No.

IN THE
Supreme Court of the United States

VICTOR SANTANA,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Mr. Santana was convicted for aggravated assault after allegedly striking his girlfriend's daughter in the head with a hickory stick. He was sentenced to 40 years in prison. During trial, his attorneys opened the door to a tidal wave of prior bad act evidence that would not have otherwise been admissible. They also failed to object to other inadmissible prior bad act evidence, and failed to request a limiting instruction related to all of the prior bad act evidence. Counsel even had a limiting instruction removed from the jury charge, and also failed to object to inadmissible hearsay and bolstering evidence. We know the jury considered the prior bad act evidence because the jury, which had been deadlocked in favor of a not guilty verdict, requested a jury readback of this harmful evidence. Defense counsel also failed to object to this improper jury readback. Shortly after the jury was read this testimony, they returned a verdict of guilty.

In post-conviction proceedings, Mr. Santana alleged his trial counsel were ineffective. The lead trial attorney did not offer any strategic reasons for his failures. The state district court found that counsel was ineffective, but the Court of Criminal Appeals disagreed.

Question Presented:

Did the Court of Criminal Appeals err in finding that trial counsel's errors did not amount to ineffective assistance of counsel?

LIST OF PARTIES

The caption of the case contains the names of all the parties. *See* Sup. Ct. R.14(1)(b)(i).

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- On July 25, 2011, Mr. Santana was charged in the 174th District Court of Harris County, Texas, with aggravated assault (based on using a stick, club, or unknown object). The Harris County cause number was 1312173. He was tried on the January 27th, 29th, and 30th, 2014. He was found guilty by the jury and sentenced to 40 years in prison. Judgment was entered on January 30,2014.

- Mr. Santana filed an appeal, but his appellate counsel filed an *Anders* brief explaining there were no colorable grounds for appeal. Texas' Fourteenth Court of Appeals affirmed his judgment (after modifying the language in the judgment) on November 6, 2014, in cause number No. 14–14–00130–CR. *See Santana v. State*, No. 14-14-00130-CR, 2014 WL 5795482 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.).

- Mr. Santana filed an application for writ of habeas corpus in the 174th District Court of Harris County Texas on December 2, 2020, in cause number 1312173-A. The trial court recommended that relief be granted and his conviction be set aside.

On February 22, 2023 the Texas Court of Criminal Appeals denied Mr. Santana's application for writ of habeas corpus in cause number WR-92,804-01. *See Ex parte Santana*, No. WR-92,804-01, 2023 WL 2146382 (Tex. Crim. App. Feb. 22, 2023).

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The Texas Court of Criminal Appeals' (CCA's) order, *Ex parte Santana,* No. WR-92,804-01, 2023 WL 2146382 (Tex. Crim. App. Feb. 22, 2023), rejecting the trial court's recommendation to grant a new trial, is in Appendix A. The trial court's Findings of Fact and Conclusions of Law recommending that habeas relief be granted is in Appendix B.

STATEMENT OF JURISDICTION

The CCA's opinion issued on February 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

> 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; . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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

> No state shall . . . 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.

STATEMENT OF THE CASE

Mr. Santana was charged for the aggravated assault of Kristine Marie Gonzalez, alleged to have occurred on July 15, 2011. CR at 22.[1] The allegation was that Mr. Santana assaulted Ms. Gonzalez with a deadly weapon, namely, a stick or club. CR at 22. Victor Santana's trial counsel failed to object to prior bad act testimony, and then opened the door to voluminous prior bad acts, which we know the jury considered during their deliberations because the jury asked for, and was read back, the majority of the otherwise inadmissible testimony. The jury was 8-to-4 in favor of not guilty prior to the readback, but quickly returned a guilty verdict after the testimony was read back. Trial counsel failed to object to the improper readback. Also, counsel failed to request a limiting instruction related to the prior bad act testimony, and even asked that a limiting instruction be removed from the jury charge. Counsel also failed to request a "serious bodily injury" instruction, which was required in the jury charge, and failed to object to improper opening statements, hearsay testimony, and bolstering evidence. In post-conviction proceedings, trial counsel admitted most of this evidence was

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[1] The trial clerk's record is cited as CR at page number. The trial reporter's record is cited as volume RR at page number. The post-conviction record is cited as SHCR at page number.

inadmissible, and offered no strategic reason for failing to object. The district court found that trial counsel was ineffective, but the CCA disagreed and denied the application for writ of habeas corpus.

A. The trial – and the district court's finding of ineffectiveness.

In her opening statement, the trial prosecutor offered her own opinion bolstering the complainant's upcoming testimony, a theme which continued without objection throughout trial. 3 RR at 8-10. The trial prosecutor also highlighted multiple hearsay statements made by the complainant. *Id.* During habeas proceedings, trial counsel agreed that the prosecutor's statements were improper, and offered no strategy for his failure to object. *See* Appendix C, Powell Affidavit, at para. 27-29. As a result, the district court found that trial counsel was ineffective. *See* Appendix at 27.

The prosecution's first witness was Henry Anderson, Ms. Gonzalez's former boss. On July 5, 2011, when Ms. Gonzalez came to work, she was staggering and about to fall. Mr. Anderson was permitted to testify that Ms. Gonzalez told him "it happened at home. Her stepfather hit her upside the head with a stick." Mr. Anderson was also allowed to testify he believed this story, which differed from Ms. Gonzalez's other statements to him. 3 RR at 11-19. Trial counsel agreed that this testimony was inadmissible, and offered no strategy for failing to object. *See* Appendix C, Powell Affidavit, at para. 30-31. The district court found that counsel's failure to object was not strategic, that the testimony was inadmissible hearsay and opinion testimony, and that

counsel was ineffective for failing to object to the testimony. *See* Appendix at 10, 27-29.

The prosecution also called Officer Hope, who testified that Ms. Gonzalez told him she was "extremely fearful" of getting in trouble at home, and afraid of "mother and sister being -- coming up injured 'cause of the defendant." 3 RR at 30. He took Ms. Gonzalez to the hospital and she told him her injuries were from "a large stick that her stepfather had kept in the bedroom of his house." *Id.*. She also collected the stick allegedly used in the attack. *Id.* at 33-34. Trial counsel believed that some of this testimony was hearsay, and that some was not. *See* SHCR at 149-150. She also suggested allowing this testimony was part of the defense strategy. *Id.* The district court found that allowing this harmful and inadmissible testimony was not part of a reasonable defense strategy, and also that defense counsel's affidavit showed she misunderstood the hearsay rule. Further, defense counsel was ineffective for failing to object to this testimony. *See* Appendix at 10-11, 28.

Kristine Gonzalez was next to testify. Before she testified, she was admonished not to mention any prior bad acts because the trial prosecutor believed doing so could result in a mistrial. This shows that the trial prosecutor believed the prior bad act evidence was inadmissible. The prosecution also offered Ms. Gonzalez's medical records with some handwritten notes explaining that Ms. Gonzalez's bruising was from a "physical assault by stepfather." The defense objected to this hearsay, but was overruled. The objection shows that the defense understood the harmful nature of this type of out-of-court statement. Ms. Gonzalez had a hard time remembering basic details of her life, but recalled that Mr. Santana started to date her mom when she was a teenager. He

moved in with her family in 2006. Ms. Gonzales explained that on July 5, 2011, she got into an argument with Mr. Santana in his bedroom and that Mr. Santana became angry, turned red, and used his hickory stick to hit her on the head twice. She spent the rest of the day helping her grandmother and watching television. Eventually, Ms. Gonzalez remembered that she also went to work on that day, but that she was unable to work because her "head was pounding so much". 3 RR at 40-57.

Ms. Gonzalez then recounted her various out-of-court statements about the allegation, including her statement to the trial prosecutor that her boyfriend was the one who struck her in the head. She was allowed to explain that this statement was not truthful, and that she only made that statement because Mr. Santana forced her to. 3 RR at 60-63. Trial counsel later agreed that this prior bad act testimony was inadmissible and prejudicial, and offered no strategic reason for his failure to object. *See* Appendix C, Powell Affidavit, at para. 9. The district court found that the evidence was inadmissible, defense counsel's failure to object was not strategic, and that counsel was ineffective for failing to object to this testimony. *See* Appendix at 6, 20-21.

Trial counsel's most harmful mistake was made during the cross-examination of Ms. Gonzalez. Defense counsel had already established that Ms. Gonzalez never liked Mr. Santana, but went a step further by asking "[h]ow come you don't like Mr. Santana?" The prosecutor then approached the bench and explained "they've opened the door to all the prior assault history." Trial counsel opined "We have not, Judge" and attempted to withdraw the question, but the door had been opened. 3 RR at 65-67. After a recess, defense counsel stated "[w]e're not ready to

open that door, judge." The Court ruled the door had been opened. *Id.* at 69-71. Defense counsel then covered Ms. Gonzalez's current version of the assault and recounted different stories she had told in the past. *Id.* at 72-75.

On redirect examination, the prosecution introduced the evidence to which the defense had opened the door:

- Mr. Santana "was a controlling abusive person."
- Mr. Santana "was physically violent."
- Mr. Santana punched Ms. Gonzalez in the ribs for talking to co-workers about her life at home (which he discovered by spying her).
- Mr. Santana used an "old-school paddle" to strike the family all over their body.
- the abuse occurred for very minor infractions.
- Mr. Santana "would punch the family members for minor infractions."
- Mr. Santana would punish lying among family members by forcing them to eat a jalapeno, and then eat their spit if they spit it up.
- Mr. Santana would use paddles to paddle the bare feet of family members, including the complaining witness.
- Mr. Santana threatened to "hurt" the aunts of the complaining witness if she went to the police.
- Mr. Santana refused to return the belongings of the complaining witness's sister when the sister moved out.

3 R.R. at 76-85.

Defense counsel did not know why he asked this question, but he noted "I would not ask a question expecting it to open the door to prior bad acts." *See* Appendix C, Powell Affidavit, at para. 10. The district court found that defense counsel's question had opened the door to this prior bad act evidence, and

that opening the door was not part of a defense strategy. The court found that these bad acts would not have been admissible absent counsel opening the door, and that no valid defense strategy could justify this error. *See* Appendix at 4-5, 16-19. Counsel was ineffective for opening the door to this "inherently prejudicial" testimony. *Id.*

The prosecution rested its case after Ms. Gonzalez's testimony, at which time the defense made its opening statement, but the opening appeared to be more of a closing argument. The prosecution objected and defense stated the following in front of the jury: "Well, the offense has already happened, Your Honor. I can't say what it's going to be. It has happened. I'm not arguing what that was, just how it's considered." 3 RR at 90. When the court explained that opening statements should highlight "what you intend to prove[,]" the defense decided to rest it case. *Id.* at 91-93.

Prior to closing arguments, the parties discussed the jury charge. The defense had not requested limiting instructions when the damaging prior bad act testimony was admitted.[2] At the charge conference, defense counsel argued to remove the limiting instruction from the jury charge. One counsel explained "I think it's the extraneous offense instruction, but there wasn't any presented. So, we don't think that that needs to be in there." The other said "[w]e just wanted to see about taking it out." The Court was surprised and asked: "No extraneouses

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[2] Had defense requested a limiting instruction, the Court would have instructed the jury of the limited purposes, under Rule of Evidence 404(b), for which the prior bad act evidence could be considered. *See Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007).

were presented?" 3 RR at 95-96. Defense counsel answered "no" and the charge was removed, allowing the jury to consider the prior bad act evidence without limits. In post-conviction proceedings, trial counsel did "not recall why we requested no limiting instruction." *See* Appendix C, Powell Affidavit, at para. 13-15, 20. The district court found that the failure to obtain a limiting instruction "was not part of the defense strategy" and that "there could be no strategic reason" for this failure. Trial counsel were ineffective for failing to request the instruction. *See* Appendix at 7, 21-22.

In closing arguments, the defense argued that Ms. Gonzalez's injury did not match her story, which had changed multiple times. The prosecution relied upon the hearsay statements to Mr. Anderson, the trial prosecutor, and Officer Hope. Of course, the prosecutor highlighted the prior bad act testimony, and Mr. Anderson's testimony that he believed Ms. Gonzalez. The prosecutor opined that Ms. Gonzalez had told the jury the truth, and once again highlighted that Mr. Santana had "beat her for years and she told the truth." 3 RR at 98-115.

Closing arguments ended at 2:50pm, and the jury deliberated the rest of the afternoon before adjourning. Before they left, a note revealed the jury was hung with 8 jurors in favor of a not guilty verdict. CR at 463. The next morning, the jury sent out a note stating "[w]e would like any testimony that spoke to the abuse of other family members?" *See* CR at 464. The defense did not object to this readback despite the fact that it was improper pursuant to Texas Code of Criminal Procedure article 36.28. The jury was read back, verbatim, the prior bad act evidence describing: the defendant would get mad at Ms. Gonzalez and her family for falling asleep or forgetting to provide him

with "like condiments, salt shaker, toothpicks, salt and pepper" resulting in Mr. Santana occasionally getting up to hit them "in the gut or kick [them] or slap [them]"; for lying Mr. Santana would make the family eat jalapenos "[a]nd if [they] spit it up, he would make [them] pick it up . . . and eat it"; another form of punishment was sitting on a bar stool while Mr. Santana used a paddle on their bare feet. 6 RR at 6-10.

A second note requested to "hear the testimony of Christina when she testifying about her call to DA with Victor present and said 'Oscar' did it. We would also like to include her testimony about the second call to DA to say that no it was really Victor." CR at 465. This was prior bad act evidence admitted during the state's direct examination without objection. *See supra*. The jury was read back the testimony claiming that when Ms. Gonzalez called the prosecutor to ask for the charge to be dropped and stating that "Oscar" caused her injuries, she did so at the request of Mr. Santana. *Id.* at 13-16.

Within an hour the jury returned a guilty verdict. CR at 461. Mr. Santana then agreed to a 40-year sentence.

In post-conviction proceedings, the district court held that "[t]he jury notes in this case provide direct evidence that the prior bad act testimony effected the jury's verdict." *See* Appendix at 5-6. The district court noted that the jury readback was improper under Texas law, and that no valid defense strategy permitted the readback. *Id.* at 7-8.[3] The district court also found "opening the door to prior bad

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[3] Defense counsel offered no strategic reason for failing to object to the readback. *See* Appendix C, Powell Affidavit, at para. 24.

acts was specifically prejudicial in this case, as the jury asked for a readback of prior bad act testimony after being deadlocked 8-4 in favor of an acquittal." *Id.* at 19. Further, "because there was not a limiting instruction, the jury was likely to have considered the prior bad act evidence as evidence of the defendant's guilt, that he acted in conformity with his character." *Id.* at 26.[4] Trial counsel was ineffective for allowing the jury to be readback the prior bad act testimony. *Id.* at 22.

Finally, the jury charge in this case omitted the required definition of serious bodily injury. *See* CR at 455-461. This definition was required because the state had to prove that the hickory stick was a deadly weapon, which is, as relevant here: "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." "'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Pen. Code Ann. § 1.07 (a)(46). The district court found that defense counsel failed to request this required instruction, and that the failure was not part of any valid defense strategy. *See* Appendix at 8. This failure "harmed Mr. Santana because the failure to include the charge hindered defense counsel's ability to argue that Mr. Santana had not used a deadly weapon." *Id.* Defense counsel was ineffective in failing to require the serious bodily injury definition in the jury charge. *Id.* at 24-25.

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[4] *Citing See Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001).

Relying on *Strickland v. Washington,* 466 U.S. 668 (1984), the district court also noted that ""[e]rrors cumulatively can give rise to ineffective assistance of counsel even if no single error does." *Id.* at 28. As a result, "the force of all combined errors gave rise to ineffective assistance of counsel." *Id.* at 29. The district court recommended that the Court of Criminal Appeals grant the application for writ of habeas corpus.

B. The Court of Criminal Appeals denies the application in an unreasoned decision.

The Court of Criminal Appeals decision denying relief hinged on two sentences: "The trial court's findings and recommendation to grant habeas relief are not supported by the record." *See* Appendix A. "Applicant fails to convince this Court that trial counsel was deficient in representing Applicant at trial and that the alleged deficiency harmed Applicant." *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (stating "Therefore, in most circumstances, we will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record. When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions").[5]

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[5] The CCA continued its recent trend of not adopting the trial court's findings when denying habeas relief. *See Ex parte Hamilton*, WR-78,114-02, 2020 WL 6588560, (Tex. Crim. App. 2020); *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783 (Tex. Crim. App. Feb. 13, 2019), *cert. granted, judgment vacated sub nom. Andrus v. Texas*, 140

REASONS FOR GRANTING THE PETITION

In deciding that defense counsel did not perform deficiently in making multiple harmful errors, even where defense counsel offered no reasonable trial strategy for the errors and where the trial record precludes a finding of strategy, the Court of Criminal Appeals decided an important federal question in a way that conflicts with decisions of other state courts of last resort and United States courts of appeals.[6] Other appellate courts have found that

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S. Ct. 1875 (2020); *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018), *cert. granted, judgment rev'd sub nom*. *Moore v. Texas*, 139 S. Ct. 666 (2019).

[6] Indeed, the CCA's decision conflicted with its own prior precedent. *See Ex parte Menchaca*, 854 S.W.2d 128 (Tex. Crim. App. 1993) (defense counsel's performance in failing to file motion in limine requesting trial judge to instruct the State not to elicit testimony regarding defendant's prior conviction fell below objective standard of reasonableness under prevailing professional norms for purposes of establishing ineffective assistance of counsel; counsel failed to minimize possible harm by requesting instruction limiting jury's use of prior conviction, and counsel referred to defendant's prior conviction during his argument, prompting State's emphasis of it during closing argument); *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001) (finding that trial court's finding that defense counsel's failure to request limiting instructions with respect to extraneous act evidence offered during guilt phase of capital murder prosecution was legitimate trial strategy was not supported by evidence; defense counsel's failure to request limiting instructions amounted to ineffective assistance; such failure prejudiced petitioner; and level of prejudice was sufficient to undermine confidence in outcome of trial.)

allowing the admission of harmful and inadmissible evidence, absent some reasonable strategy, constitutes deficient performance.

In *Gabaree v. Steele*, 792 F.3d 991 (8th Cir. 2015), the Eighth Circuit affirmed the district court's grant of habeas relief, in spite of the heightened AEDPA deference. Gabaree had been convicted of child sodomy, molestation, and abuse. Like Santana's case, Gabaree's relied principally on the testimony of the complainants who had given inconsistent statements. *Id.* at 998. To prove its case, the State relied on "inadmissible bolstering" evidence which "should have been excluded after a proper objection." Because the case came down to the credibility of the complainants, and because this bolstering testimony was inadmissible, there was no reasonable trial strategy for failing to object. *Id.*

The *Gabaree* case also included a failure to object to inadmissible propensity evidence that came from a doctor who opined that Gabaree was likely abusing or neglecting children. *Id.* This is similar to the list of prior bad acts the jury was allowed to consider without limit in Santana's case. The Eighth Circuit found that there could be no reasonable trial strategy for counsel's failure to object to this harmful and inadmissible evidence, and noted "[w]e cannot impute to counsel a trial strategy that the record reveals she did not follow." *Id.* at 999. The Court found that counsel's performance "was objectively unreasonable." *Id.*

In *White v. Thaler*, 610 F.3d 890 (5th Cir. 2010), the Fifth Circuit found trial counsel was ineffective despite AEDPA deference, where counsel opened the door to harmful evidence and failed to object to other inadmissible and harmful evidence. White had been convicted of murder and assault

following a parking lot altercation where he ran over two women. One of White's contentions was that "counsel rendered ineffective assistance by opening the door to allow the prosecutor to question him about and comment on his post-arrest silence." *Id.* at 899. Like Santana's case, "the trial court recommended that the TCCA grant the writ of habeas corpus" but the CCA denied the application. *Id.* at 899. Also, like Mr. Santana's case, trial counsel admitted that his opening the door to post-arrest silence was not strategic. The Fifth Circuit analyzed the issue, found that White's post-arrest silence was inadmissible pursuant to Texas law, and defense counsel's opening of the "door to the prosecutor's cross-examination of White and subsequent remarks in the prosecutor's closing argument, constitutes deficient performance." *Id.* at 900. In a similar manner, Santana's trial counsel opened the door to a tidal wave of prior bad act evidence, all of which was inadmissible absent counsel's error, proving deficient performance.

Like Santana's case, defense counsel in *White* also failed to object to inadmissible and prejudicial evidence, specifically, that one of the victims was pregnant. *Id.* at 907. Also like Santana's case, defense counsel offered no strategy for his failure to object. *Id.* Because the evidence of pregnancy was inadmissible, "counsel should have made a proper attempt to keep the evidence from the jury. Failure to do so constitutes deficient performance under *Strickland*." *Id.*

Regarding prejudice, the Fifth Circuit highlighted the bruising cross-examination permitted by defense counsel's opening of the door, and the use of that cross-examination in closing. *Id.* at 903-04. This is similar to the flood of prior bad act evidence that the prosecution admitted against Mr. Santana,

and the effective use of this evidence during closing. Regarding the victim's pregnancy, the Court noted the issue was discussed twice during trial, and that the prosecution discussed the pregnancy during closing arguments. *Id.* at 910-11. The Fifth Circuit, despite applying AEDPA deference, disagreed with the CCA's ruling that the pregnancy testimony was not prejudicial. Indeed, by reviewing the trial record carefully, the Court found that the CCA's conclusion was "objectively unreasonable." *Id.*

The same is true in Santana's case. When the trial record is reviewed carefully, it is apparent that trial counsel did not intend to open the door to the tidal wave of prior bad act evidence. Counsel told the trial court as much.[7] And the jury's change from deadlocked in favor of not guilty to guilty after being read the impermissible jury readback proves prejudice.

The Fifth Circuit also recognized that "[t]he combined prejudicial effect of the post-arrest silence and the death of the unborn child inexorably leads us to conclude that White has shown that the state court's conclusion that there was no reasonable probability of a different outcome is objectively unreasonable." *Id.* at 912. The same is true in Santana's case. Here, the jury was allowed to consider inadmissible prior bad act evidence without objection and without limitation, the state was allowed to bolster its case with inadmissible hearsay statements, the jury was permitted an improper jury readback, and we know the jury considered the otherwise inadmissible evidence during its deliberations.

In *Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017), the Supreme Court of Indiana found that

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[7] "[W]e're not ready to open that door, judge." 3 RR at 69.

counsel was ineffective for failing to object to inadmissible hearsay statements and failing to object when the trial court allowed the jury to use those statements as substantive evidence of guilt. Humphry was convicted of murder. He was convicted mostly on the unsworn written statement of Donnie Smith, who gave his statement while in jail for another offense. *Id.* at 681. The Court's analysis of the harmful hearsay statement was straightforward, as was the district court's analysis related to inadmissible evidence in Santana's case: "Had a proper objection been raised to Brooks' written statement the trial court would have been required to sustain it. By failing to raise a proper objection counsel's conduct fell below an objective standard of reasonableness and was thus deficient." *Id.* at 684 (internal citation removed).

Like Santana's counsel, Humphrey's counsel also allowed the jury to consider inadmissible evidence without the guiding assistance of a limiting instruction. The "prior inconsistent statement could have been precluded from consideration as substantive evidence for the reasons explained, [counsel's] failure to object on hearsay grounds or request a limiting instruction allowed the jury to consider the statement in deciding Humphrey's culpability." *Id.* at 685. In much the same way, the jury in Santana's case was permitted to consider the prior bad act evidence as propensity evidence, which is not permissible pursuant to Texas Rule of Evidence 404.

Finally, there was an improper jury instruction which allowed the jury to use the hearsay statement as substantive evidence. This is analogous to Santana's counsel's request to remove the prior bad act limiting instruction from the jury charge. As in

Santana's case, "[h]ad a proper objection been lodged to the instruction, the court would have been required to entertain it." *Id.* (internal quotation omitted). For this reason, "counsel performed deficiently by allowing the trial court to instruct the jury with an incorrect statement of the law." *Id.*[8]

Mr. Santana understands that the petition for writ of certiorari will only be granted for compelling reasons, but he argues that the Texas Court of Criminal Appeals' flaunting of this Court's Sixth Amendment standards is a compelling reason. The state district court's findings were detailed and supported by the record. Mr. Santana's counsel admitted during trial that they had not intended to open the door to the tidal wave of prior bad act evidence admitted against him at trial. Counsel admitted during post-conviction proceedings that there was no strategy for failing to object to other prior bad act evidence, to bolstering arguments and testimony, and to hearsay evidence. Counsel gave no strategy for failing to request limiting instructions for the inadmissible prior bad act testimony, and counsel did not ensure that the jury was given a definition of "serious bodily injury" which permitted the state to prove that the hickory stick was a deadly weapon. These errors cannot be supported as a reasonable defense strategy.

And prejudice is clear. We know that the jury considered the prior bad act testimony, without limitation, because of the jury notes requesting the testimony and the jury readback of the otherwise

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[8] The prejudice inquiry in *Humphrey* was straightforward because the "unsworn statement was the *only* evidence identifying Humphrey as the shooter. To suggest that the jury's decision was not impacted by this evidence ignores the trial court's instruction to the contrary." *Id.* at 688.

inadmissible prior bad act testimony. We know that prior to the readback the jury was hung heavily in favor of not guilty, and shortly after the readback the jury returned a verdict of guilty.

Mr. Santana has shown "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (1984). Mr. Santana is serving a 40-year sentence, but no court should have confidence in his conviction, and because the one-year AEDPA deadline has passed, only this Court can ensure that the Texas Court of Criminal Appeals' decision actually applied this Court's guiding principles.

CONCLUSION

The Court should grant the petition and set the case for argument.

Respectfully submitted,

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