No. 22-7244

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE RAMON CRUZ — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, Director — RESPONDENT(S)
Texas Department of Criminal Justice - Correctional Institutions Division

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Ramon Cruz TDCJ No. 2106956
(Your Name)

1300 FM 655
(Address)

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

n/a
(Phone Number)

QUESTIONS PRESENTED

GROUND ONE: When a State court's summary denial assumed the truth of the facts plead in a State habeas writ application and a Federal habeas court, pursuant to 28 U.S.C. § 2254(d)(1), evaluates whether that State court decision invovled an unreasonable application of Strickland to the facts of the case, does the "could have supported" framework of Harrington v Richter, 562 U.S. 86 (2011) give the Federal court an excuse to "invent" as a reason for the State court's decision historical facts which, according to the State's esatblished practice, the State court did not actually rely on for the decision?

GROUND TWO: Does 28 U.S.C. § 2253(c) require a Certificate of Appealabilty ("COA") for a State prisoner to appeal the denial of pre-trial motions related to the procedures and standards (such as in GROUND ONE) used in evaluating the merits of a § 2254 Habeas Petition?

GROUND THREE: Was Cruz's court-appointed counsel at the second trial ineffective in violation of the 6th Amendment to the U.S. Constitution when counsel was silent on the determinative issue on Cruz's decision to reject the 7 and 10 year pre-trial plea bargain offers or when counsel provided misadvise about the punishment hearing defense for the 20 year mid-trial plea bargain offer?

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. Jose Ramon Cruz, No. F12-24443-Q (204th Judicial District Court of Dallas County, Texas). Judgment entered Dec, 16, 2014.
- Ex parte Jose Ramon Cruz, No. No. F12-24443-Q(B) (204th Judicial District Court of Dallas County, Texas). Order entered March 17, 2020.
- Cruz v. State, No. 05-16-01527-CR (5th District Court of Appeals of Texas). Judgment entered June 4, 2018.
- In Re Cruz, No. PD-0648-18 (Court of Criminal Appeals of Texas). Order entered Nov. 7, 2018.
- Ex parte Jose Ramon Cruz, No. WR-87,865-02 (Court of Criminal Appeals of Texas). Judgment entered April 29, 2020.
- Cruz v. Director, No. 3:20-cv-1041 (U.S. District Court for the Northern District of Texas - Dallas Divison). Judgment entered Dec. 10, 2021.

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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 _____ 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 _____ 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 _____ 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 appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

The date on which the United States Court of APpeals decided my case was October 5, 2022.

A timely petition for rehearing was denied by the U.S. Court of Appeals on the following date: November 30, 2022, and a copy of the order denying rehearing appears at APPENDIX D.

The jursdiction of this Court is invoked under 28 U.S.C. 1554(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, 6th Amendment,:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

28 U.S.C. § 2254(d)(1),:

> "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or"

28 U.S.C. § 2253(c)(1),:

> "Unless a circuit judge or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or ..."

STATEMENT OF THE CASE

Even prior to the charged offense, Jose Ramon Cruz, the Petitioner, lived a life of "hyper-cautious[ness]." ROA.2488, 2653 (Dkt. No. 13-29 at 124, Dkt. No. 13-30) at 52). That hyper-cautiousness, or anxiety, was the result of Cruz's exposure at a young age to community violence. Indeed, Cruz lived in a "rough neighborhood" where crime was rampant. ROA. (Dkt. No. 13-29 at 111, Dkt. No. 13-12 at 187). Thus, Cruz took to carrying a handgun with him around the neighborhood. As Cruz explained at trial,:

> "Well, after certain experiences that I had and then just the way that the world has been going with a lot of the news and everything, I would always be very cautious, and I would always think to myself, 'What if I ended up in a situation like that?' So I was -- I was always afraid of -- because it's becoming more and more common for mass shooters in public or terrorism or whatever. And I just -- and especially the fact that I was robbed, in my mind ... [objection], I always wondered if somebody tried to rob me and I didn't have a gun, what happen if I ran out of ammunition and they have more guns than me or whatever the situation."

ROA. (Dkt. No. 13-29 at 123). It was that general anxiety that lead to Cruz's "inchoate sense of fear" on the night to the offense. ROA. 3359 (Dkt. No. 13-38 at 412). A fear Cruz erroneously believed justified his use of self-defense. A belief reinforced by the State prosecutor's acknowledgement during plea negotiations that Curz acted out of fear that night and the offer of several favorable plea bargains. ROA.2969-2970 (Dkt. No. 3 at 15, 16).

That excessive anxiety lead to, what was undisputed at trial, that Danny's death was the result of "Danny grabb[ing Cruz's] arm, wrist, or hand and the men struggling for control of the gun." ROA. 255 (Dkt. No. 33 at 3 (citing Cruz v. State, No. 05-16-01527-CR, 2018 WL 2473884 at *1-*2 (Tex.App. - Dallas June 4, 2018))). Cruz

had stoped by Danny's house in an attempt to purchase some beer. Danny and the other's at Danny's house refused to sell Cruz any beer because they did not know who Cruz was (and whether he was underage). "Cruz continued trying to buy beers and would not leave." Id. When Danny got aggressive in telling Cruz to leave, Cruz "drew a gun and pointed it at Danny ..." Id. At that point Danny broke free from having to be held back from Cruz and moved towards Cruz, grabbing for Cruz's gun. Id., ROA. 2327 (Dkt. No. 13-28 at 195); cf. Dkt. No. 13-11 at 150, Dkt. No. 13-38 at 72. Cruz and Danny struggled for control of the gun. Danny was shot during the struggle for control of Cruz's gun and died shortly afterwards. Cruz admitted at trial, that as a result of his hyper-cautiousness and inchoate sense of fear, when Danny came towards him and struggled for control of the gun, that Cruz intentionally pulled the trigger of the gun but did not intend to kill Danny. ROA.2651 (Dkt. No. 13-30 at 50).

Cruz's court-appointed counsel at the second trial believed that "self-defense was an incredibly weak defense" and conveyed that belief to Cruz. ROA.3358-3359 (Dkt. No. 13-38 at 411-412). Yet, counsel also believed and told Cruz that they "were locked into self-defense based on [Cruz's] prior testimony ..." Id. The problem was that Cruz's trial counsel never explained to Cruz that his "inchoate sense of fear" on the night of the offense that was the result of his "anxiety" or "hyper-cautious[ness]" was the reason why self-defense was such an incredibly weak defense. ROA. 2969-2970 (Dkt. No. 3 at 20). Trial counsel never explained that to Cruz, because he could not have, as counsel was unaware of Texas' precedent that one with "imagined suspicions, delusions, and fears," as a matter of law, could not have had a "reasonable belief" that deadly

force was required; which was necessary for self-defense to be justified. Id.; cf. Mays v. State, 318 S.W.3d 368, 383 (Tex.Crim.App.2010), Werner v. State, 711 S.W.2d 639, 645 (Tex.Crim.App.1986). Rather, trial counsel gave Cruz other excuses for why self-defense was a weak defense.

It was based on that advice that trial counsel did advise Cruz to accept several plea bargain offers. ROA.2969 (Dkt. No. 3 at 16). Those offers were explained by trial counsel on the record prior to trial,:

> "... Initially the State had offered, I think, to shave off 5 years [from the 35 years at the first trial].
> Thirty was your initial plea bargain offer. that right?
>
> [State prosecutor]: Yes.
> I communicated that to you, did I not, Mr. Cruz?
>
> Yes.
>
> As time progressed, the State actually came down. They went from 30 to 20.
>
> [State prosecutor]: Correct.
>
> I communicated that to you, Mr. Cruz.
>
> Yes.
>
> Then they went to 15. Correct?
>
> [State prosector]: Correct.
>
> I communicated that to you, Mr. Cruz.
>
> Yes.
>
> Then eventually they came down to 7.
>
> [State prosecutor]: That's correct.
>
> I communicated that 7 to you, Mr. Cruz. Correct?
>
> Yes.
>
> Every time I received an offer from the State, I visited with my client either via video conference or in person at the Dallas County Jail to communicate these offers. Each offer the State made, the 30, 20, 15, 7, those were all rejected. Correct, Mr. Cruz?

Yes.

Then -- those were rejected on your own free, voluntary decision. Correct?

Yes.

Nobody made promises, assurances how this trial would work out. You decided you did not want to take each one of those particular offers. That right?

That's ocrrect.

Then about ten days ago, [the State prosecutor] approached me again and indicated to me that he was curious what, if anything, Mr. Cruz would accept in order to resolve this case with a plea bargain. I spoke to my client, and he's also spoke to his family, and I was informed he would take time served, which would essentially be 4 years TDC, on a manslaughter. Correct?

[State prosecutor]: That's the information.

That's what you related to me, Mr. Cruz.

Yes.

I spoke to the [State prosecutor] about that. He cricled back with his alleged victim's family, and they rejected that offer. We were not able to come to any sort of agreement.

[Trial Judge]: 'They' being the State.

[State prosecutor]: Essentially that's not a number the State can sign off on.

[Trial Judge]: State was not -- never did offer the 4 years.

...

[Trial Judge]: The best offer that was made was what? Seven?

Seven TDC. ...Range of punishment is 5 to 99 or life. You understand that, Mr. Cruz?

Yes.

[Trial Judge]: Mr. Cruz your lawyer stated well everything. All I want to confirm is that everything he told me about the plea bargain going on in this case is the way you remember it and understand if that's correct.

Yes, Your Honor.

[Trial Judge]: You do not wish to accept the 7 year offer, which would be, of course, all your back time but still would be what we call a 3(g) offense. You would have to serve half of that 7 years calender time before you would be paroled. Bottom line is you understand those offers, wish to reject them. Correct?

Yes Your Honor.

[Trial Judge]: Good enough. I'll honor that, certainly. ..."

ROA. 1940-1945 (Dkt. No. 13-17 at 11-15.

Thus, having rejected the plea bargain offers Cruz went to trial before a jury. Relevant here, primarily it was trial counsel who brought up Cruz's exposure to community violence at a young age. ROA.2476, 2488, 2593 (Dkt. No. 13-29 at 111-113, 123-124, 229-230). And, it was even trial counsel who asked Cruz if his resultant cautiousness was "hyper-cautious[ness]", or excessive cautiousness. ROA.2488 (Dkt. No. 13-29 at 124). Then, trial counsel asked for a jury instruction on "apparent danager." ROA.2625-2626. Nevertheless, the Texas Court of Criminal Appeals had rejected such an apparent danger instruction when "the evidence [] only tended to show that possibly appellant was not an ordinary and prudent man with respect to self-defense" because his beliefs were based on his "imagined suspicions, delusions, and fears." Mays, 318 S.W.3d at 383, Werner, 711 S.W.2d at 645. Thus, the very evidence trial cousel presented of Cruz's "hyper", or excessive, cautiousness negated the defense of self-defense. But, that did not stop trial cousel from arguing to the jury that Cruz's "axiety" was the very reason Cruz was a "reasonable guy." ROA.2647, 2653 (Dkt. No. 13-30 at 46, 52). Of course, the State prosecutor refuted that arugument.

In any event, the record supports that the jury flatly refused to consider self-defense as a viable defense. Handwritten notations

on the Court's Charge reflect that the Jury was deliberating between finding Cruz guilty of first degree murder (with the mental state of intending to cause serious bodily injury and commiting an act clearly dangerous to human life) or the lesser included offenses of manslaughter (with the mental state of recklessly) and criminally negligent homicide (with the mental state of criminal negligence). ROA. 1893, 1895-1896 (Dkt. No. 13-25 at 76, 78-79). What the Jury did NOT consider was that Cruz had intentionally caused Danny's death nor self-defense. ROA.1896 (Dkt. No. 13-15 at 70 (no handwritten notations). It would appear that the Jury believed Cruz's testimony that he did not intend to kill Danny. And, the Jury also believed Cruz's testimony (and the State prosecutor's argument) about his hyper-cautiousness. It is just that such testimony negated a finding on self-defense. The jury sentenced Cruz to 38 years (from a range of 5 to 99 or LIFE).

Cruz's conviction was the result of two separate trials. Cruz's first trial "was reversed on direct appeal for the trial court's failure to instruct the jury on the law of self-defense." ROA.253 (Dkt. No. 33 at 1 (citing Cruz v. State, No. 05-14-00085-CR. 2015 WL 4099821 (Tex.App. - Dallas July 7, 2016))). That decision was based on Cruz's testimony which demonstrated, at the least, apparent danger. Importantly, that decision did work to reinforce Cruz's erroneous belief that he was jusitifed in using self-defense. ROA.2969-2970 (DKt. No. 3 at 15). However, when the State appellate court made that decision, the court did not have the State prosecutor's viewpoint due to a clerical error by the State prosecutor's office. ROA.3022 (Dkt. No. 13-18 at 75). Yet, on the second appeal the State prosecutor forcefully argued that Cruz's belief that self-defense was justified

was unreasonable. ROA.1764-1767 (Dkt. No. 13-20 at 30-37). That second appeal and subsequnt PDR were denied. ROA.253 (Dkt. No. 33 at 1 (citing Cruz v. State, No. 05-16001527-CR, 2018 WL 2473884 (Tex.App. - Dallas June 4, 2018) and In Re Cruz, No. PD-0648-18 (Tex.Crim.App. - Nov. 7, 2018))).

Thereafter, Cruz filed his State habeas writ application. Cruz claimed that his counsel at the second trial was ineffective during pre-trial and mid-trial plea negotiations because counsel failed to explain that Cruz was not acting as an ordinary and prudent man (or as a person of ordinary temper); so that, it was not self-defense for Cruz to shot the deceassed. Specifically, Cruz alleged,:

> "... Cruz's second trial attorney failed to explain to Cruz that due to Cruz's PTSD from his exposure to community violence, Cruz's belief that deadly force was immediately necessary was not belief to 'an ordinary and prudent man.' Yet, th[e] Court of Criminal Appeals had explicity held that the beliefs of a defendant who has mental health issues are not the beliefs of an 'ordinary and prudent man.' See i.e., Mays[], Werner[]. It is evident that Cruz's second trial counsel was unaware of that legal principle because he presented evidence during the second trial related to Cruz's exposure to community violence that made it so that he was not acting as an ordinary and prudent man would have acted in the same circumstances. [] ... In any event, counsel never sttempted to explain these legal concepts to Cruz."

and

> "... Cruz, due to counsel's advice, believed that he had a good chance at a finding on sudden passion. Yet, like self defense, sudden passion requires the defendant to be 'a person of ordinary temper' and Cruz's Jury was reminded that they could not substitute the 'defendant' for 'a person of ordinary temper.' [] But, Cruz's second trial attorney did not realize that by presenting evidence that Cruz was hyper-cautious due to his exposure to community violence that counsel demonstrated Cruz was not a person of 'ordinary temper.' []
>
> Cruz's second trial attorney provided Cruz with misadvice about the advantages and disadvantages of accepting the mid-trial 20 year plea bargain offer. Counsel visited Cruz in the trial court's hold over jail cell between the guilty verdict and sentencing phase. As counsel was

> explaining to Cruz that he was preparing to argue sudden passion to the trial court and jury, the [State] prosecutor came by and told counsel he was offering a 20 year plea bargain to resolve the second trial. After the prosecutor left, Cruz's second trial attorney advised Cruz to not accept the 20 year plea bargain offer because he felt the Jury would be recptive to a sudden passion finding. It appears that advice was partially correct, in that some on the Jury were receptive to a sudden passion finding until the trial court explained that they could NOT substitute the defendant for a person of ordinary temper. [] In any event, counsel did not explain to Cruz the risk or pitfalls of the Jury returning a finding on sudden passion because of the possibilty that the Jury would not see Cruz as a person of ordinary temper."

ROA.2629-2972 (Dkt. No. 13-38 at 22-25).

The State prosecutor obtained an affidavit from Cruz's trial counsel appearing to refute Cruz's claims. However, trial counsel did not say one word about Texas' legal standard of "reasonable belief" for self-defense to be justified or Cruz's "hyper-cautious[ness]" and anxiety. Rather, trial counsel generally asserted that it was "completely false" that counsel did not "fully explain the elements of self-defense and that Mr. Cruz's conduct was not legally self-defense." ROA.3358 (Dkt. No. 13-18 at 411). There is no dispute that trial counsel and Cruz "had numerous discussions [] wherein [counsel] explained to [Cruz] that self-defense was an incredibly weak defense ... [and that Cruz's] conduct was not self-defense." Id. The concern is what legal "opinion[s]" did counsel "fully explain" to Cruz? In his postconviction affidavit trial counsel did detail exactly what he "fully explained all of this to Mr. Cruz", and the "all of this" did not include the legal principles found in Werner and Mays that Cruz's acknowledged "imagined suspicions, delusions, and fears," which were the result of Cruz's mental disease, negated a finding that he acted in self-defense as an ordinary and prudent man. All trial counsel said that "all this" which he explained to Cruz was that Cruz's conduct was not self-defense because,:

(1) Cruz was carrying a weapon in public which wsa a class A misdemeanor,[1]

(2) Cruz was "arguably criminaly treaspassing on the victim's property when Mr. Cruz shot [Danny],"[2] and,

(3) "Mr. Cruz pulled the weapon based [solely] upon a verbal altercation with the deceased ..."[3]

ROA.3359.

Likewise, in his postconviction affidavit Cruz's trial counsel did not say one word about Texas' legal standard of "a person of ordinary temper" required for a finding on sudden passion. All trial counsel did say was to confirm that he told Cruz that they "could make an argument that this killing occurred in the heat of sudden passion ..." ROA.3358 (Dkt. No. 13-38 at 411). But, as that advice was given after evidence had been presented of Cruz's "hypercuatiou[ness]", or anxiety, it is clear that trial counsel did not consider that evidence of Cruz's mental disease would prevent a finding that Cruz acted as "a person of ordinary temper." Thus, it can be infered that counsel was unaware of the implications of Werner and Mays.[4]

At that point the State habeas trial court was statutorily tasked with determining whether there were any "controverted, previously unresolved factual issues material to the legality of" Cruz's confinement. Tex. Code Crim. Proc., art. 11.07 § 3(c). "[T]he fact issues that must be resolved are those contained within the writ application and the State's controverting answer." Ex parte Medina, 361 S.W.3d 633,

1. Engaging in criminal activity, other than a Class C misdemeanor, at the time force was used only removes the presumption that the actor acted reasonably. Tex. Penal Code § 9.31(a)(3). Cruz correctly believed that factor did not prevent a finding on sudden passion.

2. In the prior direct appeal the State appellate court found that Cruz was on the sidewalk at the time of the use of force and thus he would not have been treaspassing. ROA.343, 346 (Dkt. No. 13-2 at 2, 5). Cruz correctly believed that this factor did not prevent a finding on self-defense.

3. That was a factual dispute for the jury and Cruz believed and testified that factually Danny was the aggressive one.

4. Trial counsel did assert that the reason Cruz rejected all the plea bargain

642 (Tex.Crim.App.2011). It is the same standard as the Federal standard and can be stated as whether a prisoner has "pled specific facts, which, if proven true, might call for relief." Id. at 638.

The State habeas trial court explicitly entered an Order determining that there were no controverted, previously unresolved facts material to the legality of Cruz's confinement. See, Ex parte Cruz, No. W12-24443-Q(B) (204th District Court of Dallas County, Texas - March 17, 2020)(available at http://www/dallascounty.org/districtclerk/ (search for "documents" in case number W1224443B)).[5] Had the State habeas trial court done nothing, the court would also have been "deemed to have found that there [were] no such unresolved factual issues." Register v. Thaler, 681 F.3d 623, 629-630 (5th Cir.2012). The case was forwarded to the Texas Court of Criminal Appeals ("TCCA"). The TCCA denied relief. Ex parte Cruz, No. WR-87,865-02 (Tex.Crim. App. - April 29, 2020)(per curiam). In the unreasoned decision, the TCCA also necessarily concluded that even if the facts Cruz alleged in his State habeas writ application were true, there was no Constitutional violation. Medina, 361 S.W.3d at 638-640.[6]

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4. (cont) offers was that "someone in the jail had told Mr. Cruz to reject plea offers because he was going to be going home ... [as] the Lord had ordained [it]." At least for the seven year plea bargain offer, that goal of going home could have been realized through parole. In any event, the point is that with proper legal advice -- especially mid-trial after a verdict of guilty -- Cruz's mindset would have been different. That is what Cruz alleged in his State habeas writ application and it is what the State courts assumed to be true when adjudicating Cruz's claim.

5. This Order is nowhere in the State Court Record filed by the Director in the U.S. District Court. Cruz did not know that, because the U.S. District Court refused to provide him with access to the entire State Court Record. Thus, Cruz just referred to this Order through-out his pleadings in the U.S. District Court. However, in the U.S. Court of Appeals for the 5th Circuit, after that Court allowed him access to the entire Record on Appeal, Cruz learned that this Order was not in the State Court Record and asked the 5th Cirucit to take judicial notice of the Order from the State trial court's public website. The 5th Cirucit never ruled on that request.

6. The TCCA actually issued a written Order in Cruz's case which had some reasoning for a claim not raised herein. For the claims raised herein the TCCA did not provide any reasoning whatsoever (and there were never any Findings of Fact or Conlcusions of Law made).

Cruz filed his § 2254 habeas petition in the U.S. District Court for the Northern District of Texas (Dallas Division) raising the same claims. Cruz asked the U.S. District Court to "in determining whether the state habeas court's summary denial of Cruz's claims raised in his state habeas writ application involved an 'unreasonable application' of Federal law .. consider as true the facts pled by Cruz in his state habeas writ application..." ROA.194 (Dkt. No. 26 at). In making that request (in a pre-trial motion) Cruz cited to justice Breyer's hypothetical in Pinholster that "if the state-court rejection assumed the habeas petitioner's facts were true, federal law was not violated), then (after finding that state wrong on a [§ 2254](d) ground) an [§ 2254](e) hearing might be needed to determine whether the facts alleged were indeed true." Cullen v. Pinholster, 131 S.Ct. 1338, 1412 (2011)(BREYER, J., concurring).

The U.S. Magistrate Judge held that Cruz misunderstood "the Court's limited role in reviewing state habeas decisions " and that Richter's "could have supported" framework would apply to require the District Court to "Consider[] not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon." ROA.225 (Dkt. No.28 at (quoting Evans v. Davis, 875 F.3d 210, 216 (5th Cir. 2017))).

Cruz filed OBJECTIONS to the Magistrate Judge's ruling with the Chief U.S. District Court Judge. In his OBJECTIONS Cruz stressed that,:

> "Cruz is not asking this Court to in any way side-step, or ignore, review under 28 U.S.C. § 2254(d). Rather, review under § 2254(d)(1) focuses on the legal basis for Cruz's habeas claims. Whereas, Cruz's motion [] focuses on the facts this Court will use to make the necessary legal determination."

ROA.228 (Dkt. No.29 at). The Chief U.S. District Court Judge determined that Cruz was "seeking relief inconsistent with 28 U.S.C. § 2254(d)" and overruled Cruz's objections. ROA.250 (Dkt. No.32 at).

Therefore, the U.S Magistrate Judge applied his understanding of Richter's "could have supported" framework to his analysis of Cruz's claims. Specifically, the U.S. Magistrate Judge said,

> "Cruz also claims that [trial counsel] misadvised him as to the legal requirments for self-defense. [Trial counsel] again refutes this allegation, labeling it 'completely false' and explaining that he and Cruz had 'numberous discussions' concerning the weaknesses in Cruz's self-defense claim. [] So, as to this IAC ground too, considering Cruz's allegations against the record, the CCA's denial was not unreasonable.
>
> Cruz further claims that [trial counsel] was ineffective because counsel ... did not adequately advise him as to 'sudden passion.' Cruz then claims that, had he received effective assistance as to both issues, he would have accepted a 20-year plea deal....
>
> Considering that [trial counsel's] testimony was before the CCA and that Section 2254(d) requires that federal courts consider 'not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon,' Evans, 875 F.3d at 216, Cruz has not shown that the CCA's denial of this IAC ground was unreasonable."

ROA.271-277 (Dkt. No.33 at 19-25). In short, the U.S. Magistrate Judge considered that a "reason" the State habeas court "could have" denied relief was a credibilty determination accepting trial counsel's postconviction affidavit over Cruz's sworn allegations.

Cruz filed OBJECTIONS wherein he objected to,:

> "the Magistrate Judge's use of facts from Cruz's counsel at the second trial's post-conviction affidavit for reasons that 'could have supported' the State court's decision..."

ROA.293 (Dkt. No.39 at). Cruz did not dispute that because the State courts did not "articulate[] their reasons why there was

not a Constitutional violation, th[e] [District] Court may consider legal reasons that 'could have supported' the State court's application of ... Strickland[] to the assumed facts." ROA. (Dkt. No. 39 at). Cruz's point was that "what underlying historical facts the State court relied on is a different question than how the State court applied Strickland to those facts." Id. at . And, in Cruz's case the only underlying historical fact the State courts "could have" relied on when applying Strickland to those facts, was the facts alleged to be true in Cruz's State habeas writ application. That is because Texas' procedures required the courts to determine whether, if Cruz's factual allegations were true, there was a constitutiona violation. Thus, if Richter's "could have supported" framework applied, the only factual reasons that "could have supported" the denial of relief would have had to come from the facts alleged by Cruz and not facts from trial counsel's postconviction affidavit. Id. at .

Moreover, Cruz argued in his OBJECTIONS that because of this Court's decision in Wilson that Richter's "could have supported" framework was inapplicable (at least to the historical facts). That argument was two pronged itself. First, the U.S. District Court wholly ignored the State habeas trial court's written Order which explained the reason relief was denied and the District Court should have "looked through" to that reasoning. Id. at . Second, irrespective of the "look through" doctrine, Wilson instructed that the AEDPA required Federal habeas courts to, when the reasons can be ascertained, "train its attention on the particular reasons -- both legal and factual -- why state courts rejected a state prisoner's claims." Id. at (quoting Wilson v. Sellers, 131 S.Ct. 1188 (2018)

Either way, according to Cruz's OBJECTIONS, the U.S. District Court, like the State courts did, should have reviewed the State's courts' application of Strickland to the assumed facts.

Finally, Cruz OBJECTED that it would have been unreasonable for the State courts to have relied on trial counsel's explanations as reasons to deny relief. It would have been unreasonable because,:

> "while counsel offered a general denial of the claim that he 'did not fully explain the elements of self-defense,' he only listed other elements that he explained to Cruz; so that, counsel did not claim that he actually explained th[is] element[] central to Cruz's case. []"

and

> "while counsel refuted that he advised Cruz to 'reject the twenty years TDC offer', he ... admitted that he 'told [Cruz] that in the punishment hearing we could make the argument that this killing occurred in the heat of sudden passion' (so that, counsel had to believe that it had merit inspite of the legal definition of "a person of ordinary temper' -- which Cruz did not legally meet based on the evidence presented at the second trial by counsel)..]"

ROA. (Dkt. No. 39 at).

Upon a supposed DE NOVO review of those OBJECTIONS and without any explanation, the Chief U.S. District Court Judge found no error and accepted the Magistrate Judge's Findings, Conclusions, and Recommendation. The U.S. District Court also denied a COA and denied leave to appeal IFP. ROA. 319 (Dkt. No. 40 at).

Cruz did file a Notice of Appeal noting his desire to seek a COA from the U.S. Court of Appeals for the Fifth Circuit. In his Notice of Appeal Cruz explictly noted his desire to appeal the denial of his motion asking the District Court to assume the truth of the facts plead in his State habeas writ application. ROA. 322 (Dkt No. 42)

In his application for COA to the 5th Circuit Cruz briefed both the ineffective assistance of counsel at his second trial related

to the plea bargains and the failure to review the State court's application of Strickland to the assumed facts. And, Cruz asked that the assumed facts issue be addressed without a COA,:

> "Cruz explictly appealed the denial of his pre-trial motion on this subject. ROA. 322 (Dkt. No. 42). Cruz could not separately appeal that pre-trial denial until entry of the final judgment. Nevertheless, it is an issue "collateral to the merits of the heabeas claim itself." See i.e., Illarramendi v. U.S., 906 F.3d 268, 290 ([2nd] Cir.2018). Because it is an appeal of an Order denying a motion, much like a motion for an evidentiary hearing, no COA is required to appeal the issue. See, Harbison v. Bell, 129 S.Ct. 1481, 1485 (2009), Norman v. Stephens, 817 F.3d 226, 234 (5th Cir. 2016). As such a briefing schedule should be set for this issue irrespective of whether a COA is granted."

PRO SE COA (June 13, 2022 - 5th Cir. No. 22-11068). Then, like below, Cruz stressed the difference between a State court's legal and factual reasons for denying relief,:

> "... Admitedly, in this situation the State court's factual findings will be treated differently than the State court's legal conlcusions. That is to say that the SHTC's decision only provided a relevant rationale for that court's conclusions with respect to the historical facts. The SHTC's legal conclusions remain unexplained and Richter's 'could have supported' famework will apply to the legal grounds for the SHC's decision.
>
> Indeed, the very structure of the AEDPA treats the State court's factual and legal conclusions separately. Section 2254 (d)(1) governs the State court's application of the law to the facts of the case; whereas, § 2254(d)(2) governs the State court's determination of historical facts. See i.e., Rice v. Collins, 126 S.Ct. 969, 976 (20__)('The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law.'). ...Similarly, in Strickland the Supreme Court explained that:
>
> > 'Although state courts findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirment of § 2254(d) [now § 2254(e)(1)] ... both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact [now reviewed under § 2254(d)(1)].'
>
> The point is that Texas' postconviction habeas procedures leave one conclusion for what the SHTC (and the TCCA) 'could have done' in relation to the historical facts in Cruz's case."

Id. at pp. 16-17.

The 5th Circuit acknowledged both issues, denied a COA, and denied leave to appeal IFP. Cruz filed a motion to reconsider based on his right to appeal the denial of the pre-trial motion about assumed facts without a COA. The 5th Circuit denied reconsideration on November 30, 2022. This PRO SE petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

It is a common practice for State courts considering postconviction challenges from prisoners to only consider whether, if true, the facts alleged by the prisoner violated Federal law; and, when not, to deny relief in a summary decision that does not articulate any reasoning for the decision. This Court addressed that common practice in Harrington v. Richter, 562 U.S. 86, 178 L. Ed. 2d 624 (2011). This Court in Richter crafted the "could have supported" framework for Federal habeas courts to review summary State court decisions under the AEDPA and § 2254(d). Pursuant to Richter's could have supported framework, a Federal habeas court must gather reasons that could have supported the state court decision and determine whether any reasonable rational exisit to support the decision.

Then, in Wilson v. Sellers, 131 S.Ct. 1188 (2018) this Court addressed the common practice of a lower state court issuing a reasoned decision and the highest state court giving a summary denial. This Court in Wilson adopted the "look through" approach. Pursuant to Wilson's look through approach, a Federal habeas court trains its attention on the reasons, both factual and legal, provided in the lower state court's decision and asks whether they are reasonable.

In short, when the relevant rational for a State habeas court's decision can be assertained, Richter's could have supported framework does not apply.

In Wilson both the majority and Justice Gorsuch in his dissent were concerned with "respect[ing] what the state court actually did" or the state's "actual practice." Id. at 1196 (majority), 1198)GORSUCH, J., dissenting). Indeed, that should be the concern. As this Court said in Pinholster, "[o]ur cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did." Cullen v. Pinholster, 563 U.S. 170, 179 L. Ed. 2d 557, 570)(2011). Thus, the question arises, when a state court determines that, even if the facts alleged by the prisoner were true, there was no Constitutional violation, does Richter's could have suppported frameowrk allow a Federal habeas court to consider as a reason which could have supported that decision, facts outside those alleged by the prisoner? In other words, did the U.S. District Court below err in making a credibilty determination to accept the facts in Cruz's trial cosunel's postconviction affidavit, over the facts alleged by Cruz, when the actual practice of the Texas Court of Criminal Appeals ("TCCA") was to assume the truth of the facts alleged by Cruz in his State habeas writ application when applying Strickland to the facts of the case?

The answer appeared self-evident to Justice Sotomayer and Justice Breyer in thier separate opinions in Pinholster. For Justice Sotomayer stated the stadard of review under § 2254(d)(1) to be,:

> "When the state court rejected a Strickland claim on the pleadings assuming the allegations to be true, as here, [] the federal court must ask whether 'there is any reasonable argument' supporting the state court's

> conclusions that the petitioner's allegations did not state a claim."

Id. at 599 (SOTOMAYER, J., dissenting). Under that standard, the Federal habeas court, like the state court, assumes the allegations made by the prisoner in his or her state habeas application to be true. Id. at 603-604 (SOTOMAYER, J., dissenting)("... the California Supreme Court could not reasonably have concluded that Pinholster had failed to allege that his counsel's investigation was inadequate under Strickland."). Justice Breyer, who agreed with the majority in Pinholster that § 2254(d)(1) does not leave § 2254(e) without work to do, said the same thing in his hypothetical. In his hypothetical Justice Breyer said,:

> "if the state-court rejection assumed the habeas petitoner's facts (deciding that, even if those facts were true, federal law was not violated), then (after finding the state court wrong on a [§ 2254](d) ground) an [§ 2254](e) hearing might be needed to determine whether the facts were indeed true."

Id. at 584-585 (BREYER, J., concurring). In that hypotehtical, the Federal habeas court necessarily also assumed the truth of the facts pled by the prisoner in State court for the court's review under § 2254(d), or there would be no reason for a § 2254(e) heaing "to determine whether the facts alleged were indeed true." Id. The majority in Pinholster never took issue with those statements and, in fact, appeared to apply that same approach.

At least, the 7th Circuit has applied the could have supported framework in a way that respects the state court's actual practice of assuming the prisoner's factual allegations made in state court to be true when analyzing under § 2254(d)(1) whether the state court's application of Strickland to the assumed facts was unreasonable. See, Gish v. Hepp, 955 F.3d 597, 601, 604 (7th Cir.2019), Mosley v. Atchison, 689 F.3d 838, 842, 848 (7th Cir. 2012).

This is the only understanding of Richter's could have supported framework which can squared with the stautory langauge of 28 U.S.C. § 2254(d). In § 2254(d) of the AEDPA Congress instructed that for,:

> "a claim that has been 'adjudicated on the merits in State court proceedings,' [] an additional restriction applies. Under § 2254(d), that application 'shall not be granted with resepct to [such a] claim ... unless the adjudication of the claim':
>
> '(1) resulted in a decision that was contrary to, or invloved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"

Pinholster, 179 L.Ed.2d at 569.. To begin with, Congress dealt separately with legal and factual issues. Section 2254 (d)(1) clearly concerns legal issues and 2254(d)(2) just as clearly concerns factual issues. This Court has confirmed that § 2254(d)(1)'s "involved an unreasonable application" clause applies when "a state court decision unreasonably applies the law of this Court to the facts of a prisoner's case ..." Williams v. Taylor, 120 S.Ct. 1495, 1521 (2000). So, the unreasonbaleness has to do with the application of the law to the facts and not the determination of what the historical facts were.

Next, Congress' instruction about whether the State court's adjudication "involved" an unreasonable application of Federal law is important. The verb "involved" is one of the past tense terms that is the "backward-looking language [which] requires an examination of the state-court decision at the time it was made." Id. at 570. In other words, use of the term "involved" is an instruction from Congress to "focus on what the state court knew and did." Id.

That being the case, it would be strange to ask federal courts to "invent" reasons for a state court decision which, according

to the State's established practice, could not have actually been a reason for the State court's decision. In short, when the State's established practice precludes a particular reason as a possible argument or theory to be used by the state courts to deny relief, the state court's decision could NOT have "invovled" that reason. Which is really to say that such a reason would not fit under Richter's could have supported framework because the reason could NOT have supported the State court decision. There is little difference between a Federal habeas court "analyz[ing] whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court," Pinholster, 179 L.Ed.2d at 570, and analyzing whether the decision unreasonabily applied Federal law to facts not considered by the state court (even though those facts were "before" the state court). Because Pinholster rejcted the former, it follows that the AEDPA does not allow the later either. In both instances, the State court's decision did not "invole[]" the facts not before or not considered by the court.

Yet, somehow these princpals are apparently not as straight forward as they seem. Afterall, the U.S. District Court explictly denied Cruz's request(s) along these lines and relied on the facts from trial counsel's postconviction affidavit to determine that the TCCA's decision was not unreasonable. Cruz certainly understands the underlying bias inherent in the criminal justice system to believe a respected attorney over a convicted criminal. Nevertheless, it is supposed to be that before a trier of fact makes that credibilty determination that even a prisoner is given a fair opportunity to present his or her case. Cruz never got that fiar opportunity.

As described in Cruz's motion to the TCCA asking for the State prosecutor's Answer to be striken, within days of the State prosecutor

filing the out-of-time Answer to Cruz's State habeas writ application (that had trial counsel's postconviction affidavit attached to it), the state habease trial court had already denied relief and forwarded the case to the TCCA. Not only did Cruz never have an apportunity to cross-examine his trial counsel or obtain answers to interrogatory, Cruz did not even have an opportunity to argue the deficies in counsel's affidavit (and how the affidavit did not address Cruz's specific allegations).

The only reason that scenario could be acceptable "due process" is because of the reaminder of the State's established procedure which is relevant here. In short, the state courts side step making that credibilty determination. Under the State's established, and stautory mandated, procedure, only one of two things "could have" happen in Cruz's case. The state courts either (or both):

> (1) determined that, even if Cruz's factual allegations were true, there was no Constitutional violation and effectively ignored trial counsel's postconviction affidavit, or
>
> (2) determined that there were no factual conflicts between Cruz's factual allegations and trial counsel's postconviction affidavit.

See, Ex parte Medina, 361 S.W.3d 633, 642 (Tex.Crim.App.2011); See also, Tex. Code Crim. Proc., art. 11.07 § 3(c). In other words, rather than make a credibilty determination, the state courts assumed the truth of the facts alleged by Cruz in his State habeas writ application and that the facts asserted by trial counsel were not in conflcit with the fact alleged by Cruz.

That was an entierly reasonable assumption. While trial counsel gave general denials of ineffectiveness -- as most attoneys would -- he did not refute the specific factual allegations made by Cruz. Thus, there was no real conflict between the two sets of facts.

More to the point, the state courts determined that any conflcits were not "material" to the legality of Cruz's confinement. Or, rather, the resolution of any conflicts would not make a difference to the state courts' application of Strickland in Cruz's case. Therefore, the state courts choose to not resolve any of those conflicts.

However, the U.S. Distrit Court held that the very reason the state court's decision was not unreasonable was because the courts could have believed trial counsel over Cruz. ROA.276-277 (Dkt. No.33 at 24-25). The District Court was following the 5th Circuit's interpration of § 2254(d)(1) and Richter (to the exclusion of Wilson). The 5th Circuit has instructed Federal habeas courts that the courts "must INVENT possible avenues the state court could have relied on to deny [] relief..." Evans v. Davis, 875 F.3d 210, 217 (5th Cir. 2017). In that pre-Wilson decision the 5th Circuit explained,:

> "...whether the state court's decision involved an unreasonable application of Supreme Court precedent does not depend soley on the state habeas court's actual analysis. Section 2254(d) requires us to 'determine what arguments or theories supported or ... could have supported, the state court's decision.' We are therefore tasked with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon."

Id. at 216. And, post-Wilson, over a dissent, the 5th Circuit has still held that,:

> "Under that standard, so long as a plausible argument exists to support that ruling, we defer to the decision of a state court even if its actual rationale was unreasonable.

Sheppard v. Davis, 967 F.3d 548, 467 (5th Cir. 2020); See also, Thomas v. Vannoy, 898 F.3d 561, 568-569 (5th Cir.2018).

To the 5th Circuit the actual practice and actual rationale of the state courts is immaterial (whether the decision was summary or explained). As long as the Federal habeas court can "invent"

a reason which could make an unreasonable decision into a reasonable one, a prisoner can not overcome § 2254(d)(1) and can not move on to a de novo review of his Constitutional claim (where the Federal court can exersize its Article III authority). See i.e., Mosley, 689 F.3d at 842.

Nevertheless, in Wilson Justice Gorsuch rejected the look-through approach and believed that Richter's could have supported framework should have applied. Thus, Justice Gorsuch had an opportunity to comment on the proper application of that framework. To begin with Justice Gorsuch flatly rejected that Richter required Federal habeas courts to "imagine", or invent, reasons for a state court's decision; syaing, "Richter requires no such thing." Wilson, 138 S.Ct. at 1199 (GORSUCH, J., dissenting). Rather, Justice Gorsuch explained that,:

> "... AEDPA and our precedents require ... federal courts must presume that [summary] order[s] rest[] on any reasonable basis the law and facts allow."

Id. at 1198; See also, Id. at 1199 ("no lawful basis could have reasonabley supported it"). And, as mentioned above, that basis for the state courts decision, according to Justice Gorsuch must be "squared with" the "actual practice" of the state courts. Id. at 1201.

In Cruz's case, the law and actual practice of the state courts did not "allow" for the state court's decision to be based on facts within trial counsel's postconviction affidavit. That reason which was "invented" by the U.S. District Court could NOT have been a "lawful basis" to support the state court's decision.

Of course, Justice Gorsuch was just explaining his view of Richter's could have supported framework. But, the majority in

Wilosn went further. The Court in Wilson concluded that when the relevant rationale for a state court's decision can be assertained that RIchter's could have supported framework should not apply. WIlson, 138 S.Ct. at . Wilson's holding dealt with an explained lower state court decision and an unexplained, or summary, higher state court decision. But, Cruz believes it should apply in his case also.

First, there was an explained lower court decision in Cruz's case and the U.S. District Court ignored that deicision. The difference from Wilson is that Cruz's lower state court decision only explaines the factual reasons for the decision and leaves the legal rationale unexplained. So, while Richter's could have supported framework applies to the legal rationale, it should not apply to the factual basis for the state court's decision. And, the facutal basis for the state court's decision was to assume the truth of the facts alleged by Cruz in his State habeas writ application.

In any event, the established practice of the TCCA makes it so that the relevant rationale for the state court's decision can be assertained. It simply can not be disputed that the TCCA determined that, even if Cruz's factual allegations were true, there was no Constitutional violation. Under Wilson, because that rationale can be assertained, Richter's could have supported framework no longer applies. That should still be true even though the legal rationale remains unexplained. Again, the factual rationale is plain as day. But, the 5th Circuit, and U.S. District Court below, says that the actual raionale does not matter, as long as some reason can be "invented" to make the state court's decision reasonable.

But, even Richter does not allow that. The complete standard from Richter is,:

> "... a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision, and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Richter, 178 L.Ed.2d 624, 640. This Court used the conjunction "or" as a choice between the two alternatives and did not use "and" as a single to do both. Yet, the 5th Circuit has choosen to do both. If there were any question of whether this Court meant for a Federal habeas court to do both or just one of the alternatives, this Court's use of "as here" reflects that in Richter only the one alternative applied, not both. Thus, Richter allows for the focus to be on the actual arguments and theories which supported the state court's decision when, like in Wilson, they can be ascertained.

To do otherwise, as the 5th Circuit does, is to reject the design of the AEDPA of "futher[ing] the principles of comity, finality, and federalism." Pinholster, 179 L.Ed.2d at 572. Going beyond the actual practice of the state courts is to not respect the State's own process and decision. That is not comity. The AEDPA erects many barriers to State prisoners bringing challenges to their conivctions in Federal court. It puts the focus on the State court's decision instead of a full review of claims. However, once the state court's actual decision is determined to be unreasonable, the purposes of the AEDPA have been fulfilled and DE NOVO review is appropriate (as demanded by Article III of the U.S. Constitution).

The courts below, in an effort to avoid DE NOVO review (and the courts Article III responsibilty) stretched the AEDPA to require converting an actually unreasonable state court decision into a reasonable one. It may be that after DE NOVO review that Cruz is not

entitled to relief because there is no true Constitutional violation. But, the AEDPA and § 2254(d)(1) does not ask whether Cruz will be entitled to relief. It only asks whether the State court's decision was unreasonable.

The 5th Circuit's disrespect for the state courts actual practice and actual rationale should be addressed by this Court. If nothing else, it is in conflcit with the 7th Cirucit's postition on the issue. And, more than that the actual practice of the courts followed in Texas of assuming the truth the facts alleged by the prisoner is a common practice across the Nation. Indeed, that is why review was granted in Richter and Wilson. So to should review be granted here.

GROUND TWO

Cruz raised the above concern in a pre-trial motion which was denied by the U.S. District Court separately from the merits of Cruz's habeas claims. ROA. 194, 228 (Dkt. No(s). 26 & 29). That motion was much like a motion requesting an evidentairy hearing. The 5th Circuit has held that a COA is not necessary to appeal the Order denying an evidentiary hearing. See, Norman v. Stephens, 817 F.3d 226, 234 (5th Cir. 2016). Likewise, Cruz should have been allowed to appeal the Order denying his request for the U.S. District Court to do as the state courts did and assume the truth of the facts alleged by Cruz in his State habeas writ application for the court's review under § 2254(d)(1), without a COA

28 U.S.C. § 2253(c)(1) states that,:

> "Unless a circuit judge of judge issues a certificate of appealability, an appeal may not be taken to the court

> of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or ..."

28 U.S.C. § 2253(c)(1). This Court has held that this provision ONLY governs final orders that dispose of the merits of a habeas corpus proceeding. Harbison v. Bell, 129 S.Ct. 1482, 1485 (2009). Thus, for an appeal of an Order that is collateral or separate from such a final order no COA should be required. See i.e., Illarramendi v. U.S., (2nd Cir. 2018).

The 5th Circuit explictly denied Cruz's motion for reconsideration on this ground (and acknowledged the underlying issue in its Order denying a COA). Such a holding prevents procedural issues like this from being addressed on appeal. Such an appeal on a procedural issue is particularly important when, like here, the issue effects the entire way in which the case is viewed or reviewed. That pushed § 2253(c)(1) and the COA requirment beyond its intended limits. Cruz should have been allowed to appeal irrespective of obtaining a COA.

This Court is the final authority on the interpretation of 28 U.S.C. § 2253(c)(1) and its restrictions on prisoners right to appeal. Just like review was granted in Harbison to address the reaches of that restriction, so to should review be granted here. Does the holding in Harbison extend to situations like Cruz's pre-trial motion (and motions for evidentiary hearings)? That concern could impact all habeas petitioners and Cruz ask this Court to grant the writ to review this issue.

GROUND THREE

Can an attorney just advise a defendant to accept a plea bargain or does the attorney have a duty to explain why the defendant should accept a plea bargain? When explaining why a defendant should accept a plea bargain does an attorney have a duty to explain the legal theory that is the determinative issue in the defendant's decision to go to trial or is it enough that the attorney gave some (erronerous) explanations? What about when an attorney advises the defendant that a certain defense can be argued (during the punishment hearing) when the evidence excludes the viabilty of that defense, has that attorney meet his or her Constitutional obligation to advise the defendant of the advantages and disadvantages of a plea agreement?

The U.S. Court of Appeals for the 5th Circuit certainly appeared to answer these questions in Cruz's favor in Anaya v. Lumpkin, 976 F.3d 545 (5th Cir. 2020). So why not grant Cruz a COA on the same issue? It must have been that the 5th Circuit, like the U.S. District Court, understood trial counsel's postconviction affidavit to preclude relief under 28 U.S.C. § 2254(d)(1). Therefore, review should be granted on this ground for the same reasons as GROUND ONE herein. Afterall, when deciding whether to grant a COA the 5th Circuit would have first resolved whether the U.S. District Court applied the "deferential § 2254(d) standard" correctly. See, Ruiz v. Stephens, 728 F.3d 416, 423 (5th Cir. 2013). Cruz's ineffective assistance of counsel claims realted to the pre-trial and mid-trial plea bargain offers meet the COA requirment of a "substantial showing of the denial of a constitutional right" and that the "District Court's decision was debatable." Buck v. Davis, 137 S.Ct. 759, 773-774 (2017); See also, 28 U.S.C. § 2253(c)(2).

The 5th Circuit in Anaya followed the refrain that,:

> "The Supreme Court has repeatedly reminded us that, because our criminal justice system has become 'for the most part a system of pleas, not a system of trials,' the 'critical point for a defendant' is often plea negotiation, not trial. And because 'horse trading between prosecutor and defense counsel determines who goes to jail and for how long,' plea bargaining 'is not some adjunct to the criminal justice system; it IS the criminal justice system.'"

976 F.3d at 550(footnotes omitted); See also, ROA. (Dkt. No. 33 at 22-23). The 5th Circuit combined that general understanding about plea bargains with the court's understanding of the holding in Padilla v. Kentucky, 559 U.S. 356, 370 (2010) that,:

> "counsel's 'silence' 'on matters of great importance, even when the answers are readily available' is 'fundamentaly at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement."

Anaya, 976 F.3d at 551. Thus, in Anaya the 5th Circuit concluded,:

> "Here, [counsel's] performance was deficient and there can be no reasonable argument otherwise in light of Padilla, Lafler, and Hinton. Anaya couldn't fully understand the risks of rejecting the State's plea offer because he didn't know that his status as a felon in possession of a weapon would move the goalpost at trial. [Counsel's] silence on a 'matter[] of great importance' was 'fundamentally at odds' with his critical obligation 'to advise the client of the advantages and disadvantages of a plea agreement.' And [Counsel's] failure to advise Anaya of the law of retreat wasn't a strategic decision. There were no difficult questions about how much to investigate or how to balance competing evidence. [Counsel] knew Anaya was a felon in possession of a weapon -- thus engaged in criminal activity -- and [counsel] failed to advise Anaya of the crucial difference that fact would make at trial."

Id. at 553 (footnotes omitted).

Cruz's case was extremely similar to Anaya. Cruz's trial counsel knew Cruz's fear was based on Cruz's "hyper" cautiousness and anxity; yet, counsel failed to advise Cruz of the crucial difference that fact would make at trial. At least that is what Cruz alleged in his State habeas writ application.

Perhaps one difference from Anaya is that Cruz's trial counsel did at least advise Cruz generally that self-defense was a weak defense. The problem is that counsel did not address the determinative issue in Cruz's decision to go to trial -- Cruz's belief that his fear justified the use of self-defense. That was in Padilla's terms a "matter of great importance." Then, the terminology of "determining issue in the defendants decision to go to trial" comes from Lee v. U.S., 137 S.Ct. 1958 (2017) and this Court's Strickland prejudice analysis. Cruz believes it should similarly apply to the deficient performance prong of Strickland.

The determinative issue in Cruz's decision to reject the plea bargain offers and go to trial was his erroneous belief that his fear on the night of the offense legally justified his use of self-defense and/or a finding on sudden passion. Even in the words of Cruz's trial counsel, the only support for the use of self-defense was "some inchoate sense of fear that Mr. Cruz claimed he felt in the situation." ROA.3359 (Dkt. No.13-38 at 412). The same would go for sudden passion, which Cruz's trial counsel admitted that counsel advised Cruz "that in the punishment hearing we could make an argument that this killing occurred in the heat of sudden passion..." Id. And, as the U.D. District Court acknowledged, Cruz alleged that had his trial counsel explained to him the risk of arguing sudden passion, then Cruz would have accepted the mid-trial 20 year plea bargain. ROA. (Dkt. No.33 at). And Cruz had alleged,:

> "Cruz was particulary confused when counsel relayed to Cruz that the State prosecutor now acknowledged that Cruz acted out of fear. Why was the State prosecutor still trying to prosecute the case if he believed Cruz acted in self-defense?"

ROA. 2969-2970 (Dkt. No. at). In Cruz's mind his fear legally

equated to self-defense being justified. Thus, Cruz further alleged, that if his trial counsel had provided the proper advise, "then Cruz would have known he did not legally act in self-defense (no matter how scared he was the night of the incident) and Cruz would have accepted either to 10 year of 7 year plea bargain." ROA. 2969-2970 (Dkt. No. at). These facts establish that the determinative issue in Cruz's decision to goto trial was his belief that his fear justified his use of self-defense.

The point is that trial counsel's explaining of other reasons why self-defense was a weak defense would not have impacted Cruz's decision making process like the missing explanation that Cruz's "hyper" cautiousness and axiety was not the belief of an ordinary and prudent man under the law. With that explanation Cruz would not have risked going to trial.

However, that difference does not apply to the mid-trial plea bargain claim were Cruz's trial counsel admitted counsel advised Cruz they could argue sudden passion during the punishment hearing -- when it was not a viable defense based on the evidence already presented by counsel to the Jury. There is a factual dispute about whether trial counsel advised Cruz to reject the mid-trial plea bargain offer, but it remains that counsel advised Cruz they could argue sudden passion and on that point counsel misadvised Cruz on a matter of great importance about the advantages and disadvantages of the mid-trial plea bargain offer.

It is atleast debatable that the U.S. District Court's decision below was wrong on these claims and they present a substantial showing of the denial of a constitutional right. Cruz should have been entitled to a COA on these claims. In not granting a COA, as mentioned

above, the 5th Circuit either relied on trial counsel postconviction affidavit to the exclusion of Cruz's factual allegations that the state courts assumed to be true or applied the COA standard too strikly. It certainly would not be the first time this Court has had to admonition the 5th Circuit for applying the COA standards to strikly.

Perhaps the 5th Circuit did not grant Cruz a COA because of its holding in Anaya that the Strickland prejudice prong standards for this type of claim were unsettled. But, that also would have been inapplicable to Cruz's case. And if the 5th Cirucit relied on facts from Cruz's trial counsel's postconvcition affidavit to rebut the prejudice prong, like the U.S. District Court appears to have done, then as above review should be granted for the same reasons as in GROUND ONE herein. Yet, the reason the unsettled question about the Strickland prejudice prong standards is inapplicable to Cruz's case is because even under the more difficult standard used by the 5th Circuit in Anaya Cruz's allegations in his State habeas writ application meet that standard.

Mainly, the record in Cruz's case supports that Cruz would have accepted the plea bargains if provided the correct advise, that the State trial court and State prosecutor would have approved of the plea bargains, and that Cruz would have served less time in prison under the plea bargains. See, Anaya, 976 F.3d at . Cruz was willing to accpet a plea bargain that could lead to his going home -- the 4 year manslaughter counteroffer. Ten days before trial the State trial court appeared willing to approve the 7 year plea bargain offer and the State prosecutor did not object. And, whether the 20 year mid-trial plea bargain offer, or the 7 or 10 year pre-trial offers, all are less time than the 35 years Cruz is now sentenced to.

Nevertheless, Cruz's case could provide this Court an opportunity to address the unsettled standard for Strickland prejudice for these type of claims. Just as this case could provide this Court the opportunity to address whether even with other explanations, trial counsel must address the determinative issue in a defendant's decision to go to trial. These would be concerns in addition to those raised in GROUND ONE herein that would have an impact on the entire Nation and not just Cruz's case. Therefore, Cruz asks this Court to grant the writ and review these grounds.

CONCLUSION

The petition for a writ of ceriorari should be granted.

Respectfully Submitted,

x _____
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PETIITONER PRO SE

DATE: 27 February 2023