

No. ____

**In the
Supreme Court of the United States**

GILBERT RODRIGUEZ, IV,

PETITIONER,

v.

STATE OF TEXAS,

RESPONDENT.

**On Petition for a Writ of Certiorari to the Texas
Court of Criminal Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the 183rd district court for Harris County, Texas erred in denying Petitioner Rodriguez's writ of Habeas Corpus when Petitioner's trial and appellate counsel were ineffective in violation of the Sixth Amendment to the U.S. Constitution?

Whether the Petitioner's Fifth and Fourteenth Amendment rights to due process of law were violated in that evidence used in his trial was obtained in violation of his *Miranda* rights and counsel was ineffective in failing to object to that inadmissible evidence?

Whether the trial counsel's failure to properly file a judgment of acquittal and the appellate counsel's failure to raise an acquittal on direct appeal to challenge or vacate the conviction constitutes ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Gilbert Rodriguez, IV.

State of Texas,

LIST OF PROCEEDINGS

183RD DISTRICT COURT FOR HARRIS COUNTY,
TEXAS

Trial Court Case No. 1052781-A

RODRIGUEZ v. THE STATE OF TEXAS

Judgment Dated 4/5/2007

COURT OF APPEALS OF TEXAS, FOURTEENTH
DISTRICT, HOUSTON

Case No. 14-07-00307-CR

RODRIGUEZ v. STATE

Judgment Dated 2/19/2008

COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE GILBERT RODRIGUEZ, IV

Case No. WR-54.880-02

Order Dated 09/07/2022

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDINGS.....	ii
LIST OF PROCEEDINGS.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Concise Statement of Facts Pertinent to the Questions Presented.	2
REASONS TO GRANT THIS PETITION	6
I. THE TRIAL COURT AND COURT OF CRIMINAL APPEALS ERRED WHEN BOTH FOUND THAT MR. RODRIGUEZ WAS NOT ENTITLED TO RELIEF DUE TO PETITIONER’S INEFFECTIVE ASSISTANCE OF COUNSEL UNDER <i>STRICKLAND</i>	6
CONCLUSION	11
APPENDIX	
Appendix A Order in the Court of Criminal Appeals of Texas (September 7, 2022).....	App. 1

Appendix B	Findings of Fact, Conclusions of Law, and Order After Remand in the 183rd District Court of Harris County, Texas (July 22, 2022).....	App. 2
Appendix C	Order in the Court of Criminal Appeals of Texas (November 3, 2021).....	App. 15

TABLE OF AUTHORITIES

Cases

<i>Baxter v. Rose</i> , 523 S.W.2d 930 (Tenn. 1975)	6
<i>Brimmer v. State</i> , 29 S.W.3d 497 (Tenn.Crim.App.1998)	7, 8
<i>Herring v. New York</i> , 422 U.S. 853 (1975)	6
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988)	8
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	8
<i>Smith v. Robbins</i> , 528 U.S. 259 (2000)	8, 10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	6, 7, 8
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	7, 8

Constitutional Provisions

U.S. Const. amend. VI	1
U.S. Const. amend. VIII	2

Statutes

28 U.S.C. § 1257	1
28 U.S.C. § 2241	3

Rules

Tex. R. Crim. Evid. 403	9
Texas Code of Criminal Procedure §11.07.....	3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodriguez respectfully requests that a Writ of Certiorari be issued to review the Texas Court of Criminal Appeals denial of a writ of Habeas Corpus.

OPINIONS BELOW

The September 7, 2022, order denying Petitioner Rodriguez's Petition for Habeas Corpus from the 183rd District Court Harris County, Texas.

BASIS FOR JURISDICTION IN THIS COURT

This Court's jurisdiction is invoked pursuant to its authority under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

The grand jury for Harris County returned an indictment against the Petitioner, charging him with capital murder committed with a firearm. There was also one enhancement count alleging a prior felony conviction for engaging in organized criminal activity. The State elected not to seek the death penalty.

The facts giving rise to the aforementioned charge occurred on January 7, 2006. In the early morning hours of said date, the Petitioner's wife, Samaria Rodriguez, Julio Falcon, and Falcon's former girlfriend, 14-year-old Xochitl Diaz, were arguing at the Petitioner's house about an alleged sexual relationship between the Petitioner and Diaz. The Petitioner and Falcon decided to "take care of" Diaz. Diaz was shoved into the trunk of the Petitioner's car and the Petitioner and Falcon drove off. Diaz escaped from the trunk but was immediately captured and thrown back into the trunk. Later, the Petitioner and Falcon stopped the car at the intersection of a

subdivision. As Diaz was laying in the street, she was kicked numerous times, shot twice in the head, and then left dead and partially clothed in the street. At trial, there was conflicting evidence as to whether the Petitioner or Falcon fired the shots that killed Diaz.

Procedural History

On March 30, 2007, the Petitioner proceeded to a jury trial in the 183rd District Court for Harris County before the Honorable Vanessa Velasquez (case number 1052781). The jury returned a guilty verdict on the capital murder charge on April 5, 2007. Punishment was automatically assessed at life incarceration.

The Petitioner filed a timely notice of appeal (appeal number 14-07-00307-CR). On appeal to the Fourteenth District Court of Appeals, the Petitioner argued: (1) the trial court erred by permitting the State to impeach him with an impermissible hearsay telephone conversation; (2) the trial court erroneously allowed the State to question his wife after she invoked the husband-wife privilege; and (3) the Texas statutory scheme is unconstitutional because it permits the State to seek a life sentence without parole. On February 19, 2008, the Texas Court of Appeals issued an opinion affirming the trial court on the merits.

The Petitioner thereafter filed a petition for writ of habeas corpus pursuant to Texas Code of Criminal Procedure §11.07 with the 183rd District Court for Harris County, Texas (case number WR-WR-54,880-02). Therein, the Petitioner argued that: (1) the

Petitioner's trial and appellate counsel were ineffective in violation of the Sixth Amendment to the United States Constitution; (2) the Petitioner's Fifth and Fourteenth Amendment rights to due process of law and Sixth Amendment right to a fair trial was violated when the prosecution engaged in prejudicial misconduct; (3) the Petitioner possesses exculpatory evidence that was not previously raised at trial that reflects the Petitioner's actual innocence and protection of the Petitioner's due process rights requires consideration of said evidence; and (4) the Petitioner's Fifth and Fourteenth Amendment rights to due process of law were violated in that evidence used in his trial was obtained in violation of his *Miranda* rights and counsel was ineffective in failing to object to that inadmissible evidence. Specifically regarding the ineffective assistance of counsel claims, it was argued that trial counsel was ineffective because he: failed to adequately investigate the case and keep the Petitioner informed; failed to properly object to Julio Falcon's recorded jailhouse phone conversation with his aunt; failed to object on Fourth Amendment grounds to the Petitioner's statement made to homicide detectives and the physical evidence gathered from his home; failed to call several key, available witnesses to testify at trial on his behalf; did not allow the Petitioner to testify during trial despite the Petitioner's repeatedly requests; and failed to challenge the State's argument against the admissibility of the letter from Julio Falcon to the Petitioner's father. The Petitioner also contends that appellate counsel was ineffective because he failed to file a petition for discretionary review despite the Petitioner asking him to do so.

The application was forwarded to the Court of Criminal Appeals. On November 3, 2021, the Court of Criminal Appeals remanded the case to this Court in order to expand the record regarding the claims of ineffective assistance of counsel. The Court was also ordered to make any other findings as necessary regarding the remaining claims raised by the Petitioner, and to determine whether the doctrine of laches prevents a decision upon the merits of the Petitioner's claims.

On September 7, 2022, the trial court adopted the state's proposed findings of facts, conclusions of law, and order after remand denying relief on all grounds.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE TRIAL COURT AND COURT OF CRIMINAL APPEALS ERRED WHEN BOTH FOUND THAT MR. RODRIGUEZ WAS NOT ENTITLED TO RELIEF DUE TO PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the Constitution of the United States. “The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.” *Herring v. New York*, 422 U.S. 853, 858 (1975). To succeed in a challenge for ineffective assistance of counsel, the Petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Petitioner must establish: (1) deficient representation and (2) prejudice resulting from the deficiency. Therefore, the Petitioner must prove that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and the Petitioner must demonstrate that counsel’s errors “were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Baxter*, 523 S.W.2d at 936. To establish the prejudice prong of *Strickland*, the

Petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

To satisfy the prejudice prong under the Strickland analysis, the evidence stemming from failing to prepare a sound defense or present witnesses must be significant, but it does not necessarily follow that the trial would have otherwise resulted in an acquittal. *Brimmer v. State*, 29 S.W.3d 497, 508 (Tenn.Crim.App.1998). "A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland." *Id.* at 509. "When defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 508, Citing *United States v. Cronin*, 466 U.S. 648, 659 (1984). Where there has been "an actual breakdown of the adversarial process," no prejudice need be shown. *Id.* If there has been no complete breakdown of the adversarial process, the question is whether the deficiencies resulted in prejudice to the defendant. *Id.* at 509. The defendant must identify acts or omissions by counsel that were not the result of reasonable professional judgment, and then the court must determine whether those acts or omissions were outside the range of professionally competent assistance. *Id.* "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing

professional norms, is to make the adversarial testing process work in the particular case.” *Id.*; *Strickland*, 466 U.S. at 690.

Alternatively, if this Court finds that counsel erred but that those errors were not the but for cause of the prejudice described above, then this Court should find that the gravity of counsel’s deficient performance in this case amounts to a deprivation of counsel altogether, giving rise to a presumption of prejudice to satisfy the second prong of *Strickland*. In some cases, a defendant is either actually or constructively denied the assistance of counsel during the judicial proceeding altogether. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). When this occurs, the presumption that counsel’s assistance is essential requires the conclusion that a trial, or appeal, was unfair because the accused was denied counsel at a critical stage. *Cronic*, 466 U.S. at 659; *Roe*, 528 U.S. at 483. Under such circumstances, no specific showing of prejudice is required because the adversarial process itself is presumptively unreliable. *Roe*, 528 U.S. at 483 (quoting *Cronic*, 466 U.S. at 659); see also *Smith v. Robbins*, 528 U.S. 259, 286 (2000) (“denial of counsel altogether . . . warrants a presumption of prejudice”); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (complete denial of counsel on appeal requires a presumption of prejudice).

The Petitioner was repeatedly denied the effective assistance of trial and appellate counsel and such ineffective assistance was the but-for cause of Petitioner’s decisions throughout the trial and appellate processes. Counsel did not properly investigate the evidence the State possessed and

failed to properly challenge the State's witnesses and prejudicial tactics. *See Rodriguez Aff.* Pg 5. Petitioner was not fully informed due to this lackluster performance which resulted in a suboptimal outcome for Petitioner. Most importantly, trial counsel failed to object to highly prejudicial and inadmissible evidence introduced by the prosecution in the form of a tape-recorded phone conversation between Co-Defendant Julio Falcon and his aunt that took place while Falcon was incarcerated on the present charges.

Trial counsel's failure to object under Tex. R. Crim. Evid. 403 to such highly prejudicial and contradictory evidence resulted in denying the Petitioner the ability to later argue against the conversation's admissibility within Petitioner's appeal which directly affected the outcome of the case.

Further, trial counsel was ineffective in not objecting to the admissibility of Petitioner's statement to homicide that were made in violation of his *Miranda* rights. *See Rodriguez Aff.* Pg 1. Counsel further failed to call several key witnesses to testify on the Petitioner's behalf even though they were available at trial. Finally, trial counsel did not challenge the states argument against Petitioner's exculpatory letter from his Co-Defendant. *Rodriguez Aff.* Pg 4.

Petitioner's appellate counsel failed to argue the above ineffective assistance of counsel claims resulting in an unconstitutional outcome.

Along with the ineffective assistance of counsel claims as presented in the Court of Criminal Appeals, Petitioner was effectively denied counsel outright

where the initial trial counsel did not properly file a judgment of acquittal and the appellate counsel did not raise an acquittal on direct appeal to challenge or vacate the conviction. Since there was no initial challenge to the actual conviction and the merits of the case by the trial counsel and no challenge by the appellate counsel, Petitioner was effectively deprived of counsel altogether at a critical stage that resulted in a breakdown in the adversarial process. See *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (“[Petitioner] must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them.”).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: December 5, 2022.