented evidence to go wholly unchallenged.

Ultimately, an evaluation of the applicable juvenile certification factors in light of the evidence that counsel failed to present creates a reasonable probability that the juvenile court would have weighed the juvenile certification factors against certification, and that the result of the juvenile certification proceeding would have been different.

As this Court recognized in *Kent*, the importance of this transfer proceeding was exceedingly high for Petitioner, as it meant the difference between a maximum 40-year sentence in juvenile court, or a mandatory life sentence in adult criminal court. What this Court has described as the most critical stage of juvenile proceedings – anticipating the point of greatest advocacy – was, for Petitioner, a hearing at which virtually no advocacy was given. Petitioner's certification was assured by the complete lack of advocacy or presentation of any evidence.

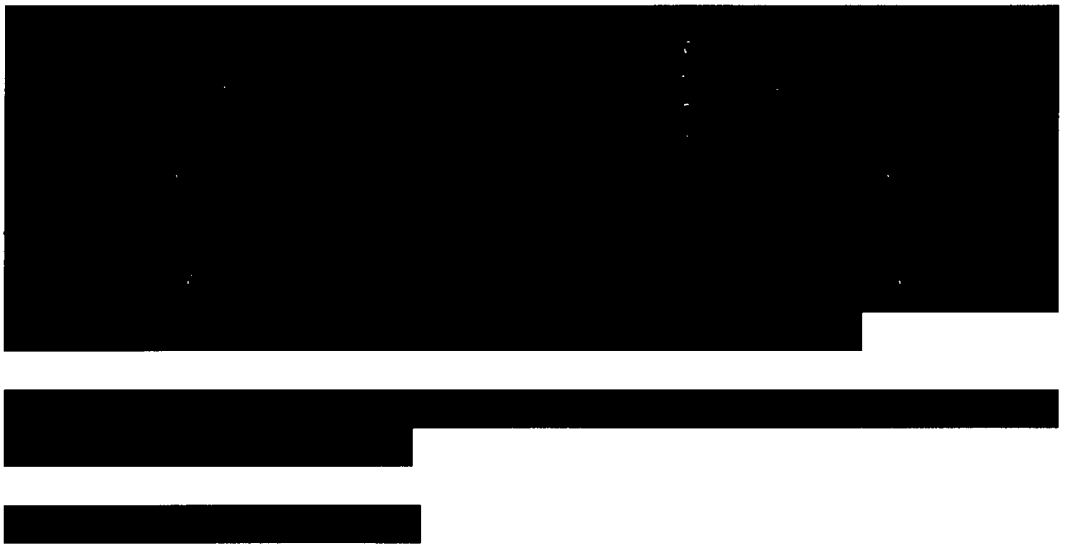
The U.S. District Court did not assert that trial counsel's performance was not deficient for this claim, as counsel's deficient performance under *Strickland* is clear. *See* Appendix B. Rather, the District Court focused on *Strickland* prejudice, stating:

> "The state habeas court explicitly found that Matthews "fail[ed] to demonstrate any allegedly deficient performance prejudiced his case" and "no reasonable probability that, but for the conduct complained of, that the result of . . . the juvenile certification proceeding . . . would have been different." Even considering the mitigating effect that Matthews's habeas evidence may have had, and the greater insight it may have given the juvenile court into his maturity and sophistication, the state habeas court was not unreasonable in considering how that evidence would have fit into the context of the evidence presented. While Matthews now relies on lay testimony about his emotional state, the State called law-enforcement witnesses and juvenile-justice experts who provided detailed testimony about his sophistication and maturity. The nature of the offense and Matthews's history weighed in heavily as the juvenile court deliberated whether adult certification would protect the public. Despite his status as a juvenile, Matthews faced charges involving three murders, allegedly committed in a particularly brutal fashion. The juvenile court considered the fact that Matthews's age had nearly removed him from its original jurisdiction. In the full context of what was presented at trial and that which was developed afterwards, the state habeas court's finding of no *Strickland* prejudice was not contrary to, or an unreasonable application of, federal law."
>
> *See* Appendix B (internal citations omitted).

This evaluation is debatable among jurists of reason, and Petitioner addressed this evaluation and the conclusions before the Fifth Circuit.

The District Court claimed, for instance, that "while Matthews now relies on lay testimony about his emotional state, the State called law-enforcement witnesses and juvenile-justice experts who provided detailed testimony about his sophistication and maturity."

The District Court uses its writing here to cloak the actual testimony from the "juvenile-justice expert" who contended Petitioner was sophisticated and mature – stating that while in juvenile custody:



See Appendix K at 48-49.

In essence, the District Court's analysis relies on concluding that one acts like a sophisticated and mature adult by punching others in the face over a basketball game, and telling other kids to shut up. And the evidence offered by the State's "law-enforcement witness" to contend Petitioner was sophisticated and mature was that he was able to lie without hesitation and threaten other students. *Id.* at 54, 57-58. Reasonable jurists could disagree with the District Court's resolution.

Additionally, the District Court's statement that "while Matthews now relies on lay testimony" fully ignores that he presented more than just the lay testimony of eleven witnesses – many of whom knew him his entire life – but that he also presented the testimony of expert Dr. Thorne, who clinically evaluated Petitioner

within the juvenile certification factor framework and found that Petitioner was unsophisticated and immature; that the records and previous history of Petitioner warranted keeping him before the juvenile court; and that he would likely benefit from placement in the CSVOTP treatment program. Jurists of reason could disagree with the District Court's resolution in this regard.

Ultimately, the District Court's analysis did little more than focus exclusively on the nature of the alleged offense, instead of evaluating each of the juvenile certification factors that the juvenile court was required to consider. Had the District Court evaluated each of the certification factors, reasonable jurists could conclude that the certification factors would weigh in favor of keeping Petitioner before the juvenile court. Reasonable jurists could disagree with the District Court's resolution of this claim.

Finally, the Fifth Circuit's denial of Petitioner's COA illustrates that it misapplied the applicable standard with regard to this claim. The Fifth Circuit found that "the district court carefully considered and rejected each of Matthews's claims in a detailed, 54-page opinion." This is not the standard for determining whether to grant COA. Even assuming *arguendo* that the District Court carefully considered and ultimately rejected the claims, consideration and rejection fails to address whether the District Court's resolution of the claim was debatable among jurists of reason, or warranted encouragement for further development.

The Fifth Circuit also stated that Petitioner had not shown or argued that the District Court applied the relitigation bar in a debatably wrong way. This

conclusion is flawed. The District Court's entire discussion of prejudice was in the context of deciding that the State court's finding of no *Strickland* prejudice was not contrary to, or an unreasonable application of federal law. Petitioner attacked, in detail, each of these premises undergirding the District Court's analysis – illustrating how this issue was debatable among jurists of reason. Petitioner repeatedly argued that reasonable jurists could disagree with the District Court's resolution of this claim – and the District Court's resolution was that the state habeas court's finding of no *Strickland* prejudice was not contrary to, or an unreasonable application of, federal law.

Ultimately, the Fifth Circuit's analysis appears to reflect what this Court has repeatedly admonished reviewing courts not to do – requiring that the claim be fully proven and litigated at the COA stage. *See generally Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 342 (2003); *see also Jordan v. Fisher*, 576 U.S. 1071 (2015); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Petitioner has shown that he meets the COA standard with respect to this claim. Petitioner has substantially shown that he was denied his right to the effective assistance of counsel at his juvenile certification hearing, and that jurists of reason would debate the District Court's resolution of this claim, and encourage further development of the claim. Petitioner requests this Court order that a COA should issue.

B. Jurists of reason would debate whether trial counsel was ineffective for failing to object to: 1) numerous items of inadmissible and harmful documentary evidence; and 2) inadmissible and harmful testimony – and a COA should issue.[1]

Petitioner substantially shows that he was denied his Sixth Amendment right to the effective assistance of counsel (applicable to the States through the Fourteenth Amendment) at his juvenile certification hearing on account of trial counsel's failure to object to numerous items of inadmissible and harmful documentary evidence – and a COA should issue. U.S. CONST. amend VI, XIV. Jurists of reason could disagree with the District Court's resolution of this constitutional claim, which Petitioner has consistently showed contravened federal law, as determined by this Court in a number of cases. Moreover, the Fifth Circuit's denial of Petitioner's COA on this claim illustrates that it misapplied the applicable COA standard.

As outlined *supra*, Petitioner's counsel failed to object to numerous items of documentary evidence during his juvenile certification proceeding, including: a police offense report; a search warrant and affidavit; a predisposition report; and three laboratory reports. These items were offered at the outset of the juvenile certification hearing, but counsel did not object – instead stating: [redacted] The Court responded: [redacted] *See* Appendix K at 13.

[1] Petitioner presented these ineffective assistance of counsel claims (one related to the failure to object to the documentary evidence and one related to the failure to object to the hearsay testimony) as separate points of error in his Petitioner for writ of habeas corpus. Because these claims interrelate and turn on the same applicability of the Texas Rules of Evidence question, the U.S. District Court addressed them in consolidated form in its released Memorandum Opinion and Order. *See* Appendix B. For purposes of brevity, Petitioner presents both claims in this unified heading.

Petitioner's counsel was deficient for failing to object on hearsay and authentication grounds to these items of evidence, as counsel has a duty to object to harmful and inadmissible evidence. *See Thomas v. State*, 923 S.W.2d 611, 613 (Tex.App.—Houston [1st Dist.] 1995, no pet.).

Petitioner's counsel was also deficient for failing to object to the hearsay testimony offered through Mosshart regarding the unavailability of a rehabilitative program in the juvenile justice department, and through Detective Arnold who testified regarding the results of forensic testing that he did not conduct, and who testified he had heard students say that Petitioner had threatened them with violence. See Appendix K at 14-23, 28-29, 51-58.

This State offered evidence was of significant value in the juvenile certification proceeding because it was both harmful and adverse to Petitioner, and went to the certification factors the juvenile court was statutorily required to consider, including the required probable cause finding. TEX. FAM. CODE § 54.02 (a)(3), (f).

In its Memorandum Opinion and Order, the U.S. District Court determined that Petitioner could not demonstrate deficient performance and an entitlement of relief under AEDPA for these claims, because Texas law is unsettled as to whether the Texas Rules of Evidence apply in juvenile certification proceedings. Jurists of reason could debate the District Court's resolution of these claims.

Texas statutory law is crystal clear – the Texas Rules of Evidence apply to juvenile certification hearings. TEX. FAM. CODE 51.17(c) ("Except as otherwise

provided by this title, the Texas Rules of Evidence applicable to criminal cases . . . apply in a judicial proceeding under this title.") *See also Matter of B.N.E.*, 927 S.W.2d 271, 276 (Tex.App.—Houston [1st Dist.] 1996, no writ) ("The 1995 amendment to section 51.17 provides that other rules also apply to juvenile certification proceedings, such as the Texas Rules of Criminal Evidence and, in certain instances, the Code of Criminal Procedure."). The statute establishing the juvenile certification hearing is even in a chapter entitled "Judicial Proceedings." *See* TEX. FAM. CODE Ch. 54.

Moreover, since its inception in 1973, § 51.17 had always been interpreted by Texas courts as applying to juvenile certification hearings. *See generally Matter of B.N.E.*, 927 S.W.2d 271, 276 (Tex.App.—Houston [1st Dist.] 1996, no writ) (applying § 51.17 to appellant's juvenile certification hearing); *Matter of R.G., Jr.*, 865 S.W.2d 504, 507 (Tex.App.—Corpus Christi 1993, no writ) (applying § 51.17 to appellant's juvenile certification hearing); *M.A.V., Jr. v. Webb County Court at Law*, 842 S.W.2d 739, 745 (Tex.App.—San Antonio 1992, writ denied) (applying § 51.17 to appellant's juvenile certification hearing); *Matter of P.B.C.*, 538 S.W.2d 448, 453 (Tex.Civ.App.—El Paso 1976, no writ) (applying § 51.17 to juvenile certification hearing).

However, prior to 1996, TEX. FAM. CODE § 51.17 did not contain any provision regarding whether the Texas Rules of Evidence applied in judicial proceedings under the title. Rather, from 1973-1996, § 51.17 only stated that the Texas Civil Rules of Procedure applied – and the Texas courts uniformly applied § 51.17 to

certification proceedings. *Id.* It was during the absence of any statutory provision making the Texas Rules of Evidence applicable, that the Texas courts judicially determined they did not apply to certification proceedings prior to 1996.

But as the *B.N.E.* court recognized in its published opinion (which was also authoritatively binding on the juvenile court before whom Petitioner appeared), the 1995 legislative amendment changed the landscape, and made the Texas Rules of Evidence applicable in certification hearings, starting Jan. 1, 1996.

In its analysis of deficient performance, the District Court ignores the *B.N.E.* case, the history of § 51.17 applying to juvenile certification hearings, and the fact of the 1996 legislative change in its conduct analysis. Instead, the District Court merely states that Petitioner cites to § 51.17(c) in a one-sentence summary of his argument (which constituted twelve pages of briefing in his original Memorandum of Law before the District Court).

By contrast, the cases cited by the District Court in denying Petitioner's claim, all source to the pre-1996 version of the statute, before the 1996 amendment that made the Texas Rules of Evidence applicable.

This includes the District Court's citations of:

- *Grant v. State*, 313 S.W.3d 443 (Tex.App.—Waco 2010, no pet.) – which cites to the pre-amendment 1992 decision of *In re D.W.L.*, 828 S.W.2d 520, 524 (Tex.App.—Houston [14th Dist.] 1992, no pet) for its rule.

- the unpublished *Milligan v. State*, 03-04-00531-CR 2006 WL 357880, at *4 (Tex.App.—Austin Feb. 16, 2006, pet. ref'd), which cites *In re S.J.M.*, 922 S.W.2d 241, 242 (Tex.App.—Houston [14th Dist.] 1996, no writ) (a 1996 opinion that arose of a 1994 juvenile certification hearing – again before the legislative change took effect).

- *Alford v. State*, 806 S.W.2d 581, 582 (Tex.App.—Dallas 1991), aff'd 866 S.W.2d 619, 625 (Tex.Crim.App. 1993).

- the unpublished *Navarro v. State*, Nos. 01-11-00139-CR & 01-11-00140-CR, 2012 WL 3776372, at *6 (Tex.App.—Houston [1st Dist] Apr. 17, 2013, pet. ref'd) (mem. Op., not designated for publication) (which cited exclusively to pre-1996 case law).

And the District Court's final two cited cases, *Matter of H.Y.*, 512 S.W.3d 467, 474 (Tex.App.—Houston [1st Dist.], 2016) and the unreported *Matter of D.S.*, 2017 WL 3187021, at *5 (Tex.App.—Fort Worth 2017) both assumed that the Texas Rules of Evidence applied in conducting their legal analysis, ultimately finding that the appellant's could not show harm.

Resolving the deficient performance question essentially requires applying *Strickland* and asking whether counsel was deficient for failing to object when Texas statutory law is clear, when there is a history of that statutory law applying to certification hearings prior to the 1995 legislative amendment, and where binding authority on the juvenile court before whom Petitioner appeared informed counsel that the Rules of Evidence applied. Petitioner substantially showed that his counsel's performance was deficient and that jurists of reason could disagree with the District Court's resolution of this constitutional claim.

The U.S. District Court also determined that Petitioner failed to show by a reasonable probability that the juvenile court would not have ordered the transfer had counsel objected – thus not demonstrating an entitlement to relief under AEDPA.

The District Court's analysis overlooks that without the inadmissible documentary evidence, the State could not have sufficiently presented and established facts showing probable cause – as required by TEX. FAM. CODE § 54.02(a)(3), and that these inadmissible items contained information that was harmful to Petitioner with regard to the juvenile certification factors.

For example, the police offense report contained allegations that Petitioner was physically abusive to and cheated on a previous girlfriend; would lie to his parents; that Petitioner was suicidal; had a history of being a liar; had a criminal past – taking a family friend's car without permission; shoplifted at Macy's; was a "controlling person"; had conducted Google searches about abortions and how to cause a miscarriage; had made threats to another student; and was rude. The laboratory reports served to alleged and establish that Petitioner's clothing had tested positive for blood, which went to the probable cause determination. And the search warrant affidavit alleged Petitioner has conducted Google searches about abortions and how to cause a miscarriage.

With regard to the inadmissible hearsay testimony, the District Court overlooks that, through Mosshart, the State was able to cast serious doubt on the availability of any rehabilitative programs or services for Petitioner – a factor the juvenile court was required to consider under TEX. FAM. CODE § 54.02 (f), and a point which the State focused upon during closing arguments at the certification hearing. *See* Appendix K at 60-61. The prejudicial effect of this testimony is heightened considering that the testimony is also false and misleading – and that

disagree with the District Court's resolution of this claim, which involved determining that the State courts application of *Strickland* was not contrary to, or involved and unreasonable application of, federal law. Reasonable jurists could disagree and find that it. Petitioner showed it was and that the District Court erred in its analysis.

Finally, the Fifth Circuit's denial of Petitioner's COA illustrates that it misapplied the applicable standard with regard to this claim. As discussed *supra*, the Fifth Circuit found that "the district court carefully considered and rejected each of Matthews's claims in a detailed, 54-page opinion." This is not the standard for determining whether to grant COA. Even assuming *arguendo* that the District Court carefully considered and ultimately rejected the claims, consideration and rejection fails to address whether the District Court's resolution of the claim was debatable among jurists of reason, or warranted encouragement for further development.

The Fifth Circuit also stated that Petitioner had not shown or argued that the District Court applied the relitigation bar in a debatably wrong way. This conclusion is flawed. The District Court's conclusion holding regarding this claim was: "given the unsettled nature of Texas law, and Matthews's failure to show by a reasonable probability that the juvenile court would not have ordered the transfer had counsel objected, he has not demonstrated an entitlement to relief under AEDPA." *See* Appendix B. Petitioner cited this holding and attacked, in detail, each of the premises undergirding the District Court's analysis and conclusion –

illustrating how the resolution was debatable among jurists of reason. Petitioner repeatedly argued that reasonable jurists could disagree with the District Court's resolution of this claim – which included that Petitioner could not demonstrate an entitlement to relief under AEDPA, as the State court's decision was contrary to and involved an unreasonable application of *Strickland*, and the District Court erred in evaluating this claim.

Again, the Fifth Circuit's analysis appears to reflect what this Court has repeatedly admonished reviewing courts not to do – requiring that the claim be fully proven and litigated at the COA stage. *See generally Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 342 (2003); *see also Jordan v. Fisher*, 576 U.S. 1071 (2015); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Petitioner has shown that he meets the COA standard with respect to this claim. Petitioner has substantially shown that he was denied his right to the effective assistance of counsel at his juvenile certification hearing, and that jurists of reason would debate the District Court's resolution of this claim, and encourage further development of the claim. Petitioner requests this Court order that a COA should issue.

CONCLUSION

Petitioner respectfully requests this Court find these issues merit review by this Court' grant the Petition for a Writ of Certiorari; order briefing and argument; find that Petitioner has shown he meets the COA standard with respect to these

claims; and grant Petitioner's claims for relief and to give him any and all further relief to which he may be entitled.

Respectfully submitted,

Bryan W.L. Garris
Attorney for Ryan Antonio Matthews
300 Main Street, Suite 300
Houston, Texas
Phone: 713-655-9000
Fax: 713-655-1812
Bryan@txdefense.net

CERTIFICATE OF MAILING

I hereby certify that, on the 25st day of January, 2022, this pleading was served on the Court via the United States Postal Service and filed electronically.

Bryan W.L. Garris

CERTIFICATE OF COMPLIANCE

I hereby certify that this document is within the page limits prescribed by Rule 33.2(b).

Bryan W.L. Garris