NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

_____

PETE RUSSELL,
Petitioner

v.

BOBBY LUMPKIN,
Director of Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Winston Earle Cochran, Jr.
Attorney at Law
Texas Bar No. 04457300
S. D. Texas No. 14490
P. O. Box 2945
League City, TX 77574
Tel. (713) 228-0264
E-mail: winstoncochran@comcast.net

Counsel of Record under the
Criminal Justice Act of 1964,
18 U.S.C. §3006A(d)(6)

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in denying a certificate of appealabilty, through a merits review, of Russell's claim that he received ineffective assistance of counsel at the punishment stage of trial with respect to future dangerousness?

LIST OF ALL PARTIES

Pete Russell, a/k/a Pete Russell, Jr.. No. 999443, Texas Dept. of Criminal Justice, Correctional Institutions Division	Petitioner, Defendant at Trial and Applicant in State Habeas Proceedings
Bobby Lumpkin Director of Texas Department of Criminal Justice, Correctional Institutions Division	Respondent

LIST OF RELATED PROCEEDINGS

1. 262nd District Court, Harris County, Texas
   No. 898795 *State of Texas v. Pete Russell, Jr.*
   Judgment entered: February 17, 2003

2 Court of Criminal Appeals of Texas
   No. AP-74,595, *Pete Russell v. State of Texas*
   Judgment entered: February 2, 2005

3. 262rd District Court, Harris County, Texas
   No. 898795-A, *Ex parte Pete Russell, Jr.*
   Findings of Fact and Conclusions of Law entered: May 9, 2013

4. Court of Criminal Appeals of Texas
   No. WR-78,128-01, *Ex parte Pete Russell*
   Judgment entered: November 27, 2013

5. |Court of Criminal Appeals of Texas
   No. WR-78,128-02, *Ex parte Pete Russell, Jr.*
   Order of Dismissal entered: March 8, 2017

6. United States District Court for the Southern District of Texas, Houston Division
   No. 4:13-cv-03636, *Pete Russell v. Lorie Davis*
   Judgment entered: July 23, 2019

7. United States Court of Appeals for the Fifth Circuit
No. 19-70015, *Pete Russell v. Bobby Lumpkin*
Judgment Entered: September 4, 2020

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CITATIONS OF OPINIONS AND ORDERS

1. The opinion of the Court of Criminal Appeals on direct appeal is published as *Russell v. State*,155 S.W.3d 176 (Tex. Crim. App. 2005).

2. The order of the Court of Criminal Appeals denying postconviction relief appears on that court's web site as *Ex parte Russell* (Tex. Crim. App. No. WR-78,128-01, November 27, 2013).

3. The order of the Court of Criminal Appeals dismissing Russell's second state habeas application appears on the Court's web site as *Ex parte Russell* (Tex. Crim. App. No. WR-78,128-02, March 8, 2017.

4. The memorandum and order of the United States District Court appears as *Russell v.Davis* and was that court's No. 4:13- cv-03636. It was not designated for publication.

5. The opinion of the Fifth Circuit Court of Appeals, denying a certificate of appealabilty, was in that court's No. 19-70015. It was not designated for publication and has not yet appeared in the Federal Appendix.

TO THE SUPREME COURT OF THE UNITED STATES;

Comes now the Petitioner, Pete Russell ("Russell"), through the undersigned attorney appointed under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6), and respectfully requests that this Court grant the writ of certiorari in order to review the decision of a panel of the United States Fifth Circuit Court of Appeals (the "Fifth Circuit") to deny a certificate of appealability ("COA"). In support of this petition, Russell submits the following arguments and authorities.

STATEMENT OF JURISDICTION

1. Russell seeks to have this Court review a judgment of a panel of the Fifth Circuit, which was entered on September 4, 2020. The Circuit panel's decision is set forth in the Appendix Exhibit 1.

2. This Court entered a general order on March 19, 2020 which extended the time for filing a petition for writ of certiorari under SUP. CT. R. 13.3 until 150 days after the entry of a judgment by a court of appeals. That places the filing deadline for this cause on February 1, 2021.

3. Jurisdiction is conferred upon this Court to review the Court of Appeals' judgment by 18 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. CONST. amend. VI states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

Russell relies in particular on the counsel clause.

2. U.S. CONST. amend. VIII states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Russell relies in particular on the punishment clause.

3. U.S. CONST. amend XIV, §1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

Russell relies in particular on the due process clause.

4. 28 U.S.C. §2254(d) states:

> 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.

5. TEX. CODE CRIM. PROC. Art. 37.071, §2(b)(1) states:

On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; ... [1]

6. TEX. CODE CRIM. PROC. Art. 37.071, §2© states:

The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

7. TEX. CODE CRIM. PROC. Art. 37.071. §2(d) provides:

The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

[1] Subsection 2(b)(2) concerns the law of parties and was not at issue here.

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

8. TEX. CODE CRIM. PROC. Art. 37.071, §2(g) provides:

If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole (emphasis added).

STATEMENT OF THE CASE

A. Factual Background

An indictment accusing Russell of Capital Murder, as proscribed by TEX. PENAL CODE §19.03(a)(2), was filed as Cause Number 898795 in the 262nd District Court of Harris County, Texas. It was specifically alleged that Russell caused the death of Tanjala Brewer by stabbing her with a knife while Russell was in the course of committing Retaliation. Because Russell was indigent, two experienced attorneys, Floyd Freed and Ronald Hayes, were appointed to represent Russell at trial. A jury found Russell guilty of Capital Murder, then gave answers to two special issues which required the trial court judge to assess the death penalty.

The trial evidence is well described in the United States District Court's

Memorandum and Order (Appendix Exhibit. 2) and in the Court of Appeals' opinion (Appendix Exhibit 1).[2] The evidence showed that Russell had a romantic relationship with Tanjala Brewer. Russell was a local cocaine dealer, while Brewer was a regular user of cocaine. In 2001 Brewer provided information about Russell to the Houston Police, who arranged to make an undercover buy of cocaine from Russell. Russell's arrest led to his guilty plea for delivery of cocaine, and a plea bargain produced a ten-year sentence, but the sentencing was set back for a few days at Russell's request.

Russell went to Brewer's house on the evening of August 13, 2001. He testified that he wanted to keep his romantic relationship going with Brewer, which is something any man facing just a few years in prison might want. Brewer was only interested in getting some cocaine that night, and they quarreled. According to Russell's later admission to a Houston Police officer, Russell was annoyed that Brewer had "set him up," but that was not why he originally decided to go to see Brewer. Russell and Brewer both became angry and Brewer tried to stab Russell, but instead Russell picked up a knife and killed her.[3]

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[2] Citations herein are to the Appendix, with exhibit numbers, or to pages in the appellate record in the Fifth Circuit Court of Appeals, using the shorthand form which shows page numbers without repeating the cause number in every citation.

[3] Russell has continually maintained that he was guilty of Murder, under TEX. PENAL CODE §19.02, but not guilty of Capital Murder. He has pursued that contention through the lower federal courts. That issue of state law was not a strong candidate for review by this Court.

At the punishment stage of trial, additional offenses which had been committed by Russell were shown. Family members and friends gave testimony about the difficulties Russell faced during his life, starting with his childhood. There was no expert testimony to help place this anecdotal evidence into the context of the special issues. The jury answered a special issue submitted under TEX. CODE CRIM. PROC. Art. 37.071,§2(b)(1), concerning future dangerousness, affirmatively. The jury answered a special issue submitted under TEX. CODE CRIM. PROC. Art. 37.071, §2(e)(1), concerning mitigation, negatively. Those answers required that the death penalty be assessed. TEX. CODE CRIM. PROC. Art. 37.071, §2(g).

B. Procedures Raising Federal Questions to be Reviewed

Russell's appeal to the Court of Criminal Appeals was automatic. The four issues on direct appeal did not included claims of ineffective assistance of counsel. The judgment and sentence were affirmed in *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005).

While the direct appeal was still pending, attorneys were appointed to prepare and file a writ application under TEX. CODE CRIM. PROC. Art. 11.071. They filed an application in the state district court in 2004 which included the ineffective assistance claim presented here (Appendix Exhibit 6).

In 2013 an appellate prosecutor prepared proposed findings of fact and

conclusions of law. Russell's state application had presented separate ineffectiveness claims as to each of the punishment special issues, but the prosecutors's proposed findings of fact and conclusions merged them into a general discussion. The state habeas judge adopted and signed those findings of fact and conclusions of law on May 72013 (ROA.5538-5560; Appendix Exhibit 3, last page). The Court of Criminal Appeals denied relief in a two-page order entered on November 27, 2013 (Appendix Exhibit 4). Without elaboration, the Court of Criminal Appeals' order stated that the findings and conclusions were "supported by the record."

Russell then sought relief under 28 U.S.C. §2254 in the United States District Court for the Southern District of Texas, Houston Division. Russell filed a skeletal pleading in order to prevent a bar under 28 U.S.C. §2244. It included both of the claims made in the state habeas court about ineffective assistance at the punishment stage. Russell filed a full petition on in 2015.

Some of the issues Russell raised at that time had not been exhausted in the Texas state courts, so Russell filed a motion for stay and abatement under *Rhines v. Weber*, 544 U.S. 269 (2005). The United States District Court judge granted the *Rhines* motion. Russell filed a second application in the Court of Criminal Appeals, which was dismissed under TEX. CODE CRIM. PROC. Art. 11.071,§5 as not meeting the Texas requirements for a second or subsequent state habeas application

(Appendix Exhibit 5). Because the Texas statute requires initial review of a second or subsequent application by the Court of Criminal Appeals, there was no evidentiary hearing in the Texas trial court.[4]

When the federal litigation resumed, the respondent filed a motion for summary judgment and Russell replied. Russell also requested an evidentiary hearing at which Dr. Mark Cunningham, a clinical psychologist, who could have testified about the report he prepared for state habeas counsel.. On July 23, 2019, without having granted a live evidentiary hearing, the United States district court issued a memorandum and order, denying Russell's requested relief on all claims(ROA.444-488; App, Exh. 2). The jjudge also denied a COA .

Russell timely appealed, seeking a COA in the Fifth Circuit Court of Appeals (ROA.496). A Circuit panel denied a COA (Appendix Exhibit 1).

[4] In a second or subsequent application in Texas, the application is not evaluated by the trial court judge before the application is sent to the Court of Criminal Appeals. Instead the higher court must grant leave to file the application before the trial court can examine the issues.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Did the Court of Appeals err in denying a certificate of appealabilty, through a merits review, of Russell's claim that he received ineffective assistance of counsel at the punishment stage of trial with respect to future dangerousness?

Russell contends that his court-appointed trial attorneys, Floyd Freed and Ronald Hayes, did not provide effective assistance of counsel at the punishment stage of trial, specifically with respect to the first of the two special issues submitted at the punishment stage of trial. This is a complex topic, but all this Court really needs to decide at this time is whether a panel of the United States Court of Appeals for the Fifth Circuit correctly applied the procedures for a COA.

This is not just a request for a simple application of well-settled law, for which a writ of certiorari is unlikely. See SUP. CT. R. 10. Russell emphasizes the paramount importance of the first special issue submitted under Texas law, concerning what is commonly called "future dangerousness." The procedural pre-eminence of this issue over the mitigation issue has not received much attention from this Court, when compared to the special issue on mitigation, but the future dangerousness special issue plays a key role in providing heightened reliability in death-penalty cases, as required under U.S. CONST. amend. VIII. See *Woodson v.*

North Carolina, 428 U.S. 280, 305 (1976). Russell's ultimate goal is a new trial on punishment.

A. The Future Dangerousness Issue

Texas law governing the trial of a Capital Murder case is structured to erect three procedural barriers to assessment of the death penalty. First, the types of offense for which the death penalty is available is limited to those set forth in Section 19.03 of the Texas Penal Code. Russell's case falls within Section 19.03(a)(2). The prosecution overcomes that barrier by obtaining a guilty verdict for Capital Murder.

Second, at the punishment stage of trial, the jury is required to answer a special issue submitted in the trial court's instructions. Under TEX. CODE CRIM PROC. Art. 37.071, §2(b)(1), Russell's jury was required to answer either "Yes" or "No" to the question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." This Texas special issue, and others like it in other jurisdictions, came to be known as a "future dangerousness" issue, although now neither "future" nor "danger" is in the Texas statutory language. Under TEX. CODE CRIM. PROC. Art. 37.071(d) and the instructions in Russell's trial, the special issue could not be answered "Yes" unless the jurors unanimously agree to that answer. A negative answer can be given if ten jurors vote that way, and there is no requirement that those ten agree as to what

evidence supports the negative answer. *Id*.

The third barrier is the jury's obligation to address mitigation. This issue in Texas law has been revised over time to comply with *Penry v. Lynaugh*, 492 U.S. 302 (1989) . Russell's jury was required to answer "yes" or "no" on that issue, and the verdict went against Russell. A jury does not reach that special issue, however, unless it has first given a "yes" answer to the "future dangerousness" special issue. TEX. CODE CRIM. PROC. Art. 37.071, §2(e)(1).

For Russell to prevail, he would not even have to win ten jurors' votes on future dangerousness, as TEX. CODE CRIM. PROC. Art. 37.071, §2(g) mandates a life sentence if "the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) *or is unable to answer any issue submitted under Subsection (b) or (e)"* (emphasis added). Graphically, the possibilities are as follows:

Number of jurors having a 0some reasonable doubt on future dangerousness	Life sentence required?	Authority in Art. 37.071	Proceed to special issue on mitigation under Sec, 2(e)?
0	No	Sec. 2(e)	Yes
1-9	Yes	Sec. 2(g)	No
10-12	Yes	Sect. 2(d)(2)	No

Thus the special issue on future dangerousness is the more important one, even

though it has garnered less attention over time. Unless the prosecutor achieves a clean sweep of the jurors, the defendant absolutely cannot receive the death penalty, and the defendant does not even have to face the risk of receiving a negative answer on the mitigation special issue.

Winning on the future dangerousness issue also may be inherently easier than winning on the mitigation issue, for two reasons. First, the highest burden of proof in law is assigned to the State on the first special issue. In contrast, the jury is not instructed on a burden of proof as to mitigation. In practice, jurors pondering the mitigation question will weigh and compare the evidence from both sides without the benefit of having a standard dictated by the trial judge. Thus the State's *de facto* burden of proof on mitigation may only be a preponderance of the evidence, or perhaps the slightly stronger "clear and convincing evidence" standard. It is better by far to be fighting from behind the strong shield of reasonable doubt.

Second, defense counsel has the edge over the State during jury argument on the first special issue because defense counsel can emphasize the State's burden of proof. Texas juries always are reminded of the State's burden in jury instructions..[5]

[5] For a period of time juries were given a definition of reasonable doubt. That commenced with *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991), but *Geesa* was overuled in *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000). With or without a formal definition, jurors are well aware that the State has the highest burden of proof in the law.

In arguments to the jury, the reasonable doubt concept lends itself particularly well to defense a defense which presents scientific information, for at least some jurors will assign greater weight to scientific research and the opinions of experts than they will to anectdotal evidence from a friend or relative of a defendant.

An elemental principle of strategy , whether in warfare or in litigation, is to choose the point of attack which is most advantageous. In the procedural framework for Capital Murder trials in Texas, the most advantageous point of attack is the first special issue, not the second. Any attorney who does not make a stand on future dangerousness is leaving his client's life up to a gamble on mitigation.

B. The Evidentiary Role of Experts and Science

Soon after the revival in the 1970's of the death penalty in Texas, prosecutors recognized the persuasive power of providing scientific evidence, through expert witnesses, to make a prediction as to the probability that the defendant on trial would continue to pose a risk of violence, even in the guarded setting of a Texas prison. One psychiatrist, James Grigson, gave that kind of expert testimony in so many Texas death-penalty cases that he came to be known as "Dr. Death." Grigson's success before juries led to legal challenges arising from interviews of defendants without proper safeguards in several cases, but there was no denying that the expert testimony worked for prosecutors at the trial level.

Over time defense lawyers came to realize that it also could work for the defense. A cadre of experts, knowledgeable about germane scientific studies, arose to challenge the assumption that a man who committed murder and other violent crimes in the past inevitably necessarily would be a danger to society in the future. Prominent among those experts was a Ph.D psychologist, Dr. Mark Cunningham. Russell's state habeas attorneys secured the services of Cunningham, who prepared a massive report covering both future dangerousness and mitigation. The portion of his report addressing future dangerousness (Appendix Exhibit 7) was appended to Russell's state habeas application. While the discussion in the writ application itself was short, incorporation of Dr. Cunningham's study put a large amount of information before the habeas court.

Dr. Cunningham is not the only expert qualified to compile studies and apply them to the question of future dangerousness in a particular case, but his work is representative of what experts in the field could research before trial and then present in court. In his report for habeas counsel, Dr. Cunningham was not just expressing his own opinion, although his opinions are well-researched and well-reasoned. He found and provided plentiful empirical evidence. For example, early in the report's discussion of future dangerousness predictions was a summary of research sponsored by the United States Department of Justice:

> [P]rison violence does not predictably follow from pre-confinement violence or the capital offense of conviction. To illustrate, summaries of research sponsored by the U.S. Justice Department (Alexander & Austin, 1992; National Institute of Corrections, 1992) have concluded:
>
> 1. Past community violence is not strongly or consistently associated with prison violence;
>
> 2. Current offense, prior convictions, and escape history are only weakly associated with prison misconduct;
>
> 3. Severity of offense is not a good predictor of prison adjustment.

(ROA.5050-5051). That was a strong start for Dr. Cunningham's report, but it was only the overture for the opera. More will be said about the thoroughness of Cunningham's report in Part C below.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983) this Court examined the use of scientific evidence, in the form of expert testimony, in the context of the future dangerousness issue. *Barefoot* provided insights which are as valid for defense expert witnesses as for prosecution expert witnesses. This Court wrote:

> The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek v. Texas*, 428 U.S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.

Barefoot, *supra* at 897. While *Barefoot* dealt directly with testimony by a psychiatrist, this Court's comment would be equally applicable to a Ph.D psychologist. In fact, Dr. Cunningham himself has appeared in a considerable number of reported appellate cases.

Barefoot also recognized that an expert serves a function which is not redundant with the testimony of lay witnesses addressing factual events in a defendant's life. *Barefoot* drew an analogy to psychiatric commitments which may hinge on dangerousness and quoted from *Addington v. Texas*, 441 U.S. 418, 429 (1979):

> There may be factual issues in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists (emphasis in *Barefoot*).

Stated another way, life events (shown through lay witnesses or records) may provide the "dots," but expert insights and scientific studies help a jury "connect the dots."

C. The Ineffective Assistance of Counsel on the Future Dangerousness Issue

The main framework for analyzing effectiveness of counsel is the two-part test of *Strickland v. Washington*, 46 U.S. 668 (1984). Russell first had to show that trial counsel's performance was of such a poor quality as to fall "below professional

norms," measured objectively. Second, Russell had to establish "prejudice." What constitutes prejudice will depend on the phase of trial at issue. *Williams v. Taylor,* 529 U.S. 362 (2000), following the lead of *Strickland v. Washington* for punishment issues, concluding that only a "reasonable probability" of a different result is needed to justify habeas relief. A "reasonable probability" means one "sufficient to undermine confidence in the outcome." *Williams, supra.*

(1) First Prong of *Strickland*

Making strategy choices are part of legal representation and that a strategic mistake does not automatically show a violation of the Sixth Amendment. On the other hand, it cannot fairly be said that "anything goes" with respect to strategy. Even before *Strickland*, the Court of Criminal Appeals put assertions of "strategy" in the proper perspective:

> A criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance to his client – in or out of the courtroom.

Ex parte Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980). Russell's trial counsel had over twenty years to read *Duffy* and learn from it. Duffy drew upon this Court's landmark case in *Powell v. Alabama,* 287 U.S. 45 (1932).

Closer to Russell's 2003 trial, this Court improved on *Duffy* by stressing that effective representation includes effective preparatory work prior to trial. *Williams*

v. Taylor, *supra* held that trial counsel failed to provide effective representation because counsel had not thoroughly investigated potentially mitigating factors in Williams' life history. By the time Russell was indicted, a Texas attorney involved in a Capital Murder case should have read *Williams* and pondered how broadly it could apply. *Wiggins v. Smith,* 539 U.S. 510 (2003) explained that preparatory investigation should continue until the point was reached where counsel reasonably could conclude that no further investigation would be useful. *Wiggins* specifically said that rule applied to choosing a punishment-stage defense. This view in *Wiggins* provided a "rule of thumb" which counsel could use to evaluate the adequacy of investigation as it progressed. It is true that *Wiggins* was decided after Russell's trial, but it was not "new" law and was decided before Russell's conviction became final.

The correct observation in *Ex parte Duffy, supra* that counsel must have a "firm command" of the applicable law, and not just the facts, is the logical companion of *Williams* and *Wiggins*. Counsel's actions should be measured against what facts must be proved or challenged, but it is the law applicable to the particular case which dictates what those facts will be.

The state habeas application sheds some light on the pretrial efforts to develop evidence. Defense counsel did employ a criminal investigator, John Castillo, and a

mitigation specialist, Gina Vitale, but neither one is a Ph.D. psychologist. There is no indication that either Castillo or Vitale, or any expert found or recommended by them, was asked to work up a presentation on future dangerousness.

A psychiatrist, Edward Friedman, M.D., did examine Russell, but he was not asked to work up a science-based defense strategy on the future dangerousness issue or testify about it. Why not? Probably because *the defense attorneys were predisposed against using a science-based defense on this issue.* That was revealed in a pretrial motion which tried to use arguments *against* expert testimony as a reason to strike down the death penalty. The motion stated in part:

> The ability to accurately predict whether or not a person would commit criminal acts of violence is not within the ability of the lay people on the jury. The probability that a person will commit future violence is not a prediction that even the psychiatric community can make particularly in the long run. The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession. American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual Clinical Aspects of the Violent Individual 1974 and Amicus Brief of the American Psychiatric Association APA in *Barefoot v. Estelle* 1983. The APA in its brief said that the primary finding of the task force was that judgments concerning the long-run potential for future violence and the dangerousness of a given individual are fundamentally of very low reliability adding that the state of the art regarding predictions of violence is very unsatisfactory.

(ROA.1037-1041). Incredibly, Russell's attorneys were relying on an *amicus* brief submitted in *Barefoot*, but ignoring this Court's holding in *Barefoot*. Defense

counsel's understanding of governing law was almost twenty years "behind the curve" and was hardly a "firm command" of applicable law. Russell's attorneys believed in this fundamental misconception enough to file the motion and argue it before the trial court.

The federal district judge's analysis was guided in part by the state habeas judge's finding, based on a "credible affidavit of trial counsel Hayes," that the driving force in the strategy regarding future dangerousness was a belief that "specific evidence of [Russell's] life and background presented to the jury would be more effective than studies of convicted murderers" (Appendix Exhibit 2, p. 43). The state habeas judge was not the judge who had presided at trial and would not have known that defense counsel had already filed a pretrial motion which showed that counsel's real thinking at the time of trial was very different, being a categorical attack on the reliability of the scientific evidence rather than a weighing of the relative benefits of lay witnesses and experts. In fact, once counsel had taken the strong position against experts in the motion, counsel could not even credibly ask for funding of an expert like Cunningham after generally denouncing such experts. Once it is recognized that Hayes' affidavit did not reveal the innate bias against experts expressed prior to trial, the state habeas finding should be considered an unreasonable one. Certainly it did not reflect the approach which this Court specified in *Wiggins*.

The state habeas judge certainly should have been aware of *Williams* and *Wiggins,* which had long been decided by the time the state habeas judge signed the proposed findings. The question under Wiggins must be: How could trial counsel fairly compare the two evidentiary approaches, choosing lay witnesses over experts, without investigating what an expert actually could say and what scientific research an expert could present? There is no indication that defense counsel investigated the topic until a point was reached where further investigation would be unnecessary, as this Court's case law demands. Instead defense counsel seems to have relied on a preconceived bias.

A courtroom is like a farmer's market, in that the quality and quantity of the work done beforehand is evident from the apparent yield. What could the yield have been if trial counsel had researched the topic of future dangerousness, or had obtained the assistance of someone like Dr. Cunningham to do so? The extent of what was missed by trial counsel can be gleaned from Cunningham's preliminary topic headings:

> Failure of the defense to accurately characterize Special Issue No. 1;
>
> Failure of the defense to detail and contextualize Russell's conduct during his prior incarceration in TDCJ;
>
> Failure of the defense to describe the low predictive utility of past

community violence or the capital offense for risk of violence in prison;

Failure of the defense to individualize Russell's risk of violence in prison in light of the low rates of serious violence in TDCJ;

Failure of the defense to individualize Russell's risk from group statistical data on capital offenders;

Failure of the defense to individualize Russell's violence risk from rates of violence among convicted murderers in TDCJ ;

Failure of the defense to individualize Russell's risk of committing serious violence in prison in light of preventive interventions available in TDCJ; and

Failure of defense counsel to equip the jury to avoid predictable error.

(ROA.5048-5061). These topic headings are not self-explanatory, but for each of those topics, Dr. Cunningham provided scholarly research to back up his position. There was so much research material that the jurors probably could not have waded through it by themselves. An expert witness, however, can explain why particular scientific information is important and guide the jury through it.

With no evidence of the kind of insights made by Dr. Cunningham having been presented to the jury, the defense argument on the future dangerousness issue did not even assert, let alone show, that there was a factual basis, rooted in science, for

reasonable doubt. The attorneys divided the two special issues between them for argument, and attorney Freed was supposed to cover the future dangerousness issue. Freed's argument, in its entirety), is presented in Appendix Exhibit 8. Less than two pages of the argument discussed future dangerousness, and Freed then switched to discussing mitigation and making a general plea for mercy. There was not a syllable about science concerning future dangerousness in the whole argument.

The one state habeas finding which addressed the value of scientific evidence, as opposed to a claimed preference by counsel, asserted that the scientific evidence would not be relevant (Appendix Exhibit 4, Finding 54). This finding is really is a conclusion of law, *i.e.* a statement of a legal reason why some fact should not be considered and therefore does not support relief. Issues of law are reviewable *de novo,* albeit under the tough standard of Section 2254(d). There are several flaws in this finding.

The"finding" is legally incorrect. TEX. R. EVID. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Expert testimony explaining what is in Dr. Cunningham's report would have had some tendency to make a "fact of consequence," *i.e.* the probability of future dangerousness, be seen by jurors as less

likely. A state evidence rule is not the equivalent of federal constitutional law, but an error in state law should have been corrected either in the habeas court or in the Court of Criminal Appeals. The lack of that correction shows diminished reliability, not heightened reliability, in the state handling of Russell's case, contrary to what the Eighth Amendment requires. *Woodson, supra*.

The finding of a lack of relevance also cannot be squared with *Barefoot.* Drawing upon *Addington*, this Court stated that a future dangerousness decision " turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." When an existing opinion of this Court has said that a dangerousness decision "turns on" what an expert may say, the state court's conclusion was an unreasonable application of this Court's case law, arguably even in outright conflict with what this Court said in *Barefoot*.

If more clarity was needed in the state habeas case (and it was), the judge could have ordered an evidentiary hearing – a *real* hearing, with witnesses under oath, answering questions on direct examination and cross-examination. That was not done. Looking at the way the punishment stage played out, this Court cannot be confident that there was any investigation of possible scientific evidence for use on the future dangerousness issue. Russell also requested that the United States District Court conduct a hearing. The federal judge originally left the idea open in order to

evaluate it with the benefit of the respondent's pleadings, but ultimately the federal judge issued the memorandum and order without conducting a hearing.

Russell has done what he can, without the benefit of an evidentiary hearing, to show that there was either poor preparation to defend on the future dangerousness issue, and quite likely, no such preparation at all. Either way, the record indicates substandard work by counsel.

(2) Second Prong of *Strickland*

Applying the standard from the second prong of *Strickland*, the dearth of scientific evidence and expert opinion as to future dangerous was prejudicial. A reviewing court cannot have confidence that the outcome, *i.e*. the verdict on the special issue, would have been the same affirmative answer, with or without the potential evidence. The respondent argued in the Court of Appeals that the damage must be "so ill chosen that it permeates the entire trial with obvious unfairness," citing *Cotton v. Cockrell*, 343 F.3d 746, 752–53 (5th Cir. 2003). That is not logical when considering punishment-stage ineffectiveness, since part of the "entire" trial, namely guilt determination, already is over before the jury turns to the future dangerousness issue. If the question is whether counsel's error "permeated" the entire *punishment* determination, that definitely was true. Russell was deprived of evidence which, by helping him prevail on the first issue, also would have shut down

determination of the second issue.

As shown earlier in the graph showing how the applicable law would work, there was everything to gain, and nothing to lose, with a vigorous scientific defense on future dangerousness. For counsel to not even try to present such a defense is inexplicable. Giving away the first issue was like Grant surrendering to Lee. That constitutes prejudice.

Compounding the prejudice was the cavalier manner in which the state habeas court made its finding. As amended in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2254(d)(1) limits the legal bases for relief which may be granted by a federal court. The state habeas court's decision must be contrary to, or an unreasonable application of, clearly established Federal law, as determined by this Court. By the terms of the statute, that limitation applies to a "decision." What is a "decision" in this context? It is not just the ultimate state court order granting or denying relief, but rather must mean a conclusion made by the state habeas court as to a particular claim. If a state habeas court does not address a particular claim, then there has not a decision on the claim.

Russell presented two claims which were similar but distinct: ineffectiveness of counsel as to mitigation, and also ineffective of counsel on future dangerousness. The issues were distinctly identified in the outline structure of the state application,

with the future dangerousness claim being in Subpart D of the application (Appendix Exhibit 6). The state habeas findings, however, did not follow that outline. Instead the two different ineffective assistance issues were thrown into one discussion.

Basic fairness in litigation calls for the judiciary to address a claim as it actually is made, not as it might be recast by an adversary (here, the prosecutor as draftsman) so that it is conveniently lost in tall weeds. This is not just a matter of policy or opinion. This Court has long held that due process of law, under U.S. CONST. amend. XIV, §1, requires a fair opportunity to be heard. *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972) . Stanley applied that principle to denial of a hearing on a driver's license. Is not a fair hearing even more necessary on habeas review, when a life, not a license, is at stake?.

D. Failure to Apply Correct COA Standard

That brings the discussion back to the only problem this Court needs to address at this time, which is the Circuit panel's use of the wrong approach at the stage of deciding whether a COA should be granted. This Court held in *Miller-El v. Cockrell*, 37 U.S. 322 (2003) and *Slack v. McDaniel*, 529 U.S. 473 (2000), that a COA should be granted if either of two conditions were met: (1) reasonable jurists could disagree whether the petition should have been resolved in a different manner; or (2) the issues which were presented deserved encouragement to proceed further. Neither of those

alternatives presents a high hurdle, and both of them called for granting of a COA in Russell's case.

Reasonable jurists could agree with Russell that the extent of investigation and preparation required by this Court's case law was not achieved, making counsel's strategy choices inadequately grounded. Reasonable jurists could agree with Russell as to why Dr. Cunningham's evidence was relevant and that the state habeas court was incorrect on that matter. Some could disagree with Russell, but reasonable disagreement means a COA should be granted, not denied.

"Proceeding further" obviously embraces the step of moving to full briefing and possible oral argument in the Court of Appeals. As part of that, weaker issues in a COA application, such as those perceived to have problems of procedural default, will be weeded out. That benefits both sides and benefits the reviewing court, as more of counsel's time and effort, and more of a court's time and effort, can be focused on a strong issue. Russell's counsel readily admits that the briefing on this issue at the time of seeking a COA was limited by competition from other issues, all of the issues being subject to a word limit, an inevitable limit on time, and hard choices as to how to resolve the competition among issues. In contrast, with the grant of a COA on a particular issue, much better analysis is possible. That, too, improves the reliability in death-penalty cases.

"Proceeding further"also includes review by this Court. Because of the hierarchy of the judicial branch of government, this Court reviews what other courts have examined before. A thorough analysis in lower courts helps this Court examine an issue. The more minds which study a life-or-death issue, the better.

Enforcement of a proper approach to COA review is not, however, just a matter of policy. *Buck v. Davis*, __ U.S. __, 137 S.Ct, 759, 197 L.Ed.2d 1 (2017), citing *Miller-El v. Cockrell*, pointed out that "[u]ntil the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. " This Court explained:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [Citation to *Miller-El*, at 327.] The threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id*., at 336.

In this cause, too, the Circuit panel in this issue was really deciding the issue on the merits. The Circuit panel put in a good effort. but in doing so it ventured into "full consideration" of the issue, contrary to *Buck*.

Buck reiterated the observation in *Miller-El* that "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id*., at 336-337. That also is what

happened in Russell's case. In contrast, Russell thinks the Circuit panel *did* have jurisdiction to go as far as remanding to the federal district court simply to order an evidentiary hearing, since a merits decision should be based on as much information as can be obtained. Just where the "jurisdictional" line of demarcation falls for COA proceedings is a topic which can be clarified by this Court, and the whole federal judiciary would benefit from the guidance.

In *Buck* this Court engaged in an extensive analysis of the underlying issue, and it is up to this Court whether to do the same in Russell's case. There are some meaty underlying questions here, such as what constitutes relevant evidence of future dangerousness, and whether or not incorporation of expert testimony of future dangerousness must be based on the level of investigation dictated by *Wiggins* for mitigation. It would be worth this Court's time to examine those issues. On the other hand, this Court could take a more limited approach and simply hold that, as the Court said in Buck, the Circuit panel "leapfrogged" over the limited inquiries that should guide a COA determination. If this Court chooses the latter, Russell will make a presentation to the Circuit panel with striking similarity to this petition. The difference is that Russell would have over thirty pages in which to do it, rather than the meager space available when briefing had to cover many issues.

The Circuit panel undertook quite a bit of work, as did Russell's counsel and

the respondent's counsel. All of those efforts had to be spread out over multiple issues. The sufficiency issue raised by Russell, by itself, consumed much of the word limitation allowed to counsel, and a large share of the Circuit panel's attention. A major benefit of the correct use of the COA process is the narrowing of issues, allowing better presentation by counsel and closer examination by the reviewing court, than is possible when all concerned must "cover the waterfront."

This Court should hold that the Circuit panel committed the same error as in *Buck*. Where the path leads from there can be decided after this Court addresses the error.

CONCLUSION

For the foregoing reasons, Russell requests that this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,

Winston Earle Cochran, Jr.
Attorney at Law
Texas Bar No. 04457300
S. D. Texas No. 14490
P. O. Box 2945
League City, TX 77574
Tel. (713) 228-0264
E-mail: winstoncochran@comcast.net

Counsel of Record under the
Criminal Justice Act of 1964,
18 U.S.C. §3006A(d)(6)