No. _____

In The
Supreme Court of the United States

JEDIDIAH ISAAC MURPHY,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the court of appeals erred in requiring that an expert witness, instead of trial counsel, correct the false impression that the prosecutor created on cross-examination that the leading experts in the country on the interpretation of certain psychological tests had evaluated Murphy's results and concluded that he would be dangerous in prison and in requiring that Murphy prove that the chance of a different result was substantial rather than reasonably probable.

2. Whether the court of appeals erred in affording the presumption of correctness to the state trial court's alternative fact findings that the suppressed evidence was not material, which the appellate court did not authorize or adopt when it dismissed the subsequent habeas corpus application on procedural grounds without considering the merits.

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PETITION FOR A WRIT OF CERTIORARI

Jedidiah Isaac Murphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 901 F.3d 578. Its previous opinion granting a certificate of appealability (COA) (App., *infra*, 40a-75a) is unreported but is available at 2018 WL 1906000. The opinion of the district court (App., *infra*, 76a-152a) is unreported.

JURISDICTION

The court of appeals judgment was entered on August 24, 2018. Murphy invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal

prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT

A. Procedural History

Murphy pled not guilty to capital murder in Dallas County, Texas. A jury convicted him. Based on its answers to special issues, the trial court sentenced him to death in 2001.

The Texas Court of Criminal Appeals (TCCA) affirmed Murphy's conviction in 2003, and this Court denied certiorari in 2004. *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 940 (2004).

Represented by Robert Abbott, Murphy filed a state habeas corpus application in 2003. The trial court adopted the State's proposed findings of fact and conclusions of law and recommended that relief be denied in 2008. The TCCA denied relief in 2009. *Ex parte Murphy*, No. WR-70,832-01 (Tex. Crim. App. 2009). Represented by present counsel, Murphy filed a suggestion that the TCCA reconsider the denial of relief, which it denied in 2009.

Murphy filed a federal habeas corpus petition in the Northern District of Texas in 2010. He raised unexhausted guilt and punishment stage ineffective assistance of trial counsel (IATC) claims and that the State suppressed impeachment evidence relevant to

punishment. The district court stayed and abated the proceeding to allow him to attempt to exhaust his state remedies. *Murphy v. Thaler*, No. 3:10-CV-163-N, 2010 WL 2381500 (N.D. Tex. 2010).

Murphy filed a subsequent state habeas corpus application raising the unexhausted claims in 2010. The TCCA dismissed the IATC claims and remanded the suppression of evidence claim for a hearing to determine whether the factual basis was ascertainable through the exercise of reasonable diligence on or before the date that the initial application was filed. *Ex parte Murphy*, No. WR-70,832-02 (Tex. Crim. App. 2010). After the hearing, the trial court found that the claim could have been raised in the initial application and recommended that it be dismissed or denied. The TCCA dismissed the application without considering the merits in 2012. *Ex parte Murphy*, No. WR-70,832-02 (Tex. Crim. App. 2012).

Murphy returned to federal court in 2012. The district court denied an evidentiary hearing on the IATC claims and denied relief and a COA in 2017. *Murphy v. Davis*, No. 3:10-CV-163-N (N.D. Tex. 2017).

The Fifth Circuit granted a COA on one IATC punishment stage claim and one aspect of the suppression of evidence claim on April 20, 2018. *Murphy v. Davis*, No. 17-70007, 2018 WL 1906000 (5th Cir. 2018). It denied relief on August 24, 2018. *Murphy v. Davis*, 901 F.3d 578 (5th Cir. 2018).

B. Summary Of The Issues

This case raises important procedural and substantive issues that are likely to recur—especially in death penalty litigation—and need to be resolved.

Appointed counsel—who testified that he was "burned out" and had lost interest in practicing law—filed a state habeas corpus application in this death penalty case that did not raise any cognizable claims. As a result, Murphy retained counsel, who obtained the State's agreement to join in a motion to extend the statutory deadlines to file an application alleging cognizable claims. Instead, the Texas Court of Criminal Appeals (TCCA) denied relief without written order on the frivolous application. Appointed counsel created a procedural nightmare that haunts Murphy 15 years later.

Murphy filed a federal habeas corpus petition raising unexhausted claims that trial counsel was ineffective at the guilt-innocence and punishment stages and that the State suppressed favorable evidence relevant to punishment. The district court stayed and abated the proceeding so he could attempt to exhaust his state remedies.

Murphy filed a subsequent state habeas corpus application. The TCCA dismissed the ineffective assistance of trial counsel (IATC) claims and ordered an evidentiary hearing on the suppression of evidence claim to determine whether it was procedurally defaulted and, if not, whether it was meritorious. After the hearing, the trial court signed the State's proposed findings

of fact and conclusions of law recommending that the application be dismissed or, alternatively, denied. The TCCA dismissed the application and expressly refused to consider the merits.

The case returned to federal court. The district court denied an evidentiary hearing on the IATC claims; concluded that all claims were procedurally defaulted; presumed the state trial court's alternative fact findings on the suppression of evidence claim—which the TCCA did not consider—to be correct and that it lacked merit; and denied a certificate of appealability (COA). The Fifth Circuit granted a COA on one IATC punishment stage claim and one aspect of the suppression of evidence claim.

The prosecutor created a false impression on cross-examination of a defense psychologist at the punishment stage that the leading experts in the country on the interpretation of certain psychological tests had evaluated Murphy's results and concluded that he would be dangerous in prison. Although the experts had developed the computer program that scored the test results, they did not personally evaluate Murphy or his test results. Defense counsel, apparently unaware of this, failed to clarify the matter on redirect examination. The prosecutor argued during summation that experts "hired by the defense to look at the tests" concluded that Murphy "is a poor candidate for psychotherapy" and "is going to be a danger wherever he is going to be." Thus, the State misled the jury in answering the special issue that Murphy would be dangerous

in the future. Murphy alleged that counsel was ineffective in failing to correct this false impression.

The court of appeals strayed from fundamental principles of this Court's IATC jurisprudence in holding that the expert, rather than defense counsel, had the duty to correct the false impression and that, even if counsel performed deficiently, Murphy did not prove a "substantial likelihood" of a different result. Its ultimate holding—that reasonably competent counsel in a death penalty case has no duty to investigate and determine how psychological tests are scored before calling an expert to testify about them so she can correct any false impression created by the prosecutor on cross-examination—defies the law of gravity. Additionally, it erroneously required Murphy to prove a "substantial" likelihood of a different result rather than a "reasonable probability" sufficient to undermine confidence in the outcome. This Court should grant certiorari because the court of appeals decided important federal questions concerning the deficient performance and prejudice prongs of an IATC claim in a way that conflicts with this Court's precedent.

The State presented testimony at the punishment stage from a kidnapping victim that she identified Murphy in a photo lineup and from a detective that he considered her identification to be one of the better ones he ever obtained. The State suppressed evidence that the prosecutor told the victim before trial that she had identified "the right man," which confirmed in her mind the accuracy of her identification, and that the

detective considered this to be only a "strong tentative" identification that would not support a conviction.

Murphy first raised this issue in a subsequent habeas corpus application. The TCCA ordered a hearing on whether the claim was procedurally defaulted and, if not, whether it was meritorious. The trial court found that it was procedurally defaulted because it could have been raised in the initial application and, alternatively, that the evidence was neither suppressed nor material. The TCCA dismissed the subsequent application without considering the trial court's alternative merits findings—which it was not authorized to make under the express terms of the remand order.

The court of appeals presumed the alternative merits findings to be correct under 28 U.S.C. § 2254(e)(1) and held that, even if the evidence was suppressed, it was not material based on other evidence of future dangerousness. This Court should grant certiorari to decide whether the presumption of correctness applies to state trial court alternative merits findings that the state appellate court did not authorize or adopt in dismissing the application on procedural grounds without considering the merits.

REASONS FOR GRANTING THE PETITION

This case concerns whether defense counsel or an expert witness has a duty to ensure that a prosecutor does not mislead the jury about a critical matter and, when the jury is misled, whether a habeas petitioner

must prove that there is a "substantial likelihood" or a "reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. Additionally, this case provides this Court with the opportunity to resolve whether the 28 U.S.C. § 2254(e)(1) presumption of correctness applies to state trial court alternative merits findings that the state appellate court did not adopt in resolving the case on procedural grounds.

A. The Fifth Circuit Erred In Requiring That An Expert Witness, Instead Of Trial Counsel, Correct The False Impression That The Prosecutor Created On Cross-Examination That The Leading Experts In The Country On The Interpretation Of Certain Psychological Tests Had Evaluated Murphy's Results And Concluded That He Would Be Dangerous In Prison And In Requiring That Murphy Prove That The Chance Of A Different Result Was Substantial Rather Than Reasonably Probable.

The defense sought to persuade the jury to answer the mitigation special issue at the punishment stage in Murphy's favor, primarily because of his troubled childhood, and to answer the future dangerousness special issue in his favor because the State failed to prove that he would be dangerous if confined in prison. Counsel called Mary Connell, a psychologist, to testify about her evaluation of Murphy.

Dr. Connell testified on direct examination that she administered the Minnesota Multiphasic Personality Inventory-II (MMPI-2) test, which measures personality assessment, and the Millon Clinical Multiaxial Inventory-III (MCMI-3) test, which assesses character problems.[1] The tests are comprised of true-false questions, and the results are scored by computer. The MMPI-2 results indicated that Murphy exhibited signs of depression, anxiety, physical ailments, and paranoid thoughts. The MCMI-3 results suggested that he suffers from extreme emotional distress and very disturbed functioning. These results ordinarily would prompt a referral for psychiatric consultation and probably indicate a need for medication.

The prosecutor elicited on cross-examination that Dr. James Butcher, the leading expert in the country on the interpretation of the MMPI-2, interpreted the test that was administered to Murphy. Dr. Connell agreed that Dr. Butcher reached damaging hypotheses, including that Murphy exaggerated his symptoms and responded to the last section of the test "either carelessly, randomly, or deceitfully," thereby invalidating that portion of the test; that he "has serious problems controlling his impulses and temper," "loses control easily," and may be "assaultive"; that he "manipulates people" and "lacks genuine interpersonal warmth";

[1] Dr. Connell explained in an affidavit filed in the state habeas proceeding that the answers to true-false questions are fed through a database; that a computer program, using group statistical data, returns a profile on the subject; and that it also may return an interpretative report, which supplies further hypotheses about the subject.

that his profile matches the Megargee Type H offender, "one of the most seriously disturbed inmate types"; and that inmates with this profile will "not seek psychological treatment on their own" and are "poor candidates for psychotherapy." The prosecutor referred to "the report of Dr. James Butcher" and obtained Dr. Connell's agreement that the hypotheses contained in it were "the statements of Dr. Butcher." Dr. Connell accepted the manner in which the prosecutor framed the questions without correcting him.[2]

The prosecutor also elicited on cross-examination that Dr. Theodore Millon created the MCMI-3; that Dr. Connell considered him to be authoritative; and that he produced the report in Murphy's case. Dr. Connell testified that Dr. Millon stated in the report that Murphy "may have reported more psychological symptoms than objectively exist"; that he has "a moderate tendency towards self-deprecation and a consequent exaggeration of current emotional problems"; and that "his anger and resentment may impair his capacity to cope satisfactorily with many of his life tasks." Dr. Connell also accepted the prosecutor's references to Dr. Millon.[3]

Counsel did not elicit testimony on redirect examination of Dr. Connell to correct the false impression that Drs. Butcher and Millon personally evaluated

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[2] Dr. Connell explained in her affidavit that Dr. Butcher developed the computer program that read the answers and generated an interpretative report but never interacted with Murphy or reviewed his answers, profile, or report.

[3] Dr. Connell explained in her affidavit that Dr. Millon was not involved in Murphy's case.

Murphy's test results and reached the conclusions to which she testified.

During the opening summation, the second chair prosecutor emphasized the "chilling" results of Murphy's MMPI-2 and MCMI-3 tests and invited the jury to read the reports. Specifically, she stated that his profile matched that of the Megargee Type H offender—"one of the most seriously disturbed inmate types"—for whom "[a]djustment to prison appears to be difficult."

Counsel did not mention these test results during her summation. During the rebuttal summation, the lead prosecutor argued that Dr. Butcher, "who the defense hired," said that Murphy "is a poor candidate for psychotherapy" and that persons with his profile are not amenable to changing their behavior and tend to be quite aggressive. He concluded, "And finally, if you have any question about what this man is all about in a confined setting, adjustment to prison appears to be difficult for them. Those aren't my words, ladies and gentlemen. That's not some expert that we hired. That's Dr. James Butcher hired by the defense to look at the tests administered to this man over here. . . . I mean their own expert says, . . . [t]his man is going to be a danger wherever he is going to be."

Present counsel interviewed Dr. Connell during the subsequent habeas investigation and learned that Drs. Butcher and Millon created the computer programs but did not evaluate Murphy's test results or reach any conclusions about him. After reviewing her

trial testimony, she provided an affidavit that the jury was misled significantly about the reports and that counsel should have asked her to explain how they were prepared to correct the false impression that the nation's two leading authorities on these tests concluded that Murphy was violent and would be dangerous in prison.

The prosecutor created the false impression that Drs. Butcher and Millon personally evaluated Murphy's test results and reached the conclusions to which Dr. Connell testified when, in fact, neither doctor examined him, evaluated his test results, reached conclusions about him, or prepared a report. Murphy contended in the district court that counsel was ineffective in failing to correct the false impression on redirect examination. He had to establish that counsel's failure to correct the false impression on redirect examination was deficient under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The district court denied an evidentiary hearing and concluded that counsel did not perform deficiently in failing to clarify Dr. Connell's testimony because the jury should have understood that Drs. Butcher and Millon did not prepare the reports in view of her testimony that Butcher made "hypotheses" rather than "conclusions" and that the tests were "computer-scored."[4] App., *infra*, 113a-118a.

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[4] Dr. Connell did not explain the difference between a "hypothesis" and a "conclusion." A rational juror would understand her testimony to mean that Dr. Butcher evaluated Murphy's test results and reached the stated opinions.

The court of appeals assumed that counsel did not know that Drs. Butcher and Millon were not involved in Murphy's case but held that she did not perform deficiently in failing to correct the false impression. App., *infra*, 19a-21a. Counsel was "reasonable not to investigate the extent of" Drs. Butcher's and Millon's involvement because "[f]iguring out this single detail about the reports might distract from more important duties."[5] App., *infra*, 23a. This is an astounding proposition. Counsel in a death penalty case has few duties more important than to understand the psychological tests administered by a psychologist. It would have taken little time for counsel to ask Dr. Connell to explain how these tests are scored and what involvement, if any, Drs. Butcher and Millon had in evaluating the results. Obtaining that understanding is the cornerstone of effective representation, not a trifling "distraction."

The court of appeals excused counsel's failure to understand the testing process because she could not anticipate what the prosecutor would argue during summation. App., *infra*, 23a-24a. Reasonably competent counsel trying a death penalty case could easily anticipate that the prosecutor would make this argument—especially after his cross-examination of Dr. Connell. At the very least, she should have requested

[5] The court of appeals took this quote out of context from *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam). This Court addressed at what point counsel reasonably could decide to stop looking for cumulative mitigating evidence in a death penalty case. That scenario is fundamentally different from counsel's duty to understand expert testimony before presenting it.

a recess before redirect examination and spoken to Dr. Connell to clarify the matter.

Finally, the court of appeals concluded that counsel was entitled to rely on Dr. Connell to explain the testing process to her and to challenge the prosecutor's framing of the questions by responding that Drs. Butcher and Millon did not evaluate the test results or prepare the reports. App., *infra*, 24a-25a. This raises the fundamental question of whether it is the duty of counsel or an expert witness to ensure that the jury knows the truth about a matter of critical importance.

The ultimate holding of the court of appeals is that reasonably competent counsel in a death penalty case has no duty to investigate and determine how psychological tests are scored before calling an expert to testify about them to ensure that she can correct any false impressions created by the prosecutor on cross-examination. This holding stands IATC jurisprudence on its head. Not surprisingly, the court of appeals did not cite any authority for this extraordinary proposition.

It is counsel's duty to prepare a witness to testify rather than the witness' duty to tell counsel what questions to ask. *Cf. Ex parte Guzmon*, 730 S.W.2d 724, 734 (Tex. Crim. App. 1987) (counsel ineffective in failing to prepare witness); *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. App.–El Paso 1999, pet. ref'd) (counsel ineffective in failing to prepare defendant to testify so he would not open door to prior convictions); *Nance v. Ozmint*, 626 S.E.2d 878, 881-82 (S.C. 2006) (counsel ineffective

in failing to prepare witness to testify about defendant's background). It is essential that counsel understand the subject matter of an expert's testimony to ensure that she can correct any false impressions created by the prosecutor on cross-examination. Indeed, counsel must understand the evidence before she can make a sound strategic decision to call the expert to testify.

The court of appeals' decision conflicts in principle with *Strickland*. It essentially transformed Murphy's IATC claim into an "ineffective assistance of expert witness" claim by placing the burden on Dr. Connell, rather than counsel, to ensure that the jury understood the testing process and to correct the false impressions created by the State. The Sixth Amendment guarantees the defendant the right to the effective assistance of counsel rather than the effective testimony of an expert. It is counsel's duty to prepare a witness to testify—especially an expert in a death penalty case. It is essential that counsel understand the subject matter of the expert's testimony so she can correct any false impressions created by the prosecutor on cross-examination. The decision of the court of appeals, which placed the burden on the expert to correct the false impression (and, presumably, to ensure before trial that counsel fully understood the subject matter), is contrary to the Sixth Amendment and *Strickland*.

The court of appeals' resolution of the prejudice prong of the IATC claim is equally flawed. It required Murphy to show that the jury gave "a good deal of weight" to the reports and that exposing their "true

origins would then meaningfully change that assessment." App., *infra*, 26a. It ignored that Texas Rule of Evidence 606(b)(2)—like its federal counterpart—prohibited Murphy from presenting juror affidavits regarding statements made during deliberations, the effect of anything on their vote, and their mental processes in reaching a verdict. Thus, he had no procedural vehicle to show how much weight the jury gave Dr. Connell's testimony and that it probably would have made a difference had the jurors known that Drs. Butcher and Millon were not involved with his test results.

The court of appeals doubted that the jury "place[d] much faith in the reports" in view of Dr. Connell's testimony that they gave hypotheses rather than conclusions—two of which proved to be incorrect. App., *infra*, 26a. It was "unlikely that the jury would put less stock in the reports based on the realization that a computer, not a person, scored a *true-false* exam," as it "still would have heard that computer programs devised by leading psychologists had generated disturbing hypotheses about Murphy." App., *infra*, 26a-27a. Thus, it was "hard to conclude that the jury gave the reports much weight at all," and it "strains credulity to believe that, had the jury given the reports weight, merely clearing up that the tests were graded by computer, not hand, would change its opinion." App., *infra*, 27a. This reasoning is fallacious. The jury knew that the tests were scored by computer but was misled into believing that Drs. Butcher and Millon evaluated the results and reached damaging conclusions about

Murphy. Considered in a different context, which of the following would be more likely to persuade an admissions committee to reject a law school applicant: reviewing his computerized test scores or being told that the Dean had reviewed them and concluded that he lacked the aptitude to be a lawyer? More importantly, if the prosecutor did not believe that it was important that the jury believe that Drs. Butcher and Millon personally evaluated Murphy's test results and concluded that he would be dangerous in prison, he would not have created that false impression on cross-examination of Dr. Connell.

The court of appeals concluded that the historical evidence of Murphy's dangerousness—that he kidnapped and murdered the elderly deceased, kidnapped another woman, held a gun to a female's head at a high school party and asked if she was afraid to die, hit a girlfriend, and threatened to shoot a co-worker—was far more damaging than Dr. Connell's testimony. App., *infra*, 27a. It ignored the lead prosecutor's devastating closing argument, in which he falsely asserted that Dr. Butcher, the expert "hired by the defense," looked at the test results and concluded that Murphy would be dangerous everywhere, including in prison. The jury had to disregard this argument to answer the future dangerousness special issue in Murphy's favor.

Although Murphy's criminal conduct arguably demonstrated that he would be dangerous outside prison, the State did not introduce evidence that he committed any crimes or had any disciplinary violations while confined in jail. Counsel argued during

summation that the jury should answer the future dangerousness special issue in Murphy's favor because he had not harmed anyone while confined in jail and the State did not prove beyond a reasonable doubt that he would be dangerous in prison. The prosecutor's false argument regarding Dr. Connell's testimony gave the jury a reason to conclude that he would be dangerous in prison. Thus, counsel's deficient performance caused enormous prejudice.

The court of appeals concluded that, while it might be "conceivable" that "the jury was swayed by a misapprehension over Drs. Butcher and Millon's involvement," the "chances of a different result" were not "substantial." App., *infra*, 27a. *Strickland* requires only that Murphy show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that "counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

Had all 12 jurors failed to agree on the answers to the special issues, the trial court would have imposed a life sentence pursuant to article 37.071, § 2(g) of the Texas Code of Criminal Procedure. Prejudice is established in a Texas capital case if there is a reasonable

probability that one juror would have voted to answer a special issue in the defendant's favor, resulting in a life sentence. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (prejudice where reasonable probability that at least one juror would not have returned death sentence had mitigating evidence been presented). Thus, the court of appeals did not use the correct standard to determine prejudice.

This Court should grant certiorari because the court of appeals decided important federal questions concerning the deficient performance and prejudice prongs of an IATC claim in a way that conflicts with this Court's precedent. SUP. CT. R. 10(c).

B. The Fifth Circuit Erred In Affording The 28 U.S.C. § 2254(e)(1) Presumption Of Correctness To The State Trial Court's Alternative Fact Findings That The Suppressed Evidence Was Not Material, Which The Appellate Court Did Not Authorize Or Adopt When It Dismissed The Subsequent Habeas Corpus Application On Procedural Grounds Without Considering The Merits.

Sheryl Wilhelm testified at the punishment stage that a man kidnapped her, commandeered her car, and drove away when she jumped out. Three years after the incident, she saw a television news report regarding Murphy's arrest for murder and called the police to report that he had kidnapped her. She identified him in

a photo lineup, at a pretrial hearing, and at trial.[6] Detective John Stanton, who conducted the pretrial photo lineup, testified that her identification was "one of the better" ones that he ever obtained.

The defense called a psychologist to testify that Wilhelm's memory was tainted by the photo of Murphy that she saw on television. He emphasized prominent differences between a composite sketch made a week after the kidnapping and the press-released photo of Murphy. He opined that the photo lineup was constructed unfairly, as obvious differences between the mugshots increased the odds of selection from one-in-six to one-in-three.

The defense also presented testimony to refute that Murphy kidnapped Wilhelm. She testified that she was kidnapped in Arlington, Texas, at 11:30 a.m. The police found her car, containing documents belonging to another woman, abandoned in Wichita Falls the following morning. That woman was assaulted in Wichita Falls, and her purse was stolen, at 8:24 p.m. on the day that Wilhelm was kidnapped. Murphy clocked in at work in Terrell at 11:54 p.m. Counsel argued that Murphy did not have time to kidnap Wilhelm in Arlington at 11:30 a.m., rob another woman in Wichita

[6] Wilhelm initially failed to identify Murphy in the courtroom at the pretrial hearing.

Falls at 8:24 p.m., and arrive at work in Terrell—without transportation—at 11:54 p.m.[7]

A prosecutor argued during summation that the Wilhelm kidnapping also demonstrated Murphy's future dangerousness.

Murphy's present habeas counsel interviewed Wilhelm in 2009. He asked what happened during the photo lineup in which she identified Murphy. She said that she told Detective Stanton, "This is him. This looks a lot like him, and I'm pretty sure it's him." She added that, although "nobody's ever 100 percent sure," she was "95 to 100 percent it was him." She also disclosed that the lead prosecutor came to her home before trial and told her that she got the right guy, which confirmed in her mind the accuracy of her identification. None of this was disclosed to trial counsel or elicited at trial.

The TCCA ordered a hearing on whether the suppression of evidence claim was procedurally defaulted and, if not, whether it was meritorious. App., *infra*, 29a. Wilhelm testified that she asked the lead prosecutor whether she "had identified the right man in the photospread"; he said that she had; and this confirmed in her mind the accuracy of her identification of Murphy. The State elicited on cross-examination that she asked the prosecutor whether she identified the person who was arrested for the murder rather than whether her

[7] Murphy presented evidence in the habeas proceeding that the location where Wilhelm's car was abandoned in Wichita Falls is 173.4 miles from his place of employment in Terrell.

identification of her kidnapper was correct. Contrary to his trial testimony, Stanton testified that he considered her identification to be only a "strong tentative"; that he did not file kidnapping charges because he could not determine whether she identified the man she saw on television or her assailant; that the State would not have accepted kidnapping charges; and, if it had, that he could have successfully defended Murphy even though he is not a lawyer. Counsel testified that this information was not disclosed to her and, had it been, she would have used it to impeach Wilhelm's identification.

The trial court found that the claim should be dismissed as an abuse of the writ because Murphy reasonably could have ascertained the factual basis for it before his first state habeas application was filed by asking Wilhelm about the conversation at the pretrial hearing or at trial.[8] App., *infra*, 29a. The trial court lacked authority, based on the express terms of the remand order, to make the alternative merits findings that the evidence was neither suppressed nor material after it found that the claim was procedurally defaulted. The TCCA dismissed the subsequent application as an abuse of the writ "without considering the merits of the claims."

Murphy contended that the district court should consider the merits of the defaulted claim pursuant to *Banks v. Dretke*, 540 U.S. 668 (2004), because the State

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[8] The trial court did not address whether the State had a duty to disclose the information.

did not disclose the evidence to the defense in time to raise the claim in the initial state application. It refused to do so, presumed that the state trial court's alternative merits findings were correct under 28 U.S.C. § 2254(e)(1), and concluded that Murphy did not rebut them by clear and convincing evidence. App., *infra*, 98a-101a. The threshold issue in the court of appeals was whether the alternative merits findings were entitled to a presumption of correctness.

The court of appeals initially observed that the § 2254(e)(1) presumption of correctness applies to factual determinations "made by a State court," without regard to whether it was a trial court or an appellate court. App., *infra*, 30a. It acknowledged circuit precedent holding that a state trial court's findings do not survive an appellate court's review "where they were neither adopted nor incorporated into the appellate court's peremptory denial of relief, but instead were directly inconsistent with the appellate court's decision." App., *infra*, 30a-31a.

Despite acknowledging that the TCCA based its dismissal of the subsequent application on the trial court's findings that the suppression of evidence claim was procedurally defaulted, the court of appeals concluded that the alternative merits findings were not "directly inconsistent" with the dismissal even though the TCCA did not consider the merits. App., *infra*, 33a. It concluded that "all the state trial court's express factual findings are owed a presumption of correctness, a presumption Murphy may rebut only with clear and convincing evidence." App., *infra*, 34a.

Once the court of appeals held that the presumption of correctness applied, and that Murphy did not rebut it by clear and convincing evidence, the dominos quickly tumbled. It concluded that the evidence of the conversation between Wilhelm and the lead prosecutor, even if suppressed, was immaterial based on the state trial court's findings that its impeachment value was *de minimus* and that other evidence demonstrated that Murphy would be dangerous in the future. App., *infra*, 35a-37a.

28 U.S.C. § 2254(e)(1) provides as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

This presumption ordinarily applies in a federal habeas corpus proceeding to factual determinations made by both state trial and appellate courts. *Sumner v. Mata*, 449 U.S. 539, 546 (1981). This Court has not decided whether the presumption applies when a state appellate court dismissed the application without adjudicating the claim on the merits and did not expressly adopt the trial court's alternative merits findings. The court of appeals has recognized that, when the TCCA decides a case on procedural grounds, there is no "determination of a factual issue made by a State court" to which a federal court must defer under

§ 2254(e)(1). *Jones v. Davis*, 890 F.3d 559, 565 (5th Cir. 2018). It found Murphy's case to be distinguishable because the TCCA expressly rejected the trial court's fact findings in *Jones* but merely failed to consider them in *Murphy*. App., *infra*, 32a-33a. This is an insupportable distinction. This Court also has not decided whether the presumption applies when the trial court made fact findings contrary to its jurisdictional mandate from the appellate court. The Third Circuit has questioned whether it should apply in this circumstance. *See Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir. 2004) (declining to conclude that state court jurisdiction or procedures are irrelevant to federal court's habeas review of state court determinations). These important questions must be resolved.

The state trial court's alternative merits findings that the undisclosed evidence was neither suppressed nor material were not entitled to the presumption of correctness for two reasons. First, the TCCA did not adopt them in dismissing the subsequent application because the suppression of evidence claim could have been raised in the initial habeas application and, as a result, was procedurally defaulted. The TCCA expressly refused to consider the merits of the claim. Second, the state trial court lacked jurisdiction to make alternative merits findings because the TCCA authorized it to do so only if it found that the claim was not procedurally defaulted. Thus, the alternative merits findings were not entitled to a presumption of correctness in the federal proceeding.

The Fifth Circuit relied on the alternative merits findings in concluding that the evidence, even if suppressed, was not material. App., *infra*, 33a, 36a-37a. This analysis was error, as it should have reviewed the claim *de novo*. Had it done so, it would have concluded that the suppressed evidence was material.

Wilhelm told present counsel that, when she viewed the photo lineup, she told Detective Stanton, "This looks a lot like him, and I'm pretty sure it's him," and that she was 95 percent sure that Murphy was her assailant. Stanton testified in the state habeas proceeding that this was only a strong tentative identification. Nonetheless, Wilhelm testified at trial that she had no doubt that Murphy was her assailant when she identified him in the photo lineup and in court. The prosecutor, by confirming the accuracy of her identification, turned a strong tentative identification in the photo lineup into a strong positive identification at trial. Thus, the suppressed evidence was material.

The Wilhelm kidnapping was the extraneous offense that best demonstrated Murphy's future dangerousness. His prior convictions were for property crimes that resulted in probated sentences and for possession of a small amount of marijuana. The State presented testimony regarding three unadjudicated assaults; two were not reported to the police, and the third resulted in charges that were dismissed.

Had the jury known that the prosecutor told Wilhelm that she identified the right man in the photo lineup, the accuracy of her identification would have

been undermined. The other extraneous offenses paled in comparison. Had one juror doubted that Murphy kidnapped her and persisted in a negative answer to the future dangerousness special issue, he would have been sentenced to life. The State's suppression of this evidence undermines confidence in the death sentence.

This Court has not decided whether the § 2254(e)(1) presumption of correctness applies to state trial court alternative merits findings that the state appellate court did not authorize or adopt when dismissing the application on procedural grounds without considering the merits. The state trial court's alternative merits findings in Murphy's case contravened the TCCA's remand order that it make them only if it found that the claim was not procedurally defaulted. Thus, they were unauthorized, and the TCCA had good reason not to adopt them.

This Court should grant certiorari to consider this important federal question that has not been, but should be, settled. SUP. CT. R. 10(c).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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