No. _____

In The

Supreme Court of the United States

KENNETH RAY STRICKLAND,

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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QUESTIONS PRESENTED

Petitioner, who is serving a 99-year sentence for attempted escape, filed a state habeas corpus application alleging that his trial counsel was ineffective by (1) failing to move for a directed verdict because the evidence was legally insufficient and (2) conceding during summation that he was guilty. The habeas judge—who also presided at the trial—recommended relief after finding that he may have granted a motion for directed verdict if it had been made, as the evidence was legally insufficient, and that counsel was ineffective in conceding guilt during summation. The Texas Court of Criminal Appeals (TCCA) summarily denied relief on the basis that "the [trial court's] findings and conclusions are not supported by the record." Its summary rejection without explanation of the trial judge's favorable dispositive fact findings raises the important constitutional question reserved in *United States v. Raddatz*, 447 U.S. 667, 681, n.7 (1980).

The questions presented are:

I. Whether it violates due process for an appellate court to reject without explanation a trial court's favorable dispositive fact findings that were based, in part, on its personal recollection of the trial.

II. Whether the TCCA's summary rejection of the trial court's findings and conclusions that trial counsel was ineffective by failing to move for a directed verdict and conceding guilt during summation misapplied this Court's ineffective assistance of counsel precedent.

RELATED CASES

- *State v. Strickland*, No. 07CR0510, 122nd District Court of Galveston County, Texas. Judgment entered November 30, 2007.
- *Strickland v. State*, No. 14-08-00011-CR, Fourteenth Court of Appeals of Texas. Judgment entered June 25, 2009.
- *Ex parte Strickland*, No. 07CR0510-83-1, 122nd District Court of Galveston County, Texas. Judgment entered April 22, 2020.
- *Ex parte Strickland*, No. WR-27,079-02, Texas Court of Criminal Appeals. Judgment entered July 1, 2020. Suggestion for reconsideration denied July 21, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kenneth Ray Strickland, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's unpublished order (App. 1a-3a) is available at 2020 WL 3635907. The trial court's findings of fact and conclusions of law (App. 4a-9a) is unreported. The TCCA's unpublished order denying reconsideration (App. 10a) is unreported. The Texas Court of Appeals' unpublished opinion on direct appeal (App. 11a-28a) is available at 2009 WL 1795025.

JURISDICTION

The TCCA denied relief on July 21, 2020, and denied petitioner's suggestion for reconsideration on July 21, 2020. This Court has jurisdiction under 28 U.S.C. §1257(a), as this petition was filed within 150 days of both orders.

CONSTITUTIONAL PROVISIONS

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

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 attempted capital murder and attempted escape using a deadly weapon in the 122nd District Court of Galveston County, Texas. A jury acquitted him of attempted capital murder but convicted him of attempted escape using a deadly weapon. He pled true to a prior conviction alleged for enhancement of punishment, and the jury assessed his punishment 99 years in prison on November 30, 2007.

The Fourteenth Court of Appeals of Texas affirmed petitioner's conviction in an unpublished memorandum opinion issued on June 25, 2009. He did not file a petition for discretionary review with the TCCA. *Strickland v. State*, No. 14-08-00011-CR, 2009 WL 1795025 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.).

Petitioner filed a state habeas corpus application on December 16, 2019. Judge John Ellisor, who had presided at the trial, conducted a hearing and recommended a new trial or, alternatively, a new direct appeal on April 22, 2020. The TCCA entered an order denying relief on July 1, 2020, and denied petitioner's

suggestion for reconsideration on July 21, 2020. *Ex parte Strickland*, No. WR-27,079-02, 2020 WL 3635907 (Tex. Crim. App. 2020) (not designated for publication).

B. Factual Statement

1. The Jury Trial

The indictment for attempted escape using a deadly weapon alleged that petitioner, "with the specific intent to commit the offense of Escape using or threatening to use a deadly weapon, from the custody of Bruno Pham-Ky, a Galveston County Sheriff's Deputy, in the Galveston County Jail, Galveston, Texas, do an act, to-wit: stabbing or striking the said Bruno Pham-Ky with a metal rod in order to escape, which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended" (C.R. 2).

The Texas Court of Appeals summarized the evidence in its opinion on direct appeal:

> Deputy Bruno Pham-Ky was handing lunch trays to inmates in a secured area. When Deputy Pham-Ky handed appellant a tray, appellant advanced toward him and forced the end of a metal rod against his throat. Although Deputy Pham-Ky used the word "stabbed" at trial, the rod caused a bruise or abrasion but did not penetrate his throat.[1] Appellant and

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[1] A doctor who testified at trial described the injury in a medical record as a "fingernail abrasion" to the neck (3 R.R. 146-47). In addition, Pham-Ky acknowledged that he did not have a bruise

> Deputy Pham-Ky struggled as appellant tried to push Deputy Pham-Ky toward a restroom. Deputy Pham-Ky diverted the rod away from his throat by grabbing appellant's wrist/hand area. Another officer came to Deputy Pham-Ky's aid and eventually subdued appellant. During the struggle, Deputy Pham-Ky also sustained bruised fingers on his left hand and a sprained left wrist. He received medical treatment the same day.
>
> Appellant gave a statement to an investigating officer. Appellant admitted he attempted to escape but claimed he did not intend to hurt or kill Deputy Pham-Ky. Appellant gave several somewhat inconsistent explanations for his actions: he was trying to threaten Deputy Pham-Ky; he thought jail officials would not hinder his escape if he took Deputy Pham-Ky hostage by holding the rod; or he wanted to take Deputy Pham-Ky's uniform.

Strickland, 2019 WL 1795025, at *1 (12a-13a).

Trial counsel did not move for a directed verdict at the conclusion of the evidence. During summation to the jury, counsel argued that petitioner was not guilty of attempted capital murder because he did not intend to kill Pham-Ky, and also that the rod was not a deadly weapon in the manner of its use (4 R.R. 15, 18). However, counsel conceded that petitioner was guilty of attempted escape based on his confession (4 R.R. 15).

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on his neck in a photo taken two days after the incident (3 R.R. 147).

The prosecutor argued to the jury that petitioner was guilty of both offenses because he tried to kill Pham-Ky to obtain his uniform so other deputies would think that he was a deputy, open the locked door, and enable him to leave the jail (4 R.R. 22-24).

The jury acquitted petitioner of attempted capital murder but convicted him of attempted escape using a deadly weapon (C.R. 57).

2. The Direct Appeal

Appellate counsel did not challenge the legal sufficiency of the evidence on the grounds that the State failed to prove the *corpus delicti* of attempted escape or that an assault on a deputy does not constitute an attempted escape from the jail. The Texas Court of Appeals rejected the unrelated claims that counsel did raise and affirmed the conviction. *Strickland*, 2009 WL 17975025 at *1-*8 (11a-28a).

3. The State Habeas Corpus Proceeding

Petitioner filed a habeas corpus application alleging that trial counsel was ineffective for (1) failing to move for a directed verdict on the grounds that the State failed to prove the *corpus delicti* of attempted escape and that an assault on a deputy does not constitute an attempted escape; and (2) conceding during summation that he was guilty of attempted escape. He also alleged that appellate counsel was ineffective in

failing to raise these sufficiency issues on direct appeal.

The habeas trial judge found both deficient performance and prejudice under the well-established standard governing ineffectiveness claims announced in *Strickland v. Washington*, 466 U.S. 688 (1984). In particular, he found that the evidence was legally insufficient to prove the *corpus delicti* of attempted escape because the State did not corroborate petitioner's confession that he intended to escape; that the evidence also was legally insufficient because an assault on a deputy does not constitute an attempt to escape from the jail; that counsel performed deficiently in failing to move for a directed verdict on these grounds, as the judge "may" have granted it; and, that counsel performed deficiently in conceding during summation that petitioner was guilty of attempted escape based on his confession instead of arguing that an assault on a deputy does not constitute an attempted escape from the jail and that petitioner could not be convicted of attempted escape based solely on his confession (App. 6a-7a). The judge recommended a new trial (App. 8a-9a).[2]

The TCCA entered an order that briefly summarized petitioner's contentions and the habeas trial judge's recommendation and disposed of them in two sentences: "However, the trial court's findings of facts,

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[2] The habeas trial judge also recommended a new appeal because appellate counsel was ineffective in failing to raise these sufficiency issues (App. 7a-8a).

conclusions of law and recommendation are not supported by the record. Based on the [sic] this Court's independent review of the entire record, relief is denied" (App. 2a-3a).

Petitioner filed a suggestion that the TCCA reconsider its decision on its own motion.[3] He contended that the TCCA had violated due process by rejecting without explanation the habeas trial judge's dispositive fact findings and conclusions as unsupported by the record in denying relief. The TCCA denied the suggestion for reconsideration without written order on July 21, 2020 (App. 10a).

REASONS FOR GRANTING CERTIORARI

The habeas trial judge, who had presided over petitioner's jury trial, made a pivotal fact finding—based on his personal recollection of the evidence—that, if trial counsel had made a motion for directed verdict, he "may" have granted it. Without any explanation, the TCCA summarily rejected all of his fact findings, legal conclusions, and recommendations and denied relief without any meaningful analysis.

[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 on initiative reconsider the case.").

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 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 ineffective assistance of counsel claim requires a remand pursuant to *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (*per curiam*).

I.

The Texas Court of Criminal Appeals Violated Due Process When It Rejected Without Explanation The Habeas Trial Judge's Favorable Dispositive Fact Findings That Were Based, In Part, on His Personal Recollection of The Trial.

A habeas trial judge in Texas is authorized to resolve controverted facts by ordering "affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as *using personal recollection*." TEX. CRIM. PROC. CODE art. 11.07, § 3(d) (2020) (emphasis added). The trial judge is "in the best position to judge the strength of his recollection. . . ." *Hunt v. Woodson*, 800 F.2d 416, 421 (4th Cir. 1986); *see also*, *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) ("On top of that, the judge who reviewed his [28 U.S.C.] § 2255 motion is the same judge who sentenced him. It is difficult to think of a better source of information

about what happened the first time around."); *Dimott v. United States*, 881 F.3d 232, 237 (1st Cir. 2018) ("Although these findings were made during the collateral review process, and not expressly stated at the time of sentencing, we give them due weight because the habeas judge was describing his own decisions at sentencing.").

Judge Ellisor, who presided at petitioner's trial, found in the habeas proceeding that trial counsel had performed deficiently in failing to move for a directed verdict on the attempted escape charge and that the deficiency prejudiced petitioner within the meaning of *Strickland*. He made the specific fact finding that, if counsel had made a motion for directed verdict, he "may" have granted it. This fact finding—which was based on his personal recollections of the evidence—constitutes the functional equivalent of a credibility determination. *See Vuong v. Scott*, 62 F.3d 673, 683-84 (5th Cir. 1995) (reliance on trial judge's personal recollection to resolve state habeas claims constitutes credibility determination that is presumed to be correct in federal habeas proceeding); *Solomon v. United State*s, 467 F.3d 928, 935 (6th Cir. 2006) ("It may not be necessary to call the district judge as a witness . . . because a district judge simply may rely on his or her recollections of the criminal proceedings in deciding a [28 U.S.C.] Section 2255 motion without testifying."). Judge Ellisor's fact finding establishes a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688.

The *Strickland* prejudice standard is satisfied by less than a preponderance of the evidence. *See Strickland*, 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). Much like the probable cause standard, which also is satisfied by less than a preponderance of the evidence, the *Strickland* prejudice standard is "not a high bar."[4]

The TCCA not only failed to defer to Judge Ellisor's findings that were based, in part, on his personal recollection of the trial, but also asserted without explanation that they "are not supported by the record." Its perfunctory rejection of a compelling ineffectiveness claim does not comport with due process.

Four decades ago, this Court acknowledged that, when a defendant has raised a substantial constitutional claim, a superior court's rejection of an inferior court's favorable, dispositive fact findings in order to

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[4] *Kaley v. United States*, 571 U.S. 320, 338 (2014) (majority op. of Kagan, J., for six justices) ("Probable cause, we have often told litigants, is not a high bar."); *see also id*. at 354 (Roberts, C.J., dissenting, joined by Breyer, J., & Sotomayor, J.) (describing probable cause as a "low bar"). Lower courts have equated "probable cause" with a "reasonable probability." *See*, *e.g*., *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) ("Probable cause rests on a reasonable probability that a crime has been committed[.]"); *United States v. Pritchard*, 745 F.2d 1112, 1120 (7th Cir. 1984) ("Probable cause is established whenever there is a reasonable probability of finding the desired items in a particular location.").

deny relief would "give rise to serious [constitutional] questions." *Raddatz*, 447 U.S. at 681, n.7. It held that a federal district court's adoption of a federal 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 (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.

Id. at 681, n.7; *see also id.* at 684 (Blackmun, J., concurring) ("In testing the challenged procedure against that criterion (the Due Process Clause), 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.").

Similarly, this Court has observed in the context of a federal habeas corpus proceeding that a federal court need not defer to a state appellate court's fact findings when it made dispositive credibility determinations based on a paper record. *See Cabana v. Bullock*, 474 U.S. 376, 388, n.5 (1986) ("There might be instances, however, in which the presumption would not apply to appellate factfinding . . . because appellate factfinding procedures were not 'adequate,' see 28 U.S.C. § 2254(d)(2). For example, the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record."), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497 (1987); *accord*, *Jefferson v. GDCP Warden*, 941 F.3d 452, 476 (11th Cir. 2019) ("[W]hether Jefferson's trial counsel or his psychologist was more credible . . . is not the kind of factual finding entitled to the presumption when made by an appellate court[.]"); *see also Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("Deference [to

a trial court's fact findings concerning racial discrimination in the prosecutor's exercise of peremptory challenges] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court to make credibility determinations.").

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—including findings based on the habeas trial judge's personal recollection, which is the functional equivalent of a credibility determination.

In petitioner's case, the TCCA rejected *all* of the habeas trial judge's favorable fact findings in support of his legal conclusions that trial counsel performed deficiently in failing to move for a directed verdict and in conceding guilt during summation and that these deficiencies adversely affected the outcome of the trial

(App. 2a-3a). The TCCA violated due process by rejecting without explanation the habeas trial judge's favorable dispositive fact findings—including those based on his personal recollection of the trial—in order to deny relief.

The TCCA's practice of engaging in *de novo* fact-finding in habeas corpus cases filed under article 11.07 or 11.071 of the Texas Code of Criminal Procedure—the statutory provisions for authorizing post-conviction habeas corpus proceedings to challenge felony convictions resulting in prison sentences or death sentences—is not required by rule or statute.[5] The TCCA simply adopted this practice over time. A judge's fact findings based on "personal recollection" constitute the equivalent of credibility determinations. *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 judge). 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 support a conviction,[6] a trial court's ruling on a pretrial motion to suppress evidence,[7] or other

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[5] Article 11.07 applies to cases in which defendants were sentenced to prison. Article 11.071 applies to cases in which defendants were sentenced to death.

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

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

types of habeas corpus cases.[8] 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. *On what legal basis can the TCCA properly reject the habeas trial judge's fact findings that are based on his personal recollection of the trial?*

The TCCA summarily rejected *all* of the habeas trial judge's favorable fact findings in order to deny relief without explaining why they are not supported by the record. It thus must have made *implicit* fact findings—which it did not share with the parties—in support of its conclusion that counsel was not ineffective. *On what facts did it rely to reach this conclusion*? It is ironic that the TCCA did not explain why the habeas trial judge's findings are not supported by the record, as it has directed habeas trial judges to "show their work" to ensure that "their ultimate factual and legal conclusions are clear to the parties and to reviewing courts." *Peterson*, 117 S.W.3d at 818. 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 fact findings of a

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[8] *See*, *e.g.*, *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds, Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007); *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011).

trial court, it should vacate the TCCA's order denying relief and remand for the TCCA to reconsider the habeas trial judge's findings and recommendation to grant relief with the required appellate deference. On remand, the TCCA should either: (1) specify what implicit *de novo* fact findings it made in rejecting the ineffectiveness claim and whether any of them (a) ignored the habeas trial judge's statutory authority to rely on personal recollection and (b) were dispositive to its decision to deny relief, or (2) remand to the trial court with instructions to make additional findings to replace any clearly erroneous fact findings.

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.[9] The substantial volume of state and federal capital and non-capital post-conviction habeas corpus cases in

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[9] Petitioner did not have an opportunity to raise the ineffectiveness claim until his state habeas corpus proceeding. *Cf. Trevino v. Thaler*, 569 U.S. 413, 428-29 (2013) (allowing Texas prisoner to rely on ineffectiveness of Texas state habeas counsel as "cause" for procedural default on ineffectiveness claim that state law did not allow him to raise until state habeas proceeding). Petitioner's ineffectiveness claim became ripe only after direct appeal counsel failed to raise the sufficiency of the evidence issues. The state habeas proceeding in the trial court was tantamount to the pretrial suppression hearing in *Raddatz*. Thus, the "nature of the case" requires the same due process protection applicable to a pretrial suppression hearing. *See Raddatz*, 447 U.S. at 677.

Texas alone warrants this Court's intervention to resolve this important issue.

Although it is an open question whether the United States Constitution requires a state to provide a procedure for collateral review of a federal constitutional claim,[10] Texas for decades has provided collateral review of non-capital felony convictions resulting in prison sentences via article 11.07 of the Code of Criminal Procedure. Therefore, the Due Process Clause of the Fourteenth Amendment applies to Texas habeas proceedings, just as it applies to state court direct appeals,[11] probation and parole revocation proceedings,[12] and driver's license revocation proceedings[13]—none of which is constitutionally required

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[10] *See Case v. Nebraska*, 381 U.S. 336, 337 (1965) (*per curiam*) (noting that "[w]e granted certiorari to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees" without resolving the issue).

[11] *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").

[12] *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) (extending federal due process protections to parolees facing revocation).

[13] *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

but, if provided by a state, must comport with due process.

Additionally, the TCCA's error in this case is not an isolated one. The Court should grant certiorari because the TCCA has adopted a practice of summarily rejecting without explanation a habeas trial judge's recommendation to grant relief based on favorable fact findings. *See*, *e.g.*, Petition for Writ of Certiorari, *Connors v. Texas*, No. 20-156 (petition filed on Aug. 13, 2020) (raising same issue as petitioner in Question 1 with regard to claim that State suppressed favorable evidence). Furthermore, this Court recently addressed the TCCA's inadequate review process of an ineffectiveness claim in *Andrus*. The habeas trial judge—who had presided at the trial—recommended a new trial on punishment because 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 for 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 that weighty and record-intensive analysis in the first instance, we remand for the Court

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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.").

of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." *Id.* at 1887.[14]

At the very least, the Court should grant certiorari, vacate the judgment, and remand for the TCCA to conduct a record-intensive analysis pursuant to *Andrus* and explain which fact findings it rejected and why.

II.

The Texas Court Of Criminal Appeals' Summary Rejection Of The Habeas Trial Judge's Findings And Conclusions That Trial Counsel Was Ineffective In Failing To Move For A Directed Verdict And Conceding Guilt During Summation Misapplied This Court's Ineffective Assistance Of Counsel Precedent.

To prevail on his Sixth Amendment ineffectiveness claim, petitioner must show that trial counsel's performance was deficient and that it resulted in prejudice. *Strickland*, *supra.* To show deficient performance, he must show that "counsel's representation

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[14] *Andrus* is not an outlier. It is standard fare for the TCCA—as it did in petitioner's case—to reject a trial court's recommendation to grant relief on an ineffectiveness claim with the comment that the findings and conclusions "are not supported by the record," *Ex parte Molina*, No. WR-83,007-01, 2015 WL 519737 (Tex. Crim. App. Nov. 25, 2015) (not designated for publication); or that the applicant "has not shown that he was prejudiced." *Ex parte Fears*, No. WR-86,519-01, 2019 WL 2870316 (Tex. Crim. App. July 3, 2019) (not designated for publication).

fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To show prejudice, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

A. Trial Counsel Performed Deficiently In Failing To Move For A Directed Verdict On The Ground That The State Failed To Prove The *Corpus Delicti* Of Attempted Escape.

Petitioner assaulted Pham-Ky with a metal rod and pushed him toward a bathroom that the deputies use. He told an investigator during a post-arrest interview that he tried to force Pham-Ky into the bathroom so he could take his uniform and escape. Counsel did not move for a directed verdict on the ground that the State failed to prove the *corpus delicti* of attempted escape. The habeas trial judge found that counsel performed deficiently because, if counsel had moved for a directed verdict on this ground, he may have granted it, as the evidence was legally insufficient (App. 6a-7a).

The common law *corpus delicti* rule requires the State to present evidence to corroborate the defendant's confession that the crime charged was committed. *Salazar v. State*, 86 S.W.3d 640, 644, n.14 (Tex. Crim. App. 2002). The rule is satisfied if "some evidence exists outside of the extra-judicial confession which, considered alone or in connection with the confession, shows that the crime actually occurred." *Id*. at 645. When the State does not present evidence to

corroborate the confession, the defendant must be acquitted of the crime charged.[15]

Petitioner confessed that he tried to force Pham-Ky into a bathroom so he could take his uniform and escape. The State failed to corroborate that he committed an act that amounted to more than mere preparation that tended but failed to effect his escape. Had he pushed Pham-Ky into a bathroom, taken his uniform, put it on, and walked toward an exit, that would have corroborated his confession that he intended to escape. The State proved the *corpus delicti* of assault on a public servant but not of attempted escape.

An example will illustrate the point. Assume that an officer arrests a man leaving a gun store after stealing a pistol. The officer asks why he stole the pistol. The man responds that he intended to load it and rob

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[15] *See Brown v. State*, 576 S.W.2d 36, 43 (Tex. Crim. App. 1978) (evidence insufficient to prove *corpus delicti* of conspiracy to commit capital murder where confession was only evidence of agreement to commit murder for remuneration); *Adrian v. State*, 587 S.W.2d 733, 735 (Tex. Crim. App. 1979) (evidence insufficient to prove *corpus delicti* of arson where confession was only evidence that fire was deliberately set); *Hernandez v. State*, 750 S.W.2d 902, 904 (Tex. App.—Corpus Christi 1988, no pet.) (evidence insufficient to prove *corpus delicti* of indecency with a child where confession was only evidence that defendant exposed genitals to child); *Thomas v. State*, 807 S.W.2d 803, 806-07 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (evidence insufficient to prove *corpus delicti* of aggravated robbery where confession was only evidence that property was stolen from victim's apartment); *Bradford v. State*, 515 S.W.3d 433, 441-42 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (evidence insufficient to establish *corpus delicti* of failure to report child abuse where confession was only evidence that child had been abused).

a bank. Although this evidence would be sufficient to sustain a conviction for theft of the pistol, it would not prove the *corpus delicti* of attempted aggravated robbery. The theft of the pistol was a mere preparatory act. To prove the *corpus delicti* of attempted aggravated robbery, the State would have to present evidence that the man did an act in furtherance of a robbery (for example, that he loaded the pistol and drove to the bank before being apprehended).

The habeas trial judge correctly found that counsel performed deficiently in failing to move for a directed verdict on the ground that the State failed to prove the *corpus delicti* of attempted escape. The TCCA offered no explanation for its conclusion that this finding is not supported by the record (App. 2a-3a).

B. Trial Counsel Performed Deficiently In Failing To Move For A Directed Verdict On The Ground That An Assault On A Deputy Does Not Constitute An Attempted Escape From The Jail.

Petitioner assaulted Pham-Ky with a metal rod and tried to push him toward a bathroom. Although the State proved that he assaulted a public servant, it did not prove that he did an act beyond mere preparation that tended but failed to effect his escape from the jail. Counsel did not move for a directed verdict on the ground that an assault on a deputy does not constitute an attempted escape. The habeas trial judge found that counsel performed deficiently because, if counsel had

moved for a directed verdict on this ground, he may have granted it, as the evidence was legally insufficient (App. 6a-7a).

When a defendant is charged with an attempt, as opposed to the completed offense, the State must prove that he did an act that amounted to more than mere preparation that tended but failed to effect the commission of the offense intended. TEX. PENAL CODE §15.01(a) (2006). For example, evidence that the defendant hid from an officer between two vehicles, and that a screwdriver and clothes hanger were found near him, did not prove that he attempted to burglarize a vehicle. *See Bledsoe v. State*, 578 S.W.2d 123, 125-26 (Tex. Crim. App. 1979). That he was positioning himself to break into a vehicle did not constitute an act that amounted to more than mere preparation. *Id*. at 126.

The State could have charged petitioner with assault on a public servant instead of attempted escape. Yet assaulting Pham-Ky with the intent to take his uniform did not constitute an act amounting to more than mere preparation that tended but failed to effect the commission of an escape. *Cf. Young v. State*, 622 S.W.2d 99, 100-01 (Tex. Crim. App. 1981) (commenting that the defendant should have been charged with assault on a public servant instead of resisting arrest).

The habeas trial judge correctly found that counsel performed deficiently in failing to move for a directed verdict on the ground that the State failed to prove an attempted escape. The TCCA offered no

explanation for its conclusion that this finding is not supported by the record (App. 2a-3a).

C. Trial Counsel Performed Deficiently In Conceding During Summation That Petitioner Was Guilty Of Attempted Escape.

Petitioner pled not guilty to attempted escape using a deadly weapon (3 R.R. 6). Rather than arguing to jurors that there was insufficient evidence to support the attempted escape charge, counsel asserted, "You know that Mr. Strickland was attempting to escape from the Galveston County jail. He's guilty of that. There's no argument that can be made against it" (4 R.R. 15).[16] The habeas trial judge found that counsel performed deficiently in conceding during summation that petitioner was guilty of attempted escape when he had viable defenses (App. 7a).

Counsel's strategy to concede petitioner's guilt of attempted escape in the hope that the jury would compromise and acquit him of attempted capital murder was patently unreasonable because petitioner was subject to a maximum punishment of life in prison if convicted of either offense. Capital murder is a capital felony under Section 19.03(b) of the Texas Penal Code; an attempted capital murder is a first-degree felony

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[16] Counsel's concession that petitioner was guilty of attempted escape using a deadly weapon was internally inconsistent with his argument that petitioner was not guilty of attempted capital murder because the metal rod was not a deadly weapon in the manner of its use (4 R.R. 18).

under Section 15.01(d). An escape from custody using a deadly weapon is a first-degree felony under Section 38.06(e)(2); an attempted escape is a second-degree felony under Section 15.01(d), but is punished as a first-degree felony under Section 12.42(b) when the defendant has a prior felony conviction, as petitioner did.

A defendant has the right to decide whether to plead guilty, waive a jury, testify, and appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Counsel cannot consent to a guilty plea on the defendant's behalf. *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966). Counsel can make a strategic decision, without the defendant's consent, to concede during summation that he is guilty of murder in an effort to persuade the jury not to impose a death sentence. *Florida v. Nixon*, 543 U.S. 175, 190-91 (2004). However, counsel cannot make this concession over the defendant's objection. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018).

The Court has acknowledged that an ineffectiveness claim based on counsel's strategic decision to concede the defendant's guilt during summation "might present a closer question" in a "run-of-the-mine" noncapital trial. *Nixon*, 543 U.S. at 190-91. Petitioner's case presents that very issue.

Petitioner manifested his desire to contest the attempted escape charge when he pled not guilty. He did nothing during the trial to indicate that he wanted to change his mind. Counsel, by conceding during summation that petitioner was guilty, effectively changed his plea to guilty. Counsel's concession manifested a

lack of understanding of the *corpus delicti* rule, as he argued that petitioner was guilty based solely on the confession; and, it also manifested a lack of understanding of the law of criminal attempt, as he failed to argue that the assault did not constitute an act beyond mere preparation that tended but failed to effect petitioner's escape. No sound strategy could possibly justify this concession when petitioner had viable defenses to the attempted escape charge. Moreover, there was no strategic benefit to petitioner being convicted of attempted escape using a deadly weapon instead of attempted capital murder, as he was subject to a maximum sentence of life in prison for both offenses as a result of the prior conviction alleged for enhancement of punishment.

The habeas trial judge correctly found that counsel performed deficiently in conceding during summation that petitioner was guilty of attempted escape. The TCCA offered no explanation for its conclusion that this finding is not supported by the record (App. 2a-3a).

D. Petitioner Has Established Prejudice.

If counsel had moved for a directed verdict on the grounds that the State failed to prove the *corpus delicti* of attempted escape and that an assault on a deputy does not constitute an attempted escape, there is a reasonable probability that the judge would have granted it. Indeed, his finding that he "may" have granted it establishes *Strickland* prejudice. If he had denied it, and

petitioner had been convicted, there is a reasonable probability that the Texas Court of Appeals would have held that the evidence was legally insufficient to sustain the conviction and acquitted him.

Alternatively, if counsel had argued to the jury that an assault on a deputy does not constitute an attempted escape, and that petitioner could not be convicted of attempted escape based solely on his confession—instead of conceding guilt—there is a reasonable probability that the outcome of the trial would have been different. At the very least, the jury may have failed to reach a unanimous verdict on the attempted escape charge. *See Andrus*, 140 S. Ct. at 1886 (noting that, "because Andrus' death sentence required a unanimous jury recommendation, . . . prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding Andrus' moral culpability"); *cf. Turner v. United States*, 137 S. Ct. 1885, 1898 (2017) (Kagan, J., dissenting) (recognizing that all members of the Court "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—*i.e.*, an acquittal or *hung jury* rather than a conviction") (emphasis added). Petitioner thus has demonstrated *Strickland* prejudice.

The Court should grant certiorari because the TCCA has adopted a practice that effectively nullifies *Strickland*. *Cf. Andrus*, 140 S. Ct. at 1886-87 (when

habeas trial judge recommended relief on ineffectiveness claim, and TCCA summarily denied relief without explanation, case remanded for record-intensive consideration of prejudice).

CONCLUSION

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

Respectfully submitted,

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