No. _____

In The
Supreme Court of the United States

SYLVANUS RENE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The state habeas trial court, following testimony at an evidentiary hearing, entered detailed findings of fact and conclusions of law recommending that the Texas Court of Criminal Appeals (TCCA) grant petitioner a new trial on punishment because of perjured testimony and ineffective assistance of trial counsel. The TCCA entered an order denying relief in which it (1) erroneously asserted that the trial court's order recommending relief was not accompanied by findings of fact and conclusions of law; and (2) independently concluded that "the record does not support the trial court's recommendation to grant relief." The district clerk inadvertently had separated the findings and conclusions from the order recommending relief by 40 pages in the electronic record sent to the TCCA. Petitioner filed a suggestion for reconsideration in view of the TCCA's failure to consider the findings and conclusions. In response, the TCCA revised its order and stated without explanation that, upon reconsideration, the record does not support the trial court's recommendation to grant relief.

The question presented is:

> Does it violate procedural due process for an appellate court, in denying relief on federal constitutional claims in a state habeas corpus proceeding, to reject without explanation a trial court's favorable, dispositive findings of fact that were based on witness credibility determinations following an evidentiary hearing?

RELATED CASES

- *State v. Rene*, No. 1257226, 351st District Court of Harris County, Texas. Judgment entered February 21, 2011.
- *Rene v. State*, No. 14-11-00150-CR, Fourteenth Court of Appeals of Texas. Judgment entered August 9, 2012.
- *Rene v. State*, No. PD-1160-12, Texas Court of Criminal Appeals. Judgment entered January 30, 2013.
- *Ex parte Rene*, No. 1257226-A, 351st District Court of Harris County, Texas. Judgment entered April 28, 2020.
- *Ex parte Rene*, No. WR-90,417-01, Texas Court of Criminal Appeals. Judgment entered February 24, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sylvanus Rene, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's unpublished revised order on reconsideration denying habeas corpus relief (App. 1-2) is available at 2021 WL 710308. Its unpublished initial order denying relief (App. 3-4) is available at 2021 WL 262358. The state district court's findings of fact and conclusions of law (App. 5-17) is unreported. The TCCA's unpublished order denying discretionary review on direct appeal (App. 18) is unreported. The Fourteenth Court of Appeals' opinion affirming the conviction on direct appeal (App. 19-31) is reported at 376 S.W.3d 302. The judgment of conviction of the state district court (App. 32-39) is unreported.

JURISDICTION

The TCCA entered a revised order denying relief on February 24, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT

A. Procedural History

Petitioner pled not guilty to sexual assault of a child in the 351st District Court of Harris County, Texas. A jury convicted him and, after additional witnesses testified at the punishment hearing, assessed his punishment at 65 years in prison on February 21, 2011.

The Fourteenth Court of Appeals of Texas affirmed petitioner's conviction in a published opinion issued on August 9, 2012. The TCCA refused discretionary review on January 30, 2013. *Rene v. State*, 376 S.W.3d 302 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

Petitioner filed a state habeas corpus application on June 10, 2019. The trial court, after several witnesses testified at an evidentiary hearing, recommended a new trial on punishment on April 28, 2020. The TCCA denied relief in an unpublished order issued on January 27, 2021. *Ex parte Rene*, No. WR-90,417-01, 2021 WL 262358 (Tex. Crim. App. Jan. 27, 2021). In response to petitioner's suggestion for reconsideration, it revised the order and denied relief on February 24,

2021. *Ex parte Rene*, No. WR-90,417-01, 2021 WL 710308 (Tex. Crim. App. Feb. 24, 2021) (not designated for publication).

B. Factual Statement

1. The Jury Trial

The jury convicted petitioner of sexual assault of a child based on a video depicting him engaging in sexual activity with a 16-year-old female who had run away from home and was working for him as a prostitute in 2008.

At the punishment hearing, Keon Addison testified that a man shot him in the chest with a black revolver as he walked through a crowd of 15 to 20 people at an apartment complex in 2005 (6 R.R. 36, 38, 42-43, 49-50). He did not describe the shooter or the gun to the deputy sheriff who questioned him at the scene and at the hospital (6 R.R. 14-16, 48, 50-51, 57-58). Four years later, Assistant District Attorney Katherine McDaniel and her investigator met Addison in prison, where he was serving a sentence for aggravated assault, to discuss petitioner (6 R.R. 54-55, 60). They showed him a photospread, and he identified petitioner as the shooter (6 R.R. 51-52, 60-61). McDaniel elicited on direct examination that Addison was not in a gang (6 R.R. 38). He denied on cross-examination that he was a Crip and that he was testifying in exchange for a favorable letter to the parole board (6 R.R. 61-62, 64).

At the punishment hearing, Glenn Jackson testified that petitioner and another man forced him into the trunk of a car at gunpoint in 2008 (5 R.R. 60-71). Petitioner's trial counsel did not impeach Jackson on cross-examination with any prior inconsistent statements.

During closing arguments, the prosecutors argued without objection that the jury's job was to do justice for the complainant, her family, the other victims who testified, "and all the other victims that might still be out there that we can't find yet, but that you know are there"; that, after petitioner was released from prison in 2008, "he's having sex with minors";[1] and, that he was "one of the worst gangsters in Texas, maybe in the country" (6 R.R. 130, 151, 154).[2]

The jury, after considering testimony regarding the attempted murder of Addison and the aggravated kidnapping of Jackson, as well as the arguments outside the record, assessed petitioner's punishment for the charged offense at 65 years in prison.

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[1] There was testimony that petitioner had sex with one minor—the complainant.

[2] An officer testified at the punishment stage that petitioner claimed to be a "five-star general" in the Bloods gang (6 R.R. 99-101). His testimony did not support the prosecutor's argument expressing her personal opinion.

2. The State Habeas Trial Court's Findings Of Fact And Conclusions Of Law

The state habeas corpus application alleged that the State used Addison's false and misleading testimony that petitioner was the shooter, that Addison was not a member of the Crips, and that he did not testify in exchange for a parole letter. It also alleged that trial counsel was ineffective in failing to impeach Addison and Jackson with their prior inconsistent statements and failing to object to the prosecutors' improper arguments outside the record. The habeas trial court conducted an evidentiary hearing.

Addison recanted his trial testimony and admitted that he did not see petitioner with a gun and did not see who shot him, although he "probably believed" and "felt like" petitioner did because petitioner was in the crowd (1 H.R.R. 36, 41, 45-46, 47, 49; 3 H.R.R. Exhibits 16, 17). Addison testified that McDaniel came to the prison and told him that she was out to get petitioner and that she would write a letter to the parole board on his behalf if he testified at the punishment stage (1 H.R.R. 37). The habeas trial court found that Addison's trial testimony that petitioner shot him was false (2 H.C.R. 250; Finding 23).

Deputy Paul Croas testified that Addison had used Crip gang terminology at the scene and admitted that he was a Crip and that the shooting concerned "stupid gang stuff" and "graffiti going back and forth" (1 H.R.R. 53-54). Croas prepared an offense report reflecting these matters and that Addison's girlfriend and another

witness at the scene confirmed that he was a Crip (1 H.C.R. 61; AX 2). McDaniel testified that she could not explain why she had asked Addison about gang membership without eliciting that he told Croas that he was a Crip, asserting, "Just because something is in an offense report does not make it so" (1 H.R.R. 78-79, 85). The habeas trial court found that McDaniel had elicited Addison's false testimony that he was not a gang member and failed to correct his false testimony that he was not a Crip (2 H.C.R. 251; Finding 30).

Addison also testified that he sent a letter to McDaniel one month after petitioner's trial asking whether she would send the "support" letter on his behalf (1 H.R.R. 38-39; 1 H.C.R. 80; AX 7). McDaniel testified that she understood that he was asking for a parole letter (1 H.R.R. 93). In 2013, she sent an email to the district attorney's General Counsel, Scott Durfee, acknowledging that she told Addison that she would consider providing information to the parole board regarding his testimony, including whether she found him to be truthful or untruthful (1 H.R.R. 100-02; 3 H.R.R. Exhibit 19). After petitioner filed the habeas application alleging that she failed to correct Addison's false testimony about the parole letter, she asserted for the first time that she told one of his trial counsel, Laine Lindsey, that she would consider writing this letter "at the conclusion of the trial" (1 H.R.R. 102). After the trial, she sent a letter to the parole board that Addison had cooperated with law enforcement and testified (1 H.R.R. 110-11). Lindsey testified that, if McDaniel had told him before the trial that she

would write a parole letter, he would have ensured that the defense impeached Addison's testimony denying that he was seeking this benefit (1 H.R.R. 146-50). The habeas trial court found that Lindsey was credible and McDaniel was incredible; that McDaniel and Addison discussed a parole letter before he testified; that McDaniel did not inform defense counsel about the letter; and, that McDaniel failed to correct Addison's false testimony that he was not seeking a parole letter (2 H.C.R. 252-53; Findings 36-39).

The habeas trial court concluded that Addison's false trial testimony that petitioner shot him was material to the punishment because it was the most compelling evidence presented at the punishment stage that petitioner would be dangerous in the future; and that, if the jury had known that Addison lied in denying that he was a Crip and that he was testifying to obtain a parole letter, it probably would not have believed his identification of petitioner as the shooter (2 H.C.R. 253-54; Findings 40-43).

The habeas trial court also found that trial counsel performed deficiently in failing to call Croas to impeach Addison's testimony that he was not a Crip; failing to call a police officer to testify that Jackson changed his story several times and appeared to be withholding information; and, failing to object to the improper arguments outside the record referring to "other victims," sex with "minors," and that petitioner was "the worst gangster in Texas, maybe in the country" (2 H.C.R. 254-56; Findings 44-54). It concluded that, but for counsel's errors, there is a reasonable

probability that the jury would have assessed less than 65 years in prison (2 H.C.R. 256; Findings 55). Additionally, it concluded that the cumulative prejudice resulting from the State's use of and failure to correct the false testimony and the deficient performance of counsel requires a new trial on punishment (2 H.C.R. 256; Finding 56).

3. The Texas Court Of Criminal Appeals Decision

After the state habeas proceeding concluded in the trial court, the district clerk inadvertently separated the order recommending relief from the trial court's findings of fact and conclusions of law by 40 pages in the electronic record submitted to the TCCA (2 H.C.R. 246-56, 315-16). None of the nine TCCA judges, their briefing attorneys, or their staff reviewed the record and discovered that the findings and conclusions were numbered as pages 1-11, and the order recommending relief was numbered as pages 12-13 (2 H.C.R. 246-56, 315-16). The TCCA did not remand the case to the trial court to clarify whether it entered findings and conclusions. Instead, it entered an order denying relief in which it erroneously asserted, "The trial court's order does not include specific findings of fact and conclusions of law and the record does not support the trial court's recommendation to grant relief" (App. 3-4).

Petitioner filed a suggestion for *sua sponte* reconsideration on the same morning that the TCCA denied

relief.[3] Four weeks later, the TCCA revised its order and stated without explanation, "Having considered the trial court's findings of fact, conclusions of law, and recommendation to grant relief, this Court still believes that the trial court's recommendation is not supported by the record. Based on this Court's independent review of the entire record, relief is denied" (App. 1-2).

REASONS FOR GRANTING REVIEW

The Texas Court Of Criminal Appeals Violated Due Process When, In Denying Relief On Federal Constitutional Claims, It Rejected Without Explanation The State Habeas Trial Court's Favorable Dispositive Findings Of Fact That Were Based on Witness Credibility Determinations Following an Evidentiary Hearing.

The habeas trial court, following an evidentiary hearing, entered detailed findings of fact and conclusions of law recommending that the TCCA grant petitioner a new trial on punishment because the State (1) used and failed to correct perjured testimony and (2)

[3] Texas Rule of Appellate Procedure 79.2(d) does not permit a motion for rehearing when the TCCA denies habeas corpus relief by written order. ("A motion for rehearing an order that denies habeas corpus relief . . . under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case."). For this reason, petitioner "suggested" that the TCCA reconsider his case on its own initiative.

trial counsel provided ineffective assistance. The TCCA initially entered an order denying relief in which it erroneously asserted that the trial court's order recommending relief was not accompanied by findings of fact and conclusions of law and that it independently concluded that "the record does not support the trial court's recommendation to grant relief." In fact, the habeas record contained findings and conclusions that had been separated from the order recommending relief by 40 pages in the electronic record. No TCCA judge, briefing attorney, or staff member reviewed the record and discovered that the findings, conclusions, and order was one cohesive document. The TCCA did not remand the case to the trial court to clarify whether it had entered findings and conclusions. Petitioner filed a suggestion for *sua sponte* reconsideration in view of the TCCA's failure to consider the findings and conclusions. In response, the TCCA revised its order and stated without explanation that, upon reconsideration, the record does not support the trial court's recommendation to grant relief.

The Court should grant certiorari to address a question similar to the question reserved in *United States v. Raddatz*, 447 U.S. 667 (1980): whether it violates due process in a criminal case when a defendant has raised a substantial constitutional claim for a superior court to reject an inferior court's favorable, dispositive fact-findings in denying relief. Additionally, the Court should grant certiorari to address whether the TCCA's perfunctory rejection of petitioner's perjured testimony and ineffective assistance of trial

counsel claims requires a remand for reasons similar to those resulting in a remand in *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (*per curiam*).

The TCCA not only failed to defer to the trial court's findings that were based on its credibility determinations but also asserted without explanation that they were not supported by the record. Its perfunctory rejection of these compelling constitutional claims does not comport with due process.

Although the United States Constitution does not require states to provide appeals to defendants in criminal cases, those that have integrated appellate courts into their system must ensure that their procedures comport with the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Texas provides collateral review of felony convictions resulting in prison sentences via articles 11.07 and 11.071 of the Code of Criminal Procedure, depending on whether a prison sentence or death sentence was assessed. Therefore, the Due Process Clause applies to Texas habeas proceedings, just as it applies to state court direct appeals,[4] probation and parole revocation proceedings,[5] and driver's license revocation

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[4] *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (Although "the Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier [appellate] review.").

[5] *See Gagnon v. Scarpelli*, 411 U.S. 778, 783-91 (1973) (extending federal due process protections to probationers facing revocation); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972)

proceedings[6]—none of which is constitutionally required but, if provided by a state, must comport with due process.

As a practical matter, the state habeas corpus proceeding is the main event for prisoners who challenge violations of their federal constitutional rights, as it has become virtually impossible for them to obtain relief in federal court under the AEDPA standard of review.[7] A federal habeas court must defer to the state court decision unless it was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1).

A state court decision is contrary to Supreme Court precedent if its conclusion is opposite to that reached by the Supreme Court on a question of law or "it confronts facts that are materially indistinguishable" from relevant Supreme Court precedent

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(extending federal due process protections to parolees facing revocation).

[6] *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

[7] Petitioner cannot seek federal habeas relief because his AEDPA deadline expired before he hired state habeas counsel to file the application.

and arrives at the opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring). A state court unreasonably applies Supreme Court precedent if it unreasonably applies the correct legal rule to the facts of a particular case or it unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply. *Id.* at 408, 413. The federal court must decide whether the state court's application of the law was objectively unreasonable. *Id.* at 409. The federal court reviews findings of fact for clear error and conclusions of law *de novo*. *Catalan v. Cockrell*, 315 F.3d 491, 492 (5th Cir. 2002). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

The AEDPA sets forth "a highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997). A state court's determination of the facts is presumed to be correct unless the defendant rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A federal court is authorized to issue the writ only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedent." *Harrington*, 562 U.S. at 102. Few federal habeas petitioners can meet this daunting standard.

This Court ultimately must determine whether a state's habeas procedures comport with the Due

Process Clause. *See* Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 160, 205-06 (2021) (observing that Supreme Court review is even more vital where state courts are so dismissive of habeas petitioners' federal constitutional claims that they do not even provide reasons for denying them). This Court implicitly has accepted this responsibility by granting certiorari to review the fairness of state habeas proceedings. *See Foster v. Chatman*, 579 U.S. __, 136 S. Ct. 1737, 1766, n. 3 (2016) (holding that federal question was implicated in unreasonable summary order issued by highest state court); *Williams v. Pennsylvania*, 579 U.S. __, 136 S. Ct. 1899, 1902 (2016) (holding that state habeas petitioner was denied due process where state supreme court judge—who, as district attorney, had approved request to seek the death penalty—refused to recuse himself from appellate proceeding).

For decades, this Court has ensured that state habeas corpus fact-finding procedures comport with due process. *See, e.g.*, *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his charges. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."); *Wilde v. Wyoming*, 362 U.S. 607, 607 (1960) (*per curiam*) ("It does not appear from the record that an adequate hearing on these allegations was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court. We find nothing in our examination of the record to justify the denial of hearing on these

allegations."). Because this Court has remedied a state habeas trial court's erroneous denial of an evidentiary hearing when a prisoner has alleged facts supporting a substantial federal constitutional claim, it also must remedy a state appellate court's rejection of a trial court's credibility-based findings of fact that are supported by the record and justify the trial court's recommendation to grant relief.

This Court has acknowledged that, when a defendant has raised a substantial federal constitutional claim, a superior court's rejection of an inferior court's favorable, dispositive fact-findings in order to deny relief would "give rise to serious [constitutional] questions." *Raddatz*, 447 U.S. at 681, n. 7. The Court held that a federal district court's adoption of a magistrate judge's proposed *unfavorable* fact-findings to *deny* a defendant's pretrial motion to suppress evidence—without hearing the witnesses testify in person—did not violate due process. *Id.* at 683-84. It considered the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976): (1) the private interests implicated; (2) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs that the additional procedures would involve. The Court concluded that the district court could adopt the magistrate judge's recommended findings to deny a pretrial motion to suppress evidence because this practice "strikes the proper balance" between the *Mathews* factors. *Raddatz*, 447 U.S. at 683.

However, the Court carefully distinguished the converse situation where the district court *rejected* a magistrate judge's proposed *favorable* fact-findings in support of *granting* a defendant's motion and then denied the motion without hearing testimony. Concerning that scenario, the Court observed:

> The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious [constitutional] questions which we do not reach.

Raddatz, 447 U.S. at 681, n. 7; *see also id.* at 684 (Blackmun, J., concurring) ("In testing the challenged procedure against that criterion, I would distinguish between instances where the District Court rejects the credibility-based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed results.").

The prohibition against a superior court rejecting an inferior court's favorable fact-findings that were based on credibility determinations is sufficiently established to amount to a basic requirement of due process. *See Medina v. California*, 505 U.S. 437, 445-46 (1992) (due process violation where judicial practice violates "principle of justice so rooted in the traditions and conscience of our people"). Alternatively, even if the practice is not established sufficiently to be

"rooted" in the traditions of the American judicial system, it still qualifies as a requirement of due process under the three-part test announced in *Mathews*, as this Court suggested in footnote 7 in *Raddatz*. Either way, due process prohibits a superior court from rejecting an inferior court's dispositive fact-findings that were based on credibility determinations.

In petitioner's case, the TCCA not only failed to defer to the habeas trial court's findings that were based on its credibility determinations but also summarily concluded without explanation that they were not supported by the record. Its perfunctory rejection of petitioner's compelling federal constitutional claims does not comport with due process.

The state habeas trial court heard the testimony of Addison, deputy Croas, prosecutor McDaniel, and defense counsel Lindsey. It credited Addison, Croas, and Lindsey and disbelieved McDaniel—as was its right. It found that Addison falsely testified that petitioner shot him, that he was not a gang member, and that he was not testifying to obtain a parole letter. Additionally, it found that trial counsel was ineffective in failing to call Croas to impeach Addison's testimony that he was not a Crip, failing to call a police officer to testify that Jackson changed his story about the alleged kidnapping several times and appeared to be withholding information, and failing to object to the prosecutors' improper arguments outside the record. It concluded that the false testimony was material, that counsel's deficient performance was prejudicial, and that these constitutional violations—individually and

collectively—denied petitioner a fair trial on punishment.

The TCCA initially denied relief based on its mistaken belief that the trial court's order recommending relief was not supported by findings of fact and conclusions of law and that its own review of the record did not support the recommendation. When confronted by petitioner with its failure to discover that the findings and conclusions were in the record, it revised the order and stated without explanation that the record does not support the recommendation to grant relief.[8]

The TCCA's practice of engaging in *de novo* factfinding in habeas corpus cases filed under articles 11.07 and 11.071 of the Texas Code of Criminal Procedure is not required by rule or statute. Rather, it adopted this practice over time. *See, e.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008) (recognizing its authority in habeas corpus cases to serve as "ultimate factfinder" and "exercise [its] authority to make contrary or alternative findings" to those made by habeas trial court). In no other type of case does the TCCA embrace the role of the "ultimate factfinder"—not when reviewing the sufficiency of the evidence to

[8] The state habeas trial court adopted petitioner's proposed findings of fact and conclusions of law verbatim (2 H.C.R. 246-56, 315-16). This Court has acknowledged that, when the trial court adopts proposed findings verbatim, the findings are those of the court and may be rejected only if clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985).

support a conviction,[9] a trial court's ruling on a pretrial motion to suppress evidence,[10] or other types of habeas corpus cases.[11] In those scenarios, the TCCA is highly deferential to a trial court's or a jury's express or implied fact-findings and does not substitute its own. Due process cannot countenance a contrary practice in post-conviction habeas corpus cases. The TCCA cannot properly reject the habeas trial court's fact-findings that are supported by the record in the absence of a determination that they are clearly erroneous.

The TCCA implicitly rejected *all* of the habeas trial court's favorable fact-findings in denying relief without explaining why they are not supported by the record and are clearly erroneous. It must have made *implicit* fact-findings—which it did not share with the parties—to support its conclusion that the State did not present and fail to correct perjured testimony and that trial counsel was not ineffective. However, one cannot determine, for example, whether it found that particular fact-findings were clearly erroneous or it concluded beyond a reasonable doubt that the perjured testimony did not contribute to the 65-year sentence assessed by the jury. *See United States v. Bagley*, 473 U.S. 667, 679-80 (1985) (government has burden to

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[9] *See, e.g.*, *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

[10] *See, e.g.*, *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[11] *See, e.g.*, *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011).

prove that perjured testimony did not contribute to verdict).

It is ironic that the TCCA did not explain why the habeas trial court's findings are not supported by the record, as it has directed habeas trial courts to "show their work" to ensure that "their ultimate factual and legal conclusions are clear to the parties and to reviewing courts." *Ex parte Peterson*, 117 S.W.3d 804, 818 (Tex. Crim. App. 2003), *overruled on other grounds*, *Ex parte Lewis*, 217 S.W.3d 335 (Tex. Crim. App. 2007). Clearly, the TCCA does not practice what it preaches.

The Court should grant certiorari to address the issue reserved in *Raddatz*. If it concludes, as it suggested in *Raddatz*, that an appellate court violates due process when it denies relief on a constitutional claim by rejecting the favorable dispositive findings of fact of a trial court that are supported by the record, it must vacate the order denying relief and remand to the TCCA to reconsider the habeas trial court's findings with the required appellate deference.

Although petitioner's case is in a different procedural posture than *Raddatz*—which involved a federal district court's review of a magistrate judge's fact-findings supporting the denial of a pretrial motion to suppress evidence—it is sufficiently similar to present an appropriate vehicle for this Court to decide the issue. The substantial volume of state and federal capital and non-capital post-conviction habeas corpus cases in Texas alone warrants this Court's intervention to resolve this important issue—especially

where the TCCA's fact-finding review in petitioner's case was grossly inadequate.

Additionally, the TCCA's failure to conduct a meaningful analysis of the constitutional claims in petitioner's case is not an isolated instance. It has adopted a practice of summarily rejecting without explanation a habeas trial court's fact-findings and recommendation to grant relief. *See Ex parte Molina*, No. WR-83,007-01, 2015 WL 519737 (Tex. Crim. App. Nov. 25, 2015) (not designated for publication) (rejecting recommendation to grant relief on ineffectiveness claim with comment that findings and conclusions "are not supported by the record"); *Ex parte Strickland*, No. WR-27,079-02, 2020 WL 3635907 (Tex. Crim. App. July 21, 2020), *cert. denied*, 141 S. Ct. 1231 (2020) (not designated for publication) (same); *Ex parte Connors*, No. WR-73,203-03, 2020 WL 1542424 (Tex. Crim. App. Apr. 1, 2020), *cert. denied*, 141 S. Ct. 621 (2020) (not designated for publication) (rejecting suppression of evidence claim with comment that findings and recommendation "are not supported by the record").

This Court recently addressed the TCCA's inadequate review of an ineffectiveness claim in *Andrus*, *supra*. The state habeas trial court recommended a new trial on punishment because trial counsel was ineffective. The TCCA denied relief on the basis that Andrus failed to show "a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." This Court found deficient performance and remanded to the TCCA to

conduct a proper prejudice analysis. It faulted the TCCA for failing to analyze prejudice in any meaningful respect. *Andrus*, 140 S. Ct. at 1886. "Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted the weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." *Id.* at 1887. Thus, by repeatedly failing to "show its work," the TCCA has undermined the efficiency of the post-conviction process.

This Court should grant certiorari because the TCCA's review of petitioner's federal constitutional claims did not comport with due process. SUP. CT. R. 10(c). At the very least, the Court should vacate the judgment and remand to the TCCA to conduct a record-intensive analysis (similar to what the Court ordered in *Andrus*) and explain which fact-findings it rejected, the reasons, and why the perjured testimony and deficient performance of counsel, individually and collectively, did not result in prejudice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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