PETITION FOR A WRIT OF CERTIORARI

Robert Mitchell Jennings respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit (*App*. 1-13), the order denying rehearing (*App*. 14), and the judgment reversing the grant of habeas corpus relief (*App*. 15) are not reported. The Memorandum and Order of the United States District Court for the Southern District of Texas (*App*. 16-29) and the judgment granting a new trial on punishment (*App*. 30) are not reported. The opinion of the Texas Court of Criminal Appeals (TCCA) denying habeas corpus relief is not reported (*App*. 31-41). The findings of fact and conclusions of law of the 208th District Court of Harris County, Texas, are not reported (*App*. 42-60).

JURISDICTION

The Fifth Circuit reversed the grant of habeas corpus relief on July 22, 2013, and denied rehearing on August 15, 2013. This petition is being timely filed within 90 days of the latter date. This Court has jurisdiction under 28 U.S.C § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C § 2254(a).

CONSTITUTIONAL PROVISIONS

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 . . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner shot and killed Elston Howard, a Houston Police Department vice officer, during the robbery of an adult bookstore on July 19, 1988 (33 R.R. 34, 36, 38, 112-121).[1]

Petitioner's accomplice, David Harvell, was waiting outside in a car (35 R.R. 563-64). As they drove away, petitioner told Harvell that he shot someone in the store (35 R.R. 565). Minutes later, Harvell shot petitioner, who dove out of the passenger window and ran away (35 R.R. 565-66).

Petitioner was admitted to a hospital for treatment of a gunshot wound to his hand (35 R.R. 582-85). The police arrested him in the hospital (34 R.R. 376-81).

[1] Howard was wearing civilian clothing and a police raid jacket (33 R.R. 40-42).

He gave a written confession that his gun discharged when Howard tried to tackle him during the robbery (35 R.R. 554, 563; 36 R.R. 862). The jury convicted him of capital murder (C.R. 487-89).

The State presented evidence at the punishment stage regarding petitioner's criminal history. He was declared delinquent at age 14 and placed on probation in 1972 (39 R.R. 167-71; SX 109). He was sent to a trade school at age 15 as a condition of probation in 1973 (39 R.R. 171-73; SX 110). He was sent to a juvenile facility at age 16 for a probation violation in 1974 (39 R.R. 173-75; SX 111). He was convicted of aggravated robbery at age 17 and sentenced to five years in prison in 1975 (39 R.R. 177-81; SX 115). He was convicted of two aggravated robberies and burglary of a habitation at age 20 and sentenced to concurrent 30-year sentences in 1978 (39 R.R. 181-84; SX 115). He was "handled" for 13 disciplinary violations (eight "minor" and five "major") in prison between June of 1979 and October of 1984 (39 R.R. 120-123). He committed five aggravated robberies in addition to the primary offense at age 30 after he was released from prison in May of 1988 (39 R.R. 16-19, 25-29, 35-41, 72-79, 85-97).

George Burrell, a Harris County Sheriff's Office chaplain, was the only defense witness at the punishment stage (39 R.R. 185-86). Burrell first met petitioner in the jail in July of 1988, saw him two or three times per week, and felt that he had "changed" since they met (39 R.R. 187-89). Burrell did not know of any disciplinary violations committed by petitioner in the jail and did not believe

that he was "incorrigible" (39 R.R. 188, 190-91).

Trial counsel did not conduct a "mitigation investigation" to discover evidence to offer in support of a life sentence because they did not fully appreciate the concept of mitigating evidence as it related to the Texas statutory special issues (1 S.H.C.R. 40-41). They did not investigate whether petitioner had any mental impairment that might mitigate the punishment (1 S.H.C.R. 41). They sought to call petitioner to testify about his disadvantaged background; but, after the trial court refused their request to restrict the cross-examination to the charged offense, they did not call him or a family member to elicit this testimony (39 R.R. 196-200). The jury convicted petitioner and answered the special issues in the affirmative, and the court sentenced him to death in 1989 (C.R. 487-89). His conviction was affirmed on appeal in 1993.

Petitioner filed a state habeas corpus application alleging that trial counsel were ineffective in failing to discover and present mitigating evidence of his mental impairment and disadvantaged background. The ineffective assistance of counsel (IAC) claim was developed through affidavits and documentary evidence in the state habeas proceeding.

Trial counsel failed to review the district clerk's files on petitioner's prior convictions and discover the report of a psychological evaluation reflecting that he demonstrated mild mental retardation and organic brain dysfunction in 1978, although the psychologist surmised that he was malingering (1 S.H.C.R. 46-49).

Psychological evaluation and testing during the state habeas proceeding revealed abnormal findings in his frontal lobes, parietal lobes, and left temporal lobe that support the contention that his brain has been injured (1 S.H.C.R. 72-75). His mother, Flora Jennings, and sister, Carla Jennings, testified that he received head injuries during childhood that required treatment at a hospital (1 S.H.C.R. 77-80). A psychologist concluded that he suffers from periods in which impulsive action overcomes his capacity for reason and foresightful actions; that his capacity for emotional control and self-inhibition is less than that of an unimpaired person; that his condition has a demonstrable physical basis; and that these findings could have been made in 1989 had he been tested (1 S.H.C.R. 67-68).

Petitioner also presented evidence in the state habeas proceeding that his mother conceived him as the result of a rape at age 16; that she frequently told him that she did not want him and could not complete her education because of him; that he lived sporadically with various relatives during childhood and had no positive, lasting, male influence; that he and his younger sister lived in an apartment, supervised by an older cousin, during the week; that his mother used drugs when she came home on the weekends; that he lived in poverty and had only the bare essentials; that he received little adult supervision or love; and that he did poorly in special education classes, dropped out of school in the ninth grade, and began to use drugs (1 S.H.C.R. 77-80). The jury that sentenced him to death did not hear any of this evidence.

1. Petitioner was prejudiced by counsel's failure to discover and present evidence of his mental impairment.

The state habeas district court concluded that counsel were not ineffective in failing to investigate petitioner's mental condition because the evidence did not demonstrate that he suffers from organic brain damage. *App*. 44-45, 57. The TCCA held that, although counsel "may well have performed deficiently" in failing to investigate, discover, and present evidence of petitioner's mental impairment, there was no reasonable probability that, "but for these deficiencies, the outcome of his punishment proceeding would have been different." *App*. 34.

The federal district court held that counsel performed deficiently in this regard; that the state court's prejudice determination was based on an unreasonable determination of the facts; and that there was a reasonable probability that at least one juror would have persisted in a negative answer to a special issue, resulting in a life sentence, had this evidence been presented. *App*. 23-27.

The Fifth Circuit disagreed, holding that the district court erred in failing to defer to the TCCA's determination that petitioner did not establish the requisite prejudice. *App*. 8. However, the Fifth Circuit failed to recognize that the TCCA applied an erroneous standard of review for determining prejudice. The TCCA framed the issue as "whether there is a reasonable probability that [petitioner's] jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that [petitioner]

would have received a life sentence instead of the death penalty." *App.* 37-38. The TCCA erroneously required petitioner to demonstrate a reasonable probability that the jury would have reached a verdict on punishment, and at least ten jurors would have answered a special issue in a way that would have resulted in a life sentence. To the contrary, he only had to demonstrate a reasonable probability that at least one juror would have voted against the death penalty, resulting in a mistrial and an automatic life sentence. This Court should grant *certiorari* to determine whether the Fifth Circuit erred in deferring to a state court prejudice determination based on a standard of review that was contrary to or involved an unreasonable application of *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), and *Wiggins v. Smith,* 539 U.S. 510, 537 (2003).

2. Counsel performed deficiently in failing to present any evidence of petitioner's disadvantaged background.

The state habeas district court concluded that counsel did not perform deficiently in failing to present any evidence of petitioner's disadvantaged background in view of lead counsel Connie Williams' belief that petitioner's mother, Flora, was not sympathetic to him and that his sister, Carla, was relatively young when he was incarcerated. *App.* 48-49, 58. The TCCA upheld this decision without citing any authority for the proposition that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect. *App.* 36-37.

The federal district court held that the TCCA reasonably concluded that counsel made a sound strategic decision not to call Flora but unreasonably concluded that counsel made a sound strategic decision not to call Carla, as that decision resulted in "the virtual absence of a mitigation case…." *App.* 22-23, 27-28.

The Fifth Circuit disagreed, holding that the TCCA reasonably determined that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background. *App.* 8-9. It relied substantially on the state court's alleged factual determination that counsel "did not believe that Carla Jennings would be a sympathetic witness." *App.* 8. This conclusion, which was based on respondent's interpretation of Williams' affidavit, is not supported by the state habeas district court's findings of fact or the TCCA's opinion. The state habeas district court found that counsel did not call Flora because he perceived that she "was not sympathetic" to petitioner and did not call Carla because her testimony would not be beneficial, as she was "five to six years younger than [petitioner] who had spent much of his time in juvenile facilities or prison." *App.* 48. The TCCA acknowledged these different reasons in its opinion. *App.* 36. There was no evidence that counsel did not call Carla because she was unsympathetic to petitioner.

The Fifth Circuit's conclusion that the state court reasonably determined that counsel did not perform deficiently in failing to call Carla because he believed that

she was unsympathetic to petitioner is based on a misinterpretation of counsel's affidavit and is contrary to the state habeas district court's findings and the TCCA's opinion. This Court should grant *certiorari*, vacate the judgment, and remand to the Fifth Circuit to reconsider its conclusion that was based on an inaccurate factual premise. Alternatively, this Court should grant *certiorari* to determine whether a state court judge reasonably could conclude that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect.

3. The Fifth Circuit improperly applied the federal doctrine of waiver in refusing to consider an argument initially made in a footnote in a state court brief that was not waived under state law.

Petitioner argued in footnote 25 on page 31 of his brief in the TCCA that counsel's deficient performance caused prejudice because, had counsel presented mitigating evidence of his mental impairment and/or disadvantaged background, any death sentence would have been reversed based on the nullification instruction that the jury received in violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989), as interpreted by *Penry v. Johnson*, 532 U.S. 782 (2001). The TCCA held that there was no Eighth Amendment violation in submitting the nullification instruction based on the evidence adduced at trial rather than the evidence that could have been adduced. *App.* 39-40.

The federal district court declined to consider petitioner's *Penry*-based prejudice argument—which he raised in the body of his federal petition—because

it was unexhausted in the state habeas proceeding. *App.* 28.

The Fifth Circuit acknowledged that petitioner established the factual basis to support the argument in state court but concluded that, by making it in a footnote, he did not give the TCCA a "fair opportunity" to consider it. *App.* 10. The Fifth Circuit held that petitioner "only vaguely alerted" the TCCA to the argument and that, as a result, it was unexhausted and procedurally defaulted. *App.* 11.

The Fifth Circuit erred in applying the federal doctrine of waiver to hold that this argument was inadequately briefed in state court. Under Texas law, a ground for relief raised in a footnote, without citation to authority, is inadequately briefed and will not be considered on appeal. The footnote in petitioner's brief contained an argument in support of the prejudice prong of his IAC claim; it was not a separate ground for relief. He adequately briefed it for state court purposes by citing the relevant authorities, and the TCCA addressed it in its opinion, albeit only in passing. Thus, the argument was exhausted in state court and is not procedurally defaulted in federal court. This Court should grant *certiorari*, summarily hold that the federal doctrine of waiver does not preclude a federal habeas court from considering an argument made initially in a footnote in a state court brief that was not waived under state law, vacate the judgment, and remand to the Fifth Circuit to consider the argument.

4. The Fifth Circuit erred in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected.

Petitioner's federal habeas petition presented one ground of IAC at the punishment stage based on three allegations of deficient performance. The district court granted relief on two allegations—the failure to discover and present mitigating evidence of mental impairment and disadvantaged background—but denied relief on the third allegation—counsel's prejudicial argument during summation that he could not quarrel with a death sentence. Petitioner raised the latter claim in a cross-point in his appellate brief but did not timely file a separate notice of appeal and motion for a certificate of appealability (COA). The Fifth Circuit recognized that there is a circuit split on whether a habeas petitioner "can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA." It held that the cross-point was procedurally defaulted based on circuit precedent because petitioner did not timely file a notice of appeal and move for a COA in the district court. *App.* 11-12.

The rule requiring a separate notice of appeal and motion for a COA should apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied. The rule should not apply

where the petitioner raises one ground of IAC; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance. In this scenario, the petitioner need not file a separate notice of appeal and move for a COA in the district court because the appellate court acquires jurisdiction over the entire IAC claim as a result of the respondent's notice of appeal. This Court should grant *certiorari* to resolve the circuit split and, ultimately, vacate the judgment and remand to the Fifth Circuit to consider the rejected allegation of deficient performance.

B. Procedural History

Petitioner pled not guilty to capital murder in cause number 506814 in the 208th District Court of Harris County, Texas. The jury convicted him and answered the statutory special issues in the affirmative, and the court sentenced him to death on July 13, 1989. Connie Williams and Grant Hardeway represented him.

The TCCA affirmed the conviction in an unpublished opinion issued on January 19, 1993. This Court denied certiorari on October 4, 1993. *Jennings v. State*, No. AP-70,911 (Tex. Crim. App.), *cert. denied*, 510 U.S. 830 (1993).

Petitioner filed a state habeas corpus application on September 20, 1996, and supplemented it on June 16, 2001. The district court entered findings of fact and conclusions of law recommending that relief be denied on January 22, 2006. The

TCCA denied relief in an unpublished opinion issued on November 26, 2008. *Ex parte Jennings*, Nos. AP-75,806 and 75,807, 2008 WL 5049911 (Tex. Crim. App. 2008). This Court denied certiorari on April 27, 2009. *Jennings v. Texas,* 556 U.S. ____, 129 S. Ct. 2052, 173 L.Ed.2d 1136 (2009).

Petitioner filed a federal habeas corpus petition on January 27, 2009. The district court granted a new trial on punishment on April 23, 2012. The Fifth Circuit reversed that judgment; denied relief in an unpublished opinion issued on July 22, 2013; and denied rehearing on August 15, 2013. *Jennings v. Stephens*, No. 12-70018, 2013 WL 3787589 (5th Cir. 2013).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF HABEAS CORPUS RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT STAGE OF A DEATH PENALTY TRIAL BY DEFERRING TO A STATE COURT PREJUDICE DETERMINATION THAT WAS CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

A state district court ordered a psychological evaluation of petitioner after he was charged with two aggravated robberies and burglary of a habitation in 1978. Dr. J.M. Bloom, a psychologist with the Harris County Psychiatric Hospital, prepared a report on June 21, 1978 (1 S.H.C.R. 46-49).[2] The following portion is pertinent (1 S.H.C.R. 48):

[2] Dr. Bloom's report was in the district clerk's files on the 1978 cases (2 S.H.C.R. 389-90).

> RESULTS:
>
> On the Ammons Test, Mr. Jennings obtained an IQ of 65, which is in the mild mentally retarded range of intelligence.
>
> On the Bender Gestalt, there is evidence of organic brain dysfunction, mild degree.

Dr. Bloom also expressed the opinion that petitioner was malingering (1 S.H.C.R. 48-49).

Connie Williams testified by affidavit in 1996 regarding the defense's preparation for the punishment stage (1 S.H.C.R. 40-43).[3] The defense did not conduct a "mitigation investigation" to discover evidence to offer in support of a life sentence because he did not fully appreciate the concept of mitigating evidence as it related to the special issues (1 S.H.C.R. 40-41). He prepared for the punishment stage by reviewing the penitentiary packets on the prior convictions (which contain the judgments and sentences) rather than the district clerk's files and by interviewing petitioner, his mother, and the chaplain. He did not investigate whether petitioner had any mental impairment that might have contributed to the commission of the offense or that would mitigate the punishment (1 S.H.C.R. 41). He did not know of any prior psychological evaluation, much less that Dr. Bloom prepared a report reflecting that petitioner demonstrated mild mental retardation and organic brain dysfunction in 1978 (1 S.H.C.R. 41-42). He did not consult with a psychologist or request a psychological evaluation because

[3] Williams had defended two capital murder cases at the time of petitioner's trial, one as lead counsel and one as "second chair" (1 S.H.C.R. 40).

he was not aware of Dr. Bloom's report and lacked the expertise to determine from his observations that petitioner might be mentally impaired. His failure to investigate petitioner's mental condition and present evidence of any mental impairment was not strategic; rather, it was a consequence of not knowing about any diagnosed mental impairment and petitioner not exhibiting any mental aberration.[4] Had he read Dr. Bloom's report, he would have requested a psychological evaluation, presented evidence of any mental impairment, and argued that petitioner's diminished mental condition made him less morally culpable for his conduct and constituted a reason to spare his life (1 S.H.C.R. 42).[5]

Petitioner was psychologically evaluated and tested in 1996 during the state habeas proceeding. Dr. Meyer Proler prepared a report regarding a Quantitative EEG (QEEG) that suggested that petitioner has a post-concussive syndrome (1 S.H.C.R. 72-73). Dr. Theodore Simon prepared a report regarding a SPECT-Scan in which abnormal findings in petitioner's frontal lobes, parietal lobes, and left temporal lobe "support the contention" that his brain has been injured (1 S.H.C.R. 75).

Dr. Windel Dickerson, a psychologist, prepared a report regarding a

[4] The State obtained an affidavit from Williams in 2003 asserting that there was "nothing about [petitioner] to indicate that he suffered from a mental illness or mental retardation" (1 S.H.C.R. 352). This observation is meaningless in view of Williams's acknowledgment that he lacked the expertise to determine that petitioner might be mentally impaired.

[5] Co-counsel Grant Hardeway gave a similar affidavit in 1996 (1 S.H.C.R. 44-45).

neuropsychological examination of petitioner in 1996 and the significance of the findings made by Drs. Bloom, Proler, and Simon. The neuropsychological examination did not confirm that petitioner is mentally retarded, but it suggested that he has "learning problems of a fairly subtle sort, difficulties with emotional stability and difficulty with impulsive behavior" (1 S.H.C.R. 68). The results of the QEEG and SPECT-Scan indicate that, at some point, he received a blow to the head that resulted in organic brain dysfunction (1 S.H.C.R. 67).[6] His prison medical records do not reveal any incident that could account for these findings. He suffers from periods in which impulsive action overcomes his capacity for reason and foresightful action; his capacity for emotional control and self-inhibition is less than that of an unimpaired person; his condition has a demonstrable physical basis; and these findings could have been made in 1989 had he been tested (1 S.H.C.R. 68).

Flora Jennings testified by affidavit in 1996 that petitioner had two head injuries that required treatment at a hospital during childhood. He was in an auto accident in which the car rolled over several times, and he was hit in the head with a baseball bat (1 S.H.C.R. 77-78). Carla Jennings testified similarly by affidavit in 1996 regarding the auto accident (1 S.H.C.R. 79-80).

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[6] Brain "damage" is an injury that causes necrosis or scarring of the tissue and is manifested by anatomical problems. Brain "dysfunction" means that the brain is not working properly; it can occur without any anatomical problems. Brain damage ordinarily produces brain dysfunction. Petitioner has both (1 S.H.C.R. 67).

Edward Mallett, a criminal defense lawyer, testified by affidavit in 1996 regarding his representation of Roger DeGarmo (1 S.H.C.R. 81-83). DeGarmo was convicted of capital murder and sentenced to death.[7] A federal court ordered a new trial because of prosecutorial misconduct. The defense hired Dr. Dickerson as a consulting expert to help prepare for the retrial (1 S.H.C.R. 81). Dr. Dickerson concluded that DeGarmo, although competent and sane, exhibited symptoms consistent with temporal lobe disorder, a form of organic brain damage, and suggested that specialists conduct tests (1 S.H.C.R. 82). The results of a QEEG and a PET-Scan demonstrated that DeGarmo suffered from temporal lobe and frontal lobe dysfunction. The defense presented this evidence at the punishment stage of the retrial. DeGarmo received a life sentence based on the jury's answer to the "mitigation" special issue (1 S.H.C.R. 83).

The State countered that, even had counsel read Dr. Bloom's report, they would not have been obligated to investigate petitioner's mental condition because Dr. Bloom ultimately concluded that petitioner was malingering in order to delay the proceedings (1 S.H.C.R. 48-49). Dr. John Nottingham, a psychiatrist at the Harris County Psychiatric Hospital, also examined petitioner in 1978 and agreed

[7] DeGarmo kidnapped a young woman in Houston, locked her in the trunk of his car, drove her to another county, and shot her in the head. *DeGarmo v. State*, 691 S.W.2d 657, 659 (Tex. Crim. App. 1985). He achieved lasting infamy when he testified at the punishment stage that he was guilty and that he would kill or have someone kill each juror or members of their families if he were not sentenced to death. *Id*. at 660.

with that diagnosis (1 S.H.C.R. 243-44).[8] Dr. Jerome Brown, a psychologist, examined petitioner prior to trial in 1989 and concluded that he was sane and competent (1 S.H.C.R. 245-47).[9]

The State hired Dr. Victor Scarano, a psychiatrist, in 2002 to review the evidence developed in the state habeas proceeding and prepare a report (1 S.H.C.R. 336-47). Dr. Scarano concluded that petitioner malingered a mental disease or disorder in 1978; that he did not suffer from organic brain dysfunction at the time of the primary offense; and that his conduct during the offense was controlled and deliberate rather than impulsive (1 S.H.C.R. 336).[10]

The state habeas district court adopted the State's proposed findings of fact and conclusions of law verbatim. *App.* 42-60. It concluded that counsel were not ineffective in failing to investigate petitioner's mental condition because the evidence did not demonstrate that he suffers from organic brain dysfunction. *App.* 44-45, 57.

The TCCA held that, although counsel "may well have performed deficiently" in failing to investigate, discover, and present evidence of petitioner's

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[8] Dr. Nottingham observed that petitioner's speech demonstrated that he is "slow" and that his syntax is simple (1 S.H.C.R. 244).

[9] Petitioner did not cooperate with Dr. Brown during the examination (1 S.H.C.R. 245-47).

[10] Dr. Scarano considered it significant that petitioner obtained a GED and college credits in prison and acquired skills as a butcher and a barber (1 S.H.C.R. 342). He believed that the results of the QEEG and SPECT-Scan should not alone be used to make a diagnosis of organic brain dysfunction due to traumatic brain injury (1 S.H.C.R. 337, 345-47).

mental impairment, there was no "reasonable probability that, but for these deficiencies, the outcome of his punishment proceeding would have been different." *App.* 34. The TCCA framed the issue as "whether there is a reasonable probability that [petitioner's] jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that [petitioner] would have received a life sentence instead of the death penalty." *App*. 37-38. Although the jury could have decided that brain damage constituted a basis for a sentence less than death, "brain damage would constitute practically the *only* circumstance to be entered on the side of life; there is precious little other evidence of mitigating value to counteract the substantial, non-statutory aggravating circumstances in this case." *App.* 39. Thus, there was no reasonable probability that the jury would have considered the chaplain's testimony and the evidence of brain damage to be sufficiently mitigating to warrant a life sentence. *Id*.

The federal district court held that counsel performed deficiently in this regard; that the state court's finding that there was no prejudice was based on an unreasonable determination of the facts; and that, had this evidence been presented, there was a reasonable probability that at least one juror would have persisted in a negative answer to a special issue, resulting in a life sentence. *App.* 23-27.

The Fifth Circuit disagreed, holding that the district court erred in failing to defer to the TCCA's determination that petitioner did not establish the requisite

prejudice. *App.* 8. However, the Fifth Circuit failed to recognize that the TCCA applied an erroneous standard of review for determining prejudice. The TCCA erroneously required petitioner to demonstrate a reasonable probability that the jury would have reached a verdict on punishment, and at least ten jurors would have answered a special issue in a way that would have resulted in a life sentence. To the contrary, he only had to demonstrate a reasonable probability that at least one juror would have voted against the death penalty, resulting in a mistrial and an automatic life sentence.

The TCCA's prejudice determination conflicts with this Court's clearly established precedent. To prevail on an IAC claim, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A capital defendant must show a reasonable probability that, but for counsel's errors, his death sentence is not worthy of confidence. Texas law in 1989 provided that, if the jurors did not agree on affirmative answers to the special issues, the court had to impose a life sentence. TEX. CODE CRIM. PROC. art. 37.071(e) (West 1988). Thus, prejudice is established in a capital case if there is a reasonable probability that at least one juror would have persisted in a negative answer to a special issue based on the mitigating evidence. *Cf. Wiggins*, 539 U.S. at 537 ("Wiggins' sentencing jury

heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place [his] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").[11]

The federal district court granted relief in reliance on *Williams v. Taylor*, *supra*. The TCCA mentioned *Williams* only in passing in a footnote. *App.* 38. The Fifth Circuit attempted to distinguish the cases on the basis that Williams presented "significantly more mitigation evidence" than petitioner. *App.* 6. This Court has rejected a similar comparative analysis in its precedent holding that the Texas nullification instruction was unconstitutional. The underlying principle in the nullification cases is that, if trial counsel introduced testimony regarding the defendant's mental impairment and/or disadvantaged background—which is beyond the scope of the statutory special issues—an appellate court must reverse the death sentence because of the unconstitutional nullification instruction regardless of the quantity or quality of the mitigating evidence. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007);

[11] The TCCA relied exclusively on federal circuit court cases in concluding that petitioner failed to demonstrate prejudice. *App.* 39. These cases were decided under the AEDPA standard of review, which requires a federal habeas petitioner to demonstrate that the state court decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Federal cases relying on the AEDPA standard do not apply in a state habeas corpus proceeding. The TCCA found no prejudice because it relied on federal cases that were based on the more onerous AEDPA standard of review.

Smith v. Texas, 550 U.S. 297 (2007).[12] The evidence need not be as severe as the abuse suffered during childhood by Johnny Paul Penry. *See Penry v. Lynaugh*, 492 U.S. at 309.[13] Thus, the Fifth Circuit unreasonably applied this Court's precedent in concluding that petitioner did not establish prejudice because the mental impairment in his case was not as severe as in *Williams*.

Williams was in the same procedural posture as petitioner's case when this Court granted *certiorari*. Trial counsel failed to present evidence of Williams' disadvantaged background and possible mental impairment. The state habeas court denied relief after concluding that there was no prejudice based on the facts of the offense and Williams' criminal history. *Williams*, 529 U.S. at 371-72. The federal district court granted relief, concluding that the state court's prejudice determination was based on a factual error and an erroneous interpretation of *Strickland*. *Id.* at 372-73. The Fourth Circuit disagreed, deferring to the state court's prejudice determination because the evidence of future dangerousness was overwhelming. *Id.* at 374. This Court recognized that the federal courts have an independent responsibility to interpret federal law and need not "defer to a state-

[12] "Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime." *Brewer*, 550 U.S. at 294.

[13] For example, the TCCA set aside a death sentence, despite the absence of an objection to the nullification instruction, where the defense presented mitigating evidence that the defendant's family lived in poverty in a crime-ridden neighborhood. *Ex parte Smith*, 309 S.W.3d 53, 61-64 (Tex. Crim. App. 2010).

court application of the federal law that is, in the independent judgment of the federal court, an error." *Id.* at 379, 387. "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's … sentence of death … violates the Constitution, that independent judgment should prevail." *Id.* at 389. The state court in *Williams* analyzed prejudice under the wrong standard by failing to evaluate "the totality of the available mitigating evidence" against the aggravating evidence; as a result, its prejudice determination was contrary to and involved an unreasonable application of *Strickland*. *Id.* at 393-99. Although Williams' evidence "may not have overcome a finding of future dangerousness," it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

Similarly, in *Wiggins*, the state habeas court concluded that counsel made a reasonable strategic decision to focus his efforts on convincing the jury that Wiggins was not directly responsible for the murder instead of presenting mitigating evidence of his disadvantaged background. *Wiggins*, 539 U.S. at 518. The federal district court granted relief, concluding that the state court unreasonably applied *Williams*. *Id.* The Fourth Circuit disagreed, deferring to the state court's conclusion that counsel made a reasonable strategic decision not to present the mitigating evidence. This Court held that the state court unreasonably applied *Strickland* in deferring to counsel's decision not to present a mitigation

case based on an inadequate investigation. *Id.* at 534.[14] Wiggins had the kind of troubled history that was relevant to the jury's assessment of his moral culpability. *Id.* at 535. Sentencing strategies of focusing on his lack of direct responsibility for the murder and his disadvantaged background were "not necessarily mutually exclusive." *Id.* There was a reasonable probability that at least one juror would have voted against the death sentence had the mitigating evidence been presented. *Id.* at 537.

The Fifth Circuit acknowledged in petitioner's case that, although respondent conceded that petitioner "may have a learning disability … and … a brain injury of unspecified type and severity," had counsel presented the Bloom report and the evidence developed in the state habeas proceeding, the State would have presented compelling evidence in rebuttal. *App.* 7. It found no prejudice because, "… at best, [petitioner] relies on the opinions of dueling experts who would have provided conflicting evidence concerning his mental capacity," and he cannot show that "no reasonable jurist would have reached the same conclusion" as the TCCA. *App.* 8. Almost every death penalty case involving mental health issues has "dueling experts." Both the TCCA and the Fifth Circuit assumed, without any factual or legal basis, that all twelve jurors would have believed the prosecution experts instead of the defense experts and that no juror would have believed that petitioner had some degree of mental impairment that made him less

[14] Counsel completely failed to investigate petitioner's mental health history (1 S.H.C.R. 41).

morally culpable for his conduct and, as a result, voted for a life sentence.

The Fifth Circuit erred in deferring to a state court prejudice determination that was based on an erroneous standard of review that required petitioner to demonstrate that the jury would have reached a verdict on punishment, and at least ten jurors would have voted for a life sentence had counsel presented evidence of his mental impairment. The correct analysis under this Court's clearly established precedent is whether, had counsel discovered and presented the evidence of petitioner's mental impairment, there is a reasonable probability that at least one juror would have voted for a life sentence. The evidence presented by petitioner in the state habeas proceeding is "exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). Evidence of his mental impairment perhaps would have explained why he was prone to engage in violent outbursts. *Id.* at 943. Had the jury been able to place his mental impairment "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 944. It is irrelevant that the evidence of his mental impairment was not as severe as in *Williams* and *Wiggins* as long as there is a reasonable probability that it could have influenced at least one juror.

This Court should grant *certiorari* to determine whether the Fifth Circuit erred in deferring to a state court prejudice determination that was based on a standard of review that was contrary to or involved an unreasonable application of

Williams and *Wiggins*. SUP. CT. R. 10(c).

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE STATE COURT REASONABLY DETERMINED THAT TRIAL COUNSEL MADE A SOUND STRATEGIC DECISION NOT TO PRESENT ANY EVIDENCE OF PETITIONER'S DISADVANTAGED BACKGROUND IN A CAPITAL CASE WHERE, IN ITS ABSENCE, THE JURY WAS DEPRIVED OF MEANINGFUL MITIGATING EVIDENCE THAT COULD HAVE RESULTED IN A LIFE SENTENCE.

Counsel proffered petitioner's testimony at a hearing outside the presence of the jury that he was raised in an impoverished home by a drug-addicted mother who had been convicted of theft; that he often was left without adult supervision; that he was a poor student who dropped out of school in the ninth grade; and that he was too intoxicated to act deliberately at the time of the offense (39 R.R. 196-99). The trial court denied petitioner's motion to restrict the cross-examination to the charged offense (39 R.R. 198-200). Thereafter, counsel presented testimony from the chaplain but did not present any testimony regarding petitioner's disadvantaged background.

Flora and Carla Jennings testified by affidavit in 1996 regarding petitioner's social history (1 S.H.C.R. 77-80). Flora was raped at age 16, became pregnant, and gave birth to petitioner at age 17 (1 S.H.C.R. 77). She frequently told him that he was conceived as a result of a "date rape" and that she could not complete her education because of him. According to Carla, Flora frequently told him that she did not want him (1 S.H.C.R. 79).

Flora sent petitioner to live with her mother and grandmother on a farm outside Houston because she could not support him. She married in 1962, and petitioner returned to Houston two years later (when he was about six years old) to live with the family. Petitioner's stepfather was seldom at home. Flora soon divorced him, and petitioner had no male role model. Flora lived with and cared for an elderly woman during the week. Petitioner and Carla lived in an apartment, supervised by an older cousin, and received little adult supervision or love. Flora used drugs when she came home on the weekends. The family was poor and had only the bare essentials, such as food and clothing (1 S.H.C.R. 77, 79).

Petitioner performed poorly in special education classes, dropped out of school in the ninth grade, and began to use drugs. He was in and out of reform school and prison from the age of 15. He had no stable influences when he was at home (1 S.H.C.R. 78, 80).

Connie Williams spoke to Flora and Carla a couple of times but did not question them much about petitioner's background or ask them to testify. They would have testified to the facts set forth in their affidavits (1 S.H.C.R. 78, 80).

Williams testified by affidavit in 1996 that he was informed that petitioner was raised by a drug-addicted mother, had a limited education, and abused alcohol. He decided not to offer this evidence after the court denied his motion to restrict the cross-examination of petitioner (1 S.H.C.R. 41).

The State obtained an affidavit from Williams in 2003 asserting that he did

not call Flora or Carla because he did not think that their testimony would be beneficial, as Flora was not sympathetic to petitioner and Carla was quite young when petitioner left home (1 S.H.C.R. 351).[15] The State suggested in its answer in the state habeas proceeding that information contained in offense reports and witness statements not admitted in evidence at trial provided additional reasons not to call them (1 S.H.C.R. 223-25). Petitioner's girlfriend, Wanda Taylor, told the police that Flora placed a wallet containing money stolen in the charged offense in a drawer at Carla's house and that Flora had a bad cocaine habit and may have gone to buy cocaine after visiting petitioner at the hospital. The offense reports reflect that Flora appeared to be high when she gave her statement and that she told the officer that she smoked a cocaine-laced marijuana cigarette earlier that day; he arrested her for possession of a controlled substance after she allowed him to search her purse. Petitioner told the police that Carla took him to the hospital after he was shot and that he gave Flora and Carla money from the robberies. Flora and Carla told the probation officer who prepared the 1978 presentence investigation report that petitioner was very moody and tended to withdraw; was "mixed-up"; was constantly truant from school and in trouble with the law as a juvenile; and acted strange.

The state habeas district court concluded that counsel did not perform

[15] Petitioner was sent to trade school in 1973, to a juvenile facility in 1974, and to prison in 1975 (39 R.R. 171-81). Carla was born on May 9, 1962 (1 S.H.C.R. 304). She was 11 years old when he first left home. Thus, she was old enough to perceive and remember these events.

deficiently in failing to present evidence of petitioner's disadvantaged background because he believed that the testimony of Flora and Carla would not be beneficial. *App.* 48-49, 58. It cited the two reasons given by Williams—that Flora was not sympathetic to petitioner and that Carla was so young when he left home—and the additional reasons that the State suggested but that Williams did not articulate. *App.* 48-49.[16]

The TCCA held that counsel made a sound strategic decision not to present evidence of petitioner's disadvantaged background through Flora, who was not sympathetic to him, or through Carla, who was relatively young when he was incarcerated. *App.* 36-37. The TCCA did not cite any authority for the proposition that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect.

The federal district court held that the TCCA reasonably concluded that counsel made a sound strategic decision not to call Flora but unreasonably concluded that counsel made a sound strategic decision not to call Carla, as that decision resulted in "the virtual absence of a mitigation case . . . . " *App.* 22-23, 27-28.

The Fifth Circuit disagreed, holding that the TCCA reasonably determined

[16] Petitioner asserted in his objections in state court that Williams' explanations were not credible because they were inconsistent with his conduct in proffering the evidence at trial and, in any event, that it is unsound strategy to fail to present any evidence of a capital defendant's disadvantaged background because the witnesses are imperfect (2 S.H.C.R. 433-34).

that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background. *App.* 8-9. It relied substantially on what it categorized as the state court's factual determination that counsel "did not believe that Carla Jennings would be a sympathetic witness." *App.* 8. This conclusion, which was based on respondent's interpretation of Williams' affidavit, is not supported by the state habeas district court's findings or the TCCA's opinion. The state habeas district court found that counsel did not call Flora because he perceived that she "was not sympathetic" to petitioner and did not call Carla because her testimony would not be beneficial, as she was "five to six years younger than [petitioner] who had spent much of his time in juvenile facilities or prison." *App.* 48. The TCCA acknowledged these different reasons in its opinion. *App.* 36. There was no evidence that Carla was unsympathetic to petitioner or that counsel did not call her for that reason.

The Fifth Circuit's conclusion that the state court reasonably determined that counsel did not perform deficiently in failing to call Carla because he believed that she was unsympathetic to petitioner is based on a misinterpretation of counsel's affidavit and is contrary to the state habeas district court's findings and the TCCA's opinion. A state court decision based on an erroneous factual finding is unreasonable. *Wiggins,* 539 U.S. at 528 (state court decision that counsel made sound strategic decision not to present mitigating evidence of defendant's disadvantaged background unreasonable where based on erroneous factual finding

regarding content of records). This Court should grant *certiorari*, vacate the judgment, and remand to the Fifth Circuit to reconsider its conclusion that was based on an inaccurate factual premise. SUP. CT. R. 10(c).

Additionally, the Fifth Circuit failed to give proper consideration to the importance of testimony regarding a capital defendant's disadvantaged background. An appellate court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Because testimony regarding a capital defendant's disadvantaged background places him in a more sympathetic light before the jury, counsel has a duty to investigate and present this evidence. *Ex parte Gonzales*, 204 S.W.3d 391, 396-97 (Tex. Crim. App. 2006).

Even if Williams truly believed that Carla would not be an effective witness because of her age and limited interaction with petitioner while he was incarcerated, there can be no doubt that her testimony regarding the sordid conditions of their home and the poor parenting skills of their mother would have been beneficial. Indeed, Carla knew petitioner much better than the chaplain, who was the only defense witness at the punishment stage. There was no legitimate reason not to call her, as her testimony regarding his disadvantaged background could not have been impeached.

The Fifth Circuit also concluded that counsel "could reasonably have concluded that resources were better spent focusing the jury's attention on

[petitioner's] lack of future dangerousness rather than attempting to garner support for [petitioner] based on his troubled background." *App.* 9.[17] To the contrary, Williams' strategy was to present evidence of petitioner's disadvantaged background rather than to focus solely on future dangerousness—which was a losing issue. Indeed, he unsuccessfully tried to offer that evidence through petitioner without exposing him to cross-examination beyond the charged offense—a strategy foreclosed by the Texas Rules of Evidence (39 R.R. 198-200). Furthermore, neither Williams nor Hardeway argued at the punishment stage that the chaplain's testimony demonstrated that petitioner would not be dangerous in the future. Their arguments can be summarized as follows:

- petitioner did not act deliberately in firing the shots because everything happened very fast (39 R.R. 233-34);
- petitioner demonstrated remorse during his recorded confession and informed the police of his other robbery victims (39 R.R. 229-30, 235);
- there was no evidence that petitioner committed acts of violence in jail (39 R.R. 238);
- the chaplain has known petitioner for a year and says that he is not incorrigible (39 R.R. 237); and
- although counsel wants the jury to find mitigation that would result in

[17] The Fifth Circuit observed that a capital defendant's disadvantaged background can be a "double–edged sword" because, although it might suggest he is not as morally culpable for his conduct, it also might suggest that, as a product of his environment, he is likely to be dangerous in the future. *App*. 9. This observation carries no weight in petitioner's case, as there was substantial evidence that he would be dangerous outside of prison based on his criminal history; realistically, the only way to persuade a juror to vote to spare his life was to present evidence of his disadvantaged background and argue that it made him less morally culpable for his conduct.

> a life sentence, if the jury cannot do so, counsel "can't quarrel with that"; and nobody will miss petitioner if the jury kills him (39 R.R. 230, 236, 239-40).

Competent counsel would have tried to persuade at least one juror to find that petitioner was less morally culpable for his conduct because of his disadvantaged background and/or that he would not be dangerous in the future because he would be in prison. These sentencing strategies were not "mutually exclusive." *Cf. Wiggins*, 539 U.S. at 535.

The Fifth Circuit acknowledged that the chaplain's testimony regarding petitioner's conduct had only a "tenuous connection" to his moral culpability. *App. 10*. A juror who voted to spare his life probably would do so because he believed that petitioner was less morally culpable for his conduct because of his mental impairment or disadvantaged background rather than because he would not be dangerous in the future. The chaplain's sparse testimony could not have persuaded any juror to do so in view of the facts of the offense and petitioner's criminal history. No state court judge reasonably could conclude that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background under these circumstances. Even if Carla arguably was not a perfect witness, her testimony would have been much more compelling than the chaplain's. *See Simmons v. Leubbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) (state court unreasonably concluded that counsel made sound strategic decision not to present evidence of defendant's troubled background).

Ultimately, the Fifth Circuit concluded that "there was no AEDPA-recognizable error" based on the state court determination that counsel "reasonably could have decided that the risks associated with [Carla's] unsympathetic testimony outweighed any benefits." *App.* 9. There was no evidence that Carla was unsympathetic to petitioner or that counsel did not call her for that reason; and the state court did not so find. Alternatively, this Court should grant *certiorari* to determine whether a state court judge reasonably could conclude that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect. SUP. CT. R. 10(c).

III. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL DOCTRINE OF WAIVER PRECLUDES A FEDERAL HABEAS COURT FROM CONSIDERING AN ARGUMENT MADE INITIALLY IN A FOOTNOTE IN A STATE COURT BRIEF THAT WAS NOT WAIVED UNDER STATE LAW.

Petitioner argued in footnote 25 on page 31 of his brief in the TCCA that counsel's deficient performance caused prejudice because, had counsel presented mitigating evidence of his mental impairment or disadvantaged background, any death sentence would have been reversed based on the nullification instruction that the jury received in violation of *Penry v. Lynaugh*, as interpreted by *Penry v.*

Johnson.[18] The TCCA held that there was no Eighth Amendment violation in submitting the nullification instruction based on the evidence adduced at trial rather than the evidence that could have been adduced. *App.* 39-40.

The federal district court declined to consider petitioner's *Penry*-based prejudice argument—which he raised in the body of his federal petition—because it was unexhausted in the state habeas proceeding. *App.* 28.

The Fifth Circuit acknowledged that petitioner established the factual basis to support the argument in state court but concluded that, by making it in a footnote, he did not give the TCCA a "fair opportunity" to consider it. *App.* 10. It relied on *Bridas SAPIC v. Gov't of Turkm*, 345 F.3d 347, 356 n.7 (5th Cir. 2003), which held—in a footnote, no less—that an argument raised only in a footnote in a brief is waived. The Fifth Circuit, after quoting verbatim the lengthy footnote in petitioner's brief, held that petitioner "only vaguely alerted" the TCCA to the argument and that, as a result, it was unexhausted and procedurally defaulted. *App.* 11.

The Fifth Circuit erred in applying the federal doctrine of waiver to hold that petitioner's argument was procedurally defaulted under Texas law. *Bridas* and the

[18] Petitioner made this argument in a footnote instead of in the body of the brief because he could not have plausibly contended that the TCCA should vacate the death sentence based only on the unconstitutional nullification instruction, as counsel failed to present evidence at the punishment stage that could not be considered within the scope of the special issues. Rather, petitioner made the observation that, had counsel presented evidence of his mental impairment and/or disadvantaged background, a habeas court ultimately would have vacated the death sentence because of the unconstitutional nullification instruction.

cases on which it relies involve direct appeals in federal cases, which are governed by the Federal Rules of Appellate Procedure. *See Quick Techs, Inc. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002). The federal rules do not apply to Texas appellate briefs.

Under Texas law, a ground for relief raised in a footnote, without citation to authority, is inadequately briefed and will not be considered on appeal. *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995). The footnote in petitioner's brief contained an argument in support of the prejudice prong of his IAC claim; it was not a separate ground for relief. He adequately briefed the argument for state court purposes by citing the relevant authorities, and the TCCA addressed it in its opinion, albeit only in passing. Thus, the argument was exhausted in state court and is not procedurally defaulted in federal court.

The Fifth Circuit's holding also assumes that the TCCA ignores footnotes. Petitioner's one-half page, single-spaced footnote was hard to miss. It is illogical to conclude that the TCCA would consider the argument had it been made in one page of double-spaced text but not in a one-half page, single-spaced footnote.

Petitioner argued in the footnote that counsel's failure to present mitigating evidence of his mental impairment and/or disadvantaged background resulted in prejudice because, had it been presented, a habeas court ultimately would have vacated the death sentence because of the unconstitutional nullification instruction. This Court should grant *certiorari*, summarily hold that the federal doctrine of

waiver does not preclude a federal habeas court from considering an argument made initially in a footnote in a state court brief that was not waived under state law, vacate the judgment, and remand to the Fifth Circuit to consider the argument. SUP. CT. R. 10(c)

IV. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A FEDERAL HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MUST FILE A SEPARATE NOTICE OF APPEAL AND MOTION FOR A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED WHERE THE FIFTH CIRCUIT ACQUIRED JURISDICTION OVER THE ENTIRE CLAIM AS A RESULT OF THE RESPONDENT'S APPEAL.

Petitioner's federal habeas petition presented one ground of IAC at the punishment stage based on three allegations of deficient performance. The district court granted relief on two allegations—the failure to discover and present mitigating evidence of mental impairment and disadvantaged background—but denied relief on the third allegation—counsel's prejudicial argument during summation that he could not quarrel with a death sentence. Petitioner raised the latter claim in a cross-point in his appellate brief but did not file a separate notice of appeal and motion for a COA. The Fifth Circuit recognized that there is a circuit split on whether a habeas petitioner "can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA." *App.* 11. The Seventh Circuit does not require a

federal habeas petitioner to seek a COA when an appeal is already before the court based on the state's appeal of a grant of habeas relief. *Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir. 2002). The Second Circuit does require him to do so. *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003). The Fifth Circuit held that petitioner's cross-point was procedurally defaulted under *Wiley v. Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010), because he did not timely file a notice of appeal and move for a COA in the district court. *App.* 12.

The rule requiring a separate notice of appeal and motion for a COA should apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied. *See Beltran v. Cockrell*, 294 F.3d 730, 733 (5th Cir. 2002) (district court granted relief on false testimony claim and denied relief on IAC claim; director appealed; and petitioner cross-appealed to raise IAC claim). The petitioner in *Wiley* failed to do this. The rule should not apply where the petitioner raises one ground of IAC; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance. In this scenario, the petitioner need not file a separate notice of appeal and move for a COA in the district court because the appellate court acquires jurisdiction over the entire IAC claim as a result of the respondent's notice of appeal.

Respondent's notice of appeal stated that he was appealing from the district court's "memorandum and order and final judgment" conditionally granting habeas relief. USCA5 123-25. The Fifth Circuit acquired jurisdiction over the entire IAC claim, which constituted one ground for relief but included all of the allegations of deficient performance. This Court should grant *certiorari* to resolve the circuit split and, ultimately, vacate the judgment and remand to the Fifth Circuit to consider the rejected allegation of deficient performance. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of *certiorari*, vacate the judgment of the Fifth Circuit, and remand for a new trial on punishment in state court; or, in the alternative, remand to the Fifth Circuit for further consideration.

Respectfully submitted,

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