
IN THE
Supreme Court of the United States

CYNTHIA HUDSON,

Petitioner

vs.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Gregory Sherwood
Attorney
P.O. Box 200613
Austin, Texas 78720-0613
(512) 484-9029
Texas Bar # 18254600
Supreme Court Bar # 262173
Email: gsherwood@mail.com

Counsel of Record for
Petitioner Cynthia Hudson

Questions Presented for Review

1. Is a state habeas corpus petitioner who pleads ineffective assistance of counsel claims denied federal constitutional due process when the state habeas court sets an evidentiary hearing, but then refuses to bench warrant the petitioner to attend the hearing, which prevented the petitioner from assisting her state habeas counsel at that hearing, or presenting any contrary evidence regarding her trial attorney's testimony on the ineffective assistance claims?
2. If this Court does not order a remand for a new evidentiary hearing with the petitioner permitted to be present, then should the Fifth Circuit have granted a certificate of appealability on the ineffective assistance of counsel claims that were rejected by the federal district court?

List of Parties

The names of the parties are listed in the caption of this case.

Table of Contents

Questions Presented for Review	<u>i</u>
List of Parties	<u>ii</u>
Table of Contents	<u>iii</u>
Table of Authorities	<u>v</u>
Opinion Below	<u>1</u>
Statement of Jurisdiction.....	<u>2</u>
Relevant Constitutional Provisions.....	<u>3</u>
Statement of the Case.....	<u>4</u>
Argument Amplifying Reasons for Granting the Writ	<u>23</u>
Standard for Determining Ineffective Assistance of Counsel, and Whether a Federal Court May Grant Federal Habeas Relief to a Person in State Custody	<u>23</u>
Why Certiorari Should be Granted on One or Both Questions Presented.....	<u>25</u>
Conclusion and Prayer for Relief.....	<u>30</u>

(Appendix listed on next page)

Appendix

	<u>Tab</u>
June 15, 2018 Report and Recommendation of the United States Judge (Fifth Cir. ROA.272-300)	A
May 10, 2019 U.S. District Court’s Order of Dismissal and Final Judgment (Fifth Cir. ROA.331-333)	B
August 14, 2020 Fifth Circuit Order by Single Judge Denying Certificate of Appealability	C
September 22, 2020 Fifth Circuit Order Denying Motion for Reconsideration by Three-Judge Panel	D
June 22, 2016 Order of Texas Court of Criminal Appeals Remanding to State Habeas Court for Evidentiary Hearing	E
December 8, 2016 State Habeas Court’s Findings of Fact and Conclusions of Law and Denial of Motion for DNA Testing (Fifth Cir. ROA.2609-2618)	F
February 8, 2017 Order of Texas Court of Criminal Appeals Denying Post-Conviction Writ (Fifth Cir. ROA.2309)	G
March 1, 2017 Order of Texas Court of Criminal Appeals Denying Reconsideration on Court’s Own Motion (Fifth Cir. ROA.2529-2530)	H

Table of Authorities

Federal Cases

<i>Buck v. Davis</i> , 137 S. Ct. 759 (U.S. 2017).....	<u>24</u>
<i>Buntion v. Lumpkin</i> , ___ F.3d ___, (No. 20-70004) (5 th Cir. Dec. 14, 2020).....	<u>24</u> , <u>25</u>
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985).....	<u>18</u>
<i>Contreras v. United States</i> ; No. 1:13-CV-00083 (S.D. Tex. – Brownsville 2018).....	<u>28</u>
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	<u>8</u> , <u>26</u>
<i>Gomez-Arreola v. United States</i> ; No. 1:12-CV-00179 (S.D. Tex. – Brownsville 2016).....	<u>28</u>
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	<u>18</u>
<i>Moore v. Dretke</i> , 369 F.3d 844 (5 th Cir. 2004)	<u>22</u>
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	<u>18</u> , <u>20</u>
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	<u>22</u> , <u>24</u>
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934).....	<u>7</u> , <u>26</u>
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	<u>24</u>
<i>Tennard v. Dretke</i> , 542 U.S. 274 (2004).....	<u>25</u>
<i>United States v. Davis</i> , 971 F.3d 524 (5 th Cir. 2020)	<u>24</u> , <u>25</u>
<i>United States v. Hoyuela</i> ; No. 2:17-CR-00571 (S.D. Tex. – Corpus Christi 2019).....	<u>28</u>

State Cases

<i>Ex parte Gutierrez</i> , 337 S.W.3d 883 (Tex. Crim. App. 2011).....	8
<i>Ex parte Mines</i> , 26 S.W.3d 910 (Tex. Crim. App. 2000)	8 , 17
<i>Ex parte Mitchell</i> , Court of Criminal Appeals Writ No. WR-86,706-01, and Williamson County No. 09-689-K277 (Tex. Crim. App. 2018).....	28
<i>Rose v. State</i> , 198 S.W.3d 271 (Tex. App. – San Antonio 2006, pet. ref’d).....	8

Federal Constitutional Provisions, Statutes and Rules

28 U.S.C. § 2253(c)(1)(A)	24
28 U.S.C. § 2253(c)(2).....	24
28 U.S.C. § 2254.....	1 , 22 , 29
Sup. Ct. March 19, 2020 Order	3
Sup. Ct. Rule 13.1	3
Sup. Ct. Rule 13.3	3
U.S. Const. Amend. V	3
U.S. Const. Amend. XIV, § 1	3

State Statutes and Rules

Tex. Code Crim. Pro. Art. 11.07, § 3(b)	4
Tex. Code Crim. Pro. Art. 11.07, § 3(c)	6
Tex. R. App. Pro. 66.2	8
Tex. R. App. Pro. 69.1	8

IN THE
Supreme Court of the United States

CYNTHIA HUDSON,

Petitioner

vs.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Petitioner CYNTHIA HUDSON, who files this Petition for a
Writ of Certiorari, and respectfully states as follows:

Opinion Below

This certiorari petition arises from an attempt to appeal in the Fifth Circuit
the denial of Petitioner's federal post-conviction writ filed under 28 U.S.C. § 2254

by a U.S. District Judge for the Eastern District of Texas, which resulted in a single-judge order of the Fifth Circuit denying Petitioner's motion for certificate of appealability, and then an order from a Fifth Circuit three-judge panel denying Petitioner's motion for reconsideration. The substantive opinion for review by this Court which denied the federal habeas writ is the June 18, 2018 Report and Recommendation of the United States Magistrate Judge, contained at Appendix Tab "A," and also at Fifth Cir. ROA.272-300. The U.S. District Court's May 10, 2019 Order of Dismissal and Final Judgment, approving the Magistrate Judge's Report without substantive discussion, is contained at Appendix Tab "B," and at Fifth Cir. ROA.331-333. The Fifth Circuit's August 14, 2020 Order Denying a Certificate of Appealability is at Appendix Tab "C." The Fifth Circuit's September 22, 2020 Order Denying Motion for Reconsideration by a Three-Judge Panel is at Appendix Tab "D."

None of the orders just mentioned are printed in any reporting service.

Statement of Jurisdiction

The substantive judgment or order sought for review by this Court is the denial of Petitioner's federal habeas writ that is discussed in the June 18, 2018 Report and Recommendation of the United States Magistrate Judge, which is contained at Appendix Tab "A," and is also at Fifth Cir. ROA.272-300. The U.S.

District Court’s May 10, 2019 Order of Dismissal and Final Judgment, approving the Magistrate Judge’s Report without substantive discussion, is contained at Appendix Tab “B,” and at Fifth Cir. ROA.331-333. The Fifth Circuit’s August 14, 2020 Order Denying a Certificate of Appealability is at Appendix Tab “C.” The Fifth Circuit’s September 22, 2020 Order Denying Motion for Reconsideration by a Three-Judge Panel is at Appendix Tab “D.”

This certiorari petition will be timely if it is electronically filed, and one paper copy is mailed to this Court’s clerk’s office, within 150 days of September 22, 2020, the date the Fifth Circuit denied Petitioner’s Motion for Reconsideration by Three-Judge Panel, (at Appendix Tab “D”), or by February 19, 2021. *See* this Court’s March 19, 2020 Order, extending the filing deadline for certiorari petitions to “150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. *See* [Sup. Ct.] Rules 13.1 and 13.3.”

Relevant Constitutional Provisions

U.S. Const. Amend. V: “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”

U.S. Const. Amend. XIV, § 1: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

Statement of the Case

Petitioner Cynthia Hudson seeks this Court's review of the June 18, 2018 Report and Recommendation of the United States Magistrate Judge. *See* Appendix Tab "A," also at Fifth Cir. ROA.272-300. The U.S. District Court's May 10, 2019 Order of Dismissal and Final Judgment, approved the Magistrate Judge's Report without substantive discussion. *See* Appendix Tab "B," also at Fifth Cir. ROA.331-333. The Fifth Circuit's non-substantive orders denying Petitioner's motion for certificate of appealability, first by a single-judge order, and then by a three-judge panel which denied Petitioner's Motion for Reconsideration, are at Appendix Tabs "C" and "D."

Pursuant to Texas Code of Criminal Procedure Art. 11.07, § 3(b), Petitioner filed her state habeas writ and supporting memorandum, Fifth Cir. ROA.2459-2519, with the Cass County District Clerk's office on February 16, 2016, which raised two grounds of ineffective assistance of counsel: (a) ineffective assistance of trial counsel in failing to request an appropriate felony-murder instruction, and (b) ineffective assistance in trial counsel's failure to investigate and present evidence on the parameters of the psychological problems of the child decedent and of child witnesses who were the decedent's adopted siblings. Fifth Cir. ROA.2464-2466, and Fifth Cir. ROA.2488-2508. The state habeas writ was heard by a different state district judge (Hon. Bill Miller, Fifth Cir. ROA.2618), than the judge who

presided at Petitioner's criminal trial held over five years earlier (Hon. Ralph Burgess), that resulted in a sentence of life without parole. Fifth Cir. ROA.2379-2380. This means that in any evidentiary hearing in the habeas action, the state habeas judge would have been unable to judge the credibility of Petitioner unless the state habeas judge had viewed her testimony at the habeas hearing, because the state habeas judge did not preside over Petitioner's criminal trial, did not observe Petitioner's demeanor at that trial, and could not have used any recollection from that trial to judge Petitioner's demeanor. This makes the refusal of the state habeas judge to permit Petitioner to attend the habeas hearing all the more puzzling, because excluding Petitioner prevented the habeas judge from judging her credibility at all. By hearing only from Petitioner's trial counsel, but not from Petitioner herself, the state habeas evidentiary hearing became a "one-sided" hearing at which only trial counsel was permitted to testify in an attempt to refute the ineffective assistance grounds raised, but Petitioner was prevented from testifying in support of her ineffective assistance grounds, and also prevented from assisting her habeas counsel at that hearing. It cannot comport with fundamental concepts of federal constitutional due process that an evidentiary hearing can be set for a habeas proceeding, but then the habeas judge can prevent one side from testifying at that hearing, as occurred in this case.

On February 29, 2016, the State of Texas, acting through the Cass County Criminal District Attorney's Office, filed Respondent's Original Answer, and a supporting affidavit from Petitioner's trial counsel, David L. James, which attempted to refute Petitioner's two ineffective assistance grounds. Fifth Cir. ROA.2520-2524. Petitioner then filed on March 28, 2016 her reply to the State's Answer and a request for evidentiary hearing. Fifth Cir. ROA.2597-2604.

No formal decision was made by the state habeas court within the time prescribed by Texas law, and the state habeas file was then forwarded to the Court of Criminal Appeals of Texas pursuant to Texas Code of Criminal Procedure Art. 11.07, § 3(c), and received on March 22, 2016. Fifth Cir. ROA.2356-2357. Petitioner filed in the Court of Criminal Appeals on March 25, 2016 her Motion for Remand for Evidentiary Hearing. Fifth Cir. ROA.2562-2568. The Court of Criminal Appeals then issued a June 22, 2016 order remanding the case to the state habeas trial court for an evidentiary hearing on Petitioner's ineffective assistance grounds. Fifth Cir. ROA.2593. The actual two page order from the Court of Criminal Appeals, which was not included in the Fifth Circuit record on appeal, but is publicly available on the Court of Criminal Appeals' website, is at Appendix Tab "E."

Before the Court of Criminal Appeals of Texas issued its remand order, the state habeas court issued a June 9, 2016 order granting Petitioner an evidentiary

hearing on the state habeas writ, and setting the hearing for August 4, 2016. Fifth Cir. ROA.2549. The state habeas court then issued an August 3, 2016 order resetting the evidentiary hearing for September 1, 2016. Fifth Cir. ROA.2551.

Petitioner filed her Application for Bench Warrant on August 22, 2016 with the Cass County District Clerk's office, noting that "[Petitioner's] presence is required at the *habeas corpus* hearing because she is the applying party and is entitled, as a matter of due process, to hear evidence at the hearing," and because Petitioner "is a material witness . . . related to the communications between [Petitioner] and her attorney. [Petitioner's] evidence is essential. Securing the presence of the [Petitioner] in court is necessary to preserve her rights under the Fifth and Fourteenth Amendments of the United States Constitution [and Texas constitutional and statutory provisions]." Fifth Cir. ROA.2553-2556. Bracketing added, italics in original. By this pleading, Petitioner notified the state habeas court that she was invoking her federal constitutional due process rights to be present at the state habeas evidentiary hearing to resolve her ineffective assistance claims raised in her habeas petition. It should be noted that in Petitioner's underlying criminal trial, she also filed Defendant's Motion to be Present at All Proceedings, Fifth Cir. ROA.1737-1738, which cited cases from this Court which held that a criminal defendant has an absolute, non-waivable right to be present at criminal proceedings, including *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934)

(noting the defendant’s presence allows that defendant “to give advice or suggestions” to counsel in aid of his or her defense), and *Faretta v. California*, 422 U.S. 806, 819-820 (1975) (“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”). Fifth Cir. ROA.1737-1738.

The next day, the state habeas court issued an August 23, 2016 order denying Petitioner’s Application for Bench Warrant, Fifth Cir. ROA.2559, citing three Texas state appellate cases in its order: (1) *Ex parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011); (2) *Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000); and (3) *Rose v. State*, 198 S.W.3d 271 (Tex. App. – San Antonio 2006, pet. ref’d).¹ However, these three cases are clearly distinguishable, as two of the cases (*Gutierrez* and *Rose*) concern only motions for DNA testing, not post-conviction writs of habeas corpus, and the third case (*Mines*) only concerns whether a person sentenced to death must be competent to assist habeas counsel in filing a post-conviction writ. These three cases do not discuss whether a habeas corpus petitioner may be excluded from attending an evidentiary hearing on the

¹ The subsequent history of “pet. refused” for the *Rose* appeal is not an adjudication on the merits by the Court of Criminal Appeals of Texas, but only an indication that there were not four votes to grant review. See, e.g., Texas Rules of Appellate Procedure 66.2, and 69.1.

habeas petition, but instead, only discuss the general proposition that it is possible for habeas petitions to be decided without a hearing, and that there is generally not a constitutional right to be present at a post-conviction habeas hearing, since that is a collateral proceeding to the criminal conviction.

However, these cases do not stand for the proposition, apparently endorsed by all the lower state and federal courts that reviewed this case, that when an evidentiary hearing is set for a habeas petition containing ineffective assistance grounds, the Petitioner may then be excluded from that hearing without violating federal constitutional due process rights to assist her habeas counsel at that hearing, and to present contrary evidence on the ineffective assistance grounds raised in the habeas petition. While it is true that a habeas petition may be decided on the pleadings only, without an evidentiary hearing, once a state (or federal) habeas trial court decides that an evidentiary hearing is needed, the Petitioner must be then allowed to be present at that hearing to assist his or her habeas counsel at the hearing, and provide relevant evidence concerning the ineffective assistance claims. That is the federal constitutional issue that was erroneously decided by the lower courts, and for which review is sought in this Court in the first question presented.

Furthermore, none of the three cases cited by the state habeas judge in his order denying Petitioner's Application for Bench Warrant, concerned a state

habeas evidentiary hearing presided over by a different judge than the judge who presided at the underlying criminal trial, who then excluded the habeas petitioner from the habeas hearing. The state habeas judge's exclusion of the Petitioner made it impossible to determine the Petitioner's credibility, since the state habeas judge had no recollection of her credibility or demeanor from the criminal trial since the state habeas judge did not preside at that trial, and could not judge Petitioner's credibility at the hearing since Petitioner was excluded from that hearing.

In addition to the August 23, 2016 order denying bench warrant just discussed, the state habeas court also issued an August 23, 2016 order setting the evidentiary hearing for September 1, 2016 (the same date as stated in the August 3, 2016 order discussed earlier in this petition), which also stated that the hearing "will be limited to the testimony of trial counsel for the purposes of clarifying and supplementing his previously submitted affidavits." Fifth Cir. ROA.2591. By this order, the state habeas court *sua sponte* decided that Petitioner would not be permitted to appear at the hearing, would not be permitted to assist her habeas counsel at that hearing, and would not be permitted to listen to trial counsel's testimony and either present contrary testimony or assist her counsel in cross-examination of trial counsel's testimony. Thus, the state habeas judge complied with the Court of Criminal Appeals of Texas's order remanding for an evidentiary hearing, but violated fundamental concepts of federal constitutional due process by

excluding the Petitioner from the hearing, making it a “one-sided” hearing at which trial counsel would be able to refute Petitioner’s contentions of ineffective assistance, while preventing Petitioner from assisting her habeas counsel at the hearing, or presenting her own testimony either refuting trial counsel’s testimony, or supporting her grounds of ineffective assistance brought in her state habeas writ.

Upon receiving the state habeas trial court’s August 23, 2016 orders just discussed, Petitioner electronically filed with the Court of Criminal Appeals of Texas late that same evening a Motion for Modification of Remand Order and Stay in Proceedings, which argued that Petitioner must be permitted to attend the evidentiary hearing on the ineffective assistance grounds raised. Fifth Cir. ROA.2539-2561. The Court of Criminal Appeals denied this motion on September 1, 2016. Fifth Cir. ROA.100, and Fifth Cir. ROA.2569.

The September 1, 2016 state habeas evidentiary hearing began with the following discussion concerning the court’s refusal to permit Petitioner to attend the hearing, which alerted the state habeas trial court to Petitioner’s objection to not being permitted to attend this hearing:

THE COURT: The Court’s going to call 2009F0005, The State of Texas v. Cynthia Hudson, with regard to the remand from the Court of Criminal Appeals for a hearing related to the Writ of Habeas Corpus. Counsel for Ms. Hudson ready to proceed?

[Habeas Counsel]: We are not, Your Honor.

THE COURT: All right.

[Habeas Counsel]: May I make – may I clarify?

THE COURT: You may. . . .

[Habeas Counsel]: Your Honor, we believe we cannot proceed without Ms. Hudson here as she is a material witness and respectfully ask the Court to withdraw its previous rulings in the case and continue the case until such time as Ms. Hudson can be present to hear Mr. James's testimony and to offer her own testimony to the Court.

THE COURT: Mr. Lee [prosecutor], do you wish to make some response to that?

[Prosecutor]: Your Honor, I've been practicing law for 31 years plus. I think the case law is quite clear that these matters can be handled through affidavits alone. No testimony is even normally required. I've been doing this for a long time. This is the first case I've ever even been involved in so it's rare to have live testimony. I think it is quite clear. Her presence is not required unless there's something, some extraordinary need for that.

THE COURT: All right. Counsel, let me ask you. . . . So the Court of Appeals has directed this court to make specific fact-finding, and all of that conduct that they've asked the Court to make fact-finding with regard to is defense counsel's conduct. I read your writs and I've read your various motions that are there. How does any testimony from Ms. Hudson – if the Court assumes what you've stated, what the writ's arguments are how does whatever Ms. Hudson testifies to make any difference as to the determination, first of all? Second of all, should the Court decide that her – you know, after hearing from Mr. James, should the Court decide that it needs additional information based upon Ms. Hudson or any other witness, what would prevent the Court from

seeking an extension from the Court of Criminal Appeals and having another hearing?

[Habeas Counsel]: From a legal standpoint, what [the prosecutor] said is correct, you did not have to schedule a hearing. From a legal standpoint, the answer to your question is no, there is absolutely nothing, should you, the trial court, decide that you need more information to ask for an extension, and based on our considerable experience, we know the Court [of Criminal Appeals] will give it to you. Respectfully, Judge, I don't personally believe that's the issue. While you did not have to schedule a hearing, you had scheduled a hearing prior to even the remand, all right? And with due respect, probably if you hadn't ordered a hearing we wouldn't have got all worked up about it, but truthfully, for you to take live testimony from Mr. James without Ms. . . . Hudson here, how does she know how to respond other than you presuming she would deny that? And you certainly cannot weigh the credibility of the trial lawyer's testimony and Ms. Hudson's denial without having them both here.

THE COURT: Well, – the question, though, is – well, I – the Court intends to – I appreciate your request. I'm going to deny the request for the stay and continue with the hearing as I've ordered it to be, go forward, and then will consider after we've – I've heard from Mr. James whether I need to do anything else before deciding whether or not I can answer the questions that have been presented by the Court of Criminal Appeals. . . . If I feel like I can't answer those questions I feel like I will ask the Court of Criminal Appeals for additional time and seek another hearing.

[Habeas Counsel]: Then if the Court notes that fact that we are not ready, we will proceed subject to your ruling with the recognition that we are doing so, in essence, under respectful protest.

Fifth Cir. ROA.2672-2675. Bracketing added. The September 1, 2016 hearing continued with Petitioner's trial counsel presenting testimony attempting to refute Petitioner's grounds on ineffective assistance, but without Petitioner being present at the hearing. ROA.2675-2723.

The state habeas court filed with the Court of Criminal Appeals its September 14, 2016 Motion for Extension of Time to Make Findings of Fact and Conclusions of Law, and a 60 day extension was granted on October 17, 2016, making those findings and conclusions due by mid-December 2016. Fifth Cir. ROA.2725. On September 30, 2016, Petitioner filed with the Cass County District Clerk's office a supplemental state habeas corpus writ, Fifth Cir. ROA.2623-2640, and supporting memorandum. Fifth Cir. ROA.2641-2663. The supplemental state habeas writ raised two additional ineffective assistance of counsel grounds (trial counsel's failure to submit evidence for DNA testing, and trial counsel's failure to file a written motion for continuance), since these grounds became apparent during the state habeas evidentiary hearing. Fifth Cir. ROA.2626, ¶ 14(C), Fifth Cir. ROA.2628-2630, and Fifth Cir.ROA.2649-2661. Petitioner asked that a rake (State's Ex. 53) be submitted for DNA testing in her supporting memorandum. Fifth Cir. ROA.2661.

On December 8, 2016, the state habeas court issued its Findings of Fact and Conclusions of Law and Denial of Motion for DNA Testing, which recommended

denial of relief on the four ineffective assistance grounds raised, but failed to address Petitioner's objection to the habeas court's refusal to permit her to attend the evidentiary hearing. Fifth Cir. ROA.2609-2618, and Appendix Tab "F." Petitioner filed on December 20, 2016 in the Court of Criminal Appeals of Texas her Notice of Filing Objections and Request for Further Remand and Complete Resolution of Issues. Fifth Cir. ROA.2319-2353. This document notified the Court of Criminal Appeals that Petitioner had objected to the evidentiary hearing being conducted without Petitioner's presence, asked for further remand to that court so that Petitioner could present evidence, and advised that Petitioner had mailed for filing to the Cass County District Clerk's office on December 19, 2016, written objections to the state habeas court's findings and conclusions, including the failure to permit Petitioner to attend the hearing. Fifth Cir. ROA.2319-2323, and Fifth Cir. ROA.2337-2353.

The Court of Criminal Appeals of Texas agreed with the state habeas court's recommendation in its February 8, 2017 order denying relief, which erroneously stated that no evidentiary hearing had been filed. Fifth Cir. ROA.2309, and Appendix Tab "G." Petitioner filed on February 13, 2017 her suggestion that the Court of Criminal Appeals reconsider its ruling, Fifth Cir. ROA.2531-3528, in part because the Feb. 8 order denying relief incorrectly stated that no evidentiary hearing was held, but also because:

Finally, by its summary ruling, the Court [of Criminal Appeals] fails to answer the important constitutional question involved in this case, which is whether a *habeas* applicant has the right to be present at an evidentiary hearing ordered by a *habeas* court, when she has not waived her right to be present and has, through counsel, objected to the habeas court proceeding in her absence. The Court should specifically address this question.

Fifth Cir. ROA.2532. Italics in original, bracketing added. However, the Court of Criminal Appeals refused to answer this important constitutional question in its March 1, 2017 order denying reconsideration on its own motion. Fifth Cir. ROA.2529-2530, and Appendix Tab “H.”

Petitioner then filed on March 21, 2017 in the U.S. District Court for the Eastern District of Texas, Marshall Division, Petitioner’s Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, Fifth Cir. ROA.5-20, and a supporting memorandum of law. Fifth Cir. ROA.22-192. Ground One of the federal habeas petition concerned the state habeas court’s refusal to permit Petitioner to attend the state habeas evidentiary hearing, which Petitioner argued violated her federal constitutional due process rights. Fifth Cir. ROA.9-10 (petition), Fifth Cir. ROA.32-35 (supporting memorandum), and Fifth Cir. ROA.66-156 (relevant exhibits). Petitioner’s remaining four grounds in the federal habeas petition raised the four ineffective assistance of counsel issues from her state habeas petition which had been substantively ruled upon by the state habeas court.

The federal habeas petition was referred to a U.S. Magistrate Judge, Fifth Cir. ROA.193-194, who directed the Respondent to file an Answer. Fifth Cir. ROA.195-196. After Respondent filed an unopposed extension motion to file an answer, Fifth Cir. ROA.200-202, which was granted, Fifth Cir. ROA.204, Respondent then filed an Answer with supporting brief on September 8, 2017. Fifth Cir. ROA.209-257. Respondent's Answer with supporting brief first argued that Petitioner's first ground, concerning the denial of her federal constitutional due process rights to attend and assist her counsel at the habeas evidentiary hearing and present her own testimony, could not be heard by a federal court because this was only a defect in the state habeas proceeding, which did not present a federal constitutional claim, and was not thus cognizable in federal court. Fifth Cir. ROA.234-235. Respondent noted that while Petitioner did have a federal constitutional due process right to attend all critical stages of her criminal trial, she had no federal constitutional due process right to be present at the state habeas hearing, citing *Ex parte Mines*, 26 S.W.3d 910, 914-915 (Tex. Crim. App. 2000), discussed earlier at pages 8-9 of this petition. Fifth Cir. ROA.235. Respondent's Answer then argued that the state habeas court properly ruled that no ineffective assistance of counsel occurred in the four grounds raised in the state habeas petition. Fifth Cir. ROA.235-256.

Petitioner filed an unopposed motion for extension of time to file a reply to the Respondent's Answer. Fifth Cir. ROA.258-261. This motion was considered moot in a June 5, 2018 written order by the magistrate judge, which expressly stated that the reply filed after the filing deadline would be considered by the magistrate. Fifth Cir. ROA.271. The Petitioner's Reply Brief filed on October 16, 2017, Fifth Cir. ROA.263-269, argued that the evidentiary hearing, which had been ordered by the Court of Criminal Appeals of Texas, meant that the evidentiary hearing had to be "fair" under *Panetti v. Quarterman*, 551 U.S. 930 (2007), meaning that once an evidentiary hearing was ordered, the hearing needed to be a fair hearing in accordance with fundamental fairness, which would include Petitioner's presence at that hearing. Fifth Cir. ROA.263-266. Petitioner's Reply Brief further argued that once the Court of Criminal Appeals of Texas had ordered an evidentiary hearing, federal constitutional due process prohibits the state habeas court from denying Petitioner's right to be present and to be heard at this hearing, citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Fifth Cir. ROA.267-268. The Petitioner's Reply Brief concluded by arguing that the federal court could not defer to the state habeas court's adjudication, or rely on Respondent's Answer regarding trial counsel's credibility or strategy rationales without holding an evidentiary hearing at which Petitioner could be present, so that she could assist her counsel

and testify as needed, and so that the federal habeas court would have an opportunity to consider trial counsel's testimony in Petitioner's presence (which was denied at the state habeas hearing by the exclusion of Petitioner from that hearing). Fifth Cir. ROA.268-269.

The federal magistrate judge did not hold an evidentiary hearing, but instead issued a June 15, 2018 Report and Recommendation of the United States Magistrate Judge (hereinafter "Magistrate Judge's Report"), recommending denial of relief. Fifth Cir. ROA.272-300, and Appendix Tab "A." This is the substantive order to be reviewed by this Court in this certiorari petition, as the U.S. District Judge's order and final judgment adopting the report and recommendation, as well as the Fifth Circuit's single-judge order denying a certificate of appealability, and the Fifth Circuit's order denying reconsideration by a three-judge panel, are all non-substantive orders.

The Magistrate Judge's Report first rejected Petitioner's argument that federal constitutional due process required that she be permitted to attend the state habeas evidentiary, by noting that while a criminal defendant "has the right to be present at all stages of a criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure[.]" Fifth Cir. ROA.279, that right did not apply to post-conviction proceedings, since they are collateral to the criminal proceeding. Fifth Cir. ROA.279-281. The magistrate

judge then held that, “[t]o the extent that [Petitioner] challenges Texas’s habeas jurisprudence, the Court notes that any purported infirmities within state habeas proceedings do not present a constitutional issue.” Fifth Cir. ROA.281 (bracketing added). The Magistrate Judge’s Report then distinguished Petitioner’s argument that *Panetti v. Quarterman*, 551 U.S. 930 (2007), required that Petitioner “be present at the habeas hearing because credibility of her attorney was an issue[,]” since that case involved questions of competency, and the case at bar did not. Fifth Cir. ROA.281-282. Finally, the Magistrate Judge’s Report stated that Petitioner was able to present her ineffective assistance claims at the hearing through her counsel, regardless of whether she was actually present, and that her presence was not foreclosed because the state habeas judge had stated that he would convene another hearing with Petitioner present if further evidence was needed. Fifth Cir. ROA.282-283. The Magistrate Judge’s Report recommended that this ground be dismissed as meritless. ROA.283.

The Magistrate Judge’s Report then discussed the four grounds of ineffective assistance of counsel raised in the federal habeas petition, which were also raised in the state habeas petition, and recommended denial of relief on those grounds. Fifth Cir. ROA.283-298. The Magistrate Judge’s Report also recommended denial of a certificate of appealability. Fifth Cir. ROA.299-300.

Petitioner timely filed objections to the Magistrate Judge's Report, Fifth Cir. ROA.306-324, which included a detailed discussion on why the magistrate judge erred in ruling that Petitioner had no federal constitutional due process right to be present at the state habeas hearing. Fifth Cir. ROA.309-313. The U.S. District Court overruled Petitioner's objections, adopted the Magistrate Judge's Report as the opinion of the district court, and entered an Order of Dismissal and Final Judgment, both dated May 10, 2019, which dismissed the federal habeas petition with prejudice and denied a certificate of appealability. Fifth Cir. ROA.331-333, and Appendix Tab "B."

Petitioner timely filed a notice of appeal on June 7, 2019 with the Fifth Circuit, which stated that a request for certificate of appealability and supporting brief would be filed with that court. Fifth Cir. ROA.334-335. On August 14, 2019, Petitioner filed with the Fifth Circuit both Appellant's Application for Certificate of Appealability, and Appellant's Brief in Support of Appellant's Application for Certificate of Appealability, on all five grounds raised in the federal habeas petition (four ineffective assistance grounds, and the refusal to permit Petitioner to attend the state habeas hearing). These pleadings are available for viewing on PACER in Fifth Cir. No. 19-40533. Respondent did not file any response to these pleadings.

A single judge of the Fifth Circuit denied a certificate of appealability in an August 14, 2020 non-substantive order included at Appendix Tab “C.” That two page non-substantive order denied a certificate of appealability by stating in part, “To the extent that Hudson also asserts that the state habeas court had an obligation to permit her to attend the evidentiary hearing on her postconviction application, this argument is not cognizable in a § 2254 proceeding,” citing *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004). Appendix Tab “C,” at p. 2. However, the *Moore* opinion does not concern a habeas court’s exclusion of a petitioner from a habeas evidentiary hearing. The Fifth Circuit’s single judge order then cited this Court’s opinion in *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) concerning the standard of review for obtaining a certificate of appealability, and summarily stated, “She has failed to make that showing. Accordingly, Hudson’s motion for a COA is DENIED.” Appendix Tab “C,” at p. 2.

Petitioner timely filed a motion for reconsideration by a three-judge panel of the Fifth Circuit. This motion was denied by a three-judge panel in a September 22, 2020 order. Appendix Tab “D.” As noted earlier, this petition for a writ of certiorari will be timely if filed within 150 days of the September 22, 2020 order, or by February 19, 2021.

Argument Amplifying Reasons for Granting the Writ

This Court should grant certiorari because the federal constitutional issue presented in this case in the first question presented, whether a Petitioner who brings a habeas corpus post-conviction writ with grounds of ineffective assistance of counsel, may then be excluded from any evidentiary hearing held to determine those ineffective assistance claims, is likely to recur in future habeas proceedings, both at the state and federal level. Indeed, if this decision is permitted to stand, state and federal habeas courts will be free to exclude habeas petitioners from ever appearing at evidentiary hearings on ineffective assistance claims, which would be a marked departure from current habeas practice.

Alternatively, if this Court does not grant certiorari on the first ground on whether Petitioner was improperly excluded from attending and assisting her counsel at the state habeas evidentiary hearing as violative of federal constitutional due process, then this Court should grant certiorari on whether the Fifth Circuit erred in failing to grant a certificate of appealability on the four ineffective assistance grounds raised in Petitioner's federal habeas petition.

Standard for Determining Ineffective Assistance of Counsel, and Whether a Federal Court May Grant Federal Habeas Relief to a Person in State Custody: To show ineffective assistance of counsel, Petitioner must demonstrate both deficient

performance by showing that her attorney’s representation fell below an objective standard of reasonableness as judged by prevailing professional norms, and prejudice caused by that deficient performance by establishing that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984).

The Fifth Circuit recently summarized the standard for determining whether a federal court may grant federal habeas relief to a person in state custody in *Buntion v. Lumpkin*, ___ F.3d ___, (No. 20-70004) (5th Cir. Dec. 14, 2020), as follows:

A state prisoner seeking appellate review of a habeas petition “denied by a federal district court” must “first obtain a COA from a circuit justice or judge.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017); see 28 U.S.C. § 2253(c)(1)(A). Because a “COA is jurisdictional[,] ‘a Court of Appeals may not rule on the merits of the prisoner’s case’ until a COA has issued.” *United States v. Davis*, 971 F.3d 524, 529 (5th Cir. 2020) (quoting *Buck*, 137 S. Ct. at 773) (alterations omitted). And a COA may only issue if the prisoner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

To make that showing, a COA applicant must demonstrate that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck*, 137 S. Ct. at 773 (quotation omitted). When a district court denies a COA because of procedural default in state court, the COA applicant must further demonstrate that reasonable jurists could disagree with the procedural ruling. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Our review is “not a full consideration of the factual

or legal bases adduced in support of the [applicant's] claims” but rather an examination of whether “the District Court’s decision was debatable.” *Davis*, 971 F.3d at 530 (quotations omitted).

Buntion v. Lumpkin, ___ F.3d ___ (No. 20-70004) (5th Cir. Dec. 14, 2020) (pdf slip op. at 4-5). Bracketing in original. *See also Tennard v. Dretke*, 542 U.S. 274, 282 (2004).

Why Certiorari Should be Granted on One or Both Questions Presented: The Statement of the Case portion of this certiorari petition is incorporated by reference into this section in order to avoid unnecessary repetition. As shown in the Statement of the Case, Petitioner was excluded from the state habeas evidentiary hearing through no fault of her own, and over the objections of her habeas counsel, which prevented her from assisting her habeas counsel at that hearing, or to present her own evidence (or refute her trial counsel’s contrary testimony) concerning her ineffective assistance of counsel habeas grounds. This Court should grant review on the first question presented, whether a habeas petitioner may be excluded from an evidentiary hearing set by the habeas court without violating federal constitutional due process, because this is an issue likely to recur in federal or state habeas proceedings.

As earlier stated, Petitioner agrees that a habeas petition could be decided based on the written pleadings only, if there are no disputed factual issues

presented by the habeas pleadings. However, once an evidentiary hearing is ordered, which occurred in the case at bar, both in orders from the state habeas trial court, Fifth Cir. ROA.2549 & 2551, and from the Court of Criminal Appeals of Texas, Appendix Tab “E,” then the habeas petitioner, who filed the habeas action containing his or her ineffective assistance or other constitutional grounds, must be permitted to attend the hearing to comport with federal constitutional due process principles of a full and fair hearing. The “one-sided” hearing conducted by the state habeas trial court, which only permitted evidence from Petitioner’s trial counsel, but did not permit Petitioner to be present to assist her habeas counsel or to present her own testimony, cannot comport with due process. Simply put, if a habeas court sets an evidentiary hearing, both sides must be permitted to be attend the hearing and present evidence.

As noted earlier at pages 7-8 of this petition, a criminal defendant has an absolute non-waivable right to be present at criminal proceedings. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), and *Faretta v. California*, 422 U.S. 806, 819-820 (1975). The state habeas court erroneously relied on the three Texas appellate cases cited in its order, Fifth Cir. ROA.2559, discussed at pages 8-9 of this petition, which do not hold that a habeas petitioner can be prohibited from attending an evidentiary hearing, or deal with exclusions of petitioners from such hearings, but instead only state the general principle that there is no constitutional

right to be present at a post-conviction hearing, since it is a collateral proceeding to the criminal conviction. However, if an evidentiary hearing is set in a habeas matter, then the habeas petitioner must be allowed to be present at that hearing, and if that requires a ruling from this Court that federal constitutional due process requires this, then Petitioner asks this Court to grant review on the first question presented and make such a holding.

An evidentiary hearing that comports with due process by being a fair hearing with an opportunity to be heard, *Panetti v. Quarterman*, 551 U.S. 930, 948-949 (2007), must be a hearing at which the habeas applicant is permitted to be present. This is required by the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) three-part test to determine whether due process was afforded because: (1) Petitioner's private interest in presenting a full record on her ineffective assistance claims was affected by the state habeas court's official action in refusing to permit her to be present, assist her attorney at that hearing, and offer her own testimony at the hearing; (2) the risk of erroneous deprivation of Petitioner's interest in having her ineffective assistance claims developed through the evidentiary hearing was great because Appellant was not permitted to attend that hearing; and (3) the State of Texas should have an interest in having ineffective assistance claims properly litigated when an evidentiary hearing is ordered by having all parties involved present at the hearing, including the habeas petitioner who brought the claims in

her post-conviction writ. Petitioner was deprived of a full and fair evidentiary hearing in her habeas petition by being excluded from the hearing by the state habeas trial court.

Additionally, Petitioner's counsel herein has been appointed to represent *pro se* habeas petitioners on four cases raising ineffective assistance grounds, three in federal courts, and one in Texas state court, when the habeas courts ordered evidentiary hearings.² In none of those hearings was there any dispute or question about whether those habeas petitioners would be bench warranted or "writted" to court to appear at the evidentiary hearings, and all were present at their hearings.

Once a habeas court sets an evidentiary hearing on a petitioner's ineffective assistance grounds raised in her habeas petition, the petitioner must be allowed to attend the hearing to assist her habeas counsel and provide evidence or testimony,

² (1) *Alvaro Gomez-Arreola v. United States*; No. 1:12-CV-00179 (S.D. Tex. – Brownsville 2016) (evidentiary hearings July 29, 2015 and Oct. 23, 2015; docket sheet on PACER accessed Jan. 6, 2021);

(2) *Juan Contreras v. United States*; No. 1:13-CV-00083 (S.D. Tex. – Brownsville 2018) (evidentiary hearing held June 6, 2016; docket sheet on PACER accessed Jan. 6, 2021);

(3) *Ex parte Ira Mitchell, Jr.*, Court of Criminal Appeals Writ No. WR-86,706-01, and Williamson County No. 09-689-K277 (Tex. Crim. App. 2018) (evidentiary hearing held Feb. 15, 2017), state habeas docket sheet available at <https://judicialrecords.wilco.org/PublicAccess/default.aspx>, accessed Jan. 6, 2021; and

(4) *United States v. Juan Jose Hoyuela*; No. 2:17-CR-00571 (S.D. Tex. – Corpus Christi 2019) (evidentiary hearing held Oct. 31, 2017; docket sheet on PACER accessed Jan. 6, 2021).

in order to comport with federal constitutional principles that once a hearing is set, that hearing must be a full and fair hearing with an opportunity for both sides to be heard. The state habeas court conducted a “one-sided” hearing at which only Petitioner’s trial counsel was permitted to testify, and Petitioner was excluded from the hearing. The federal district court decided not to decide this important constitutional question by claiming that Petitioner was actually attacking infirmities of the state habeas proceeding which could not be reviewed by a federal habeas court. Fifth Cir. ROA.279-283, and Tab “A.” The Fifth Circuit’s single-judge order denying a certificate of appealability held that any argument “that the state habeas court had an obligation to permit [Petitioner] to attend the evidentiary hearing . . . is not cognizable in a § 2254 proceeding.” Appendix Tab “C,” at p. 2. But a federal constitutional due process violation that occurs in a state habeas proceeding cannot be a mere infirmity that becomes unreviewable by a federal habeas court, for if that were so, then federal courts would lose their ability to review federal constitutional questions if they were raised in state habeas proceedings, and then determined to be “mere infirmities” in those proceedings.

Accordingly, Petitioner asks this Court to grant certiorari on the first question presented in this petition, concerning whether federal constitutional due process was violated by the state habeas trial court’s exclusion of Petitioner from the evidentiary hearing on her ineffective assistance habeas claims. If review is

granted and Petitioner prevails on the first question presented, this Court should then remand for an evidentiary hearing to be conducted by the U.S. District Court (or by a U.S. Magistrate Judge) at which Petitioner will be present, on the four ineffective assistance of counsel grounds presented in her habeas petition.

If the first question is granted certiorari and determined in Petitioner's favor, the second question concerning whether a certificate of appealability should have been granted on the ineffective assistance grounds may be deferred until another evidentiary hearing takes place at which Petitioner is allowed to be present. Alternatively, if this Court does not grant certiorari on the first question presented, then Petitioner asks this Court to grant review on the second question presented, in order to determine whether the Fifth Circuit erred in declining to grant a certificate of appealability on the ineffective assistance of counsel grounds raised, as Petitioner believes that an arguable issue on which reasonable jurists might debate was presented on one or more of the ineffective assistance issues raised in Petitioner's habeas petition.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner CYNTHIA HUDSON respectfully asks this Court to grant this petition for a writ of certiorari, set this case for oral argument and request briefing on the merits, and that on

hearing thereof, this Court reverse the June 15, 2018 Report and Recommendation of the United States Magistrate Judge recommending denial of habeas relief, which was adopted by the U.S. District Court in its May 10, 2019 Order of Dismissal and Final Judgment, and which was denied a certificate of appealability by the Fifth Circuit by a single judge in its August 14, 2020 Order, with a motion for reconsideration of that ruling by a three-judge panel being denied on September 22, 2020. Because Petitioner's federal constitutional due process rights were violated by the state habeas court's refusal to permit her to attend the state habeas hearing, the case should be remanded to the U.S. District Court for a new habeas hearing with Petitioner permitted to be present at that hearing to assist her counsel, which was denied at the prior state habeas hearing when the state habeas court refused to permit Petitioner to be present at the hearing.

Alternatively, if this Court does not grant relief on the first question presented concerning the failure to permit Petitioner to attend the habeas evidentiary hearing, then this Court should grant certiorari to determine whether the Fifth Circuit erred in failing to grant a certificate of appealability on the grounds of ineffective assistance of counsel raised in Petitioner's habeas petition, and if so, then remand this case to the Fifth Circuit for review of those grounds.

Respectfully submitted,

/s/ *Gregory Sherwood*

Gregory Sherwood
Attorney
P.O. Box 200613
Austin, Texas 78720-0613
(512) 484-9029
Texas Bar # 18254600
Supreme Court Bar # 262173
Email: gsherwood@mail.com

Counsel of Record for
Petitioner Cynthia Hudson

Date Submitted: January 7, 2021