No. 18-7203

In the Supreme Court of the United States of America

FRANCISCO SALAZAR,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

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

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an attorney performs deficiently under *Strickland* by failing to object to the admission of evidence on the basis of an unsettled point of Fifth Amendment law?

2. Whether the lower court misapplied *Strickland* when it determined that Salazar's proffered testimony failed to show that he was prejudiced by his attorney's allegedly depriving him of the right to testify?

3. Whether the lower court's holding that Salazar's attorney did not perform deficiently by failing to object to certain expert testimony was erroneous because the testimony violated Salazar's federal due process rights, even though Salazar failed to argue due process in the lower court?

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STATEMENT OF THE CASE

I. The Evidence

When E.G. was twelve years old, her stepfather, Salazar, began sexually abusing her. Pet. App. 11. It began with Salazar fondling E.G.'s breasts, but escalated to Salazar making E.G. masturbate him and perform oral sex. Pet. App. 11. Salazar had fondled E.G.'s breasts on numerous occasions before E.G. told her sister, K.S., and her mother what was happening. Pet. App. 11. When E.G.'s mother confronted Salazar, he put his hands over his face and cried, saying it was a mistake, he was sorry, and it would never happen again. Pet. App. 11. But Salazar continued abusing E.G. until, when she was fifteen years old, E.G. told her aunt what was happening. Pet. App. 11. At that time, E.G.'s mother removed E.G. from the home and called the police to report the abuse. Pet. App. 11.

Salazar pleaded not guilty and was tried in July of 2011. Pet. App. 10. Among other evidence at trial, Detective Tom Gannucci testified regarding his investigation of the case, including his attempt to get a statement from Salazar. Pet. App. 12. K.S. testified that she did not believe Salazar had done anything wrong, but admitted that E.G. had told her that Salazar had been touching E.G. Pet. App. 12. Dr. Lawrence Thompson, director of therapy and psychological services at the Harris County Children's Assessment Center, testified that two to five percent of allegations of child sexual abuse are false and that "those cases with false allegations could be ones that the prosecutor doesn't bring to court because they have a sense that there is a false allegation in the case." Pet. App. 12–13. The jury

convicted Salazar of indecency with a child by contact, sexual assault of a child, and continuous sexual abuse of a child. Pet. App. 10.

II. The Motion for New Trial

Thereafter, Salazar filed a motion for new trial alleging that trial counsel provided ineffective assistance and seeking an evidentiary hearing. Pet. App. 10. Salazar's motion for new trial alleged that trial counsel performed deficiently in several respects, only three of which are relevant here. First, Salazar claimed that his trial counsel deficiently failed to object to Dr. Thompson "bolstering" E.G.'s testimony. Br. in Opp'n App. 6a. Salazar claimed that Dr. Thompson's testimony was inadmissible bolstering because it constituted an opinion that "the class of persons to which the complainant belongs, namely children, are typically truthful." Br. in Opp'n App. 10a.

Second, Salazar alleged that his trial attorney deficiently failed to assert a Fifth Amendment objection to the following direct-examination testimony from Detective Gannucci:

> [State's counsel]: Did you attempt to make contact with the suspect?
>
> [Gannucci]: Yes.
>
> [State's counsel]: And did you get any kind of statement?
>
> [Gannucci]: No.
>
> [State's counsel]: And did you actually speak with the suspect?
>
> [Gannucci]: Yes.

Pet. App. 14; Br. in Opp'n App. 11a. In support of his motion for new trial, Salazar attached a document he described as an excerpt from Detective Gannucci's

supplement to the offense report, which included a passage stating, "I talked with the suspect via phone and asked if [he] would come to the Magnolia Detective's Office to give a statement. The suspect said he hired an attorney and was told not to talk with me." Pet. App. 14.

Third, the motion for new trial alleged that trial counsel performed deficiently by denying Salazar his constitutional right to testify. Br. in Opp'n 17a. Salazar attached an unsworn declaration to his motion for new trial, whereby he claimed that he told his attorney he wanted to testify, but his attorney refused to call him to the stand. Pet. App. 18–19. Salazar claimed that, given the opportunity, he would have testified that he "never intentionally touched [E.G.] inappropriately," that "[E.G.] did not like when [Salazar] was strict with the rules and [Salazar] would not let her talk to boys late at night on the phone and do everything she wanted to do," and that "[s]he would become very upset with [Salazar] about not letting her do what she wanted to do." Pet. App. 19. Salazar's motion surmised that if he had testified, "the jury would have been able to evaluate his credibility and there is a reasonable probability that they would have decided to find him not guilty." Pet. App. 19.

The trial court denied the motion for new trial and Salazar appealed. Pet. App. 10. On appeal, Salazar argued that the trial court erred by denying the motion for new trial without an evidentiary hearing. Salazar also reurged his ineffective assistance of counsel claims as freestanding grounds for appellate review.

III. The Opinion of the Beaumont Court of Appeals

The Court of Appeals affirmed the conviction in an unpublished panel opinion. Pet. App. 5. Noting that the record on direct appeal is seldom developed enough to support freestanding ineffective assistance of counsel claims, the court of appeals determined that the record before it failed to demonstrate "the required showings of deficient performance and prejudice as required by *Strickland*." Pet. App. 13, 19 (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

Specifically, as to trial counsel's alleged Fifth Amendment deficiency, the court of appeals found no evidence in the record that Salazar was subject to custodial interrogation at the time he declined to give a statement. Pet. App. 14. The court concluded that, under the Texas Court of Criminal Appeals opinion in *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. 2012) (holding pre-arrest, pre-*Miranda* silence substantively admissible over Fifth Amendment objection), *aff'd*, 570 U.S. 178 (2013) (plurality opinion), the trial court would not have erred in overruling a Fifth Amendment objection to the detective's testimony, and therefore counsel did not perform deficiently by failing to object. Pet. App. 14.

The court of appeals further determined that Salazar failed to demonstrate that he was prejudiced by his attorney allegedly depriving him of his right to testify. Pet. App. 17–18. The court of appeals explained that Salazar's claim "that he would have benefitted from his own testimony" was "mere speculation," unsupported by a comparison of Salazar's sparse proposed testimony to the trial evidence and proceedings. Pet. App. 18–19.

Addressing the "bolstering" subset of Salazar's ineffective assistance of counsel claim, the court quoted the Texas common law definition of "bolstering" as being evidence "the sole purpose of which" is "to add credence or weight to some earlier unimpeached evidence," and reasoned that the record did not demonstrate that the sole purpose of Dr. Thompson's testimony was to persuade the jury of E.G.'s credibility. Pet. App. 12–13. Therefore, the court rejected Salazar's claim that trial counsel performed deficiently by failing to make a specific "bolstering" objection to Dr. Thompson's testimony. Pet. App. 13–14.

The court of appeals also overruled Salazar's complaint that the trial court failed to conduct an evidentiary hearing, noting that some evidence in the record indicated that "the trial court may have actually held a 'hearing' of some type," and observing that a hearing need not necessarily entail live testimony and that evidence can be brought by affidavit. Pet. App. 22. But the court of appeals concluded that the trial court did not err even if it conducted no hearing because "Salazar failed to present facts that were adequate to demonstrate reasonable grounds existed to believe he could establish a basis for an ineffective assistance claim." Pet. App. 22.

Finally, the court of appeals held that the trial court did not abuse its discretion in denying the motion for new trial:

> The trial court could have reasonably concluded that the strength of the State's case was such that the affidavits offered by Salazar, even if true, were not compelling enough to probably bring about a different result in a new trial and, therefore, that Appellant's motion and accompanying affidavits did not show that he was entitled to relief.

Pet. App. 22.

The Texas Court of Criminal Appeals denied Salazar's petition for discretionary review without written order. Pet. App. 3.

REASONS TO DENY THE PETITION

I. The intermediate Texas court's unpublished memorandum opinion is of consequence to no one but Salazar.

Salazar overstates the significance of the lower court's opinion in his case.

First, under the Texas Rules of Appellate Procedure, courts of appeals are not to designate an opinion as a "memorandum opinion" if the opinion "(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas; (c) criticizes existing law; or (d) resolves an apparent conflict of authority." Tex. R. App. P. 47.4. That the court designated its decision in this case a "memorandum opinion" illustrates that it did not intend nor understand its decision to announce new rules of constitutional significance. Although Salazar claims the court decided important questions of federal law, the court clearly signaled otherwise.

Second, unpublished court of appeals decisions bear no precedential value. Tex. R. App. P. 47.7. The lower court further insured against its opinion being taken for more than its worth by voting to not publish the opinion. *See* Tex. R. App. P. 47.2 (b) (the designation "publish" or "do not publish" decided by majority of justices participating in consideration of the case).

Third, the Beaumont Court of Appeals is only one of fourteen intermediate appellate courts in Texas, and its influence is therefore limited to a small fraction of state cases. Thus, even if this Court disagrees with the lower court's opinion, that

opinion is highly unlikely to impact anyone but Salazar and does not merit this Court's review.

II. Salazar's Sixth Amendment ineffective assistance of counsel claim is an unsuitable vehicle for tailoring Fifth Amendment jurisprudence.

Salazar asks this Court to hold that the Fifth Amendment prohibits introduction of evidence that a suspect declined to speak with a detective if the suspect states that he is acting upon the advice of counsel. *See* U.S. Const. amend. V. But this case is an unsuitable vehicle by which to address the Fifth Amendment question because the lower court's Fifth Amendment analysis was not essential to its ultimate holding on Salazar's Sixth Amendment ineffective assistance of counsel claim. *See* U.S. Const. amend. VI. Additionally, the factual record pertaining to both the Fifth and Sixth Amendment claims is inadequately developed to inform a comprehensive analysis of Salazar's Fifth Amendment questions.

A. Even if this Court overturned the lower court's Fifth Amendment analysis, the court's holding is still supported under a proper application of *Strickland*'s deferential standard for reviewing the reasonableness of counsel's performance.

Salazar's Fifth Amendment claims, to the extent that he raised them in the courts below, were merely a sub-issue of his ineffective assistance of counsel claim. This Court's intervention in this case is unnecessary because the lower court's holding that counsel did not perform deficiently does not hinge on the validity of the court's Fifth Amendment analysis.

In the lower court, Salazar claimed that his trial attorney performed deficiently for failing to object to the detective testifying that he spoke with Salazar but did not get a statement from him. Salazar claimed that his attorney should

have objected on Fifth Amendment grounds. Citing the Texas Court of Criminal Appeals decision in *Salinas*, 369 S.W.3d at 179, the court of appeals concluded that the trial court would not have erred by overruling such an objection because "[o]n the record before us, we find no evidence that Salazar was subject to custodial interrogation at the time he declined to give a statement to Detective Gannucci, and no Fifth Amendment protections would have applied." Pet. App. 14. For that reason, the court concluded that the record failed to show that counsel performed deficiently by failing to assert a Fifth Amendment objection. However, the court and parties in the state proceedings—present counsel included—apparently failed to realize that the Court of Criminal Appeals did not decide *Salinas* until approximately one year after Salazar's trial.

In reviewing ineffective assistance of counsel claims, this Court has stated that a "fair assessment of attorney performance" requires "judg[ing] the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Strickland*, 466 U.S. at 690 (emphasis added). Texas courts applying *Strickland* "have held counsel accountable for knowledge, or the ability to attain knowledge, of relevant legal matters that are neither novel nor unsettled." *Ex parte Moody*, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999); *Ex parte Williams*, 753 S.W.2d 695, 698 (Tex. Crim. App. 1988) (counsel did not perform deficiently by failing to collaterally attack a prior conviction where, at the time, there was no recognized ground for doing so). Therefore, review of trial counsel's performance should have accounted for controlling Fifth Amendment law

at the time of Salazar's trial. And at that time, Fifth Amendment law on this subject was unsettled, at best.

The Texas Court of Criminal Appeals observed that, prior to its decision in *Salinas*, "[n]either the Supreme Court nor our Court ha[d] decided whether pre-arrest, pre-*Miranda* silence . . . is admissible against a non-testifying defendant," but remarked that "[a]t least one notable Texas treatise has presumed that it is." *Salinas*, 369 S.W.3d at 178, 178 n.10 (citing 41 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 16.190 (3d ed. 2011)). The *Salinas* court also acknowledged a "conspicuous split" between other state and federal courts on the matter. *Id.* at 178–79; *see also State v. Lee*, 15 S.W.3d 921, 924 (Tex. Crim. App. 2000) (discussing split of authorities regarding Fifth Amendment applicability to substantive admission of pre-arrest, pre-*Miranda* silence), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007). And the only Texas court to have squarely ruled on the issue at the time of Salazar's trial held that the Fifth Amendment is inapplicable to pre-arrest, pre-*Miranda* silence used as substantive evidence against a non-testifying defendant. *Salinas v. State*, 368 S.W.3d 550, 558–59 (Tex. App.—Houston [14th Dist.] 2011), *aff'd*, 369 S.W.3d at 179.

Because the admissibility of a non-testifying defendant's pre-arrest, pre-*Miranda* silence was an unsettled question of law at the time of Salazar's trial, the Texas court of appeals correctly held that Salazar's trial attorney did not perform

deficiently by failing to assert a Fifth Amendment objection.[1] *See Ex parte Chandler*, 182 S.W.3d 350, 359 (Tex. Crim. App. 2005) ("[C]ounsel's performance will be measured against the state of the law in effect during the time of trial and we will not find counsel ineffective where the claimed error is based upon unsettled law.") (internal quotations and citation omitted); *see also United States v. Morris*, No. 17-6709, 2019 WL 1086469, at *3–4 (4th Cir. Mar. 8, 2019) (not yet published) (counsel not deficient for failing to raise objection unsupported by controlling precedent and where existing authorities did not strongly suggest an objection was warranted); *Fields v. United States*, 201 F.3d 1025, 1027–28 (8th Cir. 2000) (counsel not deficient for failing to object absent controlling precedent and given split between other jurisdictions on the subject).

To the extent that Salazar distinguishes his alleged invocation of his Fifth Amendment privilege from Salinas's mere silence, he asks this Court to simultaneously announce a new rule and retroactively hold his 2011 trial attorney deficient for failing to anticipate it. Indeed, by his very invocation of this Court's jurisdiction, Salazar concedes that the questions he presents have not been settled by this Court. Pet. 17. Accepting Salazar's invitation to settle his Fifth Amendment questions would entail shifting Sixth Amendment jurisprudence as well, given that

[1] Although Salazar's trial counsel was not required to anticipate future legal developments, as it so happened, the subsequent opinion of the Texas Court of Criminal Appeals in *Salinas* fortified Salazar's counsel's decision to not object. As the court of appeals in this case noted, the *Salinas* court's rationale was that the Fifth Amendment right against compulsory self-incrimination is not implicated when a person's interaction with law enforcement is not compelled. *Salinas*, 369 S.W.3d at 177–79 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). Thus, even if Salazar's trial counsel had been prescient, he may well have taken *Salinas* as foreclosing a Fifth Amendment objection to testimony regarding his client's non-custodial communication with the detective.

heretofore this Court has warned against judging the reasonableness of counsel's actions through the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

Because the lower court's conclusion that counsel did not perform deficiently is supported by review of counsel's performance under the state of Fifth Amendment law at the time of Salazar's trial, this Court's intervention to correct the lower court's Fifth Amendment reasoning would amount to nothing more than an advisory opinion. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

At a minimum, absent contrary evidence from Salazar's trial counsel, this Court should presume that counsel's decision not to object on the basis of a gap in Fifth Amendment jurisprudence was a reasonable trial strategy. *See Strickland*, 466 U.S. at 689. Many courts have acknowledged that failing to object to potentially objectionable evidence can be a reasonable trial strategy. *See, e.g., Hodge v. Haeberlin,* 579 F.3d 627, 641 (6th Cir. 2009) (counsel's failure to object to potentially objectionable evidence for fear of drawing jury's attention to it was not unreasonable); *McKinny v. State*, 76 S.W.3d 463, 473 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (discussing possible strategic reasons for not objecting to potentially objectionable evidence). So even if this Court concludes that the detective's testimony was objectionable, it should not reverse the lower court's

holding that counsel did not perform deficiently when the record contains no evidence of counsel's possible strategic reasons for not objecting. *See Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003) ("[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective."); *see also Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

Because correction of the lower court's Fifth Amendment analysis would not necessitate reversal of its holding on Salazar's ineffective assistance of counsel claim, this is not the appropriate case in which to consider the Fifth Amendment questions presented.

B. This case is an unsuitable vehicle to develop Fifth Amendment law because the record is sparse and would require this Court to find facts that were not fully litigated below.

Salazar invites this Court to draw a nuanced distinction between non-custodial silence, which this Court already addressed in *Salinas v. Texas*, 570 U.S. 178, 186 (2013) (plurality opinion), and Salazar's alleged non-custodial invocation of the "right to remain silent." *See* Pet. 17–21. But the trial evidence established only that, while investigating a sexual assault allegation, the detective "ma[d]e contact with" and "sp[oke] with" Salazar but did not "get any kind of statement." *See* Pet. App. 14. That evidence implicates no more than Salazar's non-custodial silence, which current controlling precedent holds admissible. *See Salinas*, 369 S.W.3d at 179.

The basis for Salazar's claim that he affirmatively invoked his Fifth Amendment privilege is the document excerpt Salazar attached to his motion for new trial, wherein the document's author wrote that he talked with "the suspect" by phone and asked if the suspect would provide a statement, but the suspect responded that he hired an attorney and was told not to talk to the detective. *See* Pet. App. 14. But no record evidence developed whether the document fully and accurately reflected the facts of Salazar's case.[2]

To distinguish between non-custodial silence and a non-custodial invocation of the Fifth Amendment, this Court would have to find facts concerning Salazar's invocation. And the bare record in this case does not give this Court much to work with. This Court would be better served to wait for a case in which the factual basis for these Fifth Amendment questions is fully litigated in the record and not embedded in an ineffective assistance of counsel claim.

Therefore, even if this Court desires to address the Fifth Amendment questions presented in the petition, this case is simply not a suitable vehicle through which to tailor Fifth Amendment jurisprudence.

III. No compelling reason exists for this Court to intervene in the state court's application of *Strickland*'s affirmative prejudice requirement to Salazar's alleged deprivation of his right to testify by defense counsel.

Salazar disputes the lower court's rationale for holding that he failed to meet the prejudice prong of the *Strickland* test for ineffective assistance of counsel.

[2] For instance, the suspect's responses do not appear as quotations, so it is impossible to tell precisely what language the suspect used to allegedly invoke any constitutional right. This is significant because the "general rule" is that invocation of the Fifth Amendment privilege must be explicit. *See Salinas*, 570 U.S. at 186.

A. Salazar asks this Court to correct a lower state court's application of a rule of law with respect to which there is no significant split of authorities.

Contrary to Salazar's claim that "the Texas [c]ourt of [a]ppeals decided an important question of federal law," the lower court merely applied the well-established two-part *Strickland* test to Salazar's claim that defense counsel performed deficiently by depriving Salazar of his right to testify. The lower court's use of the *Strickland* test to analyze Salazar's claim was not novel. More than a decade ago, the Texas Court of Criminal Appeals decided that *Strickland* provides the appropriate framework for analyzing claims involving the deprivation of the right to testify by defense counsel. *Johnson v. State*, 169 S.W.3d 223, 235–39 (Tex. Crim. App. 2005). The Court of Criminal Appeals further held that such an error is not "structural" and is therefore subject to a prejudice analysis. *Id*. Thus, the lower court here decided no important, unsettled question of federal law, but merely applied controlling Texas precedent.

And Texas's approach does not significantly differ from that of other state or federal jurisdictions. The Texas Court of Criminal Appeals noted in *Johnson* that "the vast majority of state courts of last resort that have addressed the [deprivation of the right to testify by defense counsel] have found that a harm or prejudice analysis applies." *Id*. at 238 n.89. The federal circuit courts of appeals that have considered such claims have likewise applied *Strickland*'s framework and conducted a prejudice/harm analysis.[3] This case, therefore, implicates no significant conflict of

[3] *See, e.g., Casiano-Jimenez v. United States*, 817 F.3d 816, 820, 822 (1st Cir. 2016); *Brown v. Artuz*, 124 F.3d 73, 73, 79–81 (2d Cir. 1997); *Palmer v. Hendricks*, 592 F.3d 386, 394–95 (3d Cir.

authorities for this Court to resolve.

Even assuming, for argument's sake, that the lower court's reasoning was flawed, Salazar requests this Court to correct what is, at worst, a lower state court's misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10.

B. To the extent Salazar asks this Court to declare that counsel's depriving Salazar of the right to testify is per se prejudicial, Salazar waived that argument by failing to present it to the lower court.

Citing *Johnson* as controlling, Salazar's brief below expressly invited the lower court to consider his claim within *Strickland*'s framework, including requiring him to show a "reasonable probability that the outcome of the proceeding would have been different had his attorney not precluded him from testifying." Br. in Opp'n App. 20a. So to the extent that Salazar's petition may be read as asking this Court to overrule *Johnson* and declare the deprivation of the right to testify by defense counsel "structural" error that is per se prejudicial, Salazar waived those arguments by failing to raise them in the lower court. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549–50 (1987) (refusing to consider constitutional arguments that were "not properly presented to the state courts"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

2010); *United States v. Mullins*, 315 F.3d 449, 456 (5th Cir. 2002); *Gonzales v. Elo*, 233 F.3d 348, 357 (6th Cir. 2000); *Alexander v. United States*, 219 F. App'x 520, 523 (7th Cir. 2007) (not designated for publication); *Hines v. United States*, 282 F.3d 1002, 1004–05 (8th Cir. 2002); *Matylinsky v. Budge*, 577 F.3d 1083, 1097–98 (9th Cir. 2009); *United States v. Williams*, 139 F. App'x 974, 976–77 (10th Cir. 2005); *Nichols v. Butler*, 953 F.2d 1550, 1553–54 (11th Cir. 1992); *United States v. Tavares*, 100 F.3d 995, 998–99 (D.C. Cir. 1996); *see similarly Sexton v. French*, 163 F.3d 874, 882–84 (4th Cir. 1998) (analyzing defense counsel's alleged violation of defendant's right to remain silent in *Strickland* framework; requiring showing of prejudice).

C. This Court's answer on the issue of prejudice would not resolve Salazar's ineffective assistance of counsel claim.

Because there was no evidentiary hearing on the ineffective assistance of counsel claims in Salazar's motion for new trial, no fact-finder has determined whether Salazar's attorney actually deprived Salazar of his right to testify. And the lower court's conclusion that Salazar failed to show prejudice ended its analysis. So this Court deciding the issue of prejudice in Salazar's favor would still leave the deficiency prong of the ineffective assistance of counsel claim unresolved. But this Court's intervention to resolve the claim is unnecessary anyway, because Salazar can still pursue full development and review of his claim through a post-conviction habeas proceeding. *See* Tex. Code Crim. Proc. Ann. art. 11.07 (West 2015).

For these reasons, the lower Texas court's application of *Strickland*'s prejudice prong does not warrant this Court's further review.

VII. This Court lacks jurisdiction to consider Salazar's due process question which he failed to raise and litigate in the court below.

Salazar argues for the first time in his petition to this Court that the admission of Dr. Thompson's testimony violated his "due process right to receive a fair trial," and for that reason his attorney's failure to object to the testimony's admission was deficient. *See* U.S. Const. amend. XIV. However, in both his motion for new trial and his briefs to the court of appeals, Salazar relied solely on the Texas Rules of Evidence and state common law in arguing that the testimony was inadmissible. Br. in Opp'n App. 8a–13a, 48a–11, 91a–93a. Salazar never argued that the admission of Thompson's testimony implicated any federal constitutional right, much less due process specifically. Accordingly, the court of appeals decided

the expert-testimony component of Salazar's ineffective assistance of counsel claim solely under state law.

"[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary.'" *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). The lower court's opinion concerning the admissibility of Dr. Thompson's testimony decided no federal due process question. Furthermore, Salazar has not shown that he presented any such question to the state court. Consequently, this Court lacks jurisdiction to review this claim. *See* 28 U.S.C.A. § 1257(a); *Webb v. Webb*, 451 U.S. 493, 495–99 (1981) (Court lacked jurisdiction to consider federal claim that petitioner failed to raise in state court).

CONCLUSION

Respectfully, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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