No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES VICTOR THOMPSON,
Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

I. Did the circuit court err in holding that a federal habeas court may never hold a hearing on a punishment issue without first considering 28 U.S.C. § 2254 (e)(2)'s threshold inquiry as required by *Williams v. Taylor*?

II. Does the Fifth Circuit's two-pronged agency test for Sixth Amendment *Massiah* claims, which is not followed by other circuit courts, conflict with this Court's Sixth Amendment Jurisprudence.

III. Did the lower courts misapply the rule established in *Harrington v. Richter* and *Johnson v. Williams* by applying AEDPA deference to a constitutional claim that was granted by the state court, but for which the state court failed to consider harm, and should the lower courts have instead applied the rule established by *Wiggins v. Smith* and its progeny?

PARTIES TO THE PROCEEDINGS BELOW

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

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- Mr. Thompson was convicted of capital murder and sentenced to death on April 14, 1999, in Cause number 782657, previously pending in the 262nd District Court of Harris County, Texas.
- Mr. Thompson's death sentence was reversed on October 24, 2001, by the Texas Court of Criminal Appeals on Direct Appeal because the Prosecution violated his Sixth Amendment Right to Counsel. *Thompson v. State*, AP-73431, 93 S.W.3d 16 (Tex. Crim. App. 2001). Appendix D.
- Mr. Thompson's motion for rehearing was granted so that the Court of Criminal Appeals could consider whether or not the Sixth Amendment violation affected the guilt phase of his trial. That order was withdrawn as improvidently granted on April 9, 2003. *Thompson v. State*, AP-73431, 108 S.W.3d 269 (Tex. Crim. App. 2003). Appendix E.
- Mr. Thompson was once again sentenced to death on October 28, 2005, after a punishment retrial in Cause number 782657, previously pending in the 262nd District Court of Harris County, Texas.

- Mr. Thompson's death sentence was affirmed by the Texas Court of Criminal Appeals on October 31, 2007. *Thompson v. State*, AP-73,431, 2007 WL 3208755 (Tex. Crim. App. 2007).
- This Court denied certiorari on October 6, 2008. *Thompson v. Tex.*, No. 07-11572, 555 U.S. 877 (2008).
- The state trial court adopted the State's proposed findings of fact and conclusions of law in Mr. Thompson's initial application for habeas corpus on February 22, 2013, in in Cause numbers 782657-A & B, previously pending in the 262nd District Court of Harris County, Texas. The Texas Court of Criminal Appeals denied relief on April 17, 2013. *Ex Parte Thompson*, WR-78,135-01 & -02, 2013 WL 1655676 (Tex. Crim. App. 2013).
- After filing his federal petition for habeas corpus, Mr. Thompson was permitted to return to state court. The Texas Court of Criminal Appeals dismissed the second state application March 9, 2016. *Ex parte Thompson*, WR-78,135-03, 2016 WL 922131 (Tex. Crim. App. 2016).
- The United States District Court for the Southern District of Texas denied Mr. Thompson's federal petition for a writ of habeas corpus on March 23, 2017. *Thompson v. Davis*, H-13-1900, 2017 WL 1092309 (S.D. Tex. Mar. 23, 2017). Appendix C.
- The Fifth Circuit Court of Appeals granted Mr. Thompson's request for a certificate of appealability on a single issue on February 18, 2019. *Thompson v. Davis*, No. 17-70008, 916 F.3d 444 (5th Cir. 2019). Appendix B.

- The Fifth Circuit Court of Appeals affirmed the District Court's decision on October 29, 2019. *Thompson v. Davis*, No. 17-70008, 941 F.3d 813 (5th Cir. 2019), Appendix A. The Petition for Rehearing was denied May 7, 2020. Appendix F.

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- *Thompson v. Davis*, 2017 WL 1092309 (S.D. Tex. Mar. 23, 2017).
- *Ex parte Thompson*, 2016 WL 922131 (Tex. Crim. App. 2016).
- *Ex Parte Thompson*, 2013 WL 1655676 (Tex. Crim. App. 2013).
- *Thompson v. Tex.*, 555 U.S. 877 (2008).
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- *Thompson v. State*, 93 S.W.3d 16 (Tex. Crim. App. 2001).

STATEMENT OF JURISDICTION

The Circuit Court's opinion affirming the district court was filed on October 29, 2019, and Mr. Thompson's timely filed Petition for Rehearing was denied on May 7, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2253. Mr. Thompson is relying on this Court's March 19, 2020 order extending his filing deadline to 150 days from the date of the order denying a timely petition for rehearing in filing this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance of counsel for his defence.

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

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 provides, in pertinent part:

> (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 on 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.

. . .

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

> (A) the claim relies on--
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

I. THE TEXAS COURT OF CRIMINAL APPEALS FAILED TO ADDRESS THE EFFECT OF THE SIXTH AMENDMENT VIOLATION ON THOMPSON'S CONVICTION FOR CAPITAL MURDER.

A. The prosecution used evidence obtained as a result of a Sixth Amendment violation during the guilt phase of trial.

Charles Thompson was charged with the capital murder of Darren Cain and Dennise Hayslip. CR1 at 51.[1] Hayslip was Thompson's lover, and Cain was her new love interest, who had bested Thompson in a fight just hours before. 11 RR1 at 102-109. Under Texas law, a person commits capital murder if they murder more than one person during the same criminal transaction. Tex. Pen. Code § 19.03 (a)(7)(A). If Thompson was solely criminally responsible for the death of a single victim, he was not guilty of capital murder.[2]

The primary defense during the guilt phase of trial was that Hayslip's death was the result of a botched surgery. *See, e.g.,* 10 RR1 at 10-12 (defense opening statement). An expert witness called by the defense explained that the malpractice of the doctors involved in the surgery to repair the gunshot wound caused Ms. Hayslip's death. 12 RR1 at 203-33.

The defense team also challenged Thompson's intent to cause harm to Ms. Hayslip. *See, e.g.,* 11 RR at 145 (Diane Zernia explaining she did not believe Thompson intended to harm Ms. Hayslip); 13 RR at 32-39, 34-36, 38, 39. (defense

[1] CR1 at page, refers to the Clerk's Record from the first trial. Volume RR1 at page refers to the Reporters Record from the first trial. CR2 at page, refers to the Clerk's Record from the second trial. Volume RR2 at page refers to the Reporters Record from the second trial.
[2] *See* Jury Instructions. CR1 at 190-91.

counsel arguing a lack of intent related to Ms. Hayslip). The defense argued there was no evidence that Thompson harbored the intent to harm Hayslip and that the prosecution failed to meet its burden in regards to her murder. *Id.* at 34-36, 38, 39.

The prosecution used the characteristics of a handgun found as the result of a Sixth Amendment violation to combat the lack of intent argument. Months after Thompson was appointed counsel, a fellow inmate named Jack Reid informed Sheriff's Lieutenant Cox that Thompson needed someone to retrieve the gun that had been used on Cain and Hayslip. 14 RR1 at 116. Cox was aware that the gun had not been recovered by the investigating officers. *Id.* at 117. A map of the location of the gun was received and forwarded to Gary Johnson, an investigator for the Harris County District Attorney's Office. Johnson was sent to the jail in an undercover capacity to interview Thompson outside the presence of his counsel. *Id.* at 120, 128. The plan was to send Johnson in to speak with Thompson with the goal of recovering the murder weapon. *Id.* at 125-27,171-72.[3]

The following day, Johnson tape-recorded a conversation with Thompson. State's Exhibit 89. The recording establishes Investigator Johnson probed Thompson for additional details related to the location of the gun. *Id.* Johnson admitted that he went to the jail to discuss the retrieval of the gun used in the capital murder. 14 RR1 at 171-72. The gun was only found after Johnson's illegal meeting with Thompson. *Id.* at 176.[4]

[3] Cox testified he set up the interview because "there was a gun that had not been recovered." 14 RR1 117.
[4] During Johnson's testimony, defense counsel objected that the taped statement be should be suppressed on the basis of his denial of counsel while in custody. *Id.* at 169. This objection was overruled. *Id.*

Because the gun was found with a cartridge jammed inside, the prosecution developed a theory that seven shots were fired during the shooting. 11 RR at 165-179. The prosecution stressed that the gun only held six bullets and therefore the gun had to have been reloaded during the commission of the crime. *Id.* The prosecution focused during its closing arguments on the reloading of the gun, arguing specifically that it proved Thompson intended to shoot Hayslip. 13 RR at 27, 55, 57.

The Sixth Amendment violation also prejudiced Thompson at his first punishment proceeding. In addition to requesting details about the location of the handgun used in the commission of the crime of conviction, the undercover investigator had uncovered plans related to Thompson's attempt to put a "hit" out on potential witnesses. *Thompson*, 93 S.W.3d at 22-29. This was by far the most damaging punishment phase testimony in Thompson's initial trial. The other extraneous offenses admitted against Thompson generally dealt with juvenile destruction of property offenses, and an attempt to smuggle Mexican citizens into the country. *Id.* at 28 n. 9.

B. The Texas Court of Criminal Appeals refused to consider the harm as related to guilt and innocence.

The Texas Court of Criminal Appeals (TCCA) ordered a new punishment hearing because of the evidence obtained by Johnson in violation of the Sixth Amendment. *Thompson,* 93 S.W.3d at 29. However, the Court never discussed the harm caused by the introduction of the gun during the guilt phase of trial. The opinion did recognize the direct link between the Sixth Amendment violation and the

recovery of the handgun. *Id.* at 22.[5] "Johnson testified that he had been contacted by Cox and had agreed to assume an undercover identity for the purpose of meeting with appellant to discuss retrieving a weapon to be used in a murder that had possibly already been arranged." *Id.* at 23.

Before the TCCA, Thompson persistently argued that he was entitled to a new trial, not merely a new sentencing hearing. His initial appellate brief explained that "[t]he undercover interview was intertwined with the recovery of the murder weapon and the investigation of a solicitation of a homicide." State Appellant's Brief, at 26. He specifically requested a new trial. *Id.*

In a supplemental briefing, Thompson asserted "the meeting between Gary Johnson . . . was for the purpose of obtaining the gun used in the charged Capital Murder case. As a direct result of the interview the weapon was recovered by the State. . ." Supplemental Appellant's Brief, at 2. Once again, Thompson argued the entire case should be reversed. *Id.* at 3.

After the TCCA decision, Thompson filed a *pro se* motion for rehearing explaining he had requested relief from his conviction, not simply his sentence. *See* ROA.2366-2371. He specifically requested "harmless error analysis as to the effect of the inadmissible evidence had on guilt/innocence phase of the trial. . ." *Id.*

[5] Noting that Johnson was recruited "to meet with appellant in an undercover capacity to discuss the retrieval of the weapon and record their conversation." *Id.* at 16, 22 (Tex. Crim. App. 2001), order withdrawn (Feb. 26, 2003).

The Court of Criminal Appeals granted rehearing on this issue, but later concluded its "decision to grant rehearing was improvident" and withdrew the order granting rehearing. *Thompson*, 108 S.W.3d at 269.

C. Thompson has consistently argued that AEDPA deference should not be applied to issues not adjudicated by the state courts.

The district court found that the issue of harm flowing from the *Massiah* violation should be reviewed under "AEDPA's deferential scheme." ROA.2757-2758. Thompson had argued that AEDPA deference should not apply because the state court had not adjudicated the issue. ROA.1736. The district court, relying on *Johnson v. Williams,* decided the deferential standards of 28 U.S.C. § 2254(d) should apply.

Thompson requested a certificate of appealability (COA) on the application of AEDPA deference to the issue of harm during the guilt phase of trial, but the Circuit Court found that "[j]urists of reason would not debate the district court's granting of deference . . . on this issue." *Thompson*, 916 F.3d at 454 (5th Cir. 2019). The Court of Appeals incorrectly stated that the TCCA had "denied relief" on the issue, and that "Thompson has presented no indication or state-law procedural principles to overcome that presumption." *Id.* The Court the denied the merits of the underlying substantive argument by applying the "deferential AEDPA review standards." *Id.* at 454-55.

II. AS THE CIRCUIT COURT RECOGNIZED, A HEARING WAS NECESSARY TO DEVELOP THE FACTUAL BASIS OF THE SIXTH AMENDMENT VIOLATION AT THOMPSON'S RETRIAL.

A. The prosecution suppressed evidence of a full-time informant prior to Thompson's retrial.

At Thompson's punishment retrial, the State presented evidence almost identical to that obtained by Investigator Johnson, this time through a witness named Robin Rhodes. However, the State suppressed that Rhodes was a long-time and full-time informant while in the Harris County Jail with Thompson in 1998. 17 RR2 at 141, 138, 149, 152-53.

The first mention of Robin Rhodes came in the form of a "Supplemental Notice of Intent to Use Extraneous Offenses" filed prior to Thompson's first trial. CR1 at 67-68. The notice stated that "[o]n or about August 21, 1998 the defendant prepared a list of witnesses to fellow inmate Robin Rhodes for the purpose of Rhodes to kill or otherwise use physical means to prevent from testifying at trial." *Id.* Thompson had already been charged, by indictment, with capital murder by the time Rhodes obtained this list from Thompson. *See* CR1 at 51. Thompson had also been charged with solicitation of capital murder for allegedly attempting to put a hit on Diane Zernia, a witness in his case. *See* ROA.897.

The prosecution once again provided notice of its intent to use Rhodes' testimony prior to the punishment retrial. CR2 at 110. Prior to trial, Thompson's attorneys filed multiple motions requesting the state to turn over favorable evidence and agreements with witnesses, and Thompson's *Brady* motion was granted. 2 RR2 26, 31; CR2 at 45-47. During a pre-trial hearing, the prosecution explained they

intended to introduce the statement of Robin Rhodes, but they refused to disclose the contents of the statement. *Id.* at 27-28. The prosecutor agreed not "to hide anything," but did not "want to commit." *Id.* at 28. Although the prosecution would "make everything available to the defense," Rhodes' statement was an exception because "that is not subject of pretrial discovery." *Id.* The prosecutor specifically referred to Rhodes as a "non-law enforcement entity." *Id.* It was made clear that Rhodes' testimony would be offered to make up for the loss of Investigator Johnson. *Id.* at 47.

An agreement with Rhodes was disclosed. *Id.* 28. The prosecutor had agreed to dismiss outstanding "hot check cases" and a misdemeanor case in exchange for Rhodes' testimony. *Id.* at 47-48. The defense asked whether "Mr. Rhodes has already received any sort of benefit from the state in exchange for his cooperation. . ." The prosecutor explained Rhodes had "not received any benefits at this time. . ." *Id.* at 49. There was absolutely no mention of Rhodes' status as a full-time informant from 1993 until at least 2000.

On the final day of jury selection, defense counsel learned for the first time that Rhodes *might* have some previous relationship with the state (when he overheard a conversation with another prosecutor in an elevator), and filed a motion for continuance explaining that additional investigation was needed. Cl.R.2 209-14. The motion noted that if Rhodes "was an agent of the State while he was incarcerated with the defendant . . . his testimony is clearly inadmissible." *Id.* The motion for continuance was denied before testimony began. Cl.R.2 at 214.

B. The trial testimony of Robin Rhodes, and the defense's subsequent objection.

Like Investigator Johnson in the first trial, Rhodes was the State's most impactful punishment witness. He testified about the alleged solicitation of murder plot against witnesses, and he testified about the capital murder itself. He explained that Thompson "shot the gentleman and got mad because it didn't kill him" and, in reference to Hayslip, testified that Thompson told him: "[t]he bitch wouldn't get up again." 17 RR2 at 138. Rhodes also asked Thompson to put something in writing, specifically asking him for some descriptions. *Id.* at 140. Thompson allegedly gave him a "hit list" which was introduced into evidence as state's exhibit 92. *Id.* at 140-43.

Rhodes actively sought out information from Thompson, and explained he was always someone who was trying to get out of the situation he was in. *Id.* at 136. He presented himself as someone who could get narcotics and who could find people. *Id.* at 137. He made himself available to Thompson. *Id.* at 137. He led Thompson to believe he "could find anybody anywhere at any time." *Id.* at 138.

During direct examination, Rhodes testified that he had "worked as a paid informant before." *Id.*at 132 (emphasis added). He had received money and worked off cases. *Id.* at 133. He claimed that once he obtained the witness list from Thompson, he "contacted [his] handler, which was Officer Floyd Winkler of the organized crime task force." *Id.* at 141. The prosecution suggested Winkler was "somebody that [Rhodes] worked for previously." *Id.*

It was not until cross-examination that the extent of Rhodes involvement with the police and DA's office was partially exposed. Rhodes explained that he had performed a lot of work for law enforcement, and specifically for the Harris County District Attorney's Office. 17 RR2 at 152. He had been paid for that work. *Id.* at 153. He described his employment in '98 and '99 as "a full-time - - basically I was a full-time informant for the Harris County Organized Crime Task Force." *Id.* The task force included the Harris County District Attorney's Office. *Id.* at 153. Rhodes had testified in the *Stevens* trial, and in the *Benavides* trial. *Id.* at 153-54. He had received between $20,000-30,000 for his involvement in the *Benavides* trial. *Id.* at 158-59.

However, at this point Rhodes' damaging testimony was already before the jury. The defense moved to strike his testimony on *Brady* grounds. *Id.* at 162. Counsel argued the prosecution had insisted they "did not have them [sic] in their employ and the fact of the matter, by his own testimony, reveals that he has been in the employ of the District Attorney's Office and has been paid by the District Attorney's Office to –." *Id.* at 163. The Court cut counsel off and denied the motion.

C. The extent of Rhodes' involvement as a government agent was not disclosed until his alias was discovered and discovery was permitted.

Early in 2014, undersigned counsel submitted a public information act request asking for information related to Robin Rhodes' informant status, and the District Attorney's office claimed no such records existed. ROA.614,1757. However, during a review of the voluminous clerk's records related to Rhodes, it was discovered that he

occasionally used the alias "Robert Lee." ROA.2118; Appendix G-H. Indeed, it was in Harris County cause number 667239, where "Robert Lee" was charged with auto theft, where the motion to dismiss "as per Joan Huffman's Contract Agreement" was discovered. *Id.*

The discovery of a possible contractual agreement with Rhodes led to the District Court granting Rhodes' motion for discovery. ROA.780. This led to additional discoveries, and eventually led to the district court granting Thompson's motion to stay the federal proceedings so that the Rhodes' *Massiah* claim could be presented to Texas' courts. ROA.1647. First, the District Attorney's Office disclosed a contract signed by "Robert Lee," Houston Police Officer F. Winkler, Attorney Gary E. Patterson, and Assistant District Attorney Joan Huffman. ROA.2061-62; Appendix G. The contract called for Rhodes (or "Lee") to "cooperate with Officer Winkler and other law enforcement officers in the investigation of narcotics trafficking in the Harris County area." *Id.* Rhodes was required to contact Winkler every day. *Id.* The contract required that Rhodes provide information leading to the "arrest and indictment of one or more individuals for a state or federal felony offense possession or delivery which leads to a seizure of at least three ounces of cocaine." *Id.* The terms of the contract were to be completed by November 8, 1993. *Id.* The fact that Rhodes was still working with Winkler in 1998, when combined with the 1993 contract, establishes just how long the pair had been working together.

In 1997, Rhodes drafted a pro se motion to reduce sentence explaining he "co-operated in extensive narcotics investigations. Approximately 20 (twenty)-25 (twenty five) in number. Defendant has no way to ascertain all of the names of persons he has helped place into the confines of T.D.C. Defendant co-operated with the Harris County Organized Crime Task Force since 1993 to date." ROA.2112-2115; Appendix I.

During the federal proceedings, the District Attorney's Office turned over an interoffice memorandum establishing that Rhodes specifically asked for a benefit in return for providing information against Thompson in August of 1998. ROA.2063; Appendix J. He also offered to wear a wire or testify in exchange for the benefit. *Id.* Additional handwritten notes from the D.A.'s file included this notation: "contacted Floyd, get in hand." ROA.2184; Appendix K. This notation suggests that Floyd Winkler, Rhodes' police handler, instructed Rhodes to get proof of Thompson's solicitation request.

Other handwritten notes produced by the D.A.'s Office appear to state that on August 13, 1998, Rhodes was already "talking to Mike Kelly," a District Attorney investigator. ROA.2201; Appendix L. This potentially establishes that Rhodes was in contact with the prosecution prior to obtaining the "hit list" until August 21, 1998. ROA.2063, Appendix I.

Finally, Rhodes' testimony from the Stephens trial, obtained from the Court of Appeals, disclosed additional information not contained in the published opinion.

ROA.2336-2361. This testimony, from June of 2000, shows that Rhodes was an "employee of the Harris County Organized Crime Narcotics Task Force" which included the Harris County District Attorney's Office. ROA.2345. Approximately 80 percent of the cases he worked on resulted in arrest and convictions. ROA.2346. The Task Force was his primary source of income. ROA.2347. In the Stephens case, the District Attorney stipulated that defense counsel could "put in a lot more of this sort of stuff" concerning Rhodes' job as a police informant. ROA.2361.

However, Thompson's investigation into Rhodes was severely hampered because the City of Baytown, which maintained the records for the relevant Task Force, had destroyed all records prior to the initiation of federal proceedings. As the Circuit Court explained:

> Thompson was unable to develop the facts underlying the Rhodes-related *Brady* and *Massiah* claims in state habeas court. When he got to federal district court, Thompson moved for limited discovery—which was granted—and then for an evidentiary hearing—which was not. Considering documents turned over by the State pursuant to its discovery order, including privileged documents reviewed *in camera*, the district court found an evidentiary hearing not "necessary to a full and fair adjudication of [Thompson's] claims." In so deciding, the district court downplayed the toll of time. By 2014, the Harris County Organized Crime Task Force, the government entity with which Rhodes had interacted, had dissolved, and Rhodes's handler Floyd Winkler no longer worked with the State. In response to the subpoena for Rhodes-related documents, the City of Baytown, which had taken possession of the Task Force's files, disclosed that relevant retention periods had expired, and it had destroyed relevant documents from that time. As a result, no records exist from the time to document the nature of Rhodes's relationship to the State in July and August 1998. . . Thompson's factual development of these claims has been potentially hampered by the State's nine-year delay in disclosing key aspects of its history with Rhodes. As a result, the district court may not have been provided

> sufficient facts to make an informed decision as to the merits of the Rhodes-related claims.

Thompson, 916 F.3d at 457.

The district court denied Thompson's requested hearing on the basis that "Thompson has not shown that an evidentiary hearing or additional factual development is necessary to a full and fair adjudication of the claims." ROA.2768-2769. This idea was clearly rejected by the Fifth Circuit. However, the Circuit Court affirmed the district court's denial of a hearing by erroneously holding that 28 U.S.C. § 2254(e)(2) strictly prohibits evidentiary hearings on punishment issues without applying this Court's precedent in *Williams v. Taylor*, 529 U.S. 420 (2000). This error in reasoning was brought to the Circuit Court's attention in Thompson's motion for rehearing, which was denied by the Circuit months later. *See* Appendix C.

The lower courts both denied the substantive Sixth Amendment claim on the ground that Thompson didn't sufficiently establish that Rhodes was directed to specifically target Thompson in jail. ROA.2767; *Thompson*, 941 F.3d at 816. Thompson argues that both courts misapplied this Court's Sixth Amendment jurisprudence, and that both courts misapplied 28 U.S.C. § 2254(e)(2) by denying Thompson a hearing on the issue, when a hearing was specifically permitted by the rule and necessary for a fair determination of the facts.

ARGUMENT: REASON'S FOR GRANTING RELIEF

I. DID THE CIRCUIT COURT ERR IN HOLDING THAT A FEDERAL HABEAS COURT MAY NEVER HOLD A HEARING ON A PUNISHMENT ISSUE WITHOUT FIRST CONSIDERING 28 U.S.C. § 2254 (E)(2)'S THRESHOLD INQUIRY AS REQUIRED BY *WILLIAMS V. TAYLOR*?

Although Thompson established that the prosecution suppressed evidence that Rhodes was a full-time informant when he elicited information from him in jail, the district court denied Thompson's *Massiah* claim based upon the idea that "Thompson's briefing does not show that the State instructed Rhodes to" gather information from Thompson. ROA.2767. In the same order, the court denied Thompson the ability to hold a hearing to further develop the factual basis of the *Massiah* claim by denying Thompson's motion for an evidentiary hearing in passing, explaining, without citation, that "Thompson has not shown that an evidentiary hearing or additional factual development is necessary to a full and fair adjudication of the claims." *See* ROA.2768-2769 (fn.'s 22, 25).

The Circuit Court addressed the district court's ruling in its first published opinion. The Circuit Court explained that Thompson was unable to develop the facts underlying the Rhodes-related claim in state habeas court. *Thompson*, 916 F.3d at 457. The Court found that "the district court downplayed the toll of time" in reaching its decision, and noted that "Thompson's factual development of these claims has been potentially hampered by the State's nine-year delay in disclosing key aspects of its history with Rhodes." *Id.* The Court suggested the district court lacked "sufficient facts to make an informed decision as to the merits of the Rhodes-related claims." *Id.* However, the Circuit Court held that "the district court did not have discretion to

grant" Thompson a hearing because the potential constitutional violation only impacted Thompson's punishment retrial. *Id.* at 458.

A. The Circuit Court's decision conflicts directly with the decisions of this Court.

In *Townsend v. Sain*, this Court held that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . ." *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), overruled by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). This Court listed six circumstances where the "federal court must grant an evidentiary hearing," including: "(1) the merits of the factual dispute were not resolved in the state hearing; . . . (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* Each of these circumstances is present in Thompson's case.

Townsend was modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). There, the Court applied the cause and prejudice limitation applicable to procedural defaults because "it is similarly irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim . . . ." *Id.* at 7-8. However, *Tamayo-Reyes* was a pre-AEDPA case.

Currently, 28 U.S.C. § 2254(e)(2) states that "[i]f the applicant has failed to

develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant" meets additional requirements. In *Williams v. Taylor*, the Court recognized that *Keeney v. Tamayo–Reyes's* "threshold standard of diligence is codified in § 2254(e)(2)'s opening clause." 529 U.S. 420, 421 (2000). It was explained that "[b]y the terms of its opening clause the statute applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings." *Id.* at 430. "In its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Id.* at 432. "[A] person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Id.*

"The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Id.* at 435. *Williams* makes clear that a federal petitioner will not be faulted for failing to uncover evidence withheld by the prosecution. Both the Fifth Circuit, and every Court to have considered the issue, have followed this Court's precedent and held that "§ 2254(e)(2) is not operative unless the 'failure to develop the factual basis of a claim' is due to a 'lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" *Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007); *see, e.g., Conaway v. Polk*, 453 F.3d 567, 589 (4th Cir. 2006) (applying this Court's holding in *Williams*); *Wilson v. Beard*, 426 F.3d 653, 664 (3d Cir. 2005) (same); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005) (same); *Richardson v. Briley*, 401 F.3d 794, 800 (7th Cir. 2005), as

modified (Aug. 8, 2006) (same).

Further, most courts hold that once a habeas petitioner can show he was diligent in developing the facts of his case, a hearing is required if any of the *Townsend* factors apply. *See, e.g., Harrison*, 496 F.3d at 368-69 (noting that Court's "must also consider 'whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'"; *Conaway*, 453 F.3d at 582 (4th Cir. 2006) ("A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend*"); *Insyxiengmay v. Morgan*, 403 F.3d at 670 (9th Cir. 2005) (same); *Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001) ("Therefore, if Matheney has alleged facts in his petition that, if proved, entitle him to relief, he is entitled to an evidentiary hearing.") (*citing Townsend*).

The problem with the Fifth Circuit's decision is that it completely failed to conduct the threshold inquiry of whether Thompson was diligent in pursuing the factual basis of his Rhodes-based *Massiah* claim before the state courts.

B. Thompson exercised diligence in developing the factual basis of the *Massiah* claim.

Section 2254(e)(2) does not apply to Thompson's case because he was not at fault for the failure to discover the factual basis of the *Massiah/Brady* claim. It was

the prosecution who suppressed the relevant evidence necessary to establish the *Massiah* claim for many years. The Rhodes contract was only uncovered after it was discovered that Rhodes used the alias "Robert Lee." ROA.2061-2062. Rhodes' handwritten motion explaining his full-time informant status was also found in clerk's records under the alias "Robert Lee." ROA.708-709. Prior to both trials, Thompson filed motions for discovery and *Brady* motions, and the trial judge required disclosure of the evidence in question. CR1 at 19, 236-38. The Trial Prosecutor was aware of Rhodes' involvement in August of 1998. ROA.659-660. Thompson filed a motion for the state to reveal agreements, once again, before his second retrial. CR2 at 45-47. The Prosecution denied that Rhodes was a member of law enforcement prior to the beginning of Thompson's second trial. 2 RR at 28. After defense counsel was tipped to Rhodes' prior involvement with Harris County law enforcement, the prosecution was ordered to turn over all *Brady* evidence related to Rhodes, 16 RR at 8-9, but there is no indication of any disclosures prior to trial.

Indeed, the Harris County District Attorney continued to conceal evidence during state habeas proceedings by suggesting there was no additional *Brady* evidence which remained undisclosed. SHCR-B at 151. And, when specifically asked about any contractual agreements with Robin Rhodes during federal habeas proceedings, the District Attorney's office denied the existence of such agreements. ROA.597-602. Only when confronted with the dismissal in "Robert Lee's" case, which mentioned the John Huffman contract, did the District Attorney admit its long-time involvement with Robin Rhodes. ROA.598-599. Further, when Thompson returned

to state court to exhaust this claim, he specifically requested, but was never provided with, an evidentiary hearing to further develop the facts related to this claim. *See* Subsequent State Habeas Record at 1, 17, 37-39, 57, 74.

In affirming the district court's denial of an evidentiary hearing, the Circuit Court simply overlooked the opening clause of § 2254(e)(2). When the relevant legal framework is applied to the facts of this case, as established by *Williams v. Taylor*, it is obvious that § 2254(e)(2) did not bar an evidentiary hearing.

C. This Court should grant certiorari.

The Circuit Court's decision decided an important question of federal law in a way that directly conflicts with this Court's decision in *Williams v. Taylor*. Sup. Ct. R. 10. If allowed to stand as published precedent, the result will be that federal habeas petitioners in the Fifth Circuit will never be permitted a hearing to establish the factual basis for even the most severe of constitutional violations affecting the punishment phase of their capital trials. This Court should grant certiorari to prevent future cases from following precedent which directly conflicts with the precedent of this Court.

II. DOES THE FIFTH CIRCUIT'S TWO-PRONGED AGENCY TEST FOR SIXTH AMENDMENT *MASSIAH* CLAIMS, WHICH IS NOT FOLLOWED BY OTHER CIRCUIT COURTS, CONFLICT WITH THIS COURT'S SIXTH AMENDMENT JURISPRUDENCE.

The Fifth Circuit denied Thompson's Robin Rhodes *Massiah* claim by applying its own two-pronged test for agency which has no basis in this Court's Sixth Amendment jurisprudence. *Thompson*, 941 F.3d at 816-17. The test requires that a

government informant be specifically instructed to elicit information from an indicted defendant before a Sixth Amendment violation can be established. The Court also dismissed as "speculation" Thompson's interpretation of previously suppressed evidence proving Rhodes sought out information from him, while at the same time affirming the district court's denial of a hearing.

A. The Fifth Circuit's *Massiah* analysis conflicts with that of this Court, and other Circuit Courts.

In *Massiah v. U.S.,* this Court cited approvingly the maxim that "'any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." 377 U.S. 201, 205 (1964) (citation omitted). The basic protection of the Sixth Amendment's Right to Counsel was violated "when there was used against [a defendant] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. *Massiah* established a simple three-prong test: a Sixth Amendment violation occurs when (1) state agents (2) deliberately elicit incriminating words from a defendant (3) after indictment and in the absence of counsel.

This simple test was reiterated in *United States v. Henry*, 447 U.S. 264 (1980). That case, much like Thompson's, involved a long-time informant who had found himself in jail with Henry, who was charged with bank robbery. *Id.* at 266. There

was no proof that the government agents had contacted their informant about the robbery specifically, or that the agents had placed the informant in a cell with the defendant. *Id.* Importantly, the "agent told [the informant] to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question [the defendant] regarding the bank robbery." *Id.* Later, the informant was paid for furnishing the information revealed by Henry about the bank robbery. *Id.*

This Court summed up the facts concisely: "The present case involves incriminating statements made by the accused to an undisclosed and undercover Government informant while in custody and after indictment." *Id.*at 269. In deciding that the government informant had deliberately elicited incriminating statements from *Henry*, this Court relied upon the following facts:

> First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

Id. at 270. It was irrelevant that the federal agent did not intend for the informant to take affirmative steps to secure incriminating information because Nichols had been a government informant for more than a year,[6] the federal agent was aware that the informant had access to the defendant,[7] and the informant would only be paid on a contingent basis.[8]

This Court also noted the heightened Sixth Amendment concerns when a

[6] Rhodes had been an informant for 4 years.
[7] Rhodes contacted his Agent Winkler, and was to "get in hand." Appendix J.
[8] Rhodes testimony establishes he expected favors for relevant information. 17 RR2 at 130-165.

government agent poses as nothing more than a fellow inmate. "When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent" it cannot be said that the "parties are then 'arm's length' adversaries." *Id.* The Court recognized "powerful psychological inducements to reach for aid when a person is in confinement." This element surely effected Rhodes' ability to obtain information from Thompson in this case.

In *Maine v. Moulton*, this Court applied the Sixth Amendment analysis to a situation where Moulton's co-defendant, Colson, who had turned state's witness, recorded a conversation between the two which briefly discussed the elimination of witnesses, but focused on the facts of the underlying case. 474 U.S. 159, 162-68 (1985). This Court's analysis first focused on the importance of the "right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments [which] is indispensable to the fair administration of our adversarial system of criminal justice." *Id.* at 169. "The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have . . . made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.*at 171.

In *Moulton,* this Court rejected the idea that the Sixth Amendment was not violated when a defendant initiated a meeting with an informant, explaining "the identity of the party who instigated the meeting. . . was not decisive or even important. . ." *Id.* at 174. The bottom line is that "knowing exploitation by the State

of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." As a result, "[b]y concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 171.

Clearly, this Court's Sixth Amendment jurisprudence establishes broad protections for the right to counsel, but the Fifth Circuit has circumvented those protections by establishing a limiting test for who can be considered a government agent. This test was first established in *Creel v. Johnson*, where the Fifth Circuit adopted the district court's two-pronged test for agency "requiring the defendant to show that the informant: (1) was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information from the defendant; and (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control." 162 F.3d 385, 393 (5th Cir. 1998). This test was also applied in *United States v. Bates,* 850 F.3d 807, 810 (5th Circuit 2017), and was used to deny Thompson's *Massiah* claim which was being reviewed *de novo. Thompson*, 941 F.3d at 816.

The Fifth Circuit's restrictive agency test does not mesh with this Court's precedent. For example, in *Henry*, the informant was instructed not to engage with Henry, and therefore Henry could not satisfy the Fifth Circuit's second prong. Indeed, the Fifth Circuit appears to limit Sixth Amendment violations to situations where

government agents specifically instruct their informants to gather information, but this requirement has been specifically rejected by this Court and other Circuit Courts. *Moulton*, 474 U.S. at 176, n.12 ("Direct proof of the State's knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation."); *Ayers v. Hudson*, 623 F.3d 301, 316 (6th Cir. 2010) ("Regardless of whether specific instructions were given by the detectives, it is evident from the record that the State violated its 'affirmative obligation to respect and preserve the accused's choice to seek [counsel's] assistance.'"); *United States v. O'Dell*, 73 F.3d 364 (7th Cir. 1995) ("In *York*, we found that an informant was a government agent because he had an informal agreement with an FBI agent that he would be rewarded for 'suitable information obtained from *any* source....' *Id.* (emphasis added). Here, the informant had a signed, written confidential source agreement with the government to provide information on the criminal activities of others.").[9]

The Fifth Circuit, by requiring that defendants pass the two-pronged agency test, has severely limited the protections of the Sixth Amendment as established by *Massiah* and its progeny.

[9]. *See also United States v. Sampol*, 636 F.2d 621, 638 (D.C. Cir. 1980) (finding a *Massiah* violation where government informant was allowed to troll the jail netting "any anwary inmate who rose to the lure."); *United States v. Brink*, 39 F.3d 419 (3d Cir. 1994) (remanding for an evidentiary hearing where record suggested that inmate "may have had a tacit agreement with the government" and "may have informed on Brink on the reasonable assumption that government officials were aware of his actions and would reward him in the future.").

B. This Court should grant certiorari.

The Circuit Court's application of the two-pronged agency test results in a Sixth Amendment analysis that conflicts with the relevant decisions of this Court. Sup. Ct. R. 10(c). Further, the test conflicts with the decisions of the Third, Sixth, and Seventh Circuits. Sup. Ct. R. 10(a). Because of the passage of time and the state's suppression of evidence, it would have been virtually impossible for Thompson to meet this increased burden without the aid of a hearing, but this Court should take this opportunity an grant certiorari and bring the Fifth Circuit's Sixth Amendment analysis into line with the prior decisions of this Court.

III. DID THE LOWER COURTS MISAPPLY THE RULE ESTABLISHED IN *HARRINGTON V. RICHTER* AND *JOHNSON V. WILLIAMS* BY APPLYING AEDPA DEFERENCE TO A CONSTITUTIONAL CLAIM THAT WAS GRANTED BY THE STATE COURT, BUT FOR WHICH THE STATE COURT FAILED TO CONSIDER HARM, AND SHOULD THE LOWER COURTS HAVE INSTEAD APPLIED THE RULE ESTABLISHED BY *WIGGINS V. SMITH* AND ITS PROGENY?

The district court found that Thompson "afforded the state courts an opportunity to consider whether the Johnson conversation influenced the guilt/innocence phase" and also noted that the record "does not clearly indicate whether the Court of Criminal Appeals intended to adjudicate the guilt/innocence portion of the *Massiah* claim, intentionally ignored it, or neglected to rule on it." ROA.2757. However, the record shows that the TCCA did not adjudicate the guilt/innocence portion of the claim. The TCCA specifically overruled the first three points of error raised on direct review. *Thompson*, 93 S.W.3d at 21-22. The TCCA

then specifically "sustained" point of error number four (related to the Johnson/*Massiah*) violation, but only considered harm as related to the punishment phase of trial. *Id.* at 29. The TCCA then granted Thompson's motion for rehearing on the grounds that the Court had not considered harm as related to the guilt/innocence phase of trial, but later withdrew the order granting rehearing. *Thompson*, 108 S.W.3d at 269.

As the State Court failed to adjudicate the harm issue as related to guilt/innocence, Thompson has argued the issue should be reviewed *de novo*. This argument was rejected by both the district and Circuit Court. As a result, the Circuit Court reviewed the merits of the underlying constitutional claim through "the deferential AEDPA standard of review." *Thompson*, 916 F.3d at 454 (5th Cir. 2019). The Fifth Circuit denied a Certificate of Appealability on the procedural issue of whether *de novo* review was proper. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (discussing the standard of review for procedural issues).

A. The *Richter and Williams* presumption does not apply to the facts of Thompson's case.

"Because the requirements of § 2254(d) are difficult to meet, it is important whether a federal claim was 'adjudicated on the merits in State court,' and this case requires us to ascertain the meaning of the adjudication-on-the merits requirement." *Johnson v. Williams*, 568 U.S. 289, 292 (2013). Section 2254(d) explains that "[a]n 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" meets one of two strenuous requirements. 28 U.S.C.A. § 2254(d). In *Richter*, this Court addressed the application of § 2254(d) when a state court summarily denied relief on a federal claim. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99. However, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99-100.

In *Williams*, this Court extended the holding of *Richter* explaining that when "a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Johnson v. Williams*, 568 U.S. 289, 301 (2013). The Court held that "[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Id.*

This Court also provided guidance on deciding when a claim has been adjudicated on the merits in state court:

> A judgment is normally said to have been rendered "on the merits" only if it was "delivered after the court ... heard and *evaluated* the evidence and the parties' substantive arguments." . . . And as used in this context, the word "merits" is defined as "*[t]he intrinsic rights and wrongs of a case* as determined by *matters of substance,* in distinction from matters of form."

Id. at 302.

The Circuit Court incorrectly applied this Court's precedent because it failed to consider whether the TCCA had evaluated the evidence and parties' substantive arguments. *See Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 282 (3d Cir. 2018) (properly applying the *Williams* framework in finding that the petitioner established that the federal claim was inadvertently overlooked in state court.). A simple review of the TCCA's decision shows that the TCCA simply failed to consider the harm associated with the guilt phase of trial, and the subsequent granting of the motion for rehearing is further proof that the TCCA simply failed to address the claim at issue.[10] Indeed, Thompson is unaware of a Circuit Court extending *Williams* to claim which was granted by a state court, but for which harm analysis was not properly performed.

The Circuit Court's decision also conflicts with that of the Ninth Circuit in *Murdaugh v. Ryan*, where the Circuit Court looked to the content of the state court's opinion in deciding that *de novo* review was proper. 724 F.3d 1104, 1121 (9th Cir. 2013). There, the Court explained that "[g]iven that this claim had arguable merit, and in light of the state post-conviction court's otherwise careful consideration and evaluation of every other claim in Murdaugh's petition, 'the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court,' thus permitting de novo review." *Id.* (*citing Williams*).[11] The Fifth Circuit's

[10] The petitioner's failure to seek rehearing was a major deciding factor in the *Williams* case. *Williams*, 568 U.S. at 306 (considering the petitioner litigation strategy when deciding if the state court reviewed the federal issue).

[11] *See also Gonzales v. Thaler*, 643 F.3d 425, 429 (5th Cir. 2011) (But if the state courts fail to adjudicate the petitioner's claim on the merits and the claim is not procedurally barred, no deference is owed to the state-court

decision in regards to AEDPA deference simply omitted any discussion of the fact that the TCCA specifically addressed the facts and legal basis for each claim it actually adjudicated, but completely failed to discuss whether the *Massiah* violation at Thompson's first trial prejudiced the guilt/innocence phase of that proceeding.

To the extent that *Richter* and *Williams* apply, the Circuit Court's opinion misapplied the legal framework as established by those cases. The Fifth Circuit failed to review the facts of Thompson's case which rebut the presumption that the TCCA adjudicated the issue of harm during the guilt/innocence phase of Thompson's trial. However, in this case, where the state court specifically addressed one element of a federal constitutional claim, but failed to address the second element, a second line of cases mandates *de novo* review.

B. Binding precedent establishes that when the state court does not adjudicate a component of the petitioner's federal claim, that component is reviewed *de novo.*[12]

Unlike *Richter* and *Williams*, this case involves a situation where the state court found a constitutional violation, but failed to consider the harm element of a federal constitutional claim.

If the state court does not adjudicate a component of a petitioner's federal claim, that component is reviewed *de novo* in federal court. *Porter v. McCollum*, 558 U.S. 30 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*"); *Wiggins v.*

judgment and the federal courts must instead conduct a plenary review.).

[12] This claim was raised before the District Court at ROA.2757-2758 and before the Circuit Court at page 21 of Thompson's Application for COA.

Smith, 539 U.S. 510, 534 (2003) ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis"); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (same). Indeed, the Fifth Circuit's decision to apply AEDPA deference to an element not considered by the state court conflicts not only with decisions of other circuit courts,[13] but also its own decisions.[14] This binding precedent shows that the unadjudicated portion the *Massiah* claim should have been reviewed *de novo* by the district and Circuit Courts.

It should be noted that some Courts have suggested that *Richter* and *Johnson* have modified the principle established by *Rompilla* and its progeny. *See, e.g. Childers v. Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011), cert. granted, judgment vacated on other grounds, 568 U.S. 1190 (2013) and opinion reinstated, 736 F.3d 1331 (11th Cir. 2013) (en banc) ("suggest[ing]" that *Richter* "may" have overruled *Rompilla*, without deciding the issue). However, federal circuit courts have continued to apply *Rompilla*'s holding post *Richter*. *See Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012); *Woolley v. Rednour*, 702 F.3d 411 (7th Cir. 2012); *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012); *Ferrell v. Hall*, 640 F.3d 1199, 1224–27 (11th Cir. 2011); *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (Ripple, J.); *see Salts*, 676 F.3d at 480 n.46 (5th Cir. 2012).

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[13] *Davis v. Lafler*,658 F.3d 525, 537 (6th Cir.2011) (en banc); *Ferrell v. Hall*, 640 F.3d 1199, 1224–27 (11th Cir.2011); *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir.2011) (Ripple, J.); *Williams v. Cavazos*, 646 F.3d 626, 637 n. 6 (9th Cir.2011), *cert. granted on other grounds*, —— U.S. ——, 132 S.Ct. 1088, 181 L.Ed.2d 806 (2012).

[14] *Salts v. Epps*, 676 F.3d 468, 480 n.46 (5th Cir. 2012) (explaining that portions of claims not addressed by state courts are reviewed *de novo*); *Henderson v. Cockrell*, 333 F.3d 592, 601–02 (5th Cir. 2003) (where state court only addressed second prong of petitioner's *Strickland* claim (prejudice), first *Strickland* prong (deficient performance) reviewed *de novo* by the federal court).

Richter and *Williams* both specifically dealt with a situation where the state court rejected a federal claim without giving any indication as to why the federal claim was rejected. Neither case involved a situation where the state court adjudicated an element of a federal claim but specifically failed to address another element of that federal claim. In situations like this, this Court's precedent establishes that *de novo* review is proper.

C. This Court should grant certiorari.

This Court should grant Thompson's petition for certiorari because the Fifth Circuit's decision is "in conflict with the decisions of another United States court of appeals" on the same issue. Sup. Ct. R. 10(a). Indeed, the decision conflicts with the Fifth Circuit's own precedent. Further, the question of whether or not AEDPA deference applies to elements of claims which were not adjudicated on their merits should be clarified by this Court. Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant the petition and order merits review.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of this petition was delivered to, Assistant Attorney General Ari Cuenin, via email at ari.cuenin@oag.texas.gov on October 1, 2020. Further, service will be made as required by Rule 29.

/s/ Jonathan Landers

JONATHAN D. LANDERS

CERTIFICATE OF COMPLIANCE

This petition complies with the word limitation of Rule 33. The relevant portions of the brief include 8,924 words.

/s/ Jonathan Landers

JONATHAN D. LANDERS