No. _____ (CAPITAL CASE)

IN THE

SUPREME COURT OF THE UNITED STATES

REINALDO DENNES,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

Kathryn Wood Hutchinson
Supervisor, Capital Habeas Unit

Donna Coltharp*
Assistant Federal Public Defender
919 Congress Avenue, Suite 950
Austin, Texas 78701
737-207-3017 (tel.)
Donna_Coltharp@fd.org
* Counsel of Record

Reinaldo Dennes is scheduled for execution November 19, 2026.

CAPITAL CASE

QUESTION PRESENTED

The question presented is:

1. In light of *Sears v. Upton*, 516 U.S. 945 (2010), did the Texas Court of Criminal Appeals err in concluding that trial counsel was not deficient when it put on a nominal mitigation case after conducting no investigation?

PARTIES TO THE PROCEEDING

The Petitioner is Reinaldo Dennes. The Respondent is The State of Texas. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF RELATED PROCEEDINGS

- *State v. Dennes*, 263rd Judicial District Court of Harris County, Texas, No. 750,313 (Sept. 3, 1997)
- *Dennes v. State*, Texas Court of Criminal Appeals, No. 72,966 (Jan. 5, 2000)
- *Ex parte Dennes*, Texas Court of Criminal Appeals, No. WR-34,627-02 (Dec. 18, 2013)
- *Dennes v. Davis*, United States District Court for the Southern District of Texas, No. CV H-14-0019 (Mar. 22, 2017)
- *Dennes v. Davis*, United States Court of Appeals for the Fifth Circuit, No. 17-70010 (Jan. 6, 2020)
- *Norman v. Tex. Dep't of Criminal Justice*, No. D-1-GN-26-006939 (Nov. 5, 2026)
- *Rubio v. Tex. Dep't of Criminal Justice*, No. 15-26-00200-CV (Tex. App. [15th Dist.] Nov. 9, 2026)
- *In re Rubio*, Supreme Court of Texas, No. 26-1300 (Nov. 13, 2026)
- *Ex parte Dennes*, Texas Court of Criminal Appeals, No. WR-34,627-03 (Nov. 18, 2026)

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

LIST OF RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

PROCEDURAL HISTORY 2

STATEMENT OF THE CASE 2

I. Defense counsel presented little mitigating evidence at punishment. 3

II. New counsel discovered additional, unpresented mitigating evidence. 4

REASONS FOR GRANTING THE PETITION 7

I. Trial counsel's performance was deficient because he failed to investigate and present mitigating evidence at trial. 7

A. Trial counsel failed to conduct a reasonable investigation into mitigating evidence. 8

B. The inadequate investigation is not rendered reasonable by the presentation of four sentencing-phase witnesses. 11

II. This case should be remanded for a proper prejudice inquiry. 13

III. This Court may review the TCCA's order because that order was not based on independent state law grounds. 14

CONCLUSION 16

INDEX TO APPENDIX

Appendix	Description	Appendix Page
A	**Order of the Texas Court of Criminal Appeals**	**1–3**

TABLE OF AUTHORITIES

Cases

Andrus v. Texas,
590 U.S. 806 (2020) 7, 8, 11

Blanco v. Singletary,
943 F.2d 1477 (11th Cir. 1991) 8

Ex parte Blue,
230 S.W.3d 151 (Tex. Crim. App. 2007)..... 15, 16

Cruz v. Arizona,
598 U.S. 17 (2023) 15

Dennes v. Davis,
797 F. App'x 835 (5th Cir. 2020) 2

Dennes v. Davis,
No. CV H-14-0019, 2017 WL 1102697 (S.D. Tex. Mar. 22, 2017)..... 2

Dennes v. Lumpkin,
592 U.S. 1128 (2020) 2, 3

Dennes v. State,
No. 72,966 (Tex. Crim. App. Jan. 5, 2000)..... 2, 4

Ex parte Dennes,
No. WR-34,627-02, 2013 WL 6673058 (Tex. Crim. App. Dec. 18, 2013)..... 2

Glossip v. Oklahoma,
604 U.S. 226 (2025) 15

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995) 8

Kenley v. Armontrout,
937 F.2d 1298 (8th Cir. 1991) 8

Lee v. Kemna,
534 U.S. 362 (2002) 15

Penry v. Lynaugh,
492 U.S. 302 (1989) 14

Sears v. Upton,
561 U.S. 945 (2010) 12, 14

Strickland v. Washington,
466 U.S. 668 (1984) 8

Wiggins v. Smith,
539 U.S. 510 (2003) 8, 9, 11, 13

Woodson v. North Carolina,
428 U.S. 280 (1976) 13

Constitutional Provisions

U.S. Const. amend. VI 1

U.S. Const. amend. VIII 13

U.S. Const. amend. XIV 1

Statutes and Rules

28 U.S.C. § 1257(a) 1

Tex. Code Crim. Proc. art 11.071 2

Tex. Code Crim. Proc. art 11.071, § 5 15

Tex. Code Crim. Proc. art. 11.071, § 5(a)(3) 15, 16

Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) 3, 13

Tex. Code Crim. Proc. art. 37.071, § 2(e)(1) 13

Tex. Code Crim. Proc. art. 37.071, § 2(f)(2) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Reinaldo Dennes respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The November 18, 2026 order of the Texas Court of Criminal Appeals is attached as Appendix A.

JURISDICTION

The Texas Court of Criminal Appeals entered its order on November 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involved the Sixth and Fourteenth Amendments to the United States Constitution:

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

U.S. Const. amend. VI, and

> [N]or shall any state deprive any person of life, liberty, or property, without the due process of law....

U.S. Const. amend. XIV.

PROCEDURAL HISTORY

Petitioner was convicted of capital murder in 1996 and sentenced to death. The Texas Court of Criminal Appeals ("TCCA") affirmed his conviction and sentence. *Dennes v. State*, No. 72,966 (Tex. Crim. App. Jan. 5, 2000) (unpublished). It later rejected his initial application for a writ of habeas corpus under Texas Code of Criminal Procedure Article 11.071. *Ex parte Dennes*, No. WR-34,627-02,[1] 2013 WL 6673058 (Tex. Crim. App. Dec. 18, 2013).

Petitioner subsequently sought federal habeas relief in the United States District Court for the Southern District of Texas and requested a certificate of appealability ("COA") but was denied both requests. *Dennes v. Davis*, No. CV H-14-0019, 2017 WL 1102697 (S.D. Tex. Mar. 22, 2017). The United States Court of Appeals for the Fifth Circuit granted a COA on three claims but ultimately denied relief. *Dennes v. Davis*, 797 F. App'x 835 (5th Cir. 2020). This Court denied Petitioner's petition for writ of certiorari. *Dennes v. Lumpkin*, 592 U.S. 1128 (Mem) (2020).

STATEMENT OF THE CASE

A jury convicted Petitioner of the 1996 murder of wholesale diamond dealer Janos Szucs. 28 RR 184.[2] At the guilt-innocence phase of trial, the State presented evidence that Petitioner and his brother planned to rob Janos Szucs and that during

[1] Although the cause number contains an -02 designation, this appears to be in error as the only state habeas application Petitioner filed before the instant application was on March 18, 1999. *See* SHCR 2–106.

[2] Citations to "RR" refer to the Reporter's Record from trial. Citations to "CR" refer to the Clerk's Record from trial. Citations to "SHCR" refer to the State Habeas Clerk's Record.

the robbery, Szucs was shot and killed. *Id.* A security guard was also shot and identified Petitioner as the shooter. 25 RR 143. For his role in the offense, Petitioner was sentenced to death.[3]

I. Defense counsel presented little mitigating evidence at punishment.

The punishment phase of Petitioner's trial lasted only two days. To attempt to demonstrate that there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), the State presented extensive testimony implicating Petitioner in a home invasion that occurred approximately three months before the capital offense. The State also presented evidence of Petitioner's prior misdemeanor offense and victim impact testimony. 35 RR 135–53.

Trial counsel presented minimal mitigating evidence. In total, they presented only four witnesses: 1) Deputy Sheriff Calvin Wilson, who testified that Petitioner had only two write-ups, for non-violent offenses, in the eighteen months he was incarcerated awaiting trial at the Harris County Jail, 34 RR 166; 2) Dr. Jerome Brown, a clinical psychologist who administered a Rorschach test and some personality tests to Petitioner and, based on these tests and a cursory interview, opined that there was no reason to think that Petitioner would not adjust to prison, *see* 34 RR 185–204; 3) Petitioner's son Ray, who acknowledged that Petitioner had supported him as he was growing up, *see* 34 RR 245–48; and 4) Petitioner's mother Demetria, who testified that Petitioner was a loving father, 35 RR 14.

[3] Petitioner's brother later pleaded guilty to shooting Szucs and was sentenced to 45 years' imprisonment. He is currently on parole.

The State presented a rebuttal witness to testify about the prison's ability to protect others from dangerous offenders, and then both sides rested. 35 RR 26–51; 35 RR 52. Because the jury found that there was a probability that Petitioner would commit future acts of violence and that mitigating circumstances did not warrant a life sentence, Petitioner was sentenced to death. 35 RR 106–08.

Following his conviction and sentence, Petitioner moved for a new trial. In support, trial counsel provided an affidavit in which he deemed his "ability to defend Mr. Dennes . . . inadequate." 1 CR 211. He attributed the inadequacy of his defense to the trial court's failure to grant his requests for the appointment of co-counsel and failure to grant a continuance, and the State's failure to provide proper notice of its intention to introduce evidence pertaining to an extraneous offense during the punishment phase. *Id.* Following a hearing, the trial court denied the motion. 1 CR 195. The TCCA affirmed the conviction and sentence. *Dennes v. State*, No. 72,966 (Tex. Crim. App. Jan. 5, 2000) (unpublished).

II. New counsel discovered additional, unpresented mitigating evidence.

On November 11, 2026, Petitioner filed a Subsequent Petition for Writ of Habeas Corpus in the TCCA. In this petition, Petitioner presented new evidence in mitigation that had not previously been investigated or presented to any court.

That evidence included the narrative of Petitioner's arrival to the United States as a young boy. Petitioner and his family escaped from Communist Cuba in 1961. Their flight was compelled by a particular danger: Petitioner's father was a businessman and an opponent of the Castro regime. Ex. 10, Barbara Dennes Decl.

¶ 14.[4] But flight came at a cost. In the United States, Petitioner "experienced a psychological adaptation period that included fear, frustration, confusion, and anxiety about his new environment and its demands caused by language barriers and unfamiliar social cues." Ex. 13, Report of Dr. Leo Shea at 8. This impacted him over the course of his life. *See id.*

The situation was not helped by Petitioner's parents. They drank heavily in the home during Petitioner's childhood. Ex. 10, Barbara Dennes Decl. ¶ 11. Perhaps because of their parents' habits, Petitioner and his siblings started drinking at a very young age — in fact, family photos show Petitioner drinking beer as a toddler. Ex. 14. In addition, his parents physically abused Petitioner, slapping him "hard" when he got in trouble. Ex. 10, Barbara Dennes Decl. ¶ 11.

But there were positive aspects to Petitioner's upbringing. The family of enterprising immigrants was entrepreneurial and close-knit. Petitioner's father taught him to work hard, and Petitioner grew up to be a supportive, loving father and a true family man. He "gave his son, Ray Jr., everything, toys, clothes, took him on vacations." Ex. 10, Barbara Dennes Decl. ¶ 30. Petitioner also spent time riding horses and doing taekwondo with his daughter, Desiray. Ex. 17, Desiray Escobar Decl. ¶¶ 8, 9.

On at least two occasions, Petitioner placed himself in danger for the safety of his family. In 1980, he made a dangerous voyage to Cuba by boat and on stormy

[4] The referenced exhibit numbers correspond to the exhibits filed below in the TCCA in support of the Subsequent Application for Writ of Habeas Corpus.

waters to rescue his cousin and several strangers from the oppressive Castro regime and bring them back to the United States. Ex. 18, John Harris Decl. ¶¶ 4–12. Ten years later, Petitioner saved his daughter from a lawnmower that caught fire. Ex. 17, Desiray Escobar Decl. ¶ 4. Petitioner suffered severe burns after this incident and spent nearly a month in the hospital, requiring extensive skin grafts. 33 RR 6. This later event resulted in a marked personality change in Petitioner. His employer at the time noticed that he was more "erratic" and "unpredictable" at work. Ex. 19, Dror Zadok Decl. ¶ 4. Although Petitioner had always been a good employee, Zadok terminated his employment due to his changed behavior following the fire. *Id.*

In addition to this new information about his family in Cuba and the United States, the instant habeas application included evidence of significant cognitive deficits. Petitioner underwent his first and only neuropsychological evaluation in September 2026. Ex. 13, Shea Rep. at 1. Dr. Shea noted that Petitioner has severe deficits in executive functioning, including limitations in his ability to learn, concentrate, and remember. *Id.* at 3. On some tasks, Petitioner scored as low as the bottom fifth percentile. *Id.* at 6–7. As a result of these deficits, Petitioner experiences "inhibition and attention control," "difficulty with mental flexibility," "problems with organization and planning," and "the inability to break large tasks into sequential, manageable steps as a lack of self-monitoring." *Id.* at 8.

In response to this new evidence, Respondent argued that Petitioner had not demonstrated that trial counsel was ineffective because he had shown only that this information was not offered and not that trial counsel did not perform a mitigation

investigation. Respondent also contended that the evidence was cumulative and "double edged" such that its absence did not prejudice Petitioner.

REASONS FOR GRANTING THE PETITION

I. Trial counsel's performance was deficient because he failed to investigate and present mitigating evidence at trial.

Petitioner's trial attorney conducted only a minimal mitigation investigation and presented only four witnesses at his capital sentencing. Counsel's thin efforts left undiscovered significant evidence that would likely have resulted in a different decision at sentencing. That evidence included Petitioner's traumatic flight from Cuba at the age of five; the close relationships and support he had from his family, as well as the injury neglectful parenting caused; his own self-sacrificing love for his family, and especially his children; and significant cognitive deficits that likely impaired his ability to make decisions.

In *Andrus v. Texas*, this Court made clear that capital trial counsel must both conduct a reasonable investigation of potentially mitigating evidence and then, to the extent the reasonable investigation supports it, put on a more-than-nominal case supporting a life sentence. 590 U.S. 806, 814 (2020). Because trial counsel in this case failed on both fronts, this Court should consider whether the TCCA, as it had in *Andrus*, erred in concluding that counsel's performance satisfied the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984), and whether it should remand the case so that the TCCA may address whether counsel's failures prejudiced Petitioner.

A. Trial counsel failed to conduct a reasonable investigation into mitigating evidence.

To establish that trial counsel's performance was constitutionally inadequate, a petitioner first "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Strickland*, 466 U.S. at 687–88. Those norms "unquestionably" require a "thorough" investigation of the defendant's background. *Andrus*, 590 U.S. at 814 (citing *Porter v. McCollum*, 588 U.S. 30, 39 (2009) (*per curiam*), quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). The reasonableness of the investigation must be established by more than a cursory presentation at sentencing. *Id.* at 815. Rather, "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphases in original).

These standards were well established by the time of Petitioner's trial in 1997. *Strickland* itself was decided more than a decade before the trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, by 1997 several circuit courts had followed *Strickland* and determined that trial counsel were ineffective for failing to investigate potential mitigating factors. *See, e.g.*, *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) (each determining that counsel were ineffective for failing to conduct a thorough mitigation investigation).

Professional guidelines in place in 1997 also emphasized the importance of investigation. In 1989, the American Bar Association (ABA) published the

"Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," which *Wiggins* cited as a source of established norms.[5] *See Wiggins*, 539 U.S. at 522 ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred as 'guides to determining what is reasonable.'" (internal citations omitted)). The 1989 Guidelines called upon death penalty lawyers to "discover all reasonably available mitigating evidence," including medical, family, and social history, and religious and cultural influences. Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989), Guideline 11.4.1(D)(2)(C). These guidelines not only notified counsel of the need to investigate mitigating circumstances—they also provided a clear roadmap of what that investigation should entail. A reasonable defense attorney would have relied on this guidance to ensure adequate mitigation investigation.

Petitioner's counsel did not do so. Instead, he chose to use the little resources and time available to him to focus exclusively on investigating the case-in-chief. The attorney's own statements attest to his failures. On July 16, 1997—less than a week before voir dire began—he asked the court to appoint co-counsel, explaining that although "the family of Reinaldo Dennes has retained the services of an attorney . . . they are unable to afford the services of a co-counsel, investigators and/or experts." 1 CR 106. This statement makes clear that as counsel prepared to question jurors about

[5] These guidelines were updated in 2003.

their ability to consider mitigating evidence, he had not attempted to discover that evidence.

The trial court did grant "minimal" funds for "an investigator, ballistic expert, and psychologist." 1 CR 110. But by then, voir dire and pre-trial motions loomed, and the investigator only had time to investigate the case-in-chief. Again, trial counsel himself attested to this fact. On August 13th, after voir dire began and only five days before trial, the State informed counsel that it intended to introduce an extraneous robbery during the punishment stage. 24A RR 5. In response, counsel filed a motion to prohibit the evidence, writing:

> Counsel have been unable to do anything other than voir dire and work on the case-in-chief. Furthermore, the investigator and counsel are continuing at this date to work on the case-in-chief and do not have time to research and investigate and prepare a response to any extraneous matters of misconduct the State may wish to present at this late date.

1 CR 119–20.[6]

The trial investigator confirmed that the exclusive focus of his investigation was on guilt-innocence phase issue. He said that when trial began, "[his] investigators were still in the process of investigating witnesses that were being called by the State and leads regarding other persons who may have had a motive to kill Szucs. I informed [trial counsel] that I did not believe we had time to investigate the extraneous offense." 1 CR 215. Thus, even if trial counsel intended to investigate mitigating evidence, his investigators were already short on time and would not have been able to do so.

---

[6] Thus, the State's argument before the TCCA that Petitioner has not established that counsel did no more than a minimal investigation is incorrect. *See* State's Mot. to Dismiss at 16.

Finally, in an affidavit attached to a motion for new trial, trial counsel called his "ability to defend Mr. Dennes . . . inadequate" and attributed this to the court's failure to grant his requests for continuance, co-counsel, or proper notice of the State's intention to introduce extraneous offense evidence. 1 CR 211. He did not mention mitigation as a reason for any of the requests he made, nor did he consider his failure to produce mitigating evidence "inadequate." This proves the lack of attention counsel gave to his mitigation obligations.[7]

Whether because of pressure of the court or his own failure to recognize the need for mitigation, trial counsel "chose to abandon [his] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527–28.

B. The inadequate investigation is not rendered reasonable by the presentation of four sentencing-phase witnesses.

The statements of both trial counsel and the investigator indicate that the case for a life sentence was not considered or constructed until the eve of trial. *See Andrus*, 590 U.S. at 815 (deficient performance where counsel was "barely acquainted" with witnesses). Thus, although counsel put four witnesses on the stand at punishment, the case he presented was unsurprisingly spare. *See Sears v. Upton*, 561 U.S. 945, 954 (2010) (*per curiam*) ("[W]e have found deficiency and prejudice in other cases in

[7] Even if trial counsel's deficient performance resulted from insufficient funding, time, or manpower, the resulting deficiency is constitutionally unacceptable. *See* Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989), Guideline 11.2(b) (counsel is "required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, *who had adequate time and resources for preparation*" (emphasis added)).

which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.").

Of the four defense punishment-phase witnesses, only Petitioner's son and mother testified about his life and redeeming qualities. Petitioner's son's testimony spans just five pages of the trial transcript. 34 RR 244–48. Of those, only two pages are dedicated to talking about his father. 34 RR 247–48. Aside from stating that his father "encouraged [him] to attempt to achieve certain goals" and that he will "rely upon him as far as certain forms of advice and guidance," trial counsel did not elicit any details or stories that could have helped the jury understand Petitioner. 34 RR 247–48.

Petitioner's mother gave the jury a little bit more color. She told the jury that Petitioner was born in Cuba before his family came to the United States in 1961. 35 RR 6. During her testimony, the jury saw several photos of Petitioner with his children and heard that, at the time of trial, he had a ten-month-old baby. 35 RR 9–13. His mother also offered some descriptions of Petitioner as a father: "[H]e has always given the children everything they needed, love, protection, education . . . he's been the best father." 35 RR 14.

The other two witnesses had not met Petitioner before his arrest. One merely verified Petitioner's disciplinary record at the Harris County Jail. 34 RR 159. The other was a clinical psychologist, not a forensics neuropsychologist. 34 RR 185. When he visited Petitioner, he did not administer any kind of neurological testing to help understand Petitioner's bio-social-psychological history or trauma. Based merely on

personality tests such as a Rorschach test and a sixteen-personality factor questionnaire, he testified that Petitioner did not display any signs of antisocial personality disorder or any other type of personality disorder. 34 RR 185, 198.

An investigation would have revealed a richer and fuller case upon which a juror might base a decision for life. A reasonable investigation would have ultimately introduced the jury to Petitioner's family history and to the family itself, to Petitioner's traumatic journey to the United States, to the Petitioner as an abused son and as a loving father, and to the Petitioner as a person whose cognitive deficits impede his ability to make good decisions.

II. This case should be remanded for a proper prejudice inquiry.

The Eighth Amendment requires that persons convicted of capital offenses be seen as "uniquely individual human beings," rather than as "members of faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976). At trial, the State portrayed Petitioner as a sophisticated jewelry thief. His attorneys were obligated to provide the jurors the portrait of a full human being. Had they done so, it is likely that at least one juror would have chosen a life sentence. *See Wiggins*, 539 U.S. at 513; *see also* Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1), (e)(1), (f)(2).

This is so even if, as the State argued before the habeas court, the evidence had aggravating as well as mitigating aspects. *See* State's Mot. to Dismiss at 18. Indeed, it would be "unsurprising" if mitigation evidence did not bring with it some adverse implications. *See Sears*, 561 U.S. at 951. But that does not render the exclusion of the evidence harmless. Competent defense counsel are skilled at drawing

out the positive aspects of mitigating evidence so that the jury, with a better understanding of the person it is sentencing, is given an opportunity to give effect to those aspects. *Id.* Concluding otherwise deprives the evidence of the very mitigating nature this Court has held the jurors must be allowed to consider. *See Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (jury must be able to give effect to both aggravating and mitigating aspects of evidence).

Nor does it matter, as the State argued, that some of the evidence was offered at the guilt-innocence phase. *See* State's Mot. to Dismiss at 17. Plainly, the evidence was not offered in mitigation. But, more important, trial counsel did not assist the jury, in his brief closing sentencing arguments, in understanding how it might be mitigating. *See* 35 RR 67–83. He did not discuss the trip from Cuba, the fire that scarred Petitioner for life, or the boat trip to save a relative. It would be wrong to assume the jurors, unaided by an expert or the assistance of Petitioner's attorney, understood the mitigating aspects of this evidence.

Guided by these principles, the TCCA should be provided the opportunity to determine whether trial counsel's deficient performance prejudiced Petitioner.

III. This Court may review the TCCA's order because that order was not based on independent state law grounds.

This Court has jurisdiction to review the TCCA's order dismissing his subsequent application for writ of habeas corpus because that judgement was not independent of federal law. Generally, this Court will not take up a question of federal law in a case if the state court decision rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment. *Cruz v. Arizona*, 598

U.S. 17, 25 (2023) (citing *Lee v. Kemna*, 534 U.S. 362, 375 (2002)) (emphases in *Lee*). "A state ground of decision is independent only when it does not depend on a federal holding." *Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025) (citing *Foster v. Chatman*, 578 U.S. 488, 498 (2016)). Thus, a state court judgment is independent when it "is not intertwined with questions of federal law." *Id.* (citing *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)).

The TCCA's determination that Petitioner's ineffective assistance of counsel claim failed to meet the requirements of Texas Code of Criminal Procedure Article 11.071, Section 5, is intertwined with federal law and therefore not independent. Petitioner raised this claim under Section 5(a)(3) of this provision, which permits a subsequent state application to proceed if the applicant can demonstrate "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071, § 5(a)(3). The TCCA has explained that at the authorization stage, that court determines whether an applicant has made "a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence" that no rational factfinder would sentence him to death. *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphases in original). Thus, despite the TCCA's statement that it did not review the merits of Petitioner's claim, *see* App. at 3, to determine whether that claim met the requirements of Section 5(a)(3) required the court to consider federal law in assessing whether that claim met the necessary threshold, *see Blue*, 230 S.W.3d at 163. Because

the TCCA's determination was not independent of federal law, this Court has jurisdiction to consider the claim.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari and stay Petitioner's execution pending the disposition of this petition, as requested by separate application.

Respectfully submitted,

MAUREEN FRANCO
Federal Public Defender
for the Western District of Texas

Kathryn Wood Hutchinson
Supervisor, Capital Habeas Unit

/s/ Donna Coltharp
Donna Coltharp
Assistant Federal Public Defender
919 Congress Ave., Ste. 950
Austin, Texas 78701
737-207-3017 (tel.)
Donna_Coltharp@fd.org

November 18, 2026