No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JOHN STEVEN GARDNER
Petitioner,
v.
Lorie Davis, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent.

_____

On Petition for a Writ of Certiorari to
the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF *CERTIORARI*

CAPITAL CASE

EXECUTION SCHEDULED JANUARY 15, 2020

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QUESTION PRESENTED

In *Wilson v. Sellers*, this Court instructed that a federal court should train its attention on the particular legal and factual reasons of the state-court, merits-decision and determine if the reasons "involved" an unreasonable application of Supreme Court law or "were based on" an unreasonable determination of fact. In contrast, because "the district court found that the state habeas court's findings on the claim[s] were not unreasonable," the Fifth Circuit in the *Gardner* opinion, "simply reviewed the reasons" and agreed with the federal district court. The Fifth Circuit made a merits-based *Strickland* determination adverse to Mr. Gardner, and denied COA.

Mr. Gardner asks this Court to grant certiorari to answer the question:

I. Whether in denying a COA, the Fifth Circuit's methodology in the *Gardner* opinion is in conflict with *Wilson v. Sellers* and *Miller-El*.

PARTIES TO THE PROCEEDING

JOHN STEVEN GARDNER, Petitioner

LORIE DAVIS, Director, Texas Department of Criminal Justice Institutional Division. Respondent

RELATED CASES

- *Gardner v. Davis*, No. 18-70012, 2019 WL 2536093 (5th Cir. June 19, 2019) (Denied Certificate of Appealability)

- *Gardner v. Davis*, No. 1:10-cv-610 (USDC Eastern Dist. Tex.) (Doc. 93 - Mem. Opinion and Order denies Petition for Writ of Habeas Corpus, dated 3-1-2018; Doc 94 - Judgment, petition denied case dismissed with prejudice, dated 3-20-2018)

- *Ex parte John Steven Gardener*, No. WR-74,030-01, 2010 WL 3583072 (Tex. Crim. App. Sept. 15, 2010) ("We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions, except for findings paragraphs 67, 85, and 86. In addition, we do not adopt the phrase, "at China Blue's direction," in findings paragraph 81. We also observe that the word, "first," in findings paragraph 94(c) should be changed to the word, "second." Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.")

- *Ex parte John Steven Gardener*, No. 219-81121-06 (219th Judicial District Court, Collin County, TX, May 12, 2010) (Findings of Fact Conclusions of Law (FFCL) recommends denial of state habeas relief)

- *Gardner v. Texas*, 562 U.S. 850 (2010) ("Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied")

- *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009) (Direct Appeal, affirmed the trial court's judgment and sentence of death)

- *State v. Gardner*, No. 219-81121-06 (219th Judicial District Court, Collin County, TX, Nov. 14, 2006) (Judgment, Jury Verdict, Death Sentence)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL LAW

OTHER AUTHORITIES

STATUTORY PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOHN STEVEN GARDNER, petitions for a writ of certiorari to review the Fifth Circuit's opinion

denying a petition for writ of certiorari: *Gardner v. Davis*, 2019 WL 2536093 (5th Cir. 2019).

OPINION BELOW

Gardner v. Davis, 2019 WL 2536093 (5th Cir. 2019)

JURISDICTION

The Fifth Circuit Court of Appeals opinion sought to be reviewed was entered on June 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the rights ... to have the assistance of counsel for his defence" U.S. CONST. amend. VI.

Title 28 USCA § 2254 (d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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
> >
> > (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.

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

A. State Trial, Direct Appeal and Habeas Proceedings[1]

1. The Trial. On May 23, 2006, Mr. Gardner was reindicted for capital murder in the death of Tammy Dawn Gardner, in the course of committing or attempting to commit burglary or retaliation for her service or status as a prospective witness in their divorce proceeding. (Indictment - CR 1:6).

In October and November, 2006, individual voir dire took place. On November 7, 2006, the jury was sworn in and the trial began. (Cause No. 219-81121-06, Docket Sheet).

a. In Guilt/Innocence, the defense rested without calling any witnesses

In only two days, November 7, 2006 and November 8, 2006, the State presented its case. (Cause No. 219-81121-06, Docket Sheet). The State's evidence was that on January 11, 2005, Tammy Gardner had initiated divorce proceedings against the Petitioner. The prosecution's theory of the case was that Petitioner shot and killed Tammy Gardner, his wife,"in retaliation for or on account of the service or status of another as a witness or prospective witness" in the divorce proceeding. Tex. Penal Code 36.36(a)(1). The alternative theory was that Mr. Gardner shot Tammy

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[1] State Record Abbreviations: **CR** is the abbreviation for Clerk's Record, as required by Tex. R. App. Proc. 34.1. It is followed by the volume number before the colon, and the page numbers after the colon. RR is the abbreviation for Reporter's Record, pursuant to Tex. R. App. Proc. 34.1,which is the trial transcript testimony recorded by the court reporter. The abbreviation **RR** is followed by the volume number before the colon, and the page numbers after the colon.

Federal District Court Record Abbreviations: "**Doc**" followed by a number is the document in the docket sheet of the federal district court, Gardner v. Director, Case No. 1:10-cv-610 RC (Eastern Dist., TX)

Fifth Circuit Court Record Abbreviations: **EROA or ROA** is the electronic record on appeal in *Gardner v. Davis*,18-70012 followed by the page number at which the cited material will be found (*e.g.,* ROA.815).

Gardner in the course of committing or attempting to commit the offense of burglary by intentionally and knowingly entering her house, without her effective consent, and committed the felony offense of murder. (CR 1:6). The prosecution presented testimony from twenty-two (22) witnesses, the salient points of which were as follows:

(1) Burglary Enhancement

The evidence presented by the prosecution on the burglary enhancement came from Diane Stubbs and Robert Yeager, both criminal investigators, from John White, Tammy's son by a previous marriage, and from Kay Tate, who had raised Tammy Gardner. Ms. Tate testified that she had owned a house, that she allowed Tammy to live in rent free, provided Tammy paid the utilities. Ms. Tate testified that Tammy could treat the house as her home, and Tammy could admit or exclude whomever Tammy wanted. (RR 20:109, 112-114, 116). This was the house in which Tammy was shot and ultimately died from the gunshot wounds.

Investigators Stubbs and Yeager testified that the doors to the house had been locked, as were the windows. Both investigators testified that except for the forced entry by the first responders following the 911 call by Tammy, there were no other signs of forced entry into the home. (RR 19:102, 125; RR 20:14). Both law enforcement officers testified that a burglary can occur when a person enters even through an open door. The issue is whether the owner gave consent. (RR 19:128; RR 20:17). Neither officer had any personal knowledge as to whether Tammy gave consent to Mr. Gardner's entry into the house. (RR 19:128; RR 20:17).

John White, Tammy's son by another marriage, testified that both Tammy and Mr. Gardner had told Mr. White that they were divorcing. (RR 19:259). Mr. White testified that his mother had told him that there were two sets of keys to her house and to the shed. (RR 19:261). Mr. White testified that Mr. Gardner told him that because of the divorce, Mr. Gardner was going to live with

his parents in Mississippi. At that time, Mr. Gardner gave Mr. White one set of keys to the house and the shed. (RR 19:261).

In closing argument, the prosecutor argued:

> "you basically heard him [defense attorney] in closing argument, and it didn't sound like the defense is he didn't kill her, but that if he was there, that somehow she consented to allow him in the house." (RR 21:52).
>
> "there's no way Tammy could have effectively consented to allow him to come in the home to kill her. Consent was not effective." (RR 21:24).

(2) Retaliation-for-Testifying Enhancement

To prove retaliation for her service or status as a witness, the prosecution called Erin Whitefield, the dispatcher who spoke with Tammy on the 9-1-1- call. Ms. Whitefield testified that during the question and answer form of their conversation, she learned the victim's address and that her blue Ford pickup truck was parked outside, that the victim had been shot by her husband, and that the victim's husband had left in a white Ford pickup truck with Mississippi license plates. (RR 19:24-26).

The prosecution also called three witnesses who had been associated with Tammy's employer: Jacquie West, a former co-worker of the victim; Candace Akins, Tammy's manager; and David Young, the VP for the company that employed Tammy. They testified that they were trying to help Tammy disappear for her safety because Tammy told them that she had filed for divorce and would not get out of the relationship alive. (RR 19:201, 205, 209, 240-241, 309, 312).

The prosecution called family members Jessie Mangum, the daughter of Tammy by another marriage, and Elaine and David Holifield, the sister and brother-in-law of Petitioner. Jessie Mangum, the daughter of Tammy, testified that Tammy and Petitioner were divorcing, that she was afraid for her mother's safety, and that her mother told her that she did not think she would make it out of the

divorce. (RR 19:292). Mangum also testified to text messages from Mr. Gardner asking if Tammy were going through with the divorce. (RR 19:294).

Elaine Holifield, Petitioner's sister, testified that in December 2004, Mr. Gardner came to live with her and her husband, David, who also testified for the prosecution. (RR 20:30). David allowed Mr. Gardner to drive his white Ford pickup truck. (RR 20:22). The Holifield's testified that Mr. Gardner left in the truck, but did not know where he had gone the day Tammy had been shot. (RR 20:22). The police retrieved a gun that belonged to David Holifield, which had one spent round. David had not fired the gun. (RR 20:25-26). Elaine told Mr. Gardner to turn himself in, and he went to his parents home to wait for law enforcement, who arrested him. (RR 20:38-41).

And finally, the prosecution called Eric Higgins, a family law attorney. Mr. Higgins testified that before a divorce can be finalized, a petition must be filed, and the filing is followed by a 60 day waiting period. (RR 20:99). After the waiting period, there is a "prove up." In the prove up, a petitioner is sworn in like any witness to swear to the facts alleged in the petition, and provides some testimony to support the divorce decree. (RR 20:100). Mr. Higgins testified that in the Gardner divorce case, the petition was filed January 11, 2005, so that the prove-up would have occurred some time in the second week of March, at the earliest. (RR 20:101-103). Mr. Higgins also testified that there was a Waiver of Citation that had been signed by Mr. Gardner on January 13, 2005, which means that the person giving the waiver would not have to be served with the lawsuit, so the divorce proceeding could go forward without further notice to him. (RR 20:101, 105).

In closing, the prosecutor asserted: "The reason he drove to Texas and shot Tammy Gardner in the head was because she was divorcing him; and that's retaliation." (RR 21:63).

The defense theory was that the prosecution failed to prove its case beyond a reasonable doubt. (RR 21:31). On November 8, 2006, without calling any witnesses, the defense rested. (Cause No. 219-81121-06, Docket Sheet; RR 21:193).

On November 9, 2006, following the State's two-day trial presentation on the merits, and after only 4.5 hours of deliberation (10:30 am jury out; returned 3:00 pm), the jury returned a verdict of guilty of capital murder. (Cause No. 219-81121-06, Docket Sheet; CR 2:608).

b. The Punishment Phase

The punishment phase of the trial last lasted two days: on November 13, 2006, the state's case-in-chief consisted of testimony from seven (7) witnesses as to the future dangerousness issue, and then the state rested.

On November 14, 2006, the defense called four (4) witnesses to refute the state's future dangerousness issue and then it rested; immediately followed by two prosecution witnesses in rebuttal, again as to the future dangerousness issue only.

(1) The defense presentation in punishment was limited to refuting the prosecution's aggravating evidence

The only story of Mr. Gardner was the one told by the prosecution during the punishment phase on the issue of future dangerousness. The prosecution introduced evidence that despite having been raised by a "mother and father [who] made him pray on his knees every morning," and whose "parents are still together," and visit the grandchildren, (Vol. 23:114-115), Mr. Gardner was a man who perpetrated violence on women, sexually molested and/or physically assaulted the daughters of his former wives, and committed acts of sexual indecency in public.

The evidence in aggravation included the testimony of:

- Dr. Rohr, the medical examiner for Collin County, who testified from the Mississippi medical records of Rhoda Gardner. Rhoda was Mr. Gardner's former spouse, who was pregnant at the time he ambushed and shot her three times, resulting in paraplegia. (Vol. 22:17). As a result of complications from having lost the fetus, she was required to undergo subsequent surgery and died as a result of cardiac arrhythmia. The medical records recited that the manner of death was homicide, and listed four reasons for her death: massive pulmonary embolism; paraplegia; gunshot wounds; homicide. (Vol 22:21, 25).

- Margaret Westmoreland (Vol. 22:27) testified that during the marriage, although Mr. Gardner was work-capable, he was unemployed, (Vol. 22:39), that he was controlling, threatened to "hunt [her] down" and kill her and her children if she left him, (Vol. 22:54), and isolated her from her family.

- Rebecca Fethiere, the daughter of Ms. Westmoreland, testified Mr. Gardner had hit her in the head three times with his fist, causing injury, which required 78 stitches. (Vol. 22:74). Ms. Fethiere also testified to the inappropriate, "boyfriendish" approach of Mr. Gardner, who wanted to put her makeup on her, and suggested that if she had "sex with the devil," meaning himself, she would get devil-like powers. (Vol. 22:65, 68).

- Several law enforcement officers testified to an incident by Mr. Gardner of indecent exposure and unlawful carrying of a weapon, (Vol. 22: 103); specifically for masturbating in his vehicle in the parking lot at the Irving Mall at Christmas time in December, 1992, where there were women and children. (Vol. 22:91, 96, 100).

- Jessie Mangum, the daughter of capital murder victim Tammy Gardner, testified that when she was in second grade and living with her mom and Mr. Gardner, Mr. Gardner acted sexually inappropriate with her by kissing her and touching her, and having her touch him. (Vol. 22:124-126).

- Both Ms. Mangum and Ms. Fethiere had testified that Mr. Gardner showed no remorse when he told each of them about his ambushing and shooting his former wife, Rhoda Gardner. (Vol. 22:77; Vol. 22:132-133). Ms. Mangum also testified that when a former wife of Mr. Gardner, Sandra, would dropped off Nicholas (biological son of Mr. Gardner and Sandra), Sandra appeared "frantic" around Mr. Gardner and wanted to "get out of there." (Vol. 22:128-129).

In an attempt to refute the future dangerousness presentation, the defense called:

- two former co-workers (William Campbell Miles and Kelly Dowdy), who testified that Mr. Gardner was a diligent, responsible employee, (Vol.23:7-8; Vol 23: 17-18). Mr. Miles testified Mr. Gardner would have eternal security in God because he was a born-again Christian. (Vol. 23: 10-11).

- They called a former spouse of the victim, Juan Russel Sewell, who testified that Tammy could be manipulative. (Vol. 23:23).

- Only Elaine Hollifield, the older sister of Mr. Gardner, testified about repeated incidents of abuse of Mr. Gardner at the hands of his parents. (Vol. 23:24).

Elaine Holifield testified to the death of a sister who died in first grade of heart failure, and how her illness and death caused financial stress in the family. (Vol. 23:26). Ms. Holifield also testified to the violent temper of her father, the unhappy marriage and violent interaction of their parents, (Vol. 23:30). The violence in her parents' marriage was reflected in the presence of knives, broom handles, and a gun. (Vol. 23:32).

Ms. Holified also testified that their father was a Baptist preacher, who continuously moved from church to church because the congregation would ask him to resign, (Vol. 23:26), and how he would have them up at 5:30 am to do daily devotionals, only after their mother left for work at a sewing factory at 4:00 am. Because playmates would have been forced to participate in this morning ritual, Elaine and Steve did not invite friends to their home. (Vol. 23:28).

Ms. Holified testified that their father would physically abuse her and, Steve Gardner. Their father would interrupt a church service to take Steve to the fellowship hall to beat him with a belt while the congregants listened. The wails were heard by the parishioners, and the beating caused welts on Steve's body. (Vol 23: 35-36).

Ms. Holifield testified to other physical and verbal abuse of Mr. Gardner, by his father and mother. His father would beat Steve at least once a week for no apparent reason, not with his hand but with a limb from a bush or with his belt. (Vol. 23:31-32, 34). Steve's mother, who was a screamer, would use her hand to slap the children, and Steve in particular. Ms. Holified could not provide any particular reason for the beatings, and testified that their father would later take them to the beach. (Vol. 23:40-41).

(2) The defense did not put on any evidence in mitigation, attesting in state habeas "our mitigation expert had discovered little or nothing that was deemed useful for trial"

No mitigation was presented by the defense team. According to defense counsel, the mitigation investigation consisted of (Vol 23:77-78):

- Mr. Gardner's prior childhood accidents and injuries, which did not reveal anything significant,
- there was no serious illnesses at any time;
- There was physical abuse to Mr. Gardner and Elaine Holifield, his sister, but no sexual abuse of any kind;
- The size of the immediate family "was four – plus grandchildren;"
- there was no drug or alcohol abuse by Mr. Gardner or any members of the family;
- there was no mental health treatment, issues as to family cohesiveness, or family standard of living and living conditions, that would aid in mitigation;
- "the social relationships with members of, basically, the opposite sex, marriage, divorces, etc; and that's all come into evidence,"(as reflected in the state's case-in-chief on the future dangerousness issue)
- all awards and honors shown by his military records

The affidavit of the defense attorneys recited, among other things, that they did not present any evidence in mitigation because:

- the State had not proven future dangerousness beyond a reasonable doubt. Affidavit of Attorneys House and Hultkrantz, p. 5.

- "The fact of the matter there wasn't much [mitigation] available given the life style Steve had lived including his past homosexual relationships, his past history of violence in many if not all of the relationships and the limited testimony available from his family;" Affidavit of Attorneys House and Hultkrantz, p. 5.

- "our mitigation expert had discovered little or nothing that was deemed useful for trial," and although they had hired Dr. Allen to "examine and address about abandonment issues concerning Steve... [Dr. Allen] decided she didn't want to testify because of lack of information and felt that he was psychotic." Id. at 9;

- the mitigation expert "had developed an overly close relationship with the defendant," and had "refused to share notes from her mitigation investigation and refused to summarize her findings in a report to the attorneys;" Affidavit of Attorneys House and Hultkrantz, pp. 4, 6, 7.

- testimony about Mr. Gardner's "womanizing," "his constant focus on sex," and "his life style ... including homosexual relationships, his past history of violence in many if not all of the relationships and the limited testimony available from his family," would have been harmful because they were "well aware of what the feelings and reactions jurors [in conservative Collin County] are when it comes to presentation of evidence regarding transvestites and other alternative lifestyles." Affidavit of Attorneys House and Hultkrantz, pp. 7, 8.

Additionally, the prosecutor stated on the record in response to the defense attorneys assertion at trial that it was their "trial strategy not to put [experts] on," that "at approximately 11:15 a.m. that morning, we were summoned to the Chambers, and defense counsel was present. It was our understanding at that point the defense team had consulted with their client and that he was of the opinion that he did not want to put on a mitigation case." Defense counsel did not respond. (Vol 23:76).

The State put on rebuttal witnesses, and both sides closed. In closing argument, the prosecutor argued: "the evidence shows, after looking at all of it, there is nothing sufficiently mitigating to warrant a life sentence for this defendant." (Cause No. 219-81121-06, Docket Sheet; RR 23: 85).

The jury deliberated a mere two (2) hours. (Cause No. 219-81121-06, Docket Sheet). The jury answered special issue 1, future dangerousness, "yes." The jury answered special issue 2, mitigation, "no." (Cause No. 219-81121-06, Docket Sheet; CR 2:616-617, 619-620).

On November 14, 2006, Mr. Gardner was sentenced to death for the 1-23-05 capital murder of Tammy Gardner, with a deadly weapon finding. (Cause No. 219-81121-06, Docket Sheet; CR 2:618).

2. Direct Appeal. Steven Miears was appointed as substitute direct appeal counsel. (Trial Court Order, dated April 11, 2008). In a published opinion, *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2010), the Texas Court of Criminal Appeals affirmed the conviction and sentence of death. On October 04, 2010, the U.S. Supreme Court denied the petition for writ of certiorari. *Gardner v. Texas*, 131 S.Ct. 103 (2010).

3. State Habeas. On December 29, 2006, undersigned counsel, Lydia Brandt, was appointed to represent Mr. Gardner in his state habeas proceeding. (CR 5:1876; Order of Texas Court of Criminal Appeal, dated Dec. 29, 2006). The Application was timely filed and raised five (5) claims. Three of those claims (under discussion in this Petition) were ineffective assistance of trial counsel (IATC) claims.

On May 12, 2010, the state district judge denied the request for an evidentiary hearing, and signed verbatim the Findings of Fact and Conclusions of Law (FFCL) drafted by the State of Texas, and denied habeas relief.

On September 15, 2010, the Texas Court of Criminal Appeals (TCCA) entered an order, in which the TCCA "agree[d] with the trial judge's recommendation and adopt[ed] the trial judge's findings and conclusions, except for findings paragraphs 67, 85, and 86. In addition, we do not adopt the phrase, "at China Blue's direction," in findings paragraph 81. We also observe that the work, "first," in findings paragraph 94 (c) should be changed to the word, "second." Based upon the trial court's findings and conclusions and our own review of the record, relief is denied." *Ex parte John Steven Gardner*, Order, Texas Court of Criminal Appeals (Sept 15, 2010).

B. Federal Habeas Proceedings

1. Federal Habeas & Supplemental *Trevino* Counsel. On October 7, 2010, prior to the Supreme Court's Trevino decision, the federal district court appointed undersigned counsel, Lydia Brandt, to represent Mr. Gardner in his federal habeas proceeding. ROA.31 [Doc #6].

On August 7, 2011, Mr. Gardner through undersigned counsel Brandt filed his federal habeas petition, ROA.48 [Doc #17]. It was 147 pages in length. It was accompanied by a Motion to Expand the Record, and Motion for Evidentiary Hearing. ROA.232; ROA.239 [Doc # #18, 19]. The Director filed a 120 page Answer on June 14, 2012. ROA.280 [Doc # 27]. The IATC claims raised in the state habeas application, were re-raised by Mr. Gardner through his counsel, Brandt, in his federal habeas petition:

> 1. Trial counsel were ineffective during the guilt-innocence phase of trial because they did not present an "abandonment rage" defense to negate an essential element of capital murder— retaliation for status as a prospective witness. [“IATC Claim 1,” *see infra*]

2. Trial counsel were ineffective because they presented multiple, inconsistent, and implausible theories in both the guilt-innocence and punishment phases of trial, due to their failure to timely investigate and develop crucial information. ["IATC Claim 2," *see infra*]

3. Trial counsel were ineffective because they failed to adequately investigate and develop crucial mitigating evidence and failed to present that crucial mitigating evidence. ["IATC Claim 3," *see infra*]

4. The trial court erred in admitting Tammy's 911 call into evidence because the admission violated Mr. Gardner's Sixth Amendment right to confrontation.

[Doc 19, at pp. 27–135].

Based on a motion by Brandt, on August 13, 2015, the district court appointed Seth Kretzer as independent, supplemental *Trevino* counsel, [Doc 49, 74]. Through Mr. Kretzer, Mr. Gardner presented the following additional ground for relief in an Amended Petition:

5. State habeas counsel should have raised the following claim in State court: Trial counsel were ineffective for failing "to get the work product of their recalcitrant mitigation specialist, Shelli Schade." [Doc 78, at p. 1]."

Memorandum Opinion ("Mem. Op."). ROA.891 [Doc 93].

On March 1, 2018, the district court entered a 77-page Memorandum Opinion and Order of Dismissal, denying habeas relief and a certificate of appealability on all claims raised by Brandt, and the claim raised by Kretzer. ROA.891 [Doc #93]. It entered judgment on March 20, 2018. ROA.968 [Doc #94].

2. Fifth Circuit Court of Appeals (Denial of COA): On March 28, 2018, Seth Kretzer and Lydia Brandt jointly filed a Notice of Appeal, and recited that nothing about their joint filing was to be construed as a waiver of their appointments as independent counsel in the 8-13-2015 Order, pursuant and "limited to" the parameters set forth in *Mendoza v. Stephens*,

783 F.3d 203 (5th Cir. 2015) and *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). In the appointment order, the district court had appointed Mr. Kretzer as "independent" counsel, and not as co-counsel with Brandt, who had been both state and federal habeas counsel, prior to the decisions in *Martinez/Trevino*. *See* Order 8/13/2015 [Doc #74]; Mem. Op. at 69-70. [Doc 96, NOA].

On direct appeal to the Fifth Circuit, Brandt re-raised issues 1 to 3, *supra*, and Kretzer raised the only issue he had raised in the the district court.

As to issues 1-3 the Fifth Circuit ruled: "the district court found that the state habeas court's findings on [the] claim[s] were not unreasonable," and "agreed" with the federal district court. *Gardner*, at *2, *3, *4. Thereafter, the Fifth Circuit held that "[r]easonable jurists would not debate the propriety of granting a COA on this issue," and denied COA. *Gardner*, at *3, *5.

On the issue raised by Kretzer filed in a separate brief in the Fifth Circuit, the *Gardner* opinion recited that Gardner argued that his trial counsel were ineffective in failing to get the work product of their "recalcitrant mitigation specialist," and that state habeas counsel [Brandt] failed to raise the claim in state habeas. He further alleged the claim was unexhausted and procedurally defaulted, but excused by *Martinez/Trevino*. *Gardner v. Davis*, 2019 WL 2536093, at *5 (5th Cir. 2019). The Fifth Circuit "agree[d] with the district court that this claim was adjudicated by the state habeas court and therefore is not procedurally defaulted, and that the state court's determination on the merits of this claim was not unreasonable. See 28 U.S.C. § 2254(d)(1)." *Id*.

As to all issues, the Fifth Circuit denied COA. *Gardner*, 2019 WL 2536093, at *6.

This petition for writ of certiorari in the Supreme Court follows and is limited to issues 1-3 raised by Brandt in the Fifth Circuit below.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide if in denying a Certificate of Appealability, the Fifth Circuit's methodology in the *Gardner* opinion is in conflict with *Wilson v. Sellers* and *Miller-El*

In denying a certificate of appealability, the Fifth Circuit's *Gardner* opinion is in conflict with *Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018) and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The *Gardner* opinion quotes *Wilson*: "... a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Gardner v. Davis*, 2019 WL 2536093, at *1 (5th Cir. 2019), *citing Wilson*, 138 S. Ct. at 1192.

At issue in *Wilson* was the methodology of the Eleventh Circuit that looked "to what arguments 'could have supported' the unexplained Georgia Supreme Court's refusal to grant permission to appeal." *Wilson* rejected the Eleventh Circuit's methodology that "imagine[d] what might have been the state court's supportive reasoning." *Wilson*, 138 S.Ct. at 1195.

Wilson held that the federal courts were required to "look through" the unexplained higher state-court decision and assume it rested on grounds given in the lower state-court's decision that did provide a relevant rationale. *Wilson*, 138 S.Ct. at 1193. It was from this analysis of methodology that *Wilson* wrote that the inquiry "is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again." *Wilson*, 138 S.Ct. 1192.

Wilson still insisted that before deferring to those reasons, the federal court must conduct the contrary to/unreasonable application of law or fact in 28 U.S.C. § 2254(d)(1)(2). *Wilson* held:

> Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the

> federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, *Hittson v. Chatman*, 135 S.Ct. 2126, 2126 (2015).

Wilson, 138 S.Ct. at 1191-92 (2018).

In denying COA, the *Gardner* opinion makes no attempt to address the two prongs of 28 U.S.C. § 2254(d)(1)(2) during its COA determination pursuant to *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Rather, the *Gardner* opinion lists a series of findings and conclusions by the state habeas court, and agrees with the district court that found that the state habeas court's findings were not unreasonable. *Gardner*, at *2 (IATC claim 1); at *3 (IATC claim 2); at *4 (IATC claim 3).

The Fifth Circuit also made a premature merits-based, *Strickland* determination that trial counsel was not constitutionally ineffective.[2] As a result of its agreement with the federal district court, the Fifth Circuit denied COA because "[r]easonable jurists would not debate the propriety of granting a COA," *Gardner*, at *3, *5.

The methodology of the Fifth Circuit in *Gardner* is in conflict with *Wilson* and *Miller-El*.

As more fully discussed below, the Fifth Circuit was required to train its attention on both the legal and factual reasons in the FFCL as adopted by the TCCA (taking into consideration the exceptions) to address if the state-court decision to deny habeas relief "involved" an unreasonable application of federal law, or "was based on" an unreasonable determination of fact. *See Wilson*, 138

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[2] *See Gardner* at *3 (IATC Claim 1 – "[g]iven trial counsel's investigation and reliance on reasonable expert evaluations, Gardner cannot overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance, and counsel's performance was therefore not deficient. *Strickland*, 466 U.S. at 689; *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (holding counsel is entitled to rely on the opinions of their experts and is not required to "canvass [ ] the field to find a more favorable defense expert").). *See also Gardner*, 2019 WL 2536093, at *3 (IATC Claim 2 – "Gardner has failed to raise a substantial claim that counsel's "representation fell below an objective standard of reasonableness" in utilizing different strategies at guilt and punishment instead of relying on abandonment rage in both phases. *See Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052. "). *See also Gardner* at *4, and n.1 (IATC Claim 3 – counsel not deficient in investigation and presentation).

S.Ct. at 1191-1192. Then it should have asked whether jurists of reason could debate/disagree with the state court's resolution or could conclude the IATC claims 1-3 are issues adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Only after the COA is granted, should the Fifth Circuit undertake an actual merits determination of the *Strickland* claims.

A. The last state court decision to provide a relevant rationale was the state district court's nineteen (19) page Findings of Fact and Conclusions of Law (FFCL), a merits-decision on IATC claims 1-3, adopted with exceptions by the TCCA

In *Gardner*, the relevant state court decision – the September 15, 2010 decision of the Texas Court of Criminal Appeals (TCCA) – did not come accompanied with reasons for the denial of Gardner's state habeas claims on the merits. The TCCA ruled:

> This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions [FFCL], except for findings paragraphs 67, 85, and 86. In addition, we do not adopt the phrase, "at China Blue's direction," in findings paragraph 81. We also observe that the word, "first," in findings paragraph 94(c) should be changed to the word, "second." Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

Ex parte Gardner, 2010 WL 3583072, at *1 (Tex. Crim. App. 2010).

The May 12, 2010 FFCL was a decision on the merits as to the three IATC claims at issue in this Petition (except for the FFCL section, titled: "Juror Affidavits," striking the juror affidavits on state law procedural grounds, FFCL at 3). *See Wilson*, 138 S.Ct. at 1195 ("we have 'looked through' to lower court decisions in cases involving the merits"), *citing Premo v. Moore*, 562 U.S. 115, 123–133 (2011); *Sears v. Upton*, 561 U.S. 945, 951–956 (2010) (per curiam).

Given that the TCCA wrote explicitly that it adopted the trial judge's FFCL but with the enumerated exceptions, the lower federal courts were required to "look through" the unexplained

TCCA decision to the May 12, 2010 FFCL of the trial court, while taking into account the exceptions of the TCCA. *See Wilson*, 138 S.Ct. at 1192.

B. Jurists of reason could debate whether, or could conclude that the IATC claims are issues adequate to deserve encouragement to proceed further, because the state-court reasons "involved" an unreasonable application of Supreme Court law, or "were based on" an unreasonable determination of fact, pursuant to 28 U.S.C. § 2254 (d)(1)(2). Gardner carried his burden of rebutting the fact determinations' correctness, by clear and convincing evidence, 28 U.S.C. § 2254 (e)

Because the *Gardner* opinion relies on the same state-court reasons in rejecting IATC Claims 1, 2, and 3, these claims will be addressed together, *infra*. *See Gardner v. Davis*, 2019 WL 2536093, at *3 (5th Cir. 2019) (IATC Claim 2 – "As discussed in the previous section, there were numerous weaknesses in Gardner's proposed abandonment rage theory."). *See also Gardner*, 2019 WL 2536093, at *5) (IATC Claim 3 – "we have already explained why the state court's findings on counsel's failure to uncover and present abandonment rage are not unreasonable").

The Fifth Circuit recites that "[t]he bulk of Gardner's argument turns on the theory of abandonment rage, a condition that Gardner claims causes men to kill their female companions with excessive force when faced with recent or imminent abandonment." *Gardner*, 2019 WL 2536093, at *2. This is followed by a list of reasons from the state-court decision that denied habeas relief, except for the "double-edged nature" of the abandonment rage theory, which was raised for the first time by Respondent Davis in federal district court:

> [1] "the experts employed by counsel never raised the theory [of abandonment rage] and "counsel's decision to pursue a fact-based rather than psychological defense ... was a reasoned, strategic choice" based on counsel's experience and knowledge of jurors in Collin County;" Claim 1 - *Gardner* at *2; Claim 2 - *Gardner* at *3;
>
> [2] "the [abandonment rage] theory was not supported by the evidence and noted several pieces of evidence that were not consistent with abandonment rage,

as Gardner has a history of violence unconnected to any abandonment;" "counsel's pursuit of separate strategies at the guilt and punishment phases and were not inconsistent;" Claim 1 - *Gardner* at *2; Claim 2 - *Gardner* at *3;

[3] "abandonment rage supplied only psychological context, not legal justification, for Tammy's murder" and "did not address the independent aggravating element of murder committed in the course of a burglary, which was sufficient to support the jury's verdict." Claim 1 - *Gardner* at*2; Claim 2 - *Gardner* at *3;

[4] [federal court reason] "it is double-edged in nature...." *citing Rayford v. Stephens*, 622 F. App'x 315, 337 (5th Cir. 2015). Claim 1 - *Gardner* at *2; Claim 2 - *Gardner* at *3; Claim 3 – *Gardner* at *5;

[5] "The state habeas court analyzed the extent of Gardner's counsel's investigation and determined it was adequate .... that counsel's investigation uncovered significant harmful information that counsel reasonably concluded did not merit further investigation." Claim 1 - *Gardner* at *2; Claim 2 - *Gardner* at *3; *Gardner* at *4, *5.

As more fully discussed below, after conducting a proper *Miller-El* and *Wilson* analysis – training the attention on both the legal and factual state-court reasons pursuant to 28 U.S.C. § 2254(d)(1)(2) – jurists of reason could debate/disagree whether the state-court reasons "involved" an unreasonable application of Supreme Court law, or "were based on" an unreasonable determination of fact, or jurist of reason could conclude that the matter deserved encouragement to proceed. *Wilson*, 138 S.Ct. at 1191-92, *citing Hittson v. Chatman*, 135 S.Ct. 2126, 2126 (2015). Moreover, contrary to the Fifth Circuit's determination, Gardner shouldered his burden of rebutting the presumption of correctness by clear and convincing evidence, *see infra*. 28 U.S.C. § 2254(e).. *Gardner* at *4, n.2.

1. State-Court Reasons 1 & 5 [the mitigation investigation was adequate; experts employed by counsel never raised the theory of abandonment rage, and even if Ms. Schade acted as a counselor, and not a mitigation investigator, this did not impair the mitigation investigation] are rebutted by the clear and convincing evidence from Gardner's state habeas proceeding, recited below:

The state-court reasons 1 & 5 [the mitigation investigation was adequate; experts employed by counsel never raised the theory of abandonment rage, and that Ms. Schade acted as a counselor, and not a mitigation investigator, but this did not impair the mitigation investigation] were based on an unreasonable determination of the facts and rebutted by the clear and convincing evidence brought forward by Mr. Gardner in state habeas.

a. The Fifth Circuit impermissibly added a fact (that Dr. Allen did not want to testify because of a lack of information about Gardner's psycho-social history), which the state-court FFCL deliberately omitted (limiting FFCL 68d to because Gardner was psychotic, she did not want to testify)

Among the state-court reasons was that the trial experts employed by counsel, Drs. Allen and Kessner, did not place trial counsel on notice of a lack of mitigation information. Gardner's proof in state habeas demonstrates otherwise.

Trial counsel themselves attested in state habeas that their trial expert, Dr. Allen, "decided she didn't want to testify [to attachment disorder] because of lack of information and felt he was psychotic." State Hab. Record, Affidavit of House and Hultkrantz, p. 9. In contrast, at the same time the FFCL recite that the experts did not place trial counsel on notice of a lack of mitigation information, the FFCL No. 68 d. specifically *omitted* that Dr. Allen did not want to testify because of lack of information (although it referenced the trial attorneys affidavit at page 9).

FFCL No. 68d was limited to a finding that Dr. Allen did not want to testify *solely because* Dr. Allen "concluded that Applicant was psychotic...." FFCL No. 68d finds:

d. Dr. Kate Allen, a mental health expert retained to testify at punishment, concluded that Applicant was psychotic and she did not want to testify at trial. See Affidavit of Counsel at 9.

Notice that the Fifth Circuit's *Gardner* opinion impermissibly adds this additional fact (lack of information) in its opinion. *See Gardner*, at *4 ("one of the mental health experts hired by counsel "decided she didn't want to testify because of lack of information and [because she] felt that [Gardner] was psychotic."). The Fifth Circuit <u>*cannot*</u> now embellish on the FFCL, when the state court made a deliberate decision to overtly omit the fact that the expert, Dr. Allen, did tell the trial attorneys there was a lack of mitigating information, in its FFCL 68d. This fact (had it been recited in the state-court reasons for denying habeas relief) would have contradicted its conclusion that the mitigation investigation was adequate and trial counsel was not ineffective.

b. Dr. Kessner attested that she personally told trial counsel "there were important corroborating witnesses who were not being located and interviewed for mitigation."

Dr. Kessner, another trial expert, attested in state habeas that she had "had a telephone conference and in person conferences with the defense attorneys and various members of the defense team. I voiced my concern that there were important corroborating witnesses who were not being located and interviewed for mitigation." State Habeas Application, Exhibit 10 to Exhibit D: Affidavit of Gilda Kessner, Psy.D., at para. 10 at p. 209.

Dr. Kessner added:

> "I believe I had scant information for the development of a coherent mitigation theme due to the absence of detailed and corroborated information about Mr. Gardner's background. There was an abundance of information from Mr. Gardner but without corroborating witnesses my ability to present mitigation information to the jury was necessarily very limited."

State Hab. App., Exhibit 10 to Exhibit D, para. 12 at p. 210.

c. The TCCA order rejected FFCL 67 – trial counsel did not believe Schade's "overly close" relationship with the Gardner family impaired the mitigation investigation

FFCL 67 recites:

> 67. Counsel believed that their mitigation expert, Shelli Schade, was "overly close" with Applicant and his family, but they did not believe that their investigation was impaired. See Affidavit of Counsel at 6-7.

FFCL 67 was one of the exceptions to the TCCA's adoption of the FFCL. The TCCA Order rejected finding 67. Despite this specific rejection by the TCCA, the federal court's Memorandum Opinion determines the mitigation investigation was adequate by reasoning: "That the Court of Criminal Appeals rejected finding sixty-seven does not mean that the Court of Criminal Appeals found that the mitigation investigation was impaired." ROA.943 [Doc 93 at 52].

d. Trial counsel attested they "agree[d] with Dr. Kessner's assessment of Shelli Schade's work that she ... took on the role of counselor to them [Gardner and his family] rather than a mitigation investigator." In actuality, the defense had no mitigation investigator on the defense team

There is additional clear and convincing evidence that rebutted the state-court conclusions, recited in the *Gardner* opinion, that the mitigation investigation was adequate and counsel were not deficient in their investigation and presentation of evidence. *Gardner* at *4. It includes trial counsel attestations that Ms. Schade was acting in a capacity other than a mitigation investigator. In their joint affidavit, trial counsel attested that they "agree with Dr. Kessner's assessment of Shelli Schade's work that she ... took on the role of counselor to them [Gardner and his family] rather than a mitigation investigator." ROA.48 [Exhibit to Fed Hab. Pet. Doc 17, Affidavit of House and Hultkrantz, p.6. Thus, in actuality the defense team had no mitigation investigator, except in name only.

2. State-Court Reasons 2 & 3 [abandonment rage theory was not consistent with Gardner's history of violence unconnected to any abandonment; did not address aggravating elements; counsel's pursuit of separate strategies at the guilt and punishment phases were not inconsistent] are rebutted by the clear and convincing evidence from Gardner's state habeas proceeding, recited below:

The state-court reasons 2 & 3 [abandonment rage theory was not consistent with evidence, as Gardner had a history of violence unconnected to any abandonment; did not address the aggravating elements; trial counsel's pursuit of separate strategies at the guilt and punishment phases were not inconsistent] were based on an unreasonable determination of the facts and rebutted by the clear and convincing evidence brought forward by Mr. Gardner in state habeas.

a. Dr. Kessner attested that abandonment rage theory embraced all the periods of violence by Mr. Gardner, including acts of abuse toward the children of a spouse

Mr. Gardner brought forward clear and convincing evidence that rebutted the state-court reason that "an abandonment rage theory was not consistent with evidence, because Gardner had a history of violence unconnected to any abandonment." This conclusion misunderstands the theory.

Estrangement killings, which are named "uxoricide" when the wife is killed, take place when one spouse leaves or attempts to leave the other, as described by Donald G. Dutton and Greg Kerry, Modus Operandi and Personality Disorder in Incarcerated Spousal Killers, 22 International Journal of Law & Psychiatry 287, 287 (1999). Divorce proceedings are irrelevant, except to the extent that they are an overt signal of a wife's attempt to leave the relationship.

Dutton and Kerry explain that men, who kill their female companions with excessive force when faced with recent or imminent abandonment, are men who experience abandonment rage, which has its origins in early development. Real or threatened termination of the relationship – as

in the case at bar – are the most typical scenarios for uxoricide. See Exhibit C: Affidavit of Gilda Kessner, Psy.D., para. 26.

In her state habeas affidavit, Dr. Kessner attested to the abandonment rage and trauma experienced by Petitioner, which arose from childhood environmental factors, and which resulted in his history of domestic abuse, and in particular in spousal killing (uxoricide), when the spouse attempts to leave the relationship (estrangement killings). Dr. Kesser states:

> I have concluded based on the records and literature review, that had I been allowed to testify in the 2006 Case about the impact of the developmental trauma cited by family members, that I could have provided a context for the jury to understand the etiology of Mr. Gardner's personality and behavior. At the time of trial, there was a large and growing body of literature addressing the issue of perpetrators of domestic violence.
>
> Briefly, John Steven Gardner was born into a chaotic and dysfunctional family and events in his infancy and early childhood had a profound effect on his early and life long psychosocial development. Events taking place at critical developmental periods for trust, interpersonal relationships and self-concept had a damaging effect on his ability to relate to others in an intimate and sexual way. The modeling of violence and jealousy between his parents in their marital relationship served as a template for behavior in his future romantic relationships. These factors would have provided an explanation to the jurors, as to why John Steven Gardner perpetrated violence and threats of violence against his domestic partners, ...

Exhibit C: Affidavit of Gilda Kessner, Psy.D. *See also* Donald G. Dutton & Greg Kerry, (1999a), Modus Operandi and Personality Disorder in Incarcerated Spousal Killers, International Journal of Law & Psychiatry, 22(3-4), 287-299; Donald G. Dutton,(1999b),Traumatic Origins of Intimate Rage, Aggression and Violent Behavior, 4(4), 431-447.

Indeed, Petitioner's violent domestic history further supports the fact that he abused or killed his former spouses and their children "to manage his relationships," and not because of their status as a prospective witnesses who would testify against him, as was required by Tex. Penal Code 36.36(a)(1).

Dr. Kessner attested:

> 11. The trial transcript details Steve Gardner's history of violence with his wives. The shooting of his second wife Rhoda, leading to her death six weeks later, the threats to his third wife Margaret and the assault of her daughter Rebecca and the details of the abuse toward Tammy and her eventual death tell the story of man who uses violence to manage his relationships and who has a chronic inability to maintain a mutually satisfying marital relationship. ....

Exhibit C: Affidavit of Gilda Kessner, Psy.D.

b. There was no unified theme in trial counsel's separate strategies in each phase of the trial. The abandonment rage theory not only would have addressed the enhancement elements, but also would have naturally segued from one phase into the next

Rather than applying the *Miller-El* COA standard (if jurists of reason would debate/disagree), the *Gardner* opinion ruled that it agree with the state court conclusions that "though Gardner's attorneys utilized one strategy for guilt and another for sentencing, those strategies were not inconsistent," and there were "numerous weaknesses in Gardner's proposed abandonment rage theory." *Gardner* at *3.

Having an effective theory of the case for life is a national standard of practice when representing persons accused of capital crimes. National Legal Aid and Defender Association, Guidelines for Criminal Defense Representation (1995). ABA Guideline 11.7.1 (1989). There is clear and convincing evidence that the disjointed theories in the *Gardner* guilt/innocence and punishment trial phases did not meet that standard. The abandonment rage theory did.

Because the mitigation investigation was not adequate, *see supra*, there was an absence of a consistent, unified and effective theme in any phase of the *Gardner* trial. Therefore, during voir dire, other than seeking potential jurors who were capable of voting for other than death, Mr. Gardner's trial counsel could not test each potential juror's views concerning a consistent, unified

defense theme in all phases of the trial (it had none), and cull those persons whose view on the topic were within their "latitude of rejection," from those who views on the topic were within their "latitude of non-commitment."[3]

The theory in the guilt/innocence phase of the *Gardner* trial was that Mr. Gardner was not at the scene, but if he was, there was no burglary and the divorce was uncontested. Trial counsel argued to the jury: "the evidence will not show any forensic link to Mr. Steven Gardner, no physical link ..., nothing that places that gun in his hand." (RR 19:18). This theory failed to account for the role of circumstantial evidence, and inferences that jurors could draw.

In the punishment phase, there was no defense theory whatsoever as reflected in the disjointed opening statement of defense counsel. He first told the jury that after assaulting Margaret and being imprisoned, Margaret and Petitioner continued to have a conjugal relationship. Then defense counsel told the jury that Petitioner later divorced Sandra, to marry Tammy. And finally, defense argued in opening statement, that this sort of thing "happens everyday." (RR 22:11-13).

In contrast, the theme of abandonment rage, would have made use of the undisputed facts of domestic abuse, while leading to the conclusion that Mr. Gardner was not deserving of death. And had an adequate and thorough pre-trial investigation been performed, the defense could have developed a unified them that the killing was not in "retaliation for testifying" at the prove-up. Rather, the killing of Tammy Gardner was an estrangement killing – which is not a capital murder offense.

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[3] Social Judgment Theory posits three possible perspectives by a potential juror: latitude of acceptance; latitude of non-commitment; and latitude of rejection. "The latitude of acceptance" are those positions which are acceptable. The "latitude of non-commitment" are those positions which are neither accepted nor rejected. The "latitude of rejection" are positions which will be actively opposed.

An effective theory of the case, would have begun by testing each potential juror's views concerning "abandonment rage." These views would have allowed the defense to cull those persons whose view on the topic were within their "latitude of rejection," from those who views on the topic were within their "latitude of non-commitment."

Having at least identified those jurors who were capable of listening to the theme, the defense could then have segued into guilt/innocence where the defense would have sponsored forensic evidence that showed that men who kill their female companions with excessive force, are men who are faced with recent or imminent abandonment and that this abandonment rage has its origins in early development." Exhibit C: Affidavit of Gilda Kessner, Psy.D., para. 26. *See also* Donald G. Dutton and Greg Kerry, Modus Operandi and Personality Disorder in Incarcerated Spousal Killers, 22 International Journal of Law & Psychiatry 287, 287 (1999a).

In particular, the testimony would have revealed that Petitioner experienced abandonment rage and trauma originating in his early childhood trauma, which consisted of three meaningful childhood environmental factors. Specifically, the Petitioner

1. witnessed/experienced violence, which was the first source of trauma,
2. was shamed, which was a second source of trauma, and
3. had an insecure attachment, which was a third source of trauma.

Accordingly, the theme of abandonment rage was consistent with the prosecution's assertion that Petitioner had a history of domestic abuse and violence, while at the same time refuting that the killing of Tammy Gardner was done in retaliation for potential testimony at a prove-up.

And finally, the theme of abandonment rage and trauma would have naturally segued into the punishment phase to explain how and why Petitioner was less morally culpable and not deserving of death, as it responded to the prosecutor's admonishment:

> "all of this defendant's adult life, he has been violent and abusive toward women and children. It's been a behavior, a pattern in his life that has repeated over and over,...."

(RR 23: 85).

Finally, the theory of abandonment rage was not "novel." ROA.912; 2 SHCR 339 [Doc 93 at 22]. This is because at least as early as 1999, there were published studies as to it. Donald G. Dutton and Greg Kerry, Modus Operandi and Personality Disorder in Incarcerated Spousal Killers, 22 International Journal of Law & Psychiatry 287, 287 (1999).

3. Federal-Court Reason 4 [abandonment rage theory is double-edged] was never part of the state-court's reasons. It was raised for the first time in a Supplemental Reply by the Respondent

Reason 4 [abandonment rage theory is double-edged, having both mitigating and aggravating aspects] was not at all a part of the state-court reasons in the May 12, 2010 FFCL or the September 15, 2010 TCCA adopting the FFCL with exceptions. It was raised by the Respondent for the first time in the Respondent's March 10, 2016 Supplemental Answer to the Amended Petition filed by Kretzer after his appointment as *Trevino* counsel. Given that *Wilson* requires a "look through" to the state-court reasons supporting a merits decision, the Respondent's argument of the double-edged nature of the theory has no place in the *Wilson/Miller-El* determination.

Further, the Supreme Court's Sixth Amendment decisions embrace the value of mental health mitigation as evidence of reduced moral culpability; and do not allow such evidence to be discounted in the prejudice calculus based on its purportedly "aggravating aspects." Indeed, this Surpeme Court has granted relief in cases involving mental health impairments as mitigation without ever suggesting that any potential "double edged" quality was relevant. *See, e.g., Sears v. Upton*, 561 U.S. 945, 947-56 (2010) (finding prejudice based on counsel's failure to present evidence of brain damage related to history of childhood physical and sexual trauma and substance abuse); *Williams v. Taylor*,

529 U.S. 362, 398 (2000) (defendant's mitigating evidence "may not have overcome a finding of future dangerousness, [but] the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability" (citation omitted)).

Further, the relevant question is not whether mitigating evidence "explains" the offense, but "whether the evidence is of such a character that it 'might serve as a basis for a sentence of less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). *See also Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (*citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Thus, the mental health evidence concerning the genesis of abandonment rage (attachment disorder) would have been independently mitigating, humanizing Mr. Gardner, thereby providing a basis for a sentence of less than death and consistent with the principles set forth in *Tennard*, *Eddings*, *Lockett*, and *Skipper*.

Finally, the "double-edged" analysis ignores the actual workings of the Texas capital sentencing scheme. *Cf. Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("The governing legal standard plays a critical role in defining the question to be asked in assessing [] prejudice."). Under the Texas capital sentencing scheme, mitigation and future dangerousness are two distinct issues, answered sequentially and never weighed against each other by the jury. *Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996) ("completely independent" issues); *Ex parte Gonzales*, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006) (no "direct balancing of aggravating and mitigating circumstances").

C. In summary, the Fifth Circuit methodology conflicts with *Wilson* and *Miller-El*. Because "the district court found that the state habeas court's findings on the claim were not unreasonable," the Fifth Circuit "simply reviewed the reasons" and agreed; made a premature, merits-based *Strickland* determination adverse to Mr. Gardner; and denied COA

As the aforementioned discussion of the evidence presented in state habeas court reveals, the Fifth Circuit failed to train its attention on the particular legal and factual reasons of the state-court, merits-decision and determine if the reasons "involved" an unreasonable application of Supreme Court law or "were based on" an unreasonable determination of fact as is required by *Wilson*. Instead, because "the district court found that the state habeas court's findings on the claim were not unreasonable," the Fifth Circuit "simply reviewed the reasons" and agreed; made a premature, merits-based *Strickland* determination adverse to Mr. Gardner; and denied COA contrary to *Miller-El*.

The Fifth Circuit's methodology in the *Gardner* opinion is in conflict with both *Wilson* and *Miller-El*.

CONCLUSION

For all of the aforementioned reasons, Mr. Gardner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Appendix 1: *Gardner v. Davis*, 2019 WL 2536093 (5th Cir. 2019)

Appendix 2: *Gardner v. Davis*, No. 1:10-cv-610 (USDC Eastern Dist. Tex., Mar. 1, 2018) (Mem. Op. And Order of Dismissal) and Judgment