No. _____

In The
Supreme Court of the United States

ARTHUR RODRIGUEZ BAUTISTA,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner filed a state application for habeas corpus relief from his state court murder conviction. Relief was sought on the basis of comments by the state trial judge during the course of trial demonstrating a bias in favor of the prosecution and a lack of impartiality. Petitioner further sought relief because he was denied the effective assistance of counsel at trial and on appeal due to multiple acts of deficient performance by counsel resulting in prejudice. The Texas Court of Criminal Appeals denied the relief sought by Petitioner.

The case therefore presents the following questions:

1. Whether the trial judge's repeated improper comments throughout the trial demonstrated his bias in favor of the prosecution and denied Petitioner due process of law and a fair trial.

2. Whether Petitioner was denied the effective assistance of counsel at trial.

3. Whether Petitioner was denied the effective assistance of counsel on appeal.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

- *Ex parte Bautista*, No. WR-88,492-01, Texas Court of Criminal Appeals. Order entered June 5, 2019.
- *Ex parte Bautista*, No. W05-24750-Y(A), Criminal District Court Number 7 of Dallas County, Texas. Order entered February 4, 2019.
- *Bautista v. State*, No. 05-08-00905-CR, Fifth Court of Appeals of Texas. Judgment entered August 27, 2009.

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PETITION FOR A WRIT OF CERTIORARI

Arthur Rodriguez Bautista respectfully petitions for a writ of certiorari to review the denial of his state post-conviction habeas corpus application by the Texas Court of Criminal Appeals.

OPINION BELOW

The order by the Texas Court of Criminal Appeals denying the habeas corpus application is not published. (App. at 1).

JURISDICTION

The Court of Criminal Appeals denied Bautista's state habeas corpus application on June 5, 2019. This petition is being filed within 90 days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "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."

STATEMENT OF THE CASE

A. Summary of the Issues

Petitioner seeks a writ of certiorari concerning the flawed decision by the Texas Court of Criminal Appeals denying his state post-conviction habeas corpus petition. Upon denying his federal constitutional claims, the state court sanctioned the denial of due process of law to Petitioner during his murder trial resulting in a 40 year prison sentence. The trial record demonstrates Petitioner's state trial judge was biased in favor of the prosecution and repeatedly made comments in the presence of the jury demonstrating his lack of impartiality. The comments assisted the prosecution in securing Petitioner's conviction. The state court determination that the comments were permissible was made after winking at the trial court record and ignoring pronouncements from this Court on the due process right to a fair and impartial judge. The questions presented is worthy of this Court's consideration.

Further, upon denying state habeas corpus relief, the state court sanctioned the denial of Petitioner's federal constitutionally protected right to the effective assistance of counsel at trial and on appeal. Multiple acts of deficient performance by counsel were shown which resulted in prejudice to Petitioner at trial and on appeal. The state court determination that counsel's performance was reasonably effective ignores the trial court record, pronouncements from this Court on the right to effective counsel, and state case law demonstrating counsel's performance was unquestionably deficient. The question presented is worthy of this Court's consideration.

Petitioner concedes the Court will rarely grant a petition for a writ of certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. SUP. CT. R. 10. This case is one of those rarities and review should be granted to correct a miscarriage of justice as well as demonstrating to the Texas Court of Criminal Appeals that its rulings are not immune from review from a court willing to acknowledge and enforce constitutional rights.

B. Statement of Facts

The indictment alleged that Petitioner intentionally and knowingly caused the death of Jesus Rojas by shooting him with a firearm on or about July 18, 2005. Miguel Murillo, a high school dropout, testified that he had been a member of the NDV street gang since

age 13. Jesus Rojas, another high school dropout, belonged to the same gang but had not yet been "jumped in."

Murillo testified that he was serving a six-year sentence in a Texas Youth Commission facility for an aggravated robbery committed about two years after the charged offense and was in a chemical dependency program for addicts. Either he would be released or transferred to prison to serve the remainder of his sentence in 2010. The prosecutor did not promise him leniency in exchange for his testimony, but how he "comes across" to the prosecutor will determine whether he goes home or to prison.

Murillo testified that NDV's credo is to lie to police officers and say whatever they want to hear. A fellow gang member assured him before trial that it was acceptable to the gang for him to testify against Petitioner "as far as gang code goes."

Murillo testified that, on the night of July 18, 2005, Petitioner sold a half-ounce of marijuana at a discount to Rojas and him because they agreed to drive Petitioner around to make drug deliveries. The group smoked marijuana, "popped" pills, and drank beer as they drove around. All of them—and especially Petitioner—were high. Petitioner had a .38 revolver handgun. They stopped at two houses and, while Petitioner was inside one of them, Rojas played with the gun and acted like he was going to kill himself.

Murillo testified that Petitioner and Rojas were singing along to the song, "Pussy, Weed, and Alcohol"

by D.J. Screw that was playing on a CD in the car. Petitioner asked a question, and Rojas responded, "pussy, pussy, pussy." Petitioner got mad and asked, "Why you calling me a pussy." Rojas said that he was singing the song. Petitioner became angrier and more aggressive. He received a phone call and said, "I holler at you back . . . I'm going to kill this punk ass bitch real quick."

Murillo testified that Petitioner told Rojas to stop the car. Petitioner exited the car and threatened Rojas with the gun. Murillo started crying and told them to "chill." Petitioner got back in the car, and they drove away.

Murillo testified that Petitioner told Rojas to stop at a warehouse. Petitioner exited the car, fired the gun, and the bullet hit the driver's front window. Petitioner pulled Rojas over the console and out of the passenger door. When the prosecutor and her investigator told him that it would be awkward for Petitioner to pull Rojas (who outweighed him by 80 pounds) out of the car in this manner, he changed his story and claimed that Rojas exited the car voluntarily to fight. They threw punches at each other. Rojas grabbed Petitioner's hand; they hugged each other and fell to the ground; they wrestled for one to one-and-a-half minutes; two shots were fired, and Petitioner ran away.

Murillo testified that Rojas got back in the car and started driving. He fainted, and the car hit a trailer. Murillo pulled him out, and they ran. He fell to the ground and told Murillo to keep going. Murillo ran into

a nearby business and said that his "homeboy" had been shot.

Murillo testified that, when the police arrived, he led them to Rojas and the car and described the shooter. Fearing that he would get in trouble for smoking marijuana and drinking, he lied and said that a man came from the warehouse and shot Rojas.

Murillo testified that he wrote a false statement at the police station because a gang officer yelled at him and said that he was a disgrace to his race. The officer told Murillo what he thought happened, and Murillo agreed to get the officer off his back. Everything in this statement was false except that Petitioner shot Rojas. Murillo wrote a second statement at his grandmother's house in which he told the truth about the "murder" but lied about other matters.

Murillo testified that the prosecutor and her investigator met with him while he was confined at the Texas Youth Commission two months before the trial. He said that most of his statement was false, as he repeated "what the gang officer was telling me." He told his present version for the first time on the day of the meeting with the prosecutor and investigator.

Farmers Branch Police Department patrolman Charles Purvis found Murillo on the ground. Murillo identified himself as Jesse Martinez and said that an unknown male had shot him.

Officer David Trevino heard a description of the suspect, saw Petitioner jogging in the area, and detained

him at gunpoint. Purvis arrived and handcuffed Petitioner. Petitioner did not have a weapon. He did not appear to be intoxicated and did not have an odor of marijuana or alcohol on him. An officer drove Murillo to the location of Petitioner's detention and Murillo identified Petitioner.

Corporal Phillip Foxhall placed Petitioner in his patrol car, advised him of his rights, and asked for his side of the story. The recorded interview was admitted in evidence and played for the jury. Petitioner said that, as he was about to sell them a bag of marijuana, Murillo slipped a gun to Rojas, who pointed it at him and said, "Give me the weed." Petitioner grabbed the gun; it discharged, but no one was shot. Petitioner twisted the gun toward Rojas, who pulled the trigger. They pushed Petitioner out of the car, and he ran away. He left behind the gun and his money, marijuana, and cell phone.

Foxhall left Petitioner alone in the patrol car with the camera still activated. Petitioner made comments such as, "I just shot some nigga," "God, let me get away from this one," and, "Shit, he tried to shoot me, man."

The police found Petitioner's cell phone in his pocket but did not check it to determine whether he received a call as he was riding with Murillo and Rojas. The police found marijuana in his shoe and in the car. Although patrolman J.R. Stephens expressed the opinion that Rojas was shot outside the car, Detective Michael McKemie acknowledged that no physical

evidence corroborated that the shooting occurred outside the car.

Sergeant Erik Stokes went to the jail and asked Petitioner to take them to the gun. Petitioner said that it was self-defense, and he was a witness. He led them to the gun, which was under a loading ramp.

Rojas died from a gunshot wound to the chest. He had enough alcohol and marijuana in his system to affect him.

Petitioner and Murillo had gunshot residue on their hands, but Rojas did not. However, Rojas could have had residue that was removed during medical intervention. The absence of residue did not mean that he was not struggling over a gun when it discharged.

The trial court instructed the jury on murder and self-defense. It announced that it would instruct the jury on lesser included offenses including manslaughter, but trial counsel expressly declined to ask for any lesser offenses to be included in the court's charge.

In argument to the jury, the prosecutors argued that Petitioner ran away, but Murillo remained at the scene; that Murillo explained why he previously lied; that Petitioner made damaging admissions when he was talking to himself in the patrol car; that the physical evidence was inconsistent with his story; that he changed his story and claimed self-defense when he talked to Stokes; and that he had a motive to lie.

Defense counsel argued that the State's case depended on Murillo's credibility; that Murillo, a gang

member, is supposed to lie to the police; that Murillo testified that Petitioner was high, but every officer that saw him testified that he was sober; that Murillo changed his story about how Rojas exited the car after officers and the prosecutor told him that it did not make sense that Petitioner pulled Rojas out of the car; that officers did not search Murillo even though Petitioner said that Murillo stole his money; that Murillo is incarcerated for aggravated robbery; that, if the gun belonged to Petitioner, he would not have left it in the car when he got out to sell drugs; that there is no physical evidence that the shooting occurred outside the car; that there is no evidence that any CD found in the car contained the song, "Pussy, Weed, and Alcohol"; and that there is no cell phone record reflecting that Petitioner received a call while they were in the car.

The jury found Petitioner guilty of murder as alleged in the indictment. Following a separate punishment hearing, the jury assessed punishment at 40 years in prison for Petitioner.

C. Procedural History

Petitioner pled not guilty to the offense of murder in cause number F-05-24750-LIY in the Criminal District Court Number Seven of Dallas County, Texas. The jury convicted him and assessed his punishment at 40 years in prison.

The Texas Fifth Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. The Court of Criminal Appeals (CCA) refused discretionary

review in cause number PD-1321-09 on February 24, 2010. *Bautista v. State*, 2009 WL 2622405, No. 05-08-00905-CR (Tex. App.—Dallas 2009, pet. ref'd). Trial counsel represented Petitioner on appeal.

Pursuant to TEX. CRIM. PROC. CODE art. 11.07, State habeas counsel filed a habeas corpus application in the state convicting court raising federal constitutional claims which give rise to the questions now presented for review in this petition. An evidentiary hearing was held in the state convicting court in which both trial and appeal counsel testified. The convicting court entered findings of fact and conclusions of law recommending the relief sought be denied (App. at 11). The Texas Court of Criminal Appeals ultimately denied relief without written order on the findings of the convicting court. *Ex parte Bautista*, WR-88,492-01 (Tex. Crim. App. 2019) (App. at 1). It is from that denial of relief that Petitioner now seeks review.

REASONS FOR GRANTING THE PETITION

FIRST QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL JUDGE'S REPEATED IMPROPER COMMENTS THROUGHOUT THE TRIAL DEMONSTRATED HIS BIAS IN FAVOR OF THE PROSECUTION AND DENIED PETITIONER DUE PROCESS OF LAW AND A FAIR TRIAL.

A. Petitioner Was Entitled To An Impartial And Unbiased Judge.

Due process requires a "neutral and detached" tribunal. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). The denial of the right to an impartial judge constitutes structural error that defies a harm analysis. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *cf. Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). Likewise, where a judge's bias violates a criminal defendant's right to due process, relief is automatic without regard to any harmless error analysis. *Neder v. United States*, 527 U.S. 1, 8 (1999).

B. The Judge Made Improper Comments Throughout The Trial.

1. The Voir Dire Examination

During jury selection, the prosecutor asked the veniremen whether they could convict a defendant on the testimony of one eyewitness; some responded that they would "need more," especially in view of recent DNA exonerations. The trial judge interrupted the prosecutor and reframed the question. Some veniremen

continued to express concern. He interrupted again and said, "Mr. Fitzmartin (prosecutor) is allowed to ask this question, but I want to put your minds at ease. This is not a one-witness case." Thus, he improperly suggested that more than one witness would implicate Petitioner. However, this was a one-witness case in the sense that two witnesses to the shooting were alive but only Murillo testified at trial and Petitioner did not.

The prosecutor asked the veniremen whether they could consider probation for murder; some responded that they could not. The trial judge interrupted and said, "Mr. Fitzmartin, would you mind giving the mercy killing old folks hypothetical, please?" The prosecutor said, "Certainly," to which the judge replied, "Thank you." The prosecutor—with the judge's continued assistance in framing the question—gave that example. Thus, he improperly intervened to help the prosecutor qualify the veniremen on probation so the defense could not successfully challenge them for cause due to their inability to consider a probated sentence.

Defense counsel, while discussing the burden of proof, asked how the veniremen felt when they heard about the exonerations of prisoners based on innocence. Several responded that they felt terrible and that the number of individuals exonerated from Dallas County, Texas, convictions was "just ridiculous." The trial judge interrupted and said, " . . . yes, we've had problems in this county in the past, but the current administration under Mr. Watkins is working very, very hard to make sure that that doesn't happen in the future, so you guys from out of state, I just want you to

know that." Thus, he improperly suggested that, although previous administrations may have prosecuted the innocent, the current district attorney prosecuting Petitioner prosecutes only the guilty.

Defense counsel addressed the veniremen about their role in determining the credibility of the witnesses. A venireman asked whether the prosecutors coached the witnesses "before they even get on the stand," as, "They do it on CSI." Counsel responded that the lawyers prepare the witnesses to testify. The trial judge interrupted, asserted that it was "actually not ethical to coach your witness," and that he would "guarantee you none of these four lawyers do that." Thus, he improperly commented—without knowing whether he was correct—that the prosecutors would not coach their witnesses on what to say. This would be in dispute once Murillo testified that he told his present version of the incident for the first time to the prosecutor and her investigator shortly before trial.

The trial judge interrupted the prosecutor to inform the veniremen that the State would not rely on only one witness to convict and to help the prosecutor qualify them on probation. He interrupted defense counsel to assure the veniremen that Dallas County prosecutors do not prosecute the innocent or coach their witnesses.

2. The Testimony

At the end of the first day of testimony, the trial judge told the jurors that he would buy their lunch the

next day to thank them for their service and because, " . . . it's been my experience that if you can get to know each other outside this whole jury process, it will help you once you decide to start deliberating and reaching a unanimous verdict in this case, which is what everybody here wants." Thus, he improperly commented that he wants a verdict and misrepresented that Petitioner does, too; in fact, Petitioner would have been delighted had the jury deadlocked and a mistrial declared.

The trial judge *sua sponte* repeated Murillo's answers that were especially damaging to Petitioner. Murillo testified that Petitioner received a phone call while they were in the car and said, "I holler at you back . . . I'm going to kill this punk ass bitch real quick." The judge repeated, "I am going to kill this punk ass bitch." The prosecutor asked why Murillo started crying when Petitioner leaned inside the car with a gun and argued with Rojas. Murillo responded, "Because me, I was young. I was 15. Being around somebody with a gun, anything could happen, I mean, you know, my house been shot at—at before. I got a family member who died over a shotgun, over a gun." The judge repeated, "Your house has been shot at before, is that what you said?" Murillo answered yes and added, "And me being around a gun is something I fear, I really fear, you know, so I fear death for a reason." The judge repeated, "You fear death?" Murillo answered yes. Thus, the judge emphasized Murillo's damaging answers by repeating them succinctly for the jury. He might as well have said, "This is important. I want to

make sure that you heard it correctly." He was a more effective advocate for the State than the prosecutors.

The trial judge interrupted Murillo's testimony, declared a recess, and asked how far he went in school and whether he knew the capital of the United States. Murillo responded that he "went into the ninth grade" and that the capital is Washington, D.C., "where I was born at." The judge informed the lawyers, "I am permitting some leading questions to be used because I believe it's necessary to develop the testimony of this witness, Murillo . . . [a]nd to make the presentation effective for the ascertainment of the truth. The witness appears to be extremely unsophisticated and not educated, and, therefore, it's my ruling that some degree of leading is necessary." His transparent attempt to help the State was extraordinary in view of the fact that the prosecutor did not ask permission to lead Murillo. He obviously believed that the prosecutor needed to testify because Murillo could not effectively do so against Petitioner at trial.

The prosecutor asked Detective McKemie how Murillo's inconsistent statements played into the investigation. Petitioner objected to bolstering. The trial judge responded, "I'll allow some of it, but I don't want you making this witness into a human lie detector and invading the province of the jury, if you know what I mean." There is no valid reason for a judge to mention "lie detector" in the presence of the jury. "In criminal prosecutions, the polygraph test is a pariah; 'polygraph' is a dirty word." *State v. Hawkins*, 604 A.2d 489, 492 (Md. 1992). Thus, he improperly compared a police

officer to a human lie detector in determining credibility under the guise of saying that he did not want the officer to invade the province of the jury.

The trial judge improperly allowed the prosecutor to lead Murillo, repeated his most damaging answers, referred to a lie detector, and told the jurors that he—and the parties—want a verdict.

C. The Judge's Improper Comments Denied Petitioner Due Process.

The right to a trial before an impartial judge is a paramount concept of due process of law. The Due Process Clause of the Fourteenth Amendment guarantees a defendant the right to a fair and an impartial judge who is neutral, detached and free from "actual bias." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Bracy v. Gramley*, 520 U.S. 899, 905–06 (1997) ("[T]he floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case."); *Ward v. Village of Monroeville*, 409 U.S. 57, 59–63 (1972); *Tumey*, 273 U.S. at 532.

A claimant need not prove actual bias to make out a due process violation. *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Indeed, this Court has pointed out that it would be nearly impossible for a litigant to prove actual bias on the part of a judge. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009); *see*

also Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from view, and we must presume the process was impaired." (citing *Tumey*, 273 U.S. at 535).

A judge improperly demonstrates bias and partiality when he helps the prosecution at trial to convict a criminal defendant. Here, when the trial judge told the jury panel, "This is not a one-witness case," that District Attorney Watkins was "working very, very hard" to make sure innocent people are not convicted, and that he "guaranteed" that the prosecutors would not coach their witnesses on what to say, he abandoned his neutral status and took up the role of an advocate for the prosecution.

Additionally, the trial judge's comments throughout the trial were calculated to convey to the jury his opinion that Petitioner was guilty, that the State did not have to rely only on Murillo's testimony to obtain a conviction, and that the jury should consider probation only in a "mercy killing." These comments denied Petitioner due process of law and a fair trial.

D. Petitioner Was Prejudiced As A Matter Of Law.

Where a judge's bias violates a criminal defendant's right to due process, relief is automatic without regard to any harmless error analysis. *Neder*, 527 U.S. at 8. Likewise, the denial of the right to an impartial

judge constitutes structural error that defies a harm analysis. *See Tumey*, 273 U.S. at 523; *Fulminante*, 499 U.S. at 309–10. The judge's improper comments permeated the trial from the *voir dire* examination throughout the testimony and demonstrated a bias of intending to help the prosecution obtain a conviction against Petitioner as well as a lack of impartiality.

E. The Erroneous State Court Decision

The state convicting court entered findings that the trial judge's comments were proper and did not deny Petitioner due process of law. (App. at 9). The Court of Criminal Appeals denied habeas corpus relief on the basis of the trial court's findings. (App. at 1). Petitioner would show those findings are contrary to the record and the law.

Trial counsel, while discussing the burden of proof during the voir dire examination, asked how the veniremen felt when they heard about the exonerations of prisoners based on innocence. Several responded that they felt terrible and that the number of exonerees in Dallas County was "just ridiculous." The trial judge interrupted and said, ". . . . yes, we've had problems in this county in the past, but the current administration under Mr. Watkins is working very, very hard to make sure that that doesn't happen in the future, so you guys from out of state, I just want you to know that."

Lead trial counsel testified at the state habeas hearing that it was common knowledge at the time that the current District Attorney was doing things

differently than previous administrations; and that he believed that the trial judge was attempting to keep the panel from focusing on the exonerations and keep jury selection on track. The habeas court found that the trial judge's comments did not help the State. (App. at 9). To the contrary, the trial judge improperly suggested that, although previous administrations may have prosecuted the innocent, the current district attorney prosecutes only the guilty.

The trial judge *sua sponte* repeated answers of Miguel Murillo, the key prosecution witness, that were especially damaging to Petitioner. Specifically, the trial judge repeated that Murillo testified that Petitioner said, "I'm gonna kill this punkass bitch"; that Murillo's house "has been shot at before"; and that Murillo "fears death."

Trial counsel testified at the state habeas hearing that Murillo often mumbled, was hard to understand, and his answers were not always clear and distinct. The habeas court found that the trial judge's conduct in repeating these answers was neither improper nor prejudicial. (App. at 7). This constituted an unreasonable determination of the facts on the basis of the credible evidence. The trial court reporter's record reflects that Murillo's answers to these questions were just as audible to the court reporter as his answers to every other question. It is no coincidence that the trial judge repeated only these damaging answers. In effect, he emphasized to the jury, "This is important. I want to make sure that you heard it correctly." The trial judge's intent to help the State obtain a conviction is further

demonstrated by the fact that he *sua sponte* instructed the prosecutor to ask Murillo leading questions "to make the presentation effective for the ascertainment of the truth."

The state convicting court's findings that the trial judge's comments were not improper and did not deny Petitioner due process of law are flawed. The trial judge's improper comments persisted throughout the trial and were prejudicial to Petitioner. The Court has been willing to intervene when the decision by the Texas Court of Criminal Appeals is plainly contrary to the law and trial court record. *See Moore v. Texas*, 586 U.S. ___, ___, 139 S. Ct. 666, 672 (2019) (rejecting finding of no intellectual disability as contrary to the state court record). This is such a case and is a worthwhile candidate for certiorari review.

SECOND QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

A. The Standard Of Review

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; *Powell v. Alabama*, 287 U.S. 45, 71 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court addressed the federal constitutional standard

to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. *Id*. at 687–88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. *Id*. at 687.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id*. Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. *Strickland* requires a cumulative prejudice analysis of assorted multiple acts of deficient performance.

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted. "The result of a proceeding can be rendered unfair, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. The issue is whether the defendant received a fair trial that produced a verdict worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

B. Acts of Deficient Performance

"To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence . . . has no strategic value." *Lyons v. McCotter*, 770 F.2d 529, 534 (5th Cir. 1985).

1. Counsel failed to object to the trial judge's repeated improper comments throughout the trial.

Petitioner contends that the trial judge's improper comments throughout the trial indicated bias in favor of the State and denied him a fair trial. Counsel performed deficiently in failing to object to each improper comment at the time it was made. *See Gallman v. State*, 414 S.E.2d 780, 781–82 (S.C. 1992) (counsel ineffective in failing to object to judge's comments inviting jury to discuss case before retiring to deliberate). No sound strategy could justify these omissions.

Trial counsel asserted in an email to state habeas counsel that he believed that the judge improperly commented on the evidence and tried to help the State "but not in a way we felt was reversible." Counsel did not object because, knowing the trial judge as he did, in the face of an objection to the improper comments, "he would take it as a challenge and would help even more . . . and we would make things worse." Counsels' passivity and defeatist attitude emboldened the trial judge to continue to make improper comments throughout the trial, secure in the knowledge

that even highly experienced counsel was too meek to object.

2. Counsel failed to file a motion in limine and object to references to the incident as "the murder" and to the deceased as the "victim"; and, on one occasion, counsel referred to the deceased as the "victim."

The prosecutor and Murillo referred to "the murder" on direct examination. The prosecutor and police officers repeatedly referred to Rojas as the "victim." Additionally, trial counsel also referred to Rojas as the "victim."

Trial counsel asserted in an email to state habeas counsel that he does not like these references but has never seen a case reversed because of them. Although he probably anticipated before trial that the prosecutor and the witnesses would make these references, he did not include the matter in a motion in limine "because it would have been denied and would not have preserved anything on appeal." He did not object because he thought that it would draw more attention to the references and would not be reversible.

It is improper to refer to the complainant as the "victim" where there is a dispute as to whether a crime was committed. *Talkington v. State*, 682 S.W.2d 674, 675 (Tex. App.—Eastland 1984, pet. ref'd). References by the prosecutor, police officers, and Murillo to "the murder" and to Rojas as the "victim" improperly communicated their opinion that Petitioner did not act in

self-defense. If Petitioner acted in self-defense, Rojas was not a "victim." Thus, whether Rojas was a "victim" was in dispute.

Counsel performed deficiently in failing to file a motion in limine and, if necessary, object to the use of terminology that undermined the defense theory and in embracing that terminology by using it himself. No sound strategy could justify these omissions.

A proper analysis of the claim requires first a determination whether the trial court would have granted a motion in limine or sustained an objection to the terms "murder" and "victim." If it would have, counsel performed deficiently in failing to attempt to exclude these improper references. If it would have allowed them, the issue is whether an appellate court would have reversed any conviction on this basis. Petitioner does not believe that the Texas Court of Criminal Appeals would hold that prosecutors and officers may properly refer to the complainant as the "victim" in a case where there is a dispute as to self-defense.

3. Counsel failed to file a motion in limine and object to police opinion testimony that the officers did not believe Petitioner.

A police officer testified without objection on direct examination that he did not believe Petitioner's story and told him, "[Y]our story's not adding up with the evidence we have." Another officer testified on cross-examination that he did not believe Petitioner's story.

Trial counsel acknowledged in an email to state habeas counsel that he knew that an officer's opinion that the defendant lied is inadmissible but did not include this matter in a motion in limine because he does not generally "file motions in limine asking that prosecutors and witnesses be instructed to follow the law." He did not object because he "did not think anything reversible had occurred."

The police officers testified, in effect, that Petitioner was guilty and they did not believe him. Neither a lay nor an expert witness may properly testify to an opinion that a witness is telling the truth or lying. Counsel performed deficiently in failing to move in limine or object to police opinion testimony that Petitioner was lying. *See Weathersby v. State*, 627 S.W.2d 729, 730–31 (Tex. Crim. App. 1982) (counsel ineffective in failing to object to detective's opinion that defendant is guilty). This deficiency in performance alone is sufficiently prejudicial to require relief. *Cf. Miller v. State*, 757 S.W.2d 880, 883–85 (Tex. App.—Dallas 1988, pet. ref'd) (new trial required because counsel failed to object to opinion testimony that child told truth). No sound strategy could justify these omissions.

4. Counsel failed to object to arguments that improperly commented on Petitioner's failure to testify.

Petitioner did not testify. One prosecutor argued during summation, "Now there was only two people left alive from this incident and you heard from the

witness stand from Mickey." Thereafter, the other prosecutor argued, "We can't get into that man's mind and why he did what he did. . . ." Trial counsel asserted in an email to state habeas counsel that he did not object because the arguments "did not seem like a clear comment on the failure to testify."

A comment during summation regarding the defendant's failure to testify violates the right against self-incrimination. U.S. CONST. amend. V; *Griffin v. California*, 380 U.S. 609, 613–15 (1965). Three people were present during the shooting; Rojas was dead, Murillo testified, and Petitioner did not. The argument that "there was only two people left alive from this incident and you heard from the witness stand from Mickey" constituted an improper, direct comment on Petitioner's failure to testify. Counsel performed deficiently in failing to object to these improper comments on Petitioner's failure to testify. No sound strategy can justify these omissions.

C. Prejudice

This was a defensible case. Murillo had significant credibility problems. He belonged to a gang whose credo is to lie to police officers and say whatever they want to hear. He admitted that his initial statements were false. He gave implausible testimony that the gun belonged to Petitioner but that it remained in the car while Petitioner conducted a drug transaction in a house; and, that Petitioner told someone on the phone that he was about to kill one of them, but Rojas did not

drive away on either of the two occasions that Petitioner exited the car.

The trial judge, recognizing that the State's case was flawed because of Murillo's questionable credibility, did everything in his power to help the State obtain a conviction. He suggested that the prosecutor ask particular questions to avoid having to grant challenges for cause to veniremen who could not consider probation. He made comments to the veniremen that left the impression that the prosecutors in the current district attorney's administration do not prosecute the innocent or coach witnesses; that more than one witness would implicate Petitioner; and that he and the parties want a verdict. He *sua sponte* told the prosecutor to lead Murillo, whom he obviously believed was not presenting well. Finally, he assumed the role of a one-man Greek chorus by repeating Murillo's most damaging answers to emphasize their importance to the jury. Competent counsel does not remain silent and watch a trial judge eviscerate his client's right to a fair trial in this manner.

The prosecutors and police officers repeatedly informed the jury that, in essence, they believe that Petitioner committed murder and lied about what happened. The prosecutors alluded to Petitioner's failure to testify by arguing that the two people who know what happened are alive, and the jury heard from Murillo; and that they could not get into Petitioner's mind to determine why he shot Rojas.

But for counsels' errors, there is a reasonable probability that the jury would have acquitted Petitioner or deadlocked. Had the court overruled objections to its own improper comments and to the inadmissible evidence and improper arguments, there is a reasonable probability that an appellate court would have reversed any conviction. Petitioner's conviction for murder is not worthy of confidence. He is entitled to a new trial.

D. The Erroneous State Court Decision

The state convicting court entered findings that Petitioner was provided with the effective assistance of counsel at trial. (App. at 10). The Court of Criminal Appeals denied habeas corpus relief on the basis of the trial court's findings. (App. at 1). Petitioner would show those findings are contrary to the record and the law.

The state habeas court found credible that trial counsel did not object to the trial judge's comments because his objections would have been overruled and would have emphasized the comments to the jury, and the comments were not prejudicial enough to result in reversal. (App. at 8). The court additionally found the comments by the trial judge were proper and counsel could not be faulted for failing to object to the otherwise proper comments. (App. at 9). Accordingly, it concluded that trial counsel was not ineffective in failing to object at trial. (App. at 9).

The state habeas court ignored that counsel's testimony in this regard was impeached. He asserted in

an email to state habeas counsel before the application was filed that he believed that the trial judge improperly commented on the evidence and tried to help the State "but in a way we felt was not reversible"; and, that he did not object because, knowing the trial judge as they did, "he would take it as a challenge and would help even more . . . and we would make things worse." Counsel acknowledged at the state evidentiary hearing that he wrote this email but sought to disavow the contents. At the time of the habeas hearing, the trial judge had become the first assistant district attorney in Dallas County, where trial counsel practices. Trial counsel testified at the state habeas hearing that the trial judge's comments were meant to help the prosecution secure a conviction against Petitioner. Additionally, counsel's belief that the trial judge would overrule any objections to the comments does not constitute an adequate reason not to object and preserve the issue for appeal. Finally, the determination the comments were proper and permissible is plainly wrong.

The state habeas court found no deficient performance in failing to object to the terms "murder" and "victim" because use of the terms, even in the face of a self-defense claim, was permissible. (App. at 9). The finding is flawed because the state habeas court completely ignored controlling authority condemning the use of such terms which presuppose a crime with a blameless complainant.

The state habeas court found no deficient performance in failing to object to police officer testimony that they did not believe Petitioner's version of the

event. (App. at 10). The finding is flawed because the state habeas court chose to ignore controlling authority that neither a lay nor an expert witness may properly testify to an opinion that a witness is telling the truth or lying.

Finally, the state habeas court found no deficient performance in failing to object to the prosecution's jury argument because it did not contain comments on Petitioner's failure to testify at trial. (App. at 10). The finding is flawed because the state habeas court ignored the trial court record as well as controlling authority that the comments in this case are comments on the failure to testify.

THIRD QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

A. The Standard Of Review

Petitioner had a right to the effective assistance of counsel on appeal. U.S. CONST. amends. VI and XIV; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). *Strickland* applies in the appellate context. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has a duty to raise any issue that would require relief. Where appellate counsel failed to raise a viable issue, the defendant is entitled to an out-of-time appeal if reasonably competent counsel would have raised the issue and there is a reasonable probability that an appellate court would have granted relief.

B. Deficient Performance

1. Appellate counsel failed to raise the issue that the trial judge's repeated improper comments throughout the trial demonstrated bias in favor of the State and denied Petitioner due process of law and a fair trial.

The pertinent facts are found in the first question presented for review. Appellate counsel did not raise the issue that the trial judge's repeated improper comments throughout the trial demonstrated bias in favor of the State and denied Petitioner due process of law and a fair trial. Although no trial objection was voiced to the comments at the time of trial, appellate counsel could have raised the issue pursuant to *Blue v. State*, 41 S.W.3d 129, 130–32 (Tex. Crim. App. 2000), in which a plurality of the Texas Court of Criminal Appeals held that a trial objection is not required to raise on appeal that the trial court made fundamentally improper comments during the voir dire examination. Thus, appellate counsel performed deficiently in failing to raise this issue.

C. Prejudice

Had appellate counsel raised this issue, there is a reasonable probability that an appellate court would have reversed the conviction under *Blue*. Thus, Petitioner is entitled to an out-of-time appeal due to the ineffective assistance of counsel on appeal.

D. The Erroneous State Court Decision

The state convicting court entered findings that Petitioner was provided with the effective assistance of counsel on appeal. (App. at 11). The Court of Criminal Appeals denied habeas corpus relief on the basis of the trial court's findings. (App. at 1). Petitioner would show those findings are contrary to the record and the law.

The state habeas court found credible that trial counsel did not raise the issue of the trial judge's comments on appeal because counsel did not considered them prejudicial. (App. at 11). Accordingly, it concluded that trial counsel was not ineffective to raise the issue on appeal. (App. at 11).

The state habeas court ignored that counsel's testimony in this regard was impeached. He asserted in an email to state habeas counsel before the application was filed that he believed that the trial judge improperly commented on the evidence and tried to help the State "but in a way we felt was not reversible"; and, that he did not object because, knowing the trial judge as they did, "he would take it as a challenge and would help even more . . . and we would make things worse." Counsel acknowledged at the state evidentiary hearing that he wrote this email but sought to disavow the contents. At the time of the habeas hearing, the trial judge had become the first assistant district attorney in Dallas County, where trial counsel practices. Trial counsel testified at the stated habeas hearing that the trial judge's comments were meant to help the prosecution secure a conviction against Petitioner. The findings

are flawed because the state habeas court ignored the habeas evidentiary hearing as well as controlling authority showing the issue should have been raised on appeal despite the absence of a trial objection.

CONCLUSION

The state court sanctioned the denial of due process of law to Petitioner during his murder trial resulting in a 40 year prison sentence. His trial judge was biased in favor of the prosecution and repeatedly made comments in the presence of the jury demonstrating his lack of impartiality. The state court determination that the comments were permissible was made after winking at the trial court record and ignoring pronouncements from this Court on the due process right to a fair and impartial judge. The question presented is worthy of this Court's consideration.

The state court further sanctioned the denial of Petitioner's right to the effective assistance of counsel at trial and on appeal. Multiple acts of deficient performance by counsel were shown which resulted in prejudice to Petitioner at trial and on appeal. The state court determination that counsel's performance was sufficient to satisfy the Sixth Amendment ignores the trial court record, pronouncements from this Court on the right to effective counsel, and state case law demonstrating counsel's performance was indeed deficient. The question presented is worthy of this Court's consideration.

Petitioner acknowledges the Court will rarely grant a petition for a writ of certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. SUP. CT. R. 10. This case is one of those rarities and review should be granted to correct a miscarriage of justice.

PRAYER

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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