NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

XXX XXX, JR.,

Petitioner,

VERSUS

DAVID DRETKE, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

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

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*****CAPITAL CASE*****

QUESTIONS PRESENTED

In this Texas capital case, the state habeas court did not follow its own procedures for factual development of post-conviction claims and, instead, the judge who made the factual findings for the state habeas proceedings relied upon her "personal recollection" of the trial to resolve disputed issues despite the fact that she had *not* been the trial judge. Thereafter, despite the conclusion of the United States District Court and the United States Court of Appeals for the Fifth Circuit regarding the strong merits of Mr. XXX's ineffective assistance of counsel claim, the Fifth Circuit (ignoring this Court's precedent in *Wiggins* and *Rompilla*) found that, despite the fact that Mr. XXX properly presented a claim to the state habeas court based upon his counsel's failure to "present" mitigation evidence, such a claim was somehow different than a claim that trial counsel did not do a proper investigation in order to "find" the evidence that he failed to present. The evidence in question being primarily testimony from Mr. XXX's mother and siblings.

I. Ineffective assistance of counsel questions:

> A. Does a claim that trial counsel failed to "present" evidence of a capital defendant's horrific childhood at the sentencing phase of the trial encompass a claim that trial counsel failed to adequately "find" the evidence that was not presented?
>
> B. Where evidence is presented in a post-conviction proceeding related to a defendant's horrific childhood that could be attested to by a petitioner, his mother and siblings, is the burden on the defendant to show that this evidence could have been "easily found" before the petitioner is entitled to habeas relief?

II. Questions related to eligibility for evidentiary hearing under 28 U.S.C. § 2254(e)(2):

> A. Does a habeas petitioner "fail[] to develop the factual basis of a claim in state court proceedings" for purposes of 28 U.S.C. § 2254(e)(2) when the state court does not follow its own statutory procedures for adjudicating the claim and purports to rely upon a "personal recollection" of the trial to resolve factual disputes when the judge for the state habeas proceeding was *not* the judge for the trial proceeding and, therefore, had no "personal recollection?"
>
> B. Does a habeas petitioner act with sufficient diligence under 28 U.S.C. § 2254(e)(2) when he continually requests but is denied an evidentiary hearing in state post-conviction proceedings?

III. Can ineffective assistance of state habeas counsel excuse a procedural default in a case in which the various federal courts all but acknowledge that a federal constitutional

claim would be decided in a Petitioner's favor, thereby sparing him a death sentence, had that claim been fully presented to the state habeas court?

IV. Questions related to *Stone v. Powell*:

A. The courts of appeals disagree as to what constitutes "an opportunity for a full and fair litigation of [a Fourth Amendment] claim" under *Stone v. Powell* 428 U.S. 465 (1976). Does a Petitioner receive "an opportunity for a full and fair litigation" of his Fourth Amendment claim when the state appellate court does not address the actual Fourth Amendment claim raised by the Petitioner but, instead, mistakenly addresses a different and distinct claim that had *not* been raised by the Petitioner or must a Petitioner show, as the Fifth Circuit requires, that a state court "systematically" misaddressed Fourth Amendment questions before it can be said that *he* was denied a "full and fair opportunity."

B. Does *Stone* apply in death penalty cases in any event?

C. Was the rule in *Stone* abrogated by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") as held by one United States District Court?

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OPINION BELOW

The judgments by the United States Court of Appeals for the Fifth Circuit in *XXX v. Dretke*, No. 03-20326 entered on January 7, 2004 and June 8, 2005.

JURISDICTION

The jurisdiction of this Court to review the judgment of a United States court of appeals is set forth in 28 U.S.C. § 1254. Further, the jurisdiction of this Court to review the denial of a Certificate of Appealability was decided in *Hohn v. United States*, 524 U.S. 236 (1998). Opinions were entered by the United States Court of Appeals for the Fifth Circuit in this matter on January 7, 2004 and June 8, 2005 and a Petition for Rehearing was denied on July 27, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner submits that Amendments IV, V, VI and XIV to the United States Constitution and 28 U.S.C. § 2254 are involved in this case. The pertinent text of these constitutional amendments and the statute are set forth in Appendix G.

STATEMENT OF THE CASE

A. Proceedings Below

XXX XXX Jr. was indicted for the murder of David Jacobs committed in the course of a robbery. The jury found Mr. XXX guilty of capital murder and ultimately entered findings supporting a death sentence. Mr. XXX's conviction and sentence were upheld by the Texas Court of Criminal Appeals. *XXX v. State*, No. 71,800 (Tex. Crim. App., May, 28, 1996). Mr. XXX filed a state Application for a Writ of Habeas. The state District Court ultimately adopted the state's Proposed Finding of Fact, Conclusions of Law and Order and recommended that the Application be denied. The Application

was ultimately denied by the Texas Court of Criminal Appeals. *Ex Parte XXX*, No. 48,130-01 (Tex. Crim. App., January 17, 2001).

Mr. XXX next filed a Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The District Court entered an order denying the Petition. Simultaneously, the District Court denied Mr. XXX a Certificate of Appealability. Mr. XXX filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit subsequently granted Mr. XXX's Motion for a Certificate of Appealability on one issue- whether he received ineffective assistance of counsel at the punishment phase of his trial and issues related to the District Court's resolution of the issue- but denied him a Certificate of Appealability on other issues raised before the District Court.

On October 4, 2004, this Court denied Mr. XXX's Petition for Writ of Certiorari requesting a Certificate of Appealability on the *Stone* issues raised herein.

On June 8, 2005, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgement of the District Court. On July 27, 2005, the Fifth Circuit denied Mr. XXX's Petition for Rehearing and Rehearing *En Banc.*

B. Statement of the Facts Relating to Fourth Amendment Issue

On February 7, 1992, a Houston resident noticed a Yellow Cab parked next to her car in an apartment parking space. As she looked into the van, she discovered a body slumped over in the front seat. The Houston Police Department was then notified.

David Jacobs, a Yellow Cab driver, was found dead inside of the cab. The autopsy conducted by the Harris County Medical Examiner's Office revealed that he had

died from three gun shot wounds to his neck. No arrests were made immediately after the shooting as the Houston Police Department ("HPD") continued its investigation.

On April 5, 1992, approximately two months after the shooting of Mr. Jacobs, HPD officers responded to call at an apartment complex. Officer Norman Kiesewetter, upon his arrival at the complex, noticed an ambulance and went to investigate. He saw XXX XXX inside the ambulance with a gun shot wound to his leg. Mr. XXX told Kiesewetter that he sustained the gun shot wound while cleaning his pistol inside his apartment. Kiesewetter went to the apartment where Mr. XXX had been staying (the apartment was rented by Sharon XXX, Mr. XXX's girlfriend) and located a .45 caliber handgun on a table inside the apartment.[1] He also located a blue bag next to the .45. Inside the blue bag was a .38 caliber XXX and Wesson handgun, a gun cleaning kit, a watch and some other personal items. Kiesewetter could not recall whether the blue bag was opened or zipped shut at the time he first saw it. Kiesewetter seized the .45 and the bag and its contents and took them to the ambulance to ask Mr. XXX if the items belonged to him. Kiesewetter admitted that he seized the weapon without a warrant, consent or any indication that the items were involved in criminal activity. Kiesewetter claimed that he later returned to the apartment, after Mr. XXX claimed ownership of the bag and its contents, and was told by Ms. XXX that she did not want the guns in the apartment with her child. Still, Kiesewetter did not return the property to Mr. XXX or

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[1] XXX had knowledge that Mr. XXX was living at Ms. XXX's apartment "off and on".

his designee but rather kept possession of the property. Kiesewetter admitted that, at the time he seized Mr. XXX's property, the property was not evidence of a crime.[2]

The day following the search, Mr. XXX was arrested at Ms. XXX's apartment for Mr. Jacobs' murder. Subsequent to his arrest, Mr. XXX was subject to at least three interrogations within a period of approximately twenty-four hours regarding the murder of Mr. Jacobs and another cab driver. At the time of his arrest and interrogation, Mr. XXX, of course, knew that the police possessed the gun used in both shootings. Ultimately, Mr. XXX gave a statement admitting to shooting Mr. Jacobs and another cab driver.

Firearms Examiner Charlie XXX of the Houston Police Department testified that the bullets recovered from the deceased were fired by the .38 caliber owned by Mr. XXX and seized from Ms. XXX's apartment. Indeed, Mr. XXX's confession and the fact that his gun was used to kill Mr. Jacobs and the other cab driver was the primary evidence against him at both the guilt/innocence phase and the punishment phase of his trial.

On direct appeal to the Texas Court of Criminal Appeals, Mr. XXX complained of the trial court's denial of his motion to suppress the property seized from his bag at Ms. XXX's apartment and his statements to police and he argued, as he did in the trial court, that "his various statements were inadmissible because they were 'tainted fruit of the poisonous tree,''' in that the statements were 'tainted' by Kiesewetter's illegal *search*. The Court of Criminal Appeals assumed *arguendo,* that the seizure of Mr. XXX's property was illegal. *See* Appendix A at 8-9. Nevertheless, the Court inexplicably characterized Mr. XXX's argument that the statements were fruit of an illegal *arrest,* rather than his actual argument that the statements were fruit of an illegal

search. *Id*. As a result, the Court of Criminal Appeals applied the test in *Brown v. Illinois*, 422 U.S. 590 (1975) and determined that Mr. XXX's confessions were not "fruit" of an illegal arrest because there was sufficient attenuation between the arrest and statements. *See* Appendix A at 8-9.

C. Statement of Facts on Ineffective Assistance of Counsel Issue

1. Punishment Evidence Presented

The United States District Court in this case recognized that there was a "wealth of evidence concerning childhood abuse of Mr. XXX which his trial counsel failed to locate and present at his trial." *See* Appendix B a 30 n.16. Likewise, the Fifth Circuit noted there was "substantial evidence that Petitioner witnessed and suffered a great deal of abuse as a child" which his trial counsel failed to locate and present at his trial. *See* Appendix E at 16.

During the punishment phase, the state introduced testimony about another taxi cab driver shooting involving Mr. XXX in addition to the cab driver killing that formed the basis of his conviction in this case. Sharon XXX testified about the facts of the shooting. On March 22, 1992, Mr. XXX approached her and asked her if she was ready to "go kill some people." According to XXX, this was not unusual as Mr. XXX spoke repeatedly about killing people and often pointed a loaded gun at her while laughing. She claimed that Mr. XXX forced her to go to downtown Houston at gun point. When they arrived downtown, Mr. XXX went looking for a cab. They ultimately got into a United Cab driven by Victor Bilton. Mr. XXX directed the cab to drive to another City of Houston waste water plant where Mr. XXX formerly worked as a security guard. Mr. XXX then removed a pistol from his clothing and shot Mr. Bilton three times in the head.

Ms. XXX divided Mr. Bilton's cash with Mr. XXX. They dropped the cab off on Dumble Street before making their way back to her apartment.

The abandoned cab containing Bilton's body was ultimately discovered by HPD Officer R.A. Marshall. A subsequent autopsy revealed that Mr. Bilton had died from gunshot wounds to the back of his head. The bullets recovered during the course of the autopsy were matched with the .38 caliber seized from XXX's apartment.

The state also introduced the tape recorded interrogation of Mr. XXX concerning his involvement in the Bilton shooting. In that statement, Mr. XXX related how he was living with Sharon XXX who was suffering through financial difficulties. Ms. XXX and Mr. XXX discussed ways of raising money and ultimately jointly decided to rob a cab driver. The night of Mr. Bilton's shooting, Mr. XXX and Ms. XXX went downtown and caught a United Cab. Upon their arrival at their destination, Mr. XXX admitted that he shot him three times. Mr. XXX admitted to taking Mr. Bilton's watch as well as $120.[3]

In total, the defense mitigation case took approximately ninety-three minutes to present. The defense first presented evidence from HPD Officer D.D. Shirley and from Sharon XXX in an apparent attempt to create some residual doubts regarding Mr. XXX's guilt as it related to Mr. Jacobs' murder and/or doubt about Mr. XXX's guilt as it related

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[3] The state also introduced the testimony of Nikkitta Hickman. She testified that she dated Mr. XXX in 1991 and ultimately was engaged to marry Mr. XXX in late 1991. She recounted a domestic dispute between her and Mr. XXX on November 11, 1991. On that date, Mr. XXX asked to visit her at her residence. Ms. Hickman deferred on allowing him to visit because the father of her child was dropping off the child. According to Ms. Hickman, Mr. XXX showed up at the house and demanded entry into the residence. Mr. XXX demanded that unless he was let into the house, she would see "his other side." Ms. Hickman related how Mr. XXX forced his way into the residence where he fought with the father of her child before running away from the residence.

to Mr. Bilton's murder despite the taped confessions by Mr. XXX. The state did not cross examine either of these witnesses.

The defense then presented evidence from six character witnesses. First, Reverend Clay Wade testified. Rev. Wade testified that Mr. XXX was his godson and that Mr. XXX lived with him for a few months when Mr. XXX came to Houston from Mississippi sometime in 1991. He testified that Mr. XXX had a job and went to church. Significantly, Rev. XXX told the jury that Mr. XXX had family problems related to his mother's many marriages but did not know any other details.

Next, the defense called Mr. XXX's former employer, Ferrel Alexander, to state that Mr. XXX worked for AAA Security for approximately eight months *before being fired* for not showing up to work. He also testified that Mr. XXX was "written up" for falling asleep at his post. Mr. Alexander did say that Mr. XXX was very polite to him and that he was shocked when he learned that Mr. XXX had been charged with capital murder.

Floyd XXX, Mr. XXX's uncle, testified in mitigation. He testified that XXX's father had been killed by a drunk driver earlier that year while Mr. XXX was in jail. He stated that he had regular contact with Mr. XXX when he moved back to Houston from Mississippi in the summer of 1991, that Mr. XXX was respectful and that he was shocked when he learned that Mr. XXX was charged with capital murder.

Doris XXX, the widow of Mr. XXX's father, testified that Mr. XXX visited them when he arrived in Houston from Mississippi and that both she and Mr. XXX's father was shocked when they earned that Mr. XXX was charged with capital murder.

After reoffering all of the evidence introduced at guilt-innocence, the state rested.

Next, Maurice XXX, the nineteen year old son of Doris XXX and Mr. XXX's deceased father, testified that he saw Mr. XXX "almost every day" after Mr. XXX came to Houston from Mississippi. He also testified that Sharon XXX had stolen money from Mr. XXX's pants pocket on one occasion and that she acted wild when she drank.

Finally, Ruby XXX, Floyd XXX's wife and XXX XXX's aunt, testified that XXX XXX was "very mannerable [sic.] and respectful" and that it was "a very shock" to her when XXX XXX was charged.

In total, the direct testimony from the defense character witnesses at the punishment stage totaled approximately **thirty-one** transcript pages. Not surprisingly, Mr. XXX's defense attorney referred to the testimony from these witnesses in only one sentence during his punishment phase argument. "You have a person -- You heard from witnesses -- yes, they were family, and I hope if I get in trouble my family comes and supports me -- but you have people who know him, who describe the kind of person that XXX was -- considerate, never gave them any trouble."

In the end, although the Mr. XXX's guilt was overwhelming and "the whole case was going to ride on the sentencing phase," his trial attorney approached the punishment phases by focusing on residual doubt."[4] Indeed, in his closing, the attorney argued: "Now, you've already made your decision on XXX's guilt as far as the Yellow Cab case is concerned, but our position is this. XXX didn't do that case."[5]

2. State Habeas Claim

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4 *Collier v. Turpin*, 177 F.3d 1184, 1200 (11th Cir, 1999).

5 Mr. XXX's counsel apparently did not realize that residual doubt is *not* a mitigating circumstance under the law. *See, e,.g., Blue v. State*, 125 S.W.3d 491 (Tex.

Mr. XXX was readily able to provide mitigation evidence regarding his childhood to the attorney representing him in connection with his State Application for Writ of Habeas Corpus. As a result, Mr. XXX complained in his state Application for Writ of Habeas Corpus that he "was denied the effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, when trial counsel failed to call him as a witness at the punishment phase of the trial, or to present evidence of long standing physical abuse as a child." Indeed, Mr. XXX alleged in his state Application that the information about his childhood "and the history of beatings at the hands of his mother and numerous husbands and boyfriends were never presented to the jury, either by way of Applicant's own testimony or that of other witnesses."

The State responded by relying upon the affidavit of Wilford XXX, who was Mr. XXX's *lone* trial counsel. ("According to the credible assertions in the affidavit of defense counsel XXX, defense counsel discovered nothing unusual regarding the applicant's background in his numerous conversations with the applicant and the applicant's relatives."). It then went on to compliment Mr. XXX on the mitigation investigation he claimed to have performed and the simple fact that he "presented punishment evidence."

Surprisingly, despite these diametrically different accounts of XXX's performance, the state habeas court did not hold an evidentiary hearing. Instead, thirty-one months after the Amended Application was filed, it simply adopted Findings of Fact and Conclusion of Law submitted to it by the Harris County District Attorney's Office. Among the Findings of Fact:

Crim. App. 2003); *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2327, 2335 (1988).

> 19. The Court finds, based on the Court's *personal recollection* of the instant trial, the credible assertion in the affidavit of defense counsel XXX, and the statement of facts from the instant trial, that defense counsel *investigated* and presented mitigating evidence at the punishment phase of the trial (emphasis added.)

Ironically, the judge presiding over the trial who would have had a "personal recollection of the instant trial" was Mary Bacon. Nevertheless, she was not reelected to the bench. The judge that signed the Findings of Fact, Conclusions of Law and Order and claimed a "personal recollection" of the trial was Elsa Acala who was never present at the trial. It was apparently based in part on Judge Acala's "personal recollection" that she concluded that Mr. XXX did not demonstrate Mr. XXX was ineffective, or that, even assuming that Mr. XXX was ineffective, that Mr. XXX did not suffer any harm. The Court of Criminal Appeals summarily upheld Judge Acala's findings and conclusions, based upon her "personal recollection," without elaboration.

3. Punishment Evidence Not Presented

Just as Mr. XXX's attorney appointed to represent him in connection with his state Application for Writ of Habeas Corpus requested that Mr. XXX provide him a detailed letter regarding his childhood, so too did Undersigned Counsel make such a request of Mr. XXX. Just as Mr. XXX readily provided such information to his state Writ Attorney so too did he readily provide it to his federal writ attorney Indeed, he wrote for fourteen pages and provided his attorneys information on how to contact the individuals mentioned in his letter.

In an affidavit submitted to the United States District Court, Mr. XXX explained:

> If I had known that information about my life was important for the jury to consider, I would have volunteered all of [that] information to my attorney. I would have told names of my family in Mississippi and where they might be located. During our brief meetings, Mr. XXX never asked

> me any questions about my background and did not tell me what was important for him to know. Mr. XXX never even took the time to get to know me or to explain the trial process to me.

Still, prior to trial, Mr. XXX's investigator had written a report stating that Reverend Wade, Mr. XXX's godfather, was "very critical of the defendant's mother. He feels she is the blame of many of the things XXX has gone through." Likewise, during his testimony at trial, Reverend Wade pointed briefly to "domestic problems" regarding Mr. XXX's childhood and problems associated with his mother's multiple marriages. Also, when XXX's investigator contacted Norma XXX, from the Mississippi Juvenile System, Ms. XXX told the investigator "the mother is the real problem." Ms. XXX stated she could not talk in depth or release records for privacy reasons. Surprisingly, Mr. XXX never arranged for Mr. XXX to sign a release so those records could be provided or attempt to obtain a subpoena for the records. In addition, XXX's investigator had the address and phone number for Mr. XXX's brother, Danny XXX, who had a wealth of information regarding Mr. XXX's childhood, but he was apparently never contacted. The investigative report simply says "attempts were made."[6]

It now appears undisputed that had Mr. XXX conducted an even moderately competent mitigation investigation he would have discovered a wealth of mitigation

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[6] This is not the first time that Mr. XXX, using the same investigator he used in the instant case, Shirley Johnson, has been found ineffective for failing to interview important witnesses. *See Kober v. Texas*, 1977 Tex. App. LEXIS 5103, *14 (Tex. App. 1997) ("XXX testified that his investigator, Shirley Johnson, spoke to the people whose names appellant had given him. The fact that XXX may have proceeded with some investigation still does not overcome the fact that he did not interview Cardenas, who was known to be the only eyewitness to the incident.").

evidence. Ultimately, a great deal of this evidence was presented to the United States District Court in the form of affidavits.

a. XXX XXX Affidavit

XXX XXX explains that he is the fourth of his mother's six children. His mother was married five times and always had boyfriends in between husbands. Mr. XXX was told that his father was her second husband, but, shortly before the cab driver murders, he was told that his godfather was his real father. Mr. XXX began drinking when he was five or six years old when his grandmother would give him beer that had frozen in her cooler to the point where she could not sell it at her cafe. When Mr. XXX was nine years old, his mother moved the family from Houston to Mississippi.

As a child Mr. XXX was hit in the head with a baseball bat but never received medical care. He was hospitalized with pneumonia and, shortly thereafter, lost hearing in his left ear.

Mr. XXX explains the constant violence in his home:

> The way my mother communicated with us kids was with anger and violence. She whipped me and my brother and sister, sometimes for no reason, with anything she could get her hand on. I often had bruises and open sores from being hit with extension cords, belts and a broomstick. This went on during the entire time I lived with my mother. It felt like violence was a way of life for us. By the time I was a teenager, the beating[s] would not even come as a surprise; they were expected. One time I was tempted to tell a counselor at school about the open sores under my clothes, which I had gotten from a beating at home. I'm not certain why I didn't tell....
>
> I grew up expecting and accepting violence in our house. It seemed that only attention I got from Mom was when she was whipping me for something. I always wished I had a family where we could talk and get to know each other. I don't think I know anything personal about my parents or my family. I don't even know how old my brothers and sister are....

Mr. XXX recounts a time when he was five years old when his stepfather raped his twelve year old sister when his mother was in the hospital giving birth. When Mr. XXX's mother learned of the rape, she stabbed her husband in the chest and Mr. XXX witnessed "blood gushing out of his shirt."

Mr. XXX and his siblings, as well as his mother, were also subject to harsh physical abuse from the men in his mother's life. Indeed, Mr. XXX finally left home when one of his mother's husbands "broke a stick over [his] back and neck" and chased him through the neighborhood with the stick. For several months thereafter Mr. XXX lived in vacant cars and abandoned houses and got his food from a soup kitchen or by shoplifting. When he was arrested by juvenile authorities as a runaway they wanted to send him home to his parents. Nevertheless, the abuse was so bad that Mr. XXX refused to go home and was sent to a Boy's School instead.

Finally after the Boy's School, the Job Corps and living with his half sister, Mr. XXX vowed to escape Mississippi and returned to Houston in the hopes of reconciling with the man he thought to be his father. Although he imagined that this man "would be welcoming and invite [him] to be part of his life," he did not.

b. Mr. XXX's Mother's Affidavit

Mr. XXX's mother, Ruth Maye, was never contacted by Mr. XXX's trial attorney but she would have been willing to talk to him and testify in court. She notes that her pregnancy with XXX was difficult and it lasted eleven months and that she almost died during pregnancy. In order to save her life, she was given electrical shocks to keep her heart beating when she gave birth and this may have had an effect on XXX. She has "at

times wondered who XXX's biological father is." Ms. Maye recounted many of the experiences XXX remembers from his childhood:

> I have been married five times. All of my husbands were very abusive to me or my children. My first husband raped me all the time and would beat me. My marriages after that were no better. Because the men I married were violent and distant from my children, I was forced to be both mother and a father to all my children. This was difficult. I raised my children to the best of my abilities. I treated them as I had been treated by my parents. I would whip the kids with switches, extension cords, and a belt in order to keep them in line.....
>
> When XXX was nine years old, I married my fourth husband, Lamar Jefferson. After we got married, we moved from Houston to Mississippi. I was only married to Mr. Jefferson for a couple of years. He was quite a bit older than me, and very unpredictable and violent. Mr. Jefferson would push me, choke me, and often threaten to shoot me. He was a very large man; there was nothing my children cold do to stop him when he was angry. He whipped them with a belt all the time.

Ms. Maye explained that XXX was given beer as an infant. She confirmed that, when XXX was picked up by juvenile authorities as a runaway at about age fourteen, he refused to come home saying he would rather be in jail than come home. She notes several head traumas that XXX suffered as a child. Moreover, she recounts that XXX received booster vaccinations from the county health department and that the health department were later sued for using those vaccines because they caused brain damage and learning disabilities.

c. Siblings' Affidavits

1. Danny XXX

As noted above, despite the fact that Mr. XXX had contact information from Danny XXX, he was never contacted. Mr. XXX would have cooperated with Mr. XXX and testified at a trial. Mr. XXX confirms the horrors of Mr. XXX's childhood. As to Mr. XXX's alleged father:

> They were together less than a year. Mr. XXX [Sr.] was an alcoholic; he drank whiskey and Vodka every day. Mr. XXX [Sr.] and my mother had some terrible fights while they were together. There was nothing us kids could do but watch; we could not defend our mother. At least once a week, Mom would grab all of us kids and run out of the house to get away from Mr. XXX [Sr.]'s violence. Mom would usually take us to a neighbor's house to hide from him. The last fight I remember Mom and Mr. XXX [Sr.] having was when he threatened to get a gun and shoot her. He shoved Mom down, and she managed to get a pair of scissors and stab him seven or eight times.

Mr. XXX recalled being whipped by a belt "every other day" by one of his mother's husbands. Likewise:

> My mother was a strict disciplinarian, herself. She would whip us kids with belts, switches, extension cords, or whatever she could get her hands on. She beat me with the wood-end of a broom once when I had accidentally broken a window with a baseball....I believe her way of disciplining us is why me and XXX turned out the way we did.

2. Mary XXX Dean

Mr. XXX also had the address and phone number for Mary XXX (now Mary Dean), but never contacted her. Mary Dean confirmed Mr. XXX's and Mr. XXX's recollection of growing up. She explained that her mother and her mother's boyfriends were physically abusive to the children and noted that "[m]y mother whipped XXX in a severe manner at least once a week." Moreover, Mary explained that she was sexually assaulted by two of her mother's husbands. Mary XXX also explained:

> When [XXX] was thirteen or fourteen, XXX ran away from home. He just did not want to tolerate our mother's abuse any longer. XXX stayed with his girlfriend's mother for awhile.....XXX refused to move back in with our mother, saying he would rather go to a boy's home than move back in with her. This is what he did eventually.

3. Joseph XXX

XXX XXX's brother Joseph provides similar information as his siblings:

> Joseph described his mother as being "slow", and perhaps even emotionally disturbed. She sometimes seemed to get her thoughts "twisted". He noted you can tell her something several times and she still will not understand what you are trying to convey.
>
> Joseph was able to describe in detail the manner in which the children were treated by Ruth's fourth husband, Lamar Jefferson. Mr. Jefferson was mentally abusive to Ruth and the children, and a harsh disciplinarian.....
>
> Joseph described XXX's consuming alcohol beginning when XXX was still in diapers. XXX's father, XXX XXX Senior, would give XXX beer when he was a baby. Joseph recalls XXX always liked to drink, even as a kid.

4. Jacob XXX

Although six years younger than his brother, XXX, Jacob XXX paints a very vivid picture of the home environment in which Mr. XXX grew up and in which their mother would beat them "for even a minor problem. Their mother was "not right" and she was addicted to men like some are addicted to drugs. When their mother's husbands/boyfriends would beat the children, she would not intervene and instead would tell the children they deserved it. The fifth husband's "favorite thing to do was to threaten to kill my mother and everybody in the house, and then kill himself."

Jacob also remembers specific instances of violence toward XXX. One incident was when one of the husbands threatened XXX during a fight saying something like, "I'll get my gun and blow your brains out." On another occasion, the husband actually went after XXX with a gun. After that incident, Jacob secretly took the lead out of the bullets,

thinking he could spare XXX or someone else an injury. XXX moved out of the home after this incident. Jacob said he reported the incident to Child Welfare.

Jacob provided a gruesome picture of the house in which he, XXX, and their siblings were raised:

> The floors were rotted and there were holes everywhere. We had no front door. Instead of replacing it, [one of his mother's husbands] covered the opening with a piece of furniture. There was no heat and no running water. If someone in the house wanted a bath, a hose was run into the house from somewhere outside. Our home was infested with mice. We kept a snake in the house to help catch them. Sometimes, the family got it's food from the garden or from the boys hunting.

Like his siblings, Jacob XXX was never contacted by Mr. XXX or his investigator.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S SEEMING HOLDING- THAT A CLAIM THAT TRIAL COUNSEL FAILED TO PRESENT EVIDENCE OF A CAPITAL DEFENDANT'S HORRIFIC CHILDHOOD "AT" THE MITIGATION PHASE OF HIS TRIAL DOES NOT ALSO ENCOMPASS A CLAIM THAT THE TRIAL COUNSEL FAILED TO CONDUCT A PROPER INVESTIGATION IN ORDER TO LOCATE THIS EVIDENCE IN "PREPARATION FOR" THE MITIGATION PHASE OF THE TRIAL- IS CONTRADICTED BY HOLDINGS FROM OTHER COURTS OF APPEALS AND APPEARS TO CONFLICT WITH THIS COURT'S RESOLUTION OF *WIGGINS* AND *ROMPILLA.*

The Fifth Circuit's opinion correctly determines that the District Court was free to consider all of the evidence regarding Mr. XXX's horrific childhood because such evidence "merely confirm[ed] what was already alleged in the state habeas petition." *See* Appendix E at 8. Nevertheless, it concludes that evidence supporting trial counsel's failure to *investigate and prepare* for the punishment phase of the trial by finding this evidence was not fairly presented to the state habeas court. *Id*. at 10 ("The state habeas petition did not discuss trial counsel's *preparation for* trial, but focused solely on trial counsel's failing *at* trial." (emphasis in original)). It is not at all clear whether the Fifth

Circuit was holding 1) that Mr. XXX's habeas counsel failed to adequately present the legal claim that his trial counsel was ineffective for failure to *investigate* mitigation evidence as opposed to being ineffective for failure to *present* mitigation evidence and/or 2) that, because of its holding that affidavits related to the failure to *investigate* mitigation evidence could not be considered by the federal courts, the state court's conclusion that Mr. XXX's trial counsel was not ineffective for failing to *present* mitigation evidence was not unreasonable under 28 U.S.C. § 2254(d). In either event, the Fifth Circuit holding conflicts with this Court's recent holdings in *Wiggins* and *Rompilla*[7] as well as holdings from other courts of appeals. Indeed, it appears that, as previously recognized by this Court, the Fifth Circuit is continuing to merely pay "lipservice" to the Court's death penalty jurisprudence. *See, e,g. Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004).

A. To the Extent the Fifth Circuit Held that a Failure to Present Claim Does Not Encompass a Failure to Investigate Claim, its Holding Conflicts with Other Courts of Appeals.

A claim that counsel is ineffective for failing to present evidence necessarily encompasses the failure to investigate and locate the evidence. *See, e.g., Samper v. Greiner*, 74 Fed. Appx. 79 (2d Cir. 2003) ("We reject the State's contention that Samper failed to exhaust in state court or preserve in district court his claim that trial counsel was ineffective for not investigating the alibi witnesses or the statements of Soriano and Torres. Samper's claim that counsel failed to use or present the evidence encompassed this issue....") Indeed, a claim is properly presented to state court for exhaustion purposes when it relies upon state cases employing constitutional analysis. *See, e,g, Verdin v. O'Leary*, 972 F.2d 1467, 1478 (7th Cir. 1992). Here, the record clearly reveals that Mr. XXX's state habeas petition cited to *Butler v. State*, 716 S.W.2d 48 (Tex. App.

1986). *Butler* is a case which concerned "counsel's duties...of making an independent *investigation* of the facts of his client's case." *Butler*, 716 S.W.2d at 54 (emphasis added).

The Seventh Circuit's decision in *Boyko v. Parke*, 259 F.3d 781 (7th Cir. 2001) is on point and is contrary to the Fifth Circuit's ruling in this case. There, the petitioner argued in his federal habeas hearing that his trial attorney was ineffective for failing to *present* a transcript supporting a self defense claim and that he suffered PTSD. *Id*. at 790 ("Mr. Boyko's ultimate goal in this case is to introduce the transcript into the record and to have a federal court evaluate his ineffective assistance of counsel claims in light of the information in the transcript."). Nevertheless, "Mr Boyko never suggested...to the state courts...that his trial counsel was ineffective in failing to procure a copy of the transcript," although he argued there that his trial counsel should have taken the position that the crime was committed in self defense or that he suffered from PTSD. *Id*. at 788. The Seventh Circuit's comments in rejecting the state's non-exhaustion argument are insightful:

> Given these principles, we believe Mr. Boyko's ineffective assistance of counsel claim has been exhausted, even though Mr. Boyko did not base his arguments in the state court on trial counsel's *failure to obtain* the transcript. The situation presented in this case is not one in which a petitioner seeks to present a ground of ineffectiveness that is entirely independent of the grounds presented in the state courts. Mr. Boyko argued throughout his postconviction proceedings that his trial counsel should have pursued self-defense and PTSD theories. He raises these same claims in his federal habeas petition. The transcript does not change the substance of these arguments; instead, it merely supplies an additional piece of evidence that counsel would have found had he pursued self-defense or PTSD theories. In ruling on Mr. Boyko's habeas petition, the federal courts must resolve the same question that the state courts were asked to resolve, namely whether Mr. Boyko's trial counsel was ineffective in failing to pursue self-defense or PTSD theories. At most, then, we believe that the transcript "supplements, but does not

> fundamentally alter, the claim presented to the state courts." As such, Mr. Boyko's present reliance on the transcript does not render his ineffective assistance of counsel claims unexhausted.

Id. at 789 (emphasis added).

In the instant case, the state, in replying to Mr. XXX's state habeas claim, sought and obtained an affidavit from Mr. XXX's trial counsel regarding the "investigation" he allegedly conducted. Moreover, the state habeas court's Findings of Fact, Conclusion of Law and Order reflect the fact that the court considered questions regarding trial counsel's investigation into mitigating evidence. **Indeed, the state habeas court found that "defense counsel investigated <u>and</u> presented mitigating evidence at the punishment phase of trial" and, consequently, used that finding to find that Mr. XXX's trial counsel was not ineffective.** *See* Attachment B at 6, ¶ 21 (emphasis added). In sum, the legal claim that Mr. XXX's trial counsel was ineffective for failing to locate *and* present proper mitigation evidence was adequately presented to the state habeas court *and* was considered by that court.

<u>B. To the Extent the Fifth Circuit Held that, After Excluding Some Portions of the Affidavits Presented to the United States District Court, there Was Insufficient Evidence Presented to Support a Failure to Present Mitigating Evidence Claim, Its Holding is Contrary to the Recent Holdings of this Court.</u>

As noted above, the panel in this case refused to consider any evidence related to trial counsel's failure to *prepare* for the mitigation phase of the trial by *investigating* Mr. XXX's horrific childhood. *See* Appendix E at 10-11. Mr. XXX begins by again noting that this holding is directly contrary to the Seventh Circuit's holding in *Boyko*. Nevertheless, even if one was to disregard the evidence presented to the federal, habeas court related to trial counsel's failure to *prepare* for the mitigation phase of the trial, the

Fifth Circuit's ultimate holding that counsel was not ineffective for failing to *present* mitigation evidence fails in the face of this Court's recent jurisprudence. Indeed, the Fifth Circuit recognized that Mr. XXX *did* present a sufficient claim related to childhood abuse that was not presented at the sentencing phase of the trial. Obviously, the best witnesses to corroborate such claims would have been Mr. XXX's parents and siblings. Even Mr. XXX's trial counsel acknowledged in his affidavit to the state habeas court that he received information that Mr. XXX's "mother [was to blame] for all of [his] problems." Moreover, there was testimony at the sentencing phase of the trial that Mr. XXX had family problems related to his mother. Respondent never presented any evidence that Mr. XXX's parents or siblings would have been difficult to locate and Respondent presented no evidence that Mr. XXX's trial counsel made any serious attempt to locate them.

Thus, even if one was to *only* consider the evidence regarding the actual childhood abuse but one did <u>not</u> consider evidence regarding the ease with which such evidence *could* have been found, the simple fact that Mr. XXX's mother and siblings were never contacted (as supported by their affidavits as well as trial counsel's affidavit presented to the state, habeas court) and that their testimony was never presented would still constitute ineffective counsel under *Wiggins* and *Rompilla*. For example, in *Wiggins* the Court focused on the absolute necessity for counsel in a death penalty case to conduct a social history. *Wiggins*, 123 S.Ct. at 2533, 2536, 2538. It also noted that a *limited* investigation into mitigating evidence would rarely be reasonable. *Id*. In fact, as if talking about this case, it made clear that it would *not* accept abandoning a mitigation investigation "after having acquired only rudimentary knowledge of a [defendant's life

history] from a narrow set of sources." *Id*. at 2537. Nevertheless, according to the evidence presented to both the state and federal courts in this case and excluding all evidence that the Fifth Circuit held was not adequately presented, it is still clear that Mr. XXX's trial counsel *did* abandon the mitigation investigation after having acquired only a rudimentary knowledge of his life during the brief **one year** period spent in Houston. Moreover, given the evidence of Mr. XXX's childhood abuse that the Fifth Circuit ruled *could* be considered by the federal courts, Respondent offered no explanation why this abuse evidence was not found and never claimed that Mr. XXX's trial counsel engaged in any sort of tactical decision not to present it. In short, it is impossible to accept the overwhelming evidence of childhood abuse (as does the Fifth Circuit) without any explanation from Respondent as to why the jury was not informed of this evidence and *not* conclude, based on *Wiggins*, that Mr. XXX's trial counsel was ineffective for failing to *present* the evidence of horrific childhood abuse.

Similarly, in *Rompilla*, the Court made clear that counsel is not excused from conducting a sufficient mitigation investigation simply because they make a number of efforts, "including interviews with [the defendant] and *some* members of his family...."[8] and/or the defendant's contributions to any mitigation case is "minimal." *Rompilla*, 125 S.Ct. at 2462. Significantly, the Court noted that it was the *trial lawyer's* obligation to show that the additional mitigation evidence not *presented* could not have been found "would have required significant labor." *Id.* at 2468. It did not place the burden on a

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[8] In *Rompilla*, trial counsel, unlike Mr. XXX's trial counsel, did interview the defendant's siblings. *Rompilla*, 125 S.Ct. at 2461.

petitioner to show that the additional mitigation evidence that had not been presented could have been "easily found" as the Fifth Circuit did to Mr. XXX in the instant case.[9]

Here, even putting aside the affirmative affidavits Mr. XXX presented to the United States District Court showing the ease with which his trial counsel could have developed a persuasive mitigation case that might have well influenced the jury, the mitigation investigation that trial counsel did do, especially in light of the evidence he *did* have regarding Mr. XXX's mother, seriously compromised his opportunity to respond to a case of aggravation. No social history appears to have been done, the mitigation investigation was limited to non-parents and non-siblings living in the Houston area who were familiar with Mr. XXX for less than a year and yielded only a "rudimentary knowledge" of Mr. XXX's childhood background. Thus, even based on the evidence presented to the state habeas court, Mr. XXX was entitled to relief based upon this Court's application of *Strickland* in *Wiggins* and *Rompilla.*

II. THE COURT SHOULD ADDRESS SEVERAL IMPORTANT QUESTIONS REGARDING THE CIRCUMSTANCES UNDER WHICH A HABEAS PETITIONER IS ELIGIBLE TO AN EVIDENTIARY HEARING IN FEDERAL COURT.

A. The Court Should Address Whether a State Court's Failure to Follow Its Own Statutory Procedures Must Be Examined in Determining Whether a Habeas Petitioner "Has Failed to Develop the Factual Basis of a Claim in State Court Proceedings" Under 28 U.S.C. § 2254 (e)(2) as this is Extremely Important to the Proper Application of that Section.

In its opinion and despite the fact that Mr. XXX requested an evidentiary hearing in the state habeas court, the Fifth Circuit concluded that he was not diligent in presenting evidence of his trial attorney's failure to investigate to the state habeas court. *See* Appendix E. at 11-12. The panel does admit that it was "puzzled" by the fact that the

state habeas court purported to rely upon its "personal recollection" in resolving Mr. XXX's petition despite the fact that it "did not have any such personal recollection as it did not preside over Petitioner's trial." *Id*. at 13, n.1.

Mr. XXX's state habeas counsel followed the dictates of Art. 11.071 of the Texas Code of Criminal Procedure. Mr. XXX filed his state court petition and met his burden of pleading by alleging verified facts which, if true, entitled him to relief. *See, e.g., Ex Parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). He also requested an evidentiary hearing. Once that was done and the state responded, if the facts alleged by Mr. XXX were controverted, the state court was *required by law* to designate the controverted factual issues to be resolved and only then "require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection." *See* Tex. Code Crim. P. Art. 11.071(9)(a). Here, the state court never entered the mandatory order and simply entered its findings and conclusions based upon "personal recollection." The Texas Court of Criminal Appeals has held that the failure to follow the required procedure effectively denies parties the opportunity to present evidence to the state court:

> From the conclusory affidavits before us all that we can determine is that "controverted, previously unresolved facts which are material to the legality of the petitioner's confinement" existed at the time the convicting court considered and issued its findings of fact and conclusions of law in this matter. See Art, 11.07, Sec. 2(d), V.A.C.C.P. Hence, under this statute, it was the duty of the court to "enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved." No such order designating those issues to be resolved by the trial court appears in the record. Neither does there appear any order requiring "affidavits, depositions, interrogatories, (or) hearings" to resolve the disputed issue at bar. Further, it does not appear of record that the trial court relied on "personal recollection" to resolve the issue. See Art. 11.07, Sec. 2(d), supra.
>
> From this record we deduce, then, that the parties involved were not allowed the opportunity to present evidence to support or deny the

> controverted allegations in the application for a writ of habeas corpus. This procedure violates Art. 11.07, Sec. 2(d), and prevented the petitioner from discharging his burden of proof.

Ex Parte Campos, 613 S.W.2d 745, 746 (Tex. Crim. App. 1981).[10]

Here, Mr. XXX did everything the state habeas law required in order to plead his state habeas claim and it was then incumbent upon the state court to determine what procedures would then be employed to gather facts to resolve the controverted issues such as holding the requested evidentiary hearing. In determining whether a Petitioner met the "due diligence" standard of 28 U.S.C. § 2254(e), a Petitioner should be able to rely upon the clear rules set out by state statute and, as noted above, the Texas Court of Criminal Appeals' own decision *Campos* suggests that the failure to follow that state

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[10] Ironically, the Fifth Circuit's two decisions in *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), *overruled*, 105 F. 3d 209 (5th Cir. 1997) are also instructive. Initially, the Fifth Circuit in *Mata* upheld the District Court's denial of habeas relief and the denial of an evidentiary hearing based upon an alleged state court procedural default by Mata:

> The state habeas court disposed of Mata's claim on procedural grounds. The Master's report, which the Texas Court of Criminal Appeals adopted in denying Mata's state habeas petition, determined that Mata failed to meet his pleading burden under Texas law. Citing the Texas Court of Criminal Appeals' decision in *Ex Parte Empey*, The Master stated that Texas law requires a petitioner to offer, along with his habeas petition, at least some proof to support his factual allegations. The Master concluded that, as Mata failed to attach any affidavits, exhibits, newspaper clippings, letters from participants, or any other documents that might demonstrate or reflect the events that Mata described in his petition…

Id. at 1271-72. Nevertheless, on rehearing, the Court reversed itself based upon Texas' concession that there is, in fact, no requirement that a habeas applicant submit documentary support with his initial filing of a habeas application and that the burden-of-pleading standard required for a habeas applicant only demands that the applicant allege facts which, if later proven true, are sufficient to entitle him to relief. *Mata*, 105 F. 3d 210.

statute effectively denies parties the opportunity to present evidence to the state habeas court.[11]

Given that Mr. XXX had every reason to expect the state court to follow the procedures set out in Art. 11.071, the federal District Court, contrary to the Fifth Circuit's holding, was not prohibited from holding an evidentiary hearing under 28 U.S.C. § 2254(e)(2) given that Mr. XXX was not to blame for the failure of the state court to hold an evidentiary hearing.

B. The Fifth Circuit Appears to be the Lone Circuit that Holds that a Petitioner who has Continually Requested an Evidentiary Hearing in State Post-Conviction Proceedings Only to be Denied Such a Hearing, Does *Not* Act with Sufficient Diligence Under 28 U.S.C. § 2254(e)(2).

As noted above, Mr. XXX continually requested the state, habeas court to hold an evidentiary hearing in this case. Nevertheless, relying upon its precedent in *Dowthitt v. Johnson*, *2*30 F.3d 733, 758 (5th Cir. 2000), the Fifth Circuit held that such requests were not sufficient to satisfy the diligence standard set forth in 28 U.S.C. § 2254(e)(2). *See* Appendix E at 12.

The Fifth Circuits holding in *Dowthitt*, as applied to the instant case, appears to conflict with *all* the other courts of appeals on this issue. *See, e.g., Samper*, 74 Fed. Appx. at 82, *citing*, *Drake v. Portuondo*, 321 F.3d 338, 346-47 (2d Cir. 2003); *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998), *cert. denied*, 525 U.S. 1037 (1998)*; McFarland v. Yukins*, 356 F.3d 688, 712 (6th Cir. 2004); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997); *Mayes v. Gibson*, 210 F.3d 1284, 1288 n.2 (10th Cir.), *cert. denied*, 531 U.S. 1020 (2000); *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir.. 2002), *cert. denied sub. nom., Breedlove v. Crosby*, 537 U.S. 1204 (2003).

Indeed, this Court held that diligence under 28 U.S.C. § 2254(e)(2) "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Given the conflict among the circuits, this Court should now decide whether such a request is "sufficient" to preserve the eligibility for obtaining an evidentiary hearing in state court. This is especially significant in this case where, not only did Mr. XXX request such an evidentiary hearing in state court, but, as discussed above, he followed the state statutory procedures in presenting his claim to the state court only to have it ignore that procedure.

III. THIS CASE CRIES OUT FOR THE COURT TO FINALLY AND FULLY ADDRESS THE QUESTION OF WHETHER INEFFECTIVE ASSISTANCE OF STATE, HABEAS COUNSEL CAN EXCUSE A PROCEDURAL DEFAULT

The Fifth Circuit's opinion in this case is chilling in that it concludes in one breath that there was substantial evidence that would have spared Mr. XXX a sentence of death,[12] but concludes in another breath that XXX must be executed nonetheless because of the alleged failures of his state, court-appointed habeas counsel. Similarly, in an equally chilling footnote in the District Court's opinion, that Court all but acknowledged the deficient performance of Mr. XXX's trial counsel but went on to say that Mr. XXX must "shoulder the consequences" (the "consequences" being death) of the actions of his state, court-appointed habeas counsel. *See* Appendix B at 30 n.16. Therefore, assuming *arguendo* the Court of Appeals correctly held that Mr. XXX's failure to investigate claim was not fairly presented to the state court, this case cries out for this Court to resolve the

question it left open in *Coleman v. Thompson*, 501 U.S. 722, 755 (1991): Whether ineffective assistance of state habeas counsel can excuse a procedural default when the state, habeas proceeding was the first opportunity that a defendant had to raise the claim the state alleges in federal court was defaulted? *See Daniels v. United States*, 532 U.S. 374, 387 (2001) (Scalia, J., concurring) (Acknowledging that question was "left open" in *Coleman*).

To guide the Court in determination as to whether this is an issue worthy of consideration through a Writ of Certiorari, it is important to note several things. First, as noted above, the United States District Court and the United States Court of Appeals all but acknowledged that Mr. XXX would have been entitled to relief and would have had his death sentence vacated *but for* their ultimate holdings that Mr. XXX defaulted portions of his claim that his sentencing counsel was ineffective while presenting this claim to the state habeas court. Second, it appears clear that the state habeas proceeding was Mr. XXX's first opportunity to claim that his sentencing counsel was ineffective. *See, e.g., Ex Parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 19997) (Acknowledging that "in most instances" the state, habeas court will present the first opportunity to effectively raise an effective assistance of counsel claim). Third, even more so since the enactment of the AEDPA, it is beyond peradventure that a person's right to habeas corpus relief is extremely dependent upon his presentation of his claim to the state courts in the first instance. Finally, this Court has recognized that "'capital proceedings [must] be policed at all stages by an especially vigilant concern for

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12 "[O]ur inquiry would be much more difficult were we able to consider all of the affidavits and evidence presented to the district court." *See* Appendix E at 17 n.3

procedural fairness and for the accuracy of factfinding.'" *Monge v. California*, 524 U.S. 721, 732 (1998) (citation omitted).

Given that 28 U.S.C. § 2254 makes Mr. XXX's constitutional right to federal habeas relief almost totally dependent on how issues were presented in state court and given that Mr. XXX's "one and only" opportunity to raise a claim of ineffective assistance of sentencing counsel was in connection with his state writ, the due process clauses of the Fifth and Fourteenth Amendments as well as the Sixth Amendment to the United States Constitution should provide for effective assistance of counsel in a state, habeas court to the extent it is a defendant's "one and only opportunity" to raise a claim at issue.[13] Indeed, it would appear that this result was at least suggested by the Court in *Coleman* and is consistent with its holdings in *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Johnson v. Mississippi*, 486 U.S. 578 (1988).[14]

In sum, while the Fifth Circuit has joined other court of appeals in holding that ineffective assistance of state, habeas counsel will not serve as "cause" for a procedural default even where the state habeas proceeding provides a defendant the first opportunity to raise the claim under discussion,[15] this Court should address this issue of exceptional

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[14] In both *Ford* and *Johnson*, the Court considered claims that were only likely to arise *after* direct appeal. In *Ford*, the Court held that states may not constitutionally execute an individual who became insane following trial and they must afford adequate post-conviction procedures for assessing the sanity of condemned prisoners prior to their execution even after his direct appeal has been exhausted. *Ford*, 477 U.S. at 414; *id*. at 423-25 (Powell, J., concurring). In *Johnson*, the Court faulted Mississippi for lacking a post-conviction procedure in which a prisoner could secure relief after his conviction had become final from a death sentence that was premised in part on a prior conviction that was later found to be unconstitutional. *Johnson*, 486 U.S. at 587-88.

importance that it previously left "open" in *Coleman*. Moreover the facts of this case make it a perfect vehicle to address this issue.

IV. *STONE V. POELL*, Issues

A. There Is a Sharp Conflict Among Federal Courts of Appeals Regarding What Constitutes "An Opportunity For A Full And Fair Litigation" of a Fourth Amdendment Claim and this Conflict Should Be Settled by this Court as *Stone* Offers Very Little Guidance.

As discussed above, Mr. XXX argued on direct appeal that Kiesewetter's search and seizure of his bag was illegal and that his statements were fruit of the illegal search.[16] The Texas Court of Criminal Appeals assumed *arguendo* that the seizure of Mr. XXX's property was illegal but it characterized Mr. XXX's argument as an argument that the statements were fruit of an illegal *arrest* rather than fruit of an illegal *search*. *See* Appendix A at 8-9. In short, despite the fact that Mr. XXX's argument was clearly made, the Court of Criminal Appeals, either intentionally or because of incompetence, mischaracterized it. The United States District Court, relying on Fifth Circuit precedent, held that *Stone* precluded it from considering Mr. XXX's Fourth Amendment argument in connection with Mr. XXX's Petition for Writ of Habeas Corpus and the Fifth Circuit denied Mr. XXX a Certificate of Appealability on the issue. *See* Appendix B at 32-35.

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[15] *See, e.g., Elizalde v. Dretke*, 362 F.3d 323 (5th Cir.), *cert. denied*, 125 S.Ct. 293 (2004).

[16] There is little doubt that, had the District Court and/or the Fifth Circuit considered this claim on the merits, they would have concluded that the bag was illegally seized. Indeed, such a conclusion would have been compelled by the Fifth Circuit's decision in *United States v. Wilson* 36 F.3d 1298 (5th Cir. 1994) which is almost directly on point.

As explained in the preeminent treatise on search and seizure law, there is a marked difference in the analysis when a confession is claimed to be fruit of an illegal search than when a confession is claimed to be fruit of an illegal seizure.

> Although the Supreme Court has never confronted, except obliquely, a situation in which it was seriously contended that a confession was the fruit of a prior illegal search, *in most such cases there is little doubt as to what the result should be*. In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with incriminating evidence they had illegally seized, it is apparent that there has been an "exploitation of that illegality" when the police subsequently question the defendant about that evidence or the crime to which it relates. This is because "the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak."
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> Because this is the case, the more fine-tuned assessment which the Supreme Court mandated in *Brown v. Illinois* for determination of when a confession is the fruit of an illegal *arrest*, is ordinarily unnecessary when the "poisonous tree" is instead an illegal search. As explained in *People v. Robbins* [369 N.E. 2d 577 (Ill. App. 1977], the two situations are quite different:
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> Confronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent. On the other hand, the custodial environment resulting from a false arrest is merely one factor to be considered in determining whether a confession is inadmissible.

W. LaFave, *Search & Seizure*, § 11.4(c) at 272-73 (West 2000) (emphasis added). According to LaFave, "[a]n 'act of free will to purge the primary taint,' to take the phrase coined in *Wong Sun* and quoted with approval in *Brown*, is an *unlikely occurrence* when that taint is a productive illegal search." *Id*. at 274 (emphasis added). *See also, Amador-Gonzalez v. United States*, 391 F.2d 308, 318 (5th Cir. 1968).

In *Stone,* this Court held that Fourth Amendment claims would not be cognizable under 28 U.S.C. § 2254 provided "the State has provided an opportunity for full and fair litigation of [the] Fourth Amendment claim" at trial and on direct review. *Stone*, 428

U.S. at 481, 486. Unfortunately, the only clue that the Court gave as to what constituted "an opportunity for full and fair litigation of a Fourth Amendment claim" is a "Cf." citation to *Townsend v. Sain*, 372 U.S. 293 (1963). *Stone*, 428 U.S. at 494, n.36.[17] The Eighth Circuit's discussion in *Willett v. Lockhart*, 37 F.3d 1265 (8th Cir. 1994), *cert. denied sub. nom., Willett v. Norris*, 514 U.S. 1052 (1995) contains an excellent discussion about the confusion this has caused among the courts. It first noted that "[t]he Supreme Court has yet to elaborate upon the meaning of 'an opportunity for full and fair litigation.'" *Id*. at 1270. It then commented on the various approaches taken by the several courts of appeals: "As is evident from reading cases from our Court and from our sister circuits, application of the *Stone* rule runs the gamut--from looking at "opportunity" in the abstract to conducting a detailed review of the state court record to, in some instances, holding a plenary evidentiary hearing in district court." *Id*. at 1271. Indeed, in *Shoemaker v. Riley*, 459 U.S. 948 (1982), former Justice White dissented from the denial of certiorari and noted the conflicting lower court views regarding the *Stone* standard for "an opportunity for full and fair litigation." He concluded: "The issue is obviously important and recurring. I would grant certiorari to settle it."

This case certainly highlights the conflict among the courts of appeals about what constitutes "an opportunity for full and fair litigation of a Fourth Amendment claim." The District Court in this case applied the *Stone* roadblock based upon the Fifth Circuit's holding in *Janecka v. Cockrell*, 301 F.3d 316 (2002), *cert. denied*, 537 U.S. 1196 (2003). In *Janecka*, the Petitioner made the same argument made by Mr. XXX in the instant case, that the Texas Court of Criminal Appeals "overlooked his unlawful search claim." *Id*. at 321. The Fifth Circuit, nevertheless, held that *Stone* precluded review of the claim in

federal court. *Id*. ("[W]e have previously held that, absent additional allegations that state processes routinely or systematically are applied in such a way as to prevent the actual litigation of Fourth Amendment claims, mistakes that thwart the presentation of Fourth Amendment claims do not render the *Stone* bar inapplicable"). In other words, the Fifth Circuit requires a Petitioner to show a "systematic" denial of a "full an fair opportunity" to litigate a Fourth Amendment claim rather than an individual denial of such an opportunity. This does not appear to be what this Court intended in *Stone*.

In contrast, based upon precedent in the Eleventh, Seventh, and Tenth circuits, it appears that, in those circuits, Mr. XXX's claim would have received consideration. For example, in *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987), "[a]lthough both at trial and on direct appeal appellant argued that the second statement was inadmissible because of the residual taint from the initial, illegal arrest, the Alabama Court of Criminal Appeals ignored this contention in its opinion." *Id*. at 1490. The Eleventh Circuit held that this failure on the part of the Alabama Court of Criminal Appeals in the individual case precluded the application of the *Stone* roadblock in federal court. *Id*. *See also Tukes v. Dugger*, 911 F.2d 508, 514 (11th Cir. 1990).

In *United States v. Hamption*, 296 F.3d 560, 563-64 (7th Cir.), *cert. denied*, 537 U.S. 980 (2002), the United States Court of Appeals for the Seventh Circuit explained under what circumstances it would or would not apply the *Stone* roadblock:

> What a state has to do is look to the appropriate body of decisional law. Faced with a claim that the police lacked probable cause to make an arrest, a state court could not respond that in Illinois it is proper to arrest without probable cause. Failure to apply applicable law would show that the accused lacked a full opportunity to prevail on direct appeal. A court that has made up its mind not to enforce the fourth amendment rarely says so directly, though it may leave clues in its treatment of the merits. It is

> impossible to see how the problem could be identified without paying *some* attention to how the state court dealt with the merits.

See also, Cabrera, 324 F.3d at 531 (7th Cir. 2003) ("[W]e continue to believe that we would be wrong to close our eyes entirely to possible abuses and to say simply that *Stone* applies if the State allows motions to suppress evidence to be brought, never mind that a particular judge undermined the process in some disturbing way. In short, "full and fair" guarantees the right to present one's case, but it does not guarantee a correct result."). In short, under the Seventh Circuit's precedent, even though a state allows a defendant to submit a brief that contains a Fourth Amendment claim, when the state appellate court does not "apply applicable law" and the process is "undermined" because the state court does not understand the clearly presented claim, thereby rendering the "opportunity" to present the claim to be illusory and a "sham," the *Stone* roadblock would *not* apply.

Finally, in the Tenth Circuit, if the state court does not apply the correct "applicable law," the *Stone* roadblock will not apply. *See Herrera v. Lemaster*, 225 F.3d 1176, 1178 (10th Cir. 2000) ("Because the New Mexico Supreme Court failed to apply the *Chapman* standard in assessing the harmlessness of the Fourth Amendment violation it found, we are persuaded petitioner did not receive full and fair consideration of his claim." Indeed, as the Tenth Circuit noted in *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978) :

> "Opportunity for full and fair consideration" includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim. It also includes the full and fair evidentiary hearing contemplated by *Townsend*. Furthermore, it contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from consideringFourth Amendment claims in habeas corpus proceedings where the state court wilfully refuses to apply the correct and controlling constitutional standards. Deference to state court consideration of Fourth

> Amendment claims does not require federal blindness to a state court's willful refusal to apply the appropriate constitutional standard.

Again, Mr. XXX was unquestionably denied a "recognition and at least colorable application of the correct Fourth Amendment constitutional standards" in the instant case.

In sum, Mr. XXX presented a meritorious Fourth Amendment claim that, for whatever reason, the Texas Court of Criminal Appeals mischaracterized. Thus, any "opportunity for full and fair litigation of a [the] claim" was, at best, illusory. In at least three of the twelve judicial circuits, Mr. XXX would have been allowed to have this claim presented in federal court and, most likely, he would have prevailed on the claim. Nevertheless, because he was tried in the Fifth Circuit, he sits on death row. This is simply because the Fifth Circuit requires a "systematic" denial of a "full an fair opportunity" to litigate a Fourth Amendment claim rather than an individual denial of such an opportunity. In other words, the Fifth Circuit's concern is limited simply to whether state courts permit defendants, in general, to allege Fourth Amendment violations. In short, this Court needs to resolve the conflict between the courts of appeals and give some clarity to the "opportunity for full and fair litigation" standard it referenced in *Stone*.

B. The Question of Whether *Stone* Applies to Death Penalty Cases is an Important Question that Should Be Settled by this Court.

This Court has made clear that its rule announced in *Stone* is "not jurisdictional in nature." *Withrow v. Williams*, 507 U.S. 680, 686 (1982). Rather, it is based upon "reasons of prudence and comity" and on a "balancing" of the state's interest in the finality of convictions versus society's interests in deterring Fourth Amendment violations. *See Kimmelman v. Morrison*, 477 U.S. 365, 379 (1983) ("[T]he Court may be

free, under its analysis in *Stone*, to refuse for reasons of prudence and comity to burden the State with the costs of the exclusionary rule in contexts where the Court believes the price of the rule to exceed its utility...); *Stone*, 428 U.S. at 486-94.

Nevertheless, as one commentator has noted, it is arguable that *Stone* "does not apply to capital cases." Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure*, §27.1 at 1242 (4th ed. 1998). ("Although the lower courts have assumed that the *Stone* rule applies to capital cases, the jurisprudential underpinnings of the rule do not ineluctably lead to that conclusion."). Indeed, this Court has consistently noted:

> [T]here is a significant constitutional difference between the death penalty and lesser punishments:
>
> "[Death] is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action....."

Beck v. Alabama, 447 U.S. 625, 637-38 (1980), *quoting*, *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Therefore, while the Court may be free in the non-capital, habeas context to conclude that the price of the exclusionary rule exceeds its utility, it is not immediately clear that the Constitution allows the court the ability "to allocate the costs" of Fourth Amendment violations to human beings condemned to death. *Cf. Kimmelman*, 477 U.S. at 379. In short, "[w]hen life is at stake...society's interest in maintaining the integrity of its judicial and criminal justice processes profoundly increases, substantially recalibrating in favor of the petitioner 'the balancing process [that was] at work in the noncapital context before the Court in *Stone....*" Hertz, *supra*, § 27.1 at 1242 (citation omitted).

Given the fact that this Court has never applied *Stone* in a capital case and that it has often commented on the fact that "death is different," it is submitted that this Court should consider the very important question as to whether *Stone* does, in fact, apply in the capital context.

C. This Court Should Resolve a Split Among Lower Federal Courts as to Whether the AEDPA Abrogated the Rule in *Stone.*

The United States District Court for the Southern District of West Virginia has held that, by failing to exclude Fourth Amendment claims from its standard of review, the revised 28 U.S.C. § 2254(d) has effectively abolished the distinction drawn by *Stone* between Fourth Amendment claims and other claims and requires federal court to employ a uniform standard for assessing *all* claims raised under 28 U.S.C. § 2254. *Carlson v. Ferguson*, 9 F. Supp. 2d 654 (S.D. W.Va. 1997). Law professors have concluded that the effect of the AEDPA on *Stone* is an open question. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules,* 2 Buff. Crim. L. R. 535, 587 (1999), *citing,* Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* at 742 (4th ed. 1998). Still other courts have held that *Stone* has survived the enactment of the AEDPA. *See, e.g., Herrera*, 225 F.3d at 1178 n.2.

Mr. XXX submits that the reasoning of *Carlson* is unassailable. As noted above, *Stone* is not jurisdictional nor statutorily based. Congress, in enacting the analytical framework of § 2254(d), requires federal courts to review "the state court adjudication process to ensure that (1) the state trial judge reasonably applied clearly established federal law as interpreted by the Supreme Court of the United States and (2) the decision was not based on an unreasonable determination of the facts in light of the evidence

presented in the state court proceeding." *Carlson*, 9 F.Supp. 2d at 656. There is absolutely no indication that Congress intended to exclude Fourth Amendment claims from this review process. Indeed, as the *Carlson* court noted, 28 U.S.C. § 2254(d) provides that "[a]n application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court...." Applying "the well-established plain language rule of statutory interpretation....the phrase, 'any claim that was adjudicated on the merits' as drafted in section 2254(d) includes claims premised under the Fourth Amendment's exclusionary rule." *Carlson*, 9 F.Supp. 2d at 657.

In sum, there is a disagreement among federal courts as to the effect that the AEDPA has had on *Stone* and respected legal commentators believe this to be an open question. The Court

should grant certiorari in order to answer this question and ensure that federal habeas petitioners are treated uniformly throughout the country.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *XXX v. Dretke*, No. 03-20326.

DATED: October 4, 2005

Respectfully submitted,

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Counsel for Petitioner

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

XXX XXX, JR.,

Petitioner,

VERSUS

DAVID DRETKE, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

APPENDIX G

Amendment IV to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IV to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the United States Constitution provides:

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

Amendment XIV, § 1 to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall

have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts , in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 .

NO. _____

IN THE

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XXX XXX, JR.,

Petitioner,

VERSUS

DAVID DRETKE, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

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Counsel for Petitioner

I, F. Clinton Broden, certify that on October 4, 2005, I caused the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Motion for Leave to Proceed In Forma Pauperis on behalf of XXX XXX, Jr. to be served by first-class mail postage prepaid upon: Kelli J. Weaver, Office of the Texas Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

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