No. _____

In The

Supreme Court of the United States

LEON PHILLIP JACOB,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of solicitation of two capital murders and sentenced to life in prison. The cases were indefensible, but he demanded a trial.

Trial counsel knew that petitioner had a history of mental illness, including treatment at a hospital that diagnosed him with bipolar and personality disorders. Counsel hired a psychologist to evaluate him but abandoned the investigation because petitioner refused to cooperate. The prosecution disclosed the hospital records, but counsel failed to introduce them or present expert testimony to explain petitioner's mental illness. Counsel falsely told the court during trial that he could not obtain the records and that the psychologist had "nothing to testify about" and failed to communicate with counsel.

Petitioner alleged on habeas that counsel was ineffective in failing to present mitigating evidence at punishment. The habeas court found that counsel performed deficiently in failing to obtain and present evidence of petitioner's mental illness documented in the records; in lying about his knowledge of the records; and in failing to present expert testimony to explain the mitigating evidence. But the court concluded that petitioner did not suffer prejudice, despite receiving maximum sentences. The Texas Court of Criminal Appeals (TCCA) denied relief. The question presented is:

> Whether the Texas courts' prejudice analysis defies this Court's precedents in *Strickland v.*

QUESTION PRESENTED—Continued

Washington, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and their progeny where the habeas court found that trial counsel performed deficiently in failing to investigate and present available mitigating evidence of petitioner's mental illness—and lied to the trial court about his reasons for this omission—and where the jury assessed maximum sentences.

RELATED CASES

- *State of Texas v. Jacob*, Nos. 1543812 & 1543813, 263rd District Court of Texas. Judgments of Conviction entered March 26, 2018.
- *Jacob v. State of Texas*, Nos. 14-18-00304-CR & 14-18-00305-CR, Court of Appeals for the Fourteenth District of Texas. Opinion entered August 29, 2019.
- *Jacob v. State of Texas*, Nos. PD-1262-19 & PD-1263-19, Texas Court of Criminal Appeals. Orders Refusing Discretionary Review entered March 11, 2020.
- *Ex parte Jacob*, Nos. WR-94,428-01 & WR-94,428-02, Texas Court of Criminal Appeals. Orders Denying Habeas Corpus Relief entered September 6, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leon Phillip Jacob, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's orders denying habeas corpus relief (App. 1-2) are unreported. The TCCA's orders denying petitioner's motion to file and set the applications (App. 3-4) are unreported. The state district court's findings of fact and conclusions of law (App. 5-50) are unreported. The TCCA's orders refusing discretionary review on direct appeal (App. 55-56) are unreported. The Texas Court of Appeals' published opinion affirming the convictions on direct appeal (App. 57-82) is available at 587 S.W.3d 122.

JURISDICTION

The TCCA denied relief on September 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

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."

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled not guilty to two charges of solicitation of capital murder in the 263rd District Court of Harris County, Texas. A jury convicted him of both charges and assessed punishment at life in prison and a $10,000 fine in each case. The trial court entered judgments on March 26, 2018.

The Texas Court of Appeals affirmed petitioner's convictions in a published opinion issued on August 29, 2019. The TCCA refused discretionary review on March 11, 2020. *Jacob v. State*, 587 S.W.3d 122 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd).

Petitioner filed state habeas corpus applications on June 3, 2022. The trial court conducted an evidentiary hearing and recommended that relief be denied. The TCCA denied relief on September 6, 2023. *Ex parte Jacob*, Nos. WR-94,428-01 & WR-94,428-02 (Tex. Crim. App. 2023).[1]

[1] Petitioner is time-barred from filing a federal habeas corpus petition under 28 U.S.C. § 2254 because he filed the state habeas corpus application more than one year after his conviction became final on direct appeal.

B. Factual Statement

1. The Trial

The indictments alleged that petitioner, with the intent that capital murder be committed, requested, commanded, and attempted to induce Javier Duran (an undercover police officer posing as a hitman) to murder Meghan Verikas and Mack McDaniel for remuneration on or about March 8, 2017. Petitioner was charged along with his girlfriend, Valerie McDaniel. She committed suicide before trial.

Verikas was petitioner's ex-girlfriend, and Mack McDaniel was Valerie's ex-husband.[2] The prosecution presented evidence at trial that petitioner and Valerie engaged Duran to kill Verikas and Mack. The evidence included audio recordings that Duran secretly made of his conversations with petitioner and Valerie in which he posed as a hitman and they discussed what petitioner and Valerie wanted him to do to Verikas and Mack. The evidence of petitioner's guilt—as the primary actor regarding Verikas and as a party regarding Mack—was strong.

Petitioner's lead trial counsel, George Parnham, theorized in defense of the charge involving Verikas that petitioner did not intend that she be killed. Rather, he merely wanted Duran to "relocate" her to Pittsburgh, Pennsylvania. Parnham intended to present expert testimony from a forensic audio analyst

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[2] Petitioner will refer to Mack and Valerie McDaniel by their first names to avoid confusion.

who reviewed the recordings and would testify that, in his opinion, petitioner did not intend for Duran to kill Verikas. This testimony was clearly inadmissible under well-established Texas law that prohibits an expert from testifying that the defendant did not intend to commit the crime. The trial court correctly excluded this testimony when Parnham proffered it.[3] Without it, petitioner was left to testify in his own defense that he did not intend for Duran to kill Verikas. His testimony proved to be a disaster.

Parnham presented no defense to the charge that petitioner was a party to the solicitation of Mack's capital murder. He ignored that charge in his opening statement, and he failed to address it during his closing argument. After summation, the trial court called Parnham to the bench outside the hearing of the jury and asked, "Am I missing something or did you just argue to find your client not guilty of solicitation on Meghan, but you said nothing about the solicitation of Mack?" The court then allowed him to continue the summation. Given a second chance to address the charge involving Mack, Parnham uttered six sentences asking the jury to acquit petitioner of that charge. But he merely stated that the "same argument applies" to

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[3] The habeas court found that Parnham performed deficiently in failing to recognize that the forensic audio expert's testimony would be inadmissible (App. 12). However, the court concluded that petitioner did not suffer prejudice because he persisted in his factual innocence and, therefore, probably would have pled not guilty and gone to trial even had he known that the primary evidence in defense of the charge involving Verikas was inadmissible (App. 12-13).

the charge involving Mack as to the one involving Verikas. The defense to the charge involving Verikas was that petitioner only wanted Duran to "relocate" her to Pittsburgh, not to kill her. But there was no evidence that petitioner wanted Duran to "relocate" Mack to Pittsburgh. Mack had no connection to that city, and there was no factual basis for the jury to believe that petitioner would hire Duran to do anything to Mack other than kill him for Valerie's benefit. The charge involving Mack was utterly indefensible, and Parnham ignored it during the trial.[4]

Unsurprisingly, the jury convicted petitioner of both charges, and the case proceeded to the punishment stage. The statutory range of punishment gave the jury the option of sentencing petitioner to probation, anywhere from five to 99 years in prison, or life in prison, and up to a $10,000 fine in each case.

Outside the presence of the jury before punishment commenced, Parnham told the court that he had hired Dr. Gerald Harris, a forensic psychologist, to evaluate petitioner early in the case but that petitioner had refused to cooperate with Harris. Parnham also stated that petitioner had refused to sign authorization forms for Parnham to obtain petitioner's medical records from the Menninger Clinic, a psychiatric hospital where he previously received treatment for mental illness. Finally, Parnham told the court that he would not

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[4] When asked at the evidentiary hearing in the habeas proceeding what his defense was to the charge involving Mack, Parnham replied, "I have no idea."

present testimony from Harris because Harris had "nothing to testify about" and had refused to return Parnham's phone calls.

The prosecution offered aggravating evidence of petitioner's extraneous misconduct at the punishment stage. Recordings of jail phone calls revealed that he called himself "calculating," flirted with a news reporter, discussed book and movie deals about his case, and fought with other inmates. Verikas testified that he had assaulted, stalked, and harassed her. Other prosecution witnesses testified about petitioner's assaultive, threatening, harassing, volatile, and bizarre conduct over many years. However, he had no prior felony convictions.

Matthew Pospisil, Parnham's co-counsel, elicited on cross-examination of petitioner's ex-wife that petitioner had been "sick" and entered an in-patient mental facility at the Menninger Clinic for a few weeks in 2013, where he received a diagnosis and medication. Parnham presented testimony from petitioner's mother that he spent 60 days in the Menninger Clinic, a psychiatric facility associated with Baylor College of Medicine, where he was diagnosed with bipolar disorder and a personality disorder; and that he had been suicidal and depressed. The prosecutor elicited on cross-examination of petitioner's mother that he received these diagnoses in his mid-30s and was treated with lithium.

The jury also learned that petitioner, at age 13, watched his father die and blamed himself for not

saving his father's life. He also cared for a family friend who suffered from Alzheimer's disease.

The defense's case at the punishment stage consisted of four witnesses over 36 pages in the record, and three pages of final argument. Parnham did not introduce any medical records from Menninger to corroborate the lay testimony that petitioner had been treated there. Nor did he call a medical expert to testify about petitioner's history of mental illness, to explain what bipolar disorder and personality disorders are, and to provide a medical explanation for petitioner's charged conduct and extraneous misconduct. Without any expert explanation for why petitioner participated in an attempt to solicit the capital murders of two individuals, and why he had terrorized others over the years, the jury needed only two hours of deliberation to assess punishment at the statutory maximum sentences allowed under Texas law—life in prison and a $10,000 fine in each case.

2. The State Habeas Corpus Proceeding

Petitioner filed habeas corpus applications alleging, *inter alia*, that he was denied the effective assistance of counsel at the punishment stage because Parnham failed to present available mitigating evidence of his history of mental illness, including medical records and expert testimony from a mental health professional who could have explained to the jury what the evidence meant and why it was mitigating.

Petitioner introduced the Menninger Clinic records in the habeas proceeding (designated as Applicant's Exhibits 2A & 2B). Collectively, they demonstrated that petitioner (App. 19-21):

- was hospitalized at the Menninger Clinic in 2013;
- was diagnosed with bipolar disorder and personality disorders;
- was treated with lithium for manic symptoms;
- was a victim of trauma, abuse, grief, and loss;
- witnessed violence, sexual acts, and abuse in his childhood home;
- at age 14, witnessed his father die, had to call 911, and dragged him from a closet when paramedics arrived;
- never received emotional help after his father's death but had to care for his younger siblings;
- cooperated with his psychiatric treatment and made a sincere effort to moderate his behavior;
- had bipolar disorder and depression run in his family, and an uncle who committed suicide; and
- had a grandfather survive the Holocaust and several family members die at Auschwitz.

The parties entered into an agreed stipulation of evidence in the habeas proceeding that the prosecution

obtained petitioner's medical records from Menninger before trial; that it obtained a protective order for the records and served it on Parnham; that Parnham had requested the records; that the prosecution made them available to him; that it filed them in the clerk's office with a business record affidavit; and that they were available to Parnham in the prosecution's file and at the clerk's office at all times.

The habeas court conducted an evidentiary hearing at which Parnham, Pospisil, and Harris testified, as well as Dan Cogdell, an expert witness in criminal defense practice (who also represented Valerie McDaniel before she committed suicide).

Parnham testified that he did not remember if he reviewed psychiatric records, but he was "sure" that he knew they were in the prosecution's file and assumed that he was entitled to copies of petitioner's medical records that the prosecution possessed (App. 18). He admitted that he could have determined what medical professionals treated petitioner, issued subpoenas for them, and admitted the records into evidence with a business records affidavit (App. 18). He then could have presented testimony through these witnesses regarding the content of the records to give the jury petitioner's medical history, various diagnoses, treatments, and medications (App. 18-19).

Harris testified that Parnham hired him to conduct a mental health evaluation of petitioner (App. 22). He met with petitioner at the jail before trial, but petitioner refused to cooperate with his evaluation (App.

22). Based on petitioner's behavior, Harris believed that he was experiencing a manic episode at the jail; and Harris had serious concerns about his competency and sanity (App. 23). Parnham did not give Harris petitioner's records from Menninger to review, but Harris reviewed them during the habeas proceeding (App. 24). Harris never failed to return a phone call from Parnham. To the contrary, he never heard from Parnham again after meeting with petitioner at the jail. Harris could have testified at the punishment stage and explained how petitioner did not have full control over his behavior or actions at the time he was engaging in the charged conduct (App. 24). He also could have provided context and explanation for petitioner's irrational and abhorrent extraneous misconduct as mitigating evidence because it was the product of his mental illness and not his inherent nature (App. 24).

Pospisil, Parnham's co-counsel, testified that he believed from his interactions with petitioner that petitioner suffered from some type of mental illness (Pospisil Affidavit at 2). He and Parnham never discussed petitioner's mental health as a defense to the charges. They initially discussed investigating his mental health for mitigation at the punishment stage, but they did not revisit the issue or act on it. Pospisil did not know if Parnham obtained the Menninger records. They never discussed presenting mitigating evidence from an expert witness to testify about petitioner's history of mental illness (Pospisil Affidavit at 3). Pospisil did not believe Parnham's statement to the court at trial

that Harris refused to return Parnham's phone calls. He believes that Parnham should have conducted a more thorough mental health investigation to determine if petitioner had any mitigating evidence that could have been presented in support of a lesser sentence, and that Parnham should have presented any evidence that made petitioner less morally blameworthy for his conduct (Pospisil Affidavit at 4).

Dan Cogdell, the expert criminal defense lawyer, testified that Parnham's conduct in allowing the jury to hear only brief, passing mention of petitioner's mental illness without context and expert explanation was aggravating instead of mitigating. In his experience, when a jury hears about the defendant's mental illness, it raises concerns about the defendant returning to the community because it makes him sound more dangerous and riskier. Instead, Cogdell believed that Parnham should have had a mental health expert discuss the issues, explain them, and put them in context in the light most favorable to petitioner.

The habeas court found that Parnham performed deficiently at the punishment stage in three important ways:

(1) he failed to obtain and present evidence of petitioner's history of mental illness documented in the psychiatric records (App. 22);

(2) he lied to the trial court and was incompetent regarding his knowledge of the records (App. 22); and

(3) he failed to present expert testimony to explain the mitigating evidence and why it reduced petitioner's moral blameworthiness (App. 25).

Importantly, it found that Parnham did not make a strategic decision not to present the psychiatric records (App. 45).

The habeas court purported to conduct the "probing and fact-specific" prejudice analysis required by *Strickland*, 466 U.S. at 687-90; *see also Sears v. Upton*, 561 U.S. 945, 955 (2010) (*per curiam*) ("[W]e have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."). The court found that, had Parnham introduced the psychiatric records, the jury would have learned more aggravating evidence than what the prosecution presented at trial, and the prosecution could have argued that petitioner's particular mental illness made him more dangerous (App. 44-45). It concluded that petitioner failed to prove prejudice because his additional mitigating evidence presented in habeas, combined with the mitigating evidence introduced at trial, when weighed against the aggravating evidence introduced by the prosecution at trial and in habeas, would not have resulted in a more favorable punishment verdict (App. 45-46, 48).

The TCCA denied relief and refused to file and set the habeas applications (App. 1-4).

REASON FOR GRANTING CERTIORARI

THE TEXAS COURTS' PREJUDICE ANALYSIS DEFIES THIS COURT'S PRECEDENTS IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984); *WILLIAMS V. TAYLOR*, 529 U.S. 362 (2000); *WIGGINS V. SMITH*, 539 U.S. 510 (2003); AND THEIR PROGENY WHERE THE HABEAS COURT FOUND THAT TRIAL COUNSEL PERFORMED DEFICIENTLY IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE OF PETITIONER'S MENTAL ILLNESS—AND LIED TO THE TRIAL COURT ABOUT HIS REASONS FOR THIS OMISSION—AND WHERE THE JURY ASSESSED MAXIMUM SENTENCES.

Petitioner was convicted of solicitation of two capital murders and sentenced to two life sentences based on a misleading, incomplete punishment case that left the jury with the false impression that no mitigating evidence reduced his moral blameworthiness for the charged conduct and extraneous misconduct.

In the habeas proceeding, petitioner presented overwhelming mitigating evidence of his long-term, severe mental illness through medical records and expert testimony. The habeas court found that lead trial counsel, George Parnham, performed deficiently in failing to obtain and present evidence of petitioner's history of mental illness documented in the psychiatric records; in lying to the trial court and being incompetent regarding his knowledge of the records; and in failing to present expert testimony to explain the

mitigating evidence and why it reduced petitioner's moral blameworthiness. However, it concluded that he did not suffer prejudice because the medical records contained additional aggravating evidence that the prosecution did not present to the jury, and that the totality of the trial and habeas evidence would not have resulted in a lesser sentence. The TCCA denied relief.

The Texas courts failed to discuss *in any meaningful manner* how the expert medical testimony presented in habeas probably would have affected the verdicts. They ignored that the jury imposed the *statutory maximum sentences in both cases* where Parnham presented *no* medical records or expert mental health testimony to corroborate the lay witnesses' brief, passing references to petitioner's mental illness and treatment and to contextualize and explain why petitioner's history of mental illness made him less morally blameworthy for his conduct. They failed to consider the weight the jury probably would have given to the evidence that, when petitioner received mental health treatment and medication at Menninger in 2013, he cooperated and responded successfully. That evidence would have enabled Parnham to argue that, with continued treatment, petitioner's mental illness did not pose a future danger to the community. They also failed to analyze whether even one juror would have voted to impose a sentence less than life had Parnham presented any of this evidence. This Court's Sixth Amendment jurisprudence demands a more robust prejudice analysis that addresses how a rational jury would have

viewed the prosecution's aggravating evidence had Parnham presented the psychiatric evidence and expert testimony.

A. The Standard of Review

Petitioner had a right to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. *Id.* at 687-88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. *Id.* at 687.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* Ultimately, the defendant must show "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." *Id.* at 694. A reasonable probability is *less* than a preponderance of the evidence. *Id.* ("The result of a proceeding can be rendered

unreliable and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted. A reasonable probability of any different result—including a deadlocked jury—is sufficient. *Cf. Turner v. United States*, 137 S. Ct. 1885, 1897 (2017) (Kagan, J., dissenting) (both majority and dissent "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—i.e., an acquittal or hung jury rather than a conviction").

B. *Strickland* Prejudice

The Texas courts applied the *Strickland* prejudice test and concluded that, even had Parnham investigated and presented the mitigating evidence of petitioner's mental illness, the jury probably still would have imposed life sentences (App. 45-46, 48).

This Court has instructed lower courts to conduct a "probing and fact-specific" analysis of the prejudice prong of an ineffective assistance of counsel claim when it has found deficient performance. *Sears v. Upton*, 561 U.S. at 955; *see also Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (*per curiam*) (requiring "weighty and record-intensive record analysis" of *Strickland*

prejudice). The Texas courts did not conduct this analysis, even though they found that Parnham performed deficiently in multiple respects (App. 22, 25). Rather, they essentially concluded that sufficient evidence supported the punishment verdicts without analyzing the impact that the psychiatric records and expert testimony of Dr. Harris probably would have had on the jury.

Critically, the Texas courts defied this Court's long line of precedent regarding ineffective assistance of counsel for failing to investigate and present mitigating evidence at the punishment stage of a criminal trial. *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 130 S. Ct. 447 (2009) (*per curiam*); *Sears v. Upton*, 561 U.S. 945 (2010) (*per curiam*).

A *Strickland* prejudice analysis does not focus on whether there was sufficient evidence to support the punishment verdict after considering the effect of trial counsel's deficient performance. Rather, it focuses counterfactually[5] on the effect of trial counsel's deficient performance. *See Strickland*, 466 U.S. at 695-96 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that,

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[5] *United States v. Dominguez*, 998 F.3d 1094, 1120 (10th Cir. 2021) ("*Strickland*'s prejudice analysis involves a 'counterfactual' inquiry that hinges on counsel's alleged ineffective representation—that is, the inquiry turns on whether, but for such ineffective representation, there is a reasonable probability that the outcome of the proceeding would have been different.").

absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence altering the entire evidentiary picture. . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."); *cf. Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (holding that the analogous "materiality" standard concerning a prosecutor's failure to disclose favorable evidence "is not a sufficiency of evidence test" and that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict").

A proper prejudice analysis in petitioner's case must focus on whether, had Parnham investigated petitioner's mental illness and presented expert testimony from a mental health professional who could have explained the evidence and why it was mitigating, there is a reasonable probability that the outcome of the punishment stage would have been different. The Texas courts concluded that Parnham performed deficiently in multiple important respects at the punishment stage—and that he lied to the trial court when he stated that he could not obtain the psychiatric records. The jury heard *no* mitigating evidence from a neutral, impartial expert. Instead, it only heard brief,

passing references to petitioner's bipolar disorder and hospitalization from lay witness family members without any corroboration or explanation. The Texas courts held that there was no prejudice without discussing the probable impact that the expert testimony would have had on a jury that imposed the maximum sentences *without* that evidence. The Texas courts unreasonably concluded that the jury still would have assessed life sentences had Dr. Harris explained what bipolar disorder and personality disorders are, why they are mitigating, and why petitioner's mental illness made him less morally blameworthy for his conduct than someone who did not suffer from those mental illnesses.

The TCCA's conclusion that petitioner did not show prejudice erroneously ignored the critically important testimony that a medical expert could have given to explain why petitioner engaged in the charged conduct and extraneous misconduct. *Cf. Hinton v. Alabama*, 571 U.S. 263, 273 (2014) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence. . . . This was such a case.") (citation and internal quotation marks omitted).

C. Summary Reversal or GVR Is Appropriate

This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 577 U.S. 385, 396 (2016) (*per curiam*) (summary

reversal where state habeas court erroneously denied relief on Fourth Amendment suppression of evidence claim); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (*per curiam*) (same); *see also Hinton v. Alabama, supra* (summary reversal on Sixth Amendment ineffective assistance of counsel claim); *Sears v. Upton*, 561 U.S. at 955 (same); *Porter v. McCollum*, 558 U.S. at 44 (same). Summary correction is particularly necessary where a lower court clearly and directly contravenes this Court's settled precedent. *See*, *e.g.*, *Bosse v. Oklahoma*, 580 U.S. 1 (2016) (*per curiam*).

Because the Texas courts' prejudice analysis so clearly violated this Court's well-established precedent, the Court should grant certiorari, reverse the judgment, and remand with instructions to grant habeas corpus relief. At a minimum, in view of the lower courts' clearly inadequate analysis of the prejudice prong of petitioner's ineffectiveness claim, this Court should grant certiorari, vacate the TCCA's judgment, and remand for a proper prejudice analysis ("GVR"). *Cf. Hinton*, 571 U.S. at 276 ("Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether [petitioner's] attorney's deficient performance was prejudicial under *Strickland.*").

Petitioner's case is hardly an outlier with respect to the TCCA's misapplication of *Strickland*'s prejudice test. This Court recently addressed the TCCA's inadequate prejudice review in *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (*per curiam*). The habeas court had

recommended a new punishment trial because counsel was ineffective. The TCCA denied relief, curtly stating that Andrus "fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, at *2 (Tex. Crim. App. 2019). This Court granted certiorari, concluded that counsel performed deficiently, vacated the judgment, and remanded to the TCCA to conduct a proper prejudice analysis. The Court faulted the TCCA for failing to analyze prejudice in any meaningful respect. *Andrus*, 140 S. Ct. at 1886. "Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted the weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." *Id.* at 1887.

At a minimum, the Court should vacate the judgment and remand petitioner's case to the TCCA—as it did in *Andrus*—to conduct a "probing and fact-specific analysis" regarding whether Parnham's deficient performance resulted in prejudice where the jury heard no medical evidence or expert testimony in mitigation of punishment, and where it assessed maximum sentences.

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CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the TCCA. Alternatively, it should remand to the TCCA for a meaningful prejudice analysis.

Respectfully submitted,

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