No. _____

In The
Supreme Court of the United States

ASHLEY MERE HOWARD,

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

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
noguilt@schafferfirm.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioner pled guilty to felony theft. At the sentencing hearing, the trial court announced that it intended to sentence her to ten years in prison, the statutory maximum—asserting that she should have been charged with felony murder because her accomplice ran a red light, hit a car, and killed the driver as they fled from the police after the theft—but gave her the option of withdrawing her guilty plea. If petitioner had accepted the ten-year sentence for theft, she would have become eligible for parole after serving 15 months (and had been in jail for almost ten months by that time). Petitioner withdrew her guilty plea and was reindicted for felony murder. A jury convicted her and assessed 35 years in prison. She must serve half of the sentence (17.5 years) before she becomes eligible for parole. She sought habeas corpus relief on the basis that her original counsel in the theft case provided ineffective assistance by failing to advise her of the difference in parole eligibility between a theft sentence and a murder sentence. The court denied an evidentiary hearing and based its decision to recommend that relief be denied on the conflicting affidavits of petitioner and her counsel. The questions presented are:

I. Does the state court's decision that petitioner cannot challenge her *murder* conviction based on her original counsel's failure to inform her of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea to *theft* conflict with *Lafler v. Cooper*, 566 U.S. 166 (2012)?

QUESTIONS PRESENTED—Continued

II. Did the state courts deny petitioner procedural due process by rejecting her ineffective assistance of counsel claim based on conflicting affidavits without conducting an evidentiary hearing—particularly when the state habeas trial judge that made the credibility determinations did not preside at the proceedings in the theft case or at the felony murder trial?

RELATED CASES

- *State v. Howard*, No. 1465955, 183rd District Court of Harris County. Judgment entered February 4, 2016.
- *Howard v. State*, No. 01-16-00120-CR, First Court of Appeals of Texas. Judgment entered April 25, 2017.
- *Howard v. State*, No. PD-0939-17, Texas Court of Criminal Appeals. Judgment entered November 15, 2017.
- *Howard v. Texas*, No. 17-9302, United States Supreme Court. Judgment entered October 1, 2018.
- *Ex parte Howard*, No. 1465955-A, 183rd District Court of Harris County. Judgment entered December 10, 2020.
- *Ex parte Howard*, No. WR-92,267-01, Texas Court of Criminal Appeals. Judgment entered April 14, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ashley Mere Howard, respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

OPINIONS BELOW

The TCCA's denial of habeas corpus relief without written order (App. 1) is unreported. The state district court's findings of fact and conclusions of law (App. 2), which were expressly adopted by the TCCA as its own, are unreported. This Court's denial of certiorari on direct appeal (App. 24) is reported at 139 S. Ct. 150. The TCCA's refusal of discretionary review on direct appeal (App. 25) is unreported. The Texas Court of Appeals' opinion affirming the conviction on direct appeal (App. 26) is reported at 527 S.W.3d 348. The judgment of conviction of the state district court (App. 41) is unreported.

JURISDICTION

The TCCA denied relief on April 14, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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 defen[s]e."

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 initially was indicted for felony theft. She pled guilty without a plea bargain with respect to her sentence. The trial court informed her at the sentencing hearing that it would impose ten years in prison, the statutory maximum—asserting that, in the court's opinion, petitioner should have been charged with felony murder—but gave her the option of withdrawing her guilty plea. She withdrew her guilty plea, and was reindicted for felony murder. A jury convicted her of felony murder and assessed 35 years in prison and a $10,000 fine on February 4, 2016.

The Texas Court of Appeals affirmed petitioner's conviction on April 25, 2017. The TCCA refused discretionary review on November 15, 2017. This Court denied certiorari on October 1, 2018. *Howard v. State*, 527 S.W.3d 348 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd), *cert denied*, 139 S. Ct. 150 (2018).

Petitioner filed a state habeas corpus application on June 5, 2020, alleging, *inter alia*, that she made an

unintelligent decision to withdraw her guilty plea to theft because her original counsel had failed to inform her of the significant difference in parole eligibility between a theft sentence and a murder sentence. The habeas trial judge—who did not preside at the proceedings in the theft case or at the felony murder trial[1]—denied an evidentiary hearing and made credibility determinations based on the conflicting affidavits of petitioner and her original counsel, despite the fact that counsel's affidavit failed to address whether he had discussed parole eligibility with her before she withdrew her guilty plea to the theft charge.

On December 10, 2020, the habeas trial judge adopted verbatim the State's proposed findings of fact and conclusions of law, which included that petitioner could not challenge the felony murder conviction on the basis that her original counsel was ineffective in the theft case because he did not represent her at the felony murder trial; and, that her original counsel had provided adequate advice before she withdrew her guilty plea. The judge recommended that relief be denied. The TCCA denied relief without written order on April 14, 2021. *Ex parte Howard*, No. WR-92,267-01 (Tex. Crim. App. April 14, 2021).

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[1] Judge Vanessa Velasquez presided at the guilty plea and sentencing proceedings in the theft case and at the felony murder trial (App. 41). Judge Chuck Silverman presided at the habeas corpus proceeding (App. 2).

B. Factual Statement

1. The Offense

Petitioner and Raquel Gonzales stole shirts from a department store at a shopping mall and left in a vehicle driven by Shinquinta Franklin (4 R.R. 34, 40, 56-57; 5 R.R. 86-87). Franklin fled from an officer who tried to stop the vehicle in the parking lot (4 R.R. 74; 5 R.R. 89-90). During a high-speed police chase, Franklin exited the freeway, ran a red light on the feeder, and hit a vehicle, killing the driver (4 R.R. 115-17, 120, 124, 129, 136). A crash investigator calculated that Franklin was driving 62 miles per hour at the time of the collision (4 R.R. 180-81, 185).

Petitioner gave a video-recorded statement to an officer that she and Gonzales told Franklin to keep going at the red light, as she did not see the other vehicle, which "came out of nowhere" (5 R.R. 19-20, 28; SX 80).

2. The Proceedings In The Theft Case

Petitioner initially was indicted for organized retail theft, a third-degree felony under § 31.16(b)(4) of the Texas Penal Code, which has a punishment range of two to ten years in prison and a maximum fine of $10,000 under § 12.34 of the code. A prisoner convicted of theft becomes eligible for parole under § 508.145(f) of the Texas Government Code when her actual calendar time served plus good conduct time equals

one-fourth of the sentence imposed or 15 years, whichever is less.[2]

Felony murder, a first-degree felony under § 19.02(c) of the Texas Penal Code, has a punishment range of five to 99 years or life and a fine up to $10,000 under § 12.32 of the code. A prisoner convicted of murder becomes eligible for parole under § 508.145(d)(1) of the Government Code when her actual calendar time served, without consideration of good conduct time, equals ***one-half*** of the sentence imposed or 30 calendar years, whichever is less.[3]

Petitioner, represented by attorney David Rushing, rejected an offer to plead guilty to theft and serve 18 months in a state jail. Instead, she pled guilty without an agreement on punishment and sought probation. The trial court ordered a pre-sentence investigation (H.C.R. 70-71).

The trial court informed petitioner at the punishment hearing that it would impose the statutory maximum of ten years in prison but wished that the

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[2] If petitioner had accepted the ten-year sentence for theft, she would receive two days of good conduct time credit for each day she served, pursuant to § 498.003 of the Texas Government Code, and ***would have become eligible for parole after serving 15 months***. The judgment reflects that she had 301 days of jail time credit as of July 19, 2014 (App. 41). She was reindicted for felony murder on April 24, 2015 (C.R. 9). Thus, if she had not moved to withdraw her guilty plea to theft, with ten months of credit for the jail time she had already served, she would have become eligible for parole after serving five additional months.

[3] Petitioner will become eligible for parole after serving 17.5 years of her 35-year sentence for felony murder.

sentence could be longer because, in the court's opinion, she should have been charged with felony murder. The court gave her the option of withdrawing her guilty plea.[4] Petitioner became distraught and, following a very brief conference with Rushing, asked to withdraw her guilty plea. The court allowed her to do so (H.C.R. 70).

3. The Felony Murder Trial

Petitioner was reindicted for felony murder (C.R. 9). A new attorney, Maverick Ray, replaced Rushing as defense counsel (H.C.R. 70-71). The first trial resulted in a deadlocked jury (H.C.R. 71). The retrial resulted in a felony murder conviction and a 35-year prison sentence (H.C.R. 71).[5]

4. The State Habeas Corpus Proceeding

Petitioner filed a state habeas corpus application challenging her felony murder conviction on the basis that her decision to withdraw her guilty plea to theft was unintelligent because Rushing had failed to advise her of the difference in parole eligibility between a

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[4] A court reporter was not present at the punishment hearing. However, the chief trial court prosecutor sent a memo to the division chief documenting what happened. Petitioner filed the memo as an exhibit (H.C.R. 72). The State has never disputed the facts.

[5] Gonzalez, the other passenger, pled guilty to felony theft and was sentenced to 20 months in a state jail (5 R.R. 97-98). Franklin, the driver, pled guilty to felony murder and was sentenced to 25 years in prison (5 R.R. 139, 153).

theft sentence and a murder sentence (H.C.R. 36-37). Petitioner filed an unsworn declaration under penalty of perjury (which functions as an affidavit under Texas law)[6] and Ray's affidavit in support of the application (H.C.R. 70-71, 73-77).

Petitioner asserted in her declaration that Rushing did not inform her—nor did she know—of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea to theft. She also stated that, if he had informed her of the difference, she would have accepted the ten-year sentence (H.C.R. 71).

Petitioner's second attorney, Ray, asserted in his affidavit that a reasonably competent defense counsel would have requested sufficient time to confer with petitioner before she withdrew her guilty plea; would have informed her of the difference in parole eligibility between a theft sentence and a murder sentence; and would have advised her to accept the ten-year sentence for theft because she probably would be convicted of felony murder based on her video-recorded statement to the police that she told Franklin to run the red light. If he had represented petitioner at that time, he would have given her this advice (H.C.R. 75).

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[6] An unsworn declaration "may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law." TEX. CIV. PRAC. & REM. CODE ANN. § 132.001 (West 2011). A prisoner in Texas is allowed to file an unsworn declaration under penalty of perjury because it is difficult to obtain a notary public in prison.

Petitioner filed a motion for an evidentiary hearing (H.C.R. 88-89). The trial court denied an evidentiary hearing and ordered Rushing to file an affidavit addressing, *inter alia*, whether he "found it beneficial or necessary to discuss with [petitioner] the difference in parole eligibility for felony theft, organized retail theft and felony murder when she wanted to withdraw her plea" (H.C.R. 90, 95).

Rushing filed an affidavit in response to the court order in which he answered this question as follows (H.C.R. 101):

> 9. Of course, giving legal counsel is always beneficial. However, this all happened in such short succession on the day of the hearing, and both Ashley and her mother were in such shock that I do not believe that she could have made an intelligible [sic] decision at that moment. It was very much a "take this sentence right now, or else its [sic] refiled" situation, and her head was reeling from that. Neither Ashley nor her mother were thinking clearly in that moment.

Thus, Rushing did not address whether he informed petitioner of the difference in parole eligibility between a theft sentence and a murder sentence. The initial sentence of the paragraph—stating that giving legal advice is "always beneficial," followed by "however" at the beginning of the next sentence, strongly implies that he did **not** do so. He sought to excuse his omission on the basis that petitioner was "in shock," was not

"thinking clearly," and could not make "an intelligible [sic] decision at that moment."

Petitioner filed a response requesting that the court consider Rushing's refusal to answer this question as an admission by silence that he did not inform her of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea to theft; or, at the very least, that the court conduct an evidentiary hearing (H.C.R. 104-05). Petitioner observed that Rushing's acknowledgement that she was "in shock," was not "thinking clearly," and could not make an "intelligible [sic] decision" when she withdrew her guilty plea established that her decision had been uninformed and unintelligent (H.C.R. 105).

The state habeas trial court, instead of ruling on petitioner's request for an evidentiary hearing, adopted verbatim the State's proposed findings of fact and conclusions of law, which included that petitioner could not challenge the felony murder conviction on the basis that Rushing had been ineffective in the theft case because he did not represent her at the felony murder trial (H.C.R. 330). Additionally, the court concluded that Rushing was not ineffective by failing to inform petitioner of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea because "[petitioner] and her mother were in shock and were not thinking clearly"; he was given only a few minutes to discuss the issue with her in a witness room; the trial court would not allow a reset to give her time to make her decision;

and, she withdrew her guilty plea to theft knowing that she would be charged with murder, which has a significantly higher punishment range (H.C.R. 331-32).

Petitioner filed objections to:

(1) the trial court's finding that Rushing was credible in the absence of an evidentiary hearing;

(2) the trial court's refusal to compel Rushing to address whether he had informed petitioner of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea to theft and whether he had informed her that, with ten months credit for the jail time she had already served, she would become eligible for parole after serving five additional months;

(3) the trial court's refusal to consider that Rushing had no reason to discuss parole eligibility with petitioner until she was threatened with a murder charge if she withdrew her guilty plea to theft, as a theft conviction has no restrictions on parole eligibility;

(4) the trial court's refusal to consider that Rushing's admissions that petitioner was "in shock," was not "thinking clearly," and could not make an "intelligible [sic] decision" at the time she withdrew her guilty plea to theft demonstrated that her decision was unintelligent; and,

> (5) the trial court's conclusion that petitioner could not challenge the murder conviction on the basis that Rushing was ineffective in the theft case because he did not represent her at the murder trial.

(H.C.R. 349-57). The TCCA denied relief without written order "on the findings of the trial court without a hearing and on the Court's independent review of the record" (App. 1).

REASONS FOR GRANTING CERTIORARI

Because the TCCA denied relief without written order "on the findings of the trial court without a hearing and on the Court's independent review of the record" (App. 1), this Court should consider the trial court's findings of fact and conclusions of law as the basis for the TCCA's ruling.[7] The TCCA erroneously concluded that petitioner could not challenge her

[7] *Cf. Foster v. Chatman*, 578 U.S. 1023, 136 S. Ct. 1737, 1746 n.3 (2016) ("[It] is perfectly consistent with this Court's past practices to review a lower court decision—in this case, that of the Georgia habeas court—in order to ascertain whether a federal question may be implicated in an unreasoned summary order from a higher court."); *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."). Petitioner's case presents an even stronger reason to "look through" to the state habeas trial court's findings and conclusions as the basis for the TCCA's ruling because the TCCA expressly adopted those findings and conclusions as its own.

felony murder conviction on the basis that Rushing had been ineffective in the theft case because he did not represent her at the felony murder trial. Additionally, without requiring the trial court to conduct an evidentiary hearing, the TCCA erroneously concluded that Rushing was not ineffective in failing to inform petitioner of the difference in parole eligibility between a theft sentence and murder sentence before she withdrew her plea (H.C.R. 330-32).

As explained below, the TCCA misapplied this Court's Sixth Amendment precedent in several ways. First, it failed to recognize that, if Rushing had provided competent advice to petitioner, there is a reasonable probability that she would not have withdrawn her guilty plea to theft, would have been sentenced to ten years in prison, and would not have been charged with felony murder. Additionally, the TCCA erroneously concluded that petitioner made an intelligent decision to withdraw her guilty plea to theft even though Rushing did not inform her that, with ten months of credit for the jail time she had already served, she would have become eligible for parole after serving five additional months but, if she were convicted of felony murder, she would be required to serve one-half of the sentence imposed without consideration of good conduct time. Finally, the TCCA denied petitioner procedural due process by rejecting her substantial ineffective assistance of counsel claim based on conflicting affidavits without requiring the trial court to conduct an evidentiary hearing or requiring Rushing to address whether he had informed petitioner of the

significant difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea to theft.

I.

The State Court's Decision That Petitioner Cannot Challenge Her Murder Conviction Based On Her Original Counsel's Failure To Inform Her Of The Difference In Parole Eligibility Between A Theft Sentence And A Murder Sentence Before She Withdrew Her Guilty Plea To Theft Conflicts With *Lafler v. Cooper*, 566 U.S. 166 (2012).

The TCCA concluded that petitioner cannot challenge her murder conviction based on Rushing's failure to inform her of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea. The TCCA's decision that a defendant cannot challenge the effectiveness of counsel at a hearing to withdraw her guilty plea if she was subsequently convicted of a greater offense at trial conflicts with *Lafler v. Cooper*, 566 U.S. 166 (2012).

A. A Defendant Is Entitled To The Effective Assistance Of Counsel In Deciding Whether To Withdraw A Guilty Plea When That Would Subject Her To Prosecution For, And Likely Conviction Of, A Greater Charge.

A defendant has the right to the assistance of counsel in deciding whether to plead guilty, which

necessarily encompasses whether to accept a plea bargain offer. *Lafler*, 566 U.S. at 162; *Missouri v. Frye*, 566 U.S. 134, 140 (2012). When counseling a defendant on whether to plead guilty, counsel has a duty to advise her of the consequences of the plea. *See*, *e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 374-75 (2010) (counsel performed deficiently by failing to advise a noncitizen defendant of the immigration consequences of a guilty plea to a particular charge); *cf. Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (*en banc*) (counsel performed deficiently by providing erroneous advice to the defendant regarding parole eligibility); *Meyers v. Gillis*, 93 F.3d 1147, 1153-54 (3d Cir. 1996) (same).

A defendant has a right to the effective assistance of counsel at sentencing. *See Glover v. United States*, 531 U.S. 198, 203 (2000). Likewise, it is well-established that a hearing on a motion to withdraw a guilty plea before a sentence has been imposed is a "critical stage" of the proceeding at which the defendant has a right to counsel. *See*, *e.g.*, *United States v. Davis*, 239 F.3d 283, 286 (2d Cir. 2001) ("It cannot be gainsaid that a defendant's guilty plea is the most critical stage of the proceeding. . . . Consequently, . . . a plea withdrawal hearing is vital to ensuring the integrity of the process by which guilt may ultimately be determined. Given the occasionally complex standards governing plea withdrawals . . . it would be unreasonable to expect a criminal defendant to navigate this area of law without the competent advice of counsel."); *United States v. Sanchez-Barreto*, 93 F.3d 17, 20 (1st Cir. 1996) (plea withdrawal hearing is a critical stage at which the

defendant has a right to counsel); *United States v. Garrett*, 90 F.3d 210, 212 (7th Cir. 1996) (same); *Pate v. State*, 186 So.3d 986, 987-88 (Ala. Crim. App. 2015) (same); *Randall v. State*, 861 P.2d 314, 316 (Okla. Crim. App. 1993) (same).

Therefore, petitioner had a right to the effective assistance of counsel in deciding whether to withdraw her guilty plea to theft. Rushing performed deficiently by failing to advise her of the significant difference in parole eligibility between a theft sentence and a murder sentence before she rejected a ten-year sentence for theft that would have rendered her eligible for parole in five months.

Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Petitioner stated in her declaration—and common sense supports—that she would have accepted the ten-year sentence and not withdrawn her guilty plea if Rushing had explained the difference in parole eligibility between a theft sentence and a murder sentence; and that, with ten months of credit for the jail time she already served, she would become eligible for parole in five months (H.C.R. 71). *Cf. Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (*Strickland* prejudice not shown because defendant

failed to allege that he would not have pled guilty if he had been informed of the parole consequences).[8]

Even though petitioner demonstrated both deficient performance and prejudice under *Strickland*, the TCCA concluded that she could not challenge her felony murder conviction on the basis that Rushing was ineffective in the theft case because Ray represented her at the felony murder trial (H.C.R. 330).[9] The TCCA's decision conflicts with *Lafler*, in which this Court soundly rejected the prosecution's argument that there can be no ineffectiveness when the defendant rejects a plea bargain offer and is then convicted at a fair trial:

> The Sixth Amendment, however, is not so narrow in its reach. . . . The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants

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[8] Although this Court effectively assumed, without deciding, that counsel must provide adequate advice when parole eligibility is relevant to the defendant's decision to plead guilty, *see Hill*, 474 U.S. at 59-60 (noting, but not deciding, the question), its subsequent decision in *Padilla* leads ineluctably to the conclusion that this advice is required.

[9] The TCCA failed to consider that a habeas applicant must challenge the conviction on which she is **in custody** rather than a charge that has been dismissed. Indeed, if petitioner had filed a habeas application in the theft case, the State would have correctly argued that the trial court lacked jurisdiction because the theft charge had been dismissed, and that she should have sought relief from the felony murder conviction on which she is in prison. Following the TCCA's rationale, petitioner had no procedural vehicle to challenge the murder conviction on this basis.

> cannot be presumed to make critical decisions without counsel's advice. . . . The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. . . . In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. ***Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence***.

Lafler, 566 U.S. at 164-66 (emphasis added).

Rushing's ineffectiveness caused petitioner to reject a ten-year sentence for theft, with parole eligibility in five months, to go to trial on a felony murder charge on which a conviction was likely. The TCCA, by failing to consider "the whole course of [petitioner's] criminal proceeding," nullified petitioner's Sixth Amendment right to the effective assistance of counsel. *Lafler*, 566 U.S. at 165. If Rushing had given petitioner adequate advice regarding whether to accept the ten-year sentence for theft instead of withdrawing her guilty plea, the State would not have reindicted her for felony

murder, and she would not have been sentenced to 35 years in prison and have to serve 17.5 years before she becomes eligible for parole.

Because a defendant has a right to counsel at a hearing on a motion to withdraw a guilty plea, counsel must provide constitutionally effective representation. For example, counsel must advise the defendant of the consequences of withdrawing a guilty plea to a lesser charge to go to trial on a greater charge that carries the possibility of a greater sentence. *See Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (counsel was ineffective by advising the defendant to withdraw his guilty plea for a five-year sentence based on counsel's erroneous belief that he would receive the same sentence if he were convicted at trial); *State ex rel. Teno v. State*, 161 So.3d 647, 647 (La. 2015) (remanding for an evidentiary hearing on whether counsel was ineffective by advising the defendant to withdraw from a plea bargain and go to trial, which resulted in a much higher sentence).

An ineffective assistance of counsel claim can be predicated on counsel's deficient advice that caused a defendant to withdraw a guilty plea and go to trial. *Cf. Missouri v. Frye*, 566 U.S. 134, 141-42 (2012) (acknowledging the basis for an ineffective assistance of counsel claim when "the challenge is . . . to the course of legal representation that preceded [a trial] with respect to . . . potential pleas and plea offers"). The Sixth Amendment entitled petitioner to the effective assistance of counsel at the hearing to withdraw her guilty plea in the theft case without regard to whether she was

subsequently convicted of felony murder—no matter who represented her. The appropriate remedy, tailored to the constitutional violation, is to reverse her felony murder conviction, reinstate her theft conviction, and remand for sentencing on that conviction. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation.").

Petitioner's declaration was uncontradicted that Rushing did not inform her—nor did she know—of the difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea. If he had informed her that she would become eligible for parole in 15 months on a ten-year sentence for theft (and that, with ten months of credit for the jail time she had already served, she would become eligible after serving an additional five months); and that, if she were convicted of murder, that she would not become eligible for parole until she had served one-half of the sentence, up to 30 years, without good conduct time credit, she would have accepted the ten-year sentence for theft (H.C.R. 71).

Rushing did **not** assert in his affidavit that he provided the above advice to petitioner. He dodged the question by asserting that the events at the hearing unfolded in "short succession" and that petitioner was "in shock," was not "thinking clearly," and could not make "an intelligible [sic] decision in that moment" (H.C.R. 101).

The state habeas trial court—whose findings and conclusions were adopted *in toto* by the TCCA—refused to consider Rushing's failure to address this issue directly as an admission by silence that he did not provide this advice. It also failed to recognize that petitioner's debilitated mental condition rendered her incapable of making an intelligent decision to withdraw her guilty plea at that time. Instead, it excused Rushing's failure to provide adequate advice on the basis that petitioner would not have understood it in that frame of mind (H.C.R. 101).

Reasonably competent counsel would have provided petitioner with the following advice before she decided to withdraw her guilty plea to theft:

> You will become eligible for parole on a ten-year sentence for theft after serving 15 months. You have already served ten months and will become eligible for parole after serving five additional months. By contrast, if you are convicted of felony murder, the punishment range is five to 99 years or life. You must serve one-half of the sentence, without good conduct time credit, before you become eligible for parole. For example, if you are sentenced to ten years in prison for felony murder, you will become eligible for parole in five years; if you are sentenced to 60 years or more, you will become eligible for parole in 30 years. In my opinion, if you reject the ten-year sentence for theft and go to trial on a felony murder charge, you will be convicted of felony murder under the law of parties because you

> gave a video-recorded statement that you told Franklin to keep going at the red light instead of stopping as directed by the police. You will make a life-altering mistake if you go to trial on a felony murder charge and risk spending many years in prison instead of accepting the ten-year sentence for theft and becoming eligible for parole in five months.

Although Rushing blamed the trial court for refusing to recess the proceeding to give petitioner time to make her decision, he could have given her the above advice in less than two minutes. Moreover, if, as Rushing asserted, petitioner was so upset that she could not think clearly enough to make an intelligent decision at that time, he should have requested a court reporter to make a record; requested a recess—whether for an hour or a day—to ensure that her decision was knowing, voluntary, and intelligent; and, if the court refused a recess, preserved error for appeal.

Petitioner needed accurate information regarding the significant difference in parole eligibility between a theft sentence and murder sentence to make an intelligent decision whether to withdraw her guilty plea to theft. The state habeas trial court's conclusions that Rushing was not required to provide this advice and that petitioner made an intelligent decision to withdraw her guilty plea while she was "in shock" and unable to "think clearly" conflicts with this Court's well-established precedent. As a result of Rushing's deficient performance, petitioner must serve 17.5 years before she will become eligible for parole on a 35-year

sentence for felony murder. Notably, Gonzales, the passenger who also stole shirts, was sentenced to 20 months in a state jail and Franklin, who ran the red light and caused the death, was sentenced to 25 years in prison. Rushing's inadequate advice led to a horrendous miscarriage of justice that resulted in petitioner's sentence being 21 times harsher (400 months) than Gonzales's sentence.

Review is warranted because the TCCA's judgment conflicts with *Lafler*. SUP. CT. R. 10(c). At the very least, the Court should vacate the judgment and remand for the TCCA to reconsider the claim in light of that controlling precedent. *Cf. Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (*per curiam*) (vacating and remanding for the TCCA to reconsider its analysis of a substantial *Strickland* claim).

II.

The State Courts Denied Petitioner Procedural Due Process By Rejecting The Ineffective Assistance Of Counsel Claim Based On Conflicting Affidavits Without Conducting An Evidentiary Hearing—Particularly When The State Habeas Trial Judge That Made The Credibility Determinations Did Not Preside At The Proceedings In The Theft Case Or At The Felony Murder Trial.

Petitioner filed her declaration and Ray's affidavit in support of the habeas corpus application and a motion for an evidentiary hearing (H.C.R. 70-71, 73-77).

The state habeas trial court denied an evidentiary hearing and ordered Rushing to file an affidavit answering specific questions. Rushing filed an affidavit that did not address whether he had informed petitioner of the significant difference in parole eligibility between a theft sentence and a murder sentence before she withdrew her guilty plea (H.C.R. 101). Petitioner renewed her request for an evidentiary hearing (H.C.R. 104-05). The trial court ignored it and adopted verbatim the State's proposed findings of fact and conclusions of law (H.C.R. 345). Petitioner filed objections complaining, *inter alia*, that the trial court chose to believe Rushing in the absence of an evidentiary hearing (H.C.R. 349).

The state courts denied petitioner procedural due process by rejecting her ineffective assistance of counsel claim based on conflicting affidavits without conducting an evidentiary hearing—particularly when Judge Silverman did not preside at the proceedings in the theft case or at the murder trial.

Although the United States Constitution does not require the states to provide direct appeals or collateral review to defendants in criminal cases, those states that have integrated such post-conviction proceedings into their system must ensure that their procedures comport with the Due Process Clause of the Fourteenth Amendment. *See*, *e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Texas provides for collateral review of felony convictions resulting in a prison sentence pursuant to article 11.07 of its Code of Criminal Procedure. Therefore, the Due Process Clause applies

to Texas habeas proceedings, just as it applies to state court direct appeals,[10] probation and parole revocation proceedings,[11] and driver's license revocation proceedings[12]—none of which is constitutionally required but, if provided by a state, must comport with due process.

As a practical matter, the state habeas corpus proceeding is the "main event" for prisoners like petitioner who contend that counsel provided ineffective assistance. It has become nearly impossible for state prisoners to obtain habeas corpus relief in federal court under the AEDPA's substantive and procedural barriers.[13]

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[10] *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").

[11] *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).

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

[13] Petitioner cannot seek federal habeas relief because her AEDPA deadline expired before she retained counsel to file the state habeas application.

This Court ultimately must determine whether a state's habeas procedures comport with the Due Process Clause. *See* Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 160, 205-06 (2021) (observing that Supreme Court review is even more vital where state courts are so dismissive of habeas petitioners' federal constitutional claims that they do not even provide reasons for denying them). This Court has accepted this responsibility by granting certiorari more frequently to review the fairness of state habeas proceedings. *See*, *e.g.*, *Foster v. Chatman*, 578 U.S. 1023, 136 S. Ct. 1737, 1766 n. 3 (2016) (holding that a federal question was implicated in an unreasonable summary order issued by the highest state court); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902 (2016) (state habeas petitioner was denied due process where a state supreme court judge—who, as the district attorney, had approved a request to seek the death penalty—refused to recuse himself from the appellate proceeding).

For decades, this Court has ensured that state habeas corpus evidentiary development and fact-finding procedures comport with due process when substantial federal constitutional claims are raised. *See*, *e.g.*, *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his charges. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."); *Wilde v. Wyoming*, 362 U.S. 607, 607 (1960) (*per curiam*) ("It does not appear from the record that an adequate hearing on these allegations

was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court. We find nothing in our examination of the record to justify the denial of hearing on these allegations.").[14]

The necessity for an evidentiary hearing to resolve controverted fact issues is greater when the state habeas trial judge did not preside at the guilty plea proceeding or the trial. For example, in *Perillo v. Johnson*, 79 F.3d 441, 446-47 (5th Cir. 1996), the state habeas trial judge—who did not preside at the trial—conducted a "paper hearing" based on affidavits and recommended that relief be denied. The TCCA denied relief. The federal district court denied an evidentiary hearing. The Fifth Circuit vacated and remanded for an evidentiary hearing after observing that the state habeas trial judge could not "compare the information presented in the various affidavits against his own firsthand knowledge of the trial" and "could not supplement the affidavits with his own recollection of the trial and [trial counsel's] performance in it." *Id*. Because of the danger of a "trial by affidavit," "the findings of fact in the state habeas corpus proceeding are

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[14] *See also Cash v. Culver*, 358 U.S. 633, 637-38 (1959); *Palmer v. Ashe*, 342 U.S. 134, 137-38 (1951); *Jennings v. Illinois*, 342 U.S. 104, 111-12 (1951); *Rice v. Olson*, 324 U.S. 786, 791-92 (1945); *Tomkins v. Missouri*, 323 U.S. 485, 488-89 (1945); *Williams v. Kaiser*, 323 U.S. 471, 478-79 (1945); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942); *Smith v. O'Grady*, 312 U.S. 329, 333-34 (1941).

not entitled to the § 2254(d) presumption of correctness." *Id*.[15]

An epidemic is raging against the Due Process Clause in Texas post-conviction habeas corpus cases. The Fifth Circuit is powerless to stop it, as the AEDPA standard of review has all but eliminated habeas corpus relief for state prisoners. Only this Court can eradicate it by granting certiorari to review state habeas cases.[16]

Texas courts have consistently denied procedural due process to habeas applicants by resolving controverted fact issues by affidavits instead of evidentiary hearings (which, inevitably, means that the trial court believes the lawyer instead of the applicant). Additionally, state habeas trial courts often simply adopt verbatim the State's proposed findings of fact and conclusions

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[15] The Fifth Circuit's ultimate holding that Perillo was entitled to an evidentiary hearing in the federal district court may no longer be valid under the AEDPA standard of review. However, its observations about the flaws inherent in a "paper hearing" conducted by a habeas judge who did not preside at the trial remain valid.

[16] Certiorari petitions raising procedural due process claims in Texas post-conviction habeas proceedings are pending in *Rene v. Texas*, No. 20-1798 (docketed June 25, 2021) (whether the TCCA violated procedural due process by rejecting without explanation a trial court's favorable, dispositive findings of fact that were based on witness credibility determinations following an evidentiary hearing), and *Jackson v. Texas*, No. 21-41 (docketed July 13, 2021) (whether the TCCA violated procedural due process by summarily denying a substantial ineffective assistance of counsel claim without requiring the trial court to make meaningful findings of fact and without articulating any legal analysis). More loom on the horizon.

of law—as did the trial court in petitioner's case. The inadequate review of petitioner's substantial ineffective assistance of counsel claim violated due process—particularly considering that the Sixth Amendment right to the effective assistance of counsel is the "foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

Review is warranted because the state courts denied petitioner procedural due process by rejecting her ineffective assistance of counsel claim based on conflicting affidavits without conducting an evidentiary hearing. SUP. CT. R. 10(c).

CONCLUSION

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

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@schafferfirm.com

August 2021