No. 22-6939

IN THE

SUPREME COURT OF THE UNITED STATES

Francisco Flores — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, Director, TDCJ-CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for The Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Francisco Flores
(Your Name)
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Huntsville, Texas. 77349-0005
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QUESTION(S) PRESENTED

QUESTION No. 1

Can a Clerk of a federal appellate court refuse to file a pleading by a State habeas petitioner seeking a Panel Rehearing from the denial of an application seeking a certificate of appealability as untimely when the plading was tendered for filing was timely filed when placed in prison officials' hands for mailing and filing with the Clerk of a federal appellate court?

QUESTION No. 2

Whether a State federal habeas corpus petitioner is deprived of the opprotunity to be heard and have judicial findings made by a United States District Court upon a claim for federal habeas corpus relief as presented to the State court and district court when the district court declines to consider and address the claim for federal habeas corpus relief as presented and argued?

QUESTION No. 3

Does the difference accorded to a State court determination that a federal claim is procedurally defaulted be reviewed by a federal court if the habeas petitioner satisfies the requirement of Title 28 U.S.C., Section 2254(d)(2)?

QUESTION No. 4

Whether the Court of Appeals for the Fifth Circuit should have issued a Certificate of Appealability from the district court's determination that the Petitioner was not deprived of his constitutional rights to effective assistance of counsel as assured under the 6TH Amendment to the United States Constitution?

ISSUE No. 1: Whether the Petitioner was deprived of his Constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the Clerk for the United States Court of Appeals for the Fifth Circuit employ a Circuit Internal Operating Procedure to hold that the Petitioner's Petition for Panel Rehearing was untimely filed under the Mailbox Rule and the Federal Rules of Appellate Procedure?

ISSUE No. 2: Whether the Petitioner was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the District Court fail to address and consider the Petitioner's claim for federal habeas relief as presented and argued?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Lori Denise Brodbeck, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas, 78711-2548.

RELATED CASES

Ex Parte Francisco Flores, No. #WR-91,048-01 (Tex.Cr.App. 2021).

Francisco Flores v. State of Texas, 573 S.W.3d 864 (Tex.App. 1st Dist. 2019, pet. ref'd).

Francisco Flores v. Bobby Lumpkin, Director, TDCJ-CID, No. #H-21-175, United States District Court, Southern District of Texas, Houston Division. (2021)

Francisco Flores v. Bobby Lumpkin, Director, TDCJ-CID, No. 21-2016, United States Court of Appeals for The Fifth Circuit, (2022)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 25, 2022.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment - United States Constitution; All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C., Section 2253(c)(1)(A); Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

Title 28 U.S.C., Section 2253(c)(2)(1); A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Sixth Amendment - United States Constitution; 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.

Federal Rules of Appellate Procedure - Rule 40(1); Unless the time is shorten or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment.

Federal Rules of Appellate Procedure - Rule 25(a)(2)(A)(iii); If an insitution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and • it is accompained by a declaration in compliance with 28 U.S.C., Section 1746 - or a notarized statement - setting out the date of deposit and stating that first class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or • the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

Title 28 U.S.C.. Section 2254(d)(2); Anapplication for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Texas Penal Code, Section 15.04(b); It is an affirmative defense to prosecution under Section 15.02 or 15.03 that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or withdrew from the conspiracy before commission of the objective offense and took further affirmative action that prevented the commission of the objective offense.

Texas Penal Code, Section 15.04(c); Renunciation is not voluntrary if it is motivated in whole or in part: (1) by circumstances not present or apparent in the inception of the actor's course of conduct that increase the probability of detention or apprehension or that make more difficult the accomplishment of the objective; or (2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

STATEMENT OF THE CASE

In 2018, a jury in the 230TH Judicial District Court of Harris County, Texas, found the Petitioner guilty of the alleged offense of Solicitation of Capital Murder and sentenced the Petitioner to 12 years confinement in Case No. #1524645, Styled: The State of Texas v. Francisco Flores. The First Court of Appeals for the State of Texas affirmed the judgment and sentence of the trial court in a published opinion. Flores v. State, 573 S.W.3d 864 (Tex.App. 1st Dist. 1019, pet. ref'd). The Texas Court of Criminal Appeals refused the Petitioner's Petition for Discretionary Review on June 19, 2019, in Case No. #PD-337-19, Styled: Flores v. State. (Appendix B; p. 2).

Petitioner sought State habeas corpus review, and the Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing and on that court's independent review of the record on June 3, 2020, in Case No. #91,048-01, Styled: Ex Parte Francisco Flores.

On January 19, 2021, Petitioner sought federal habeas corpus review pressing the same claims that had been presented in the State court proceedings. On October 7, 2021, the United States District Court for the Sourthern District of Texas, Houston Division delivered a Memorandum Opinion and Order denying federal habeas relief in No. #H-21-175, Styled: Francisco Flores v. Bobby Lumpkin, Director, TDCJ-CID. (Appendix B).

Petitioner sought the issuance of a Certificate of Appealability

(COA) with the United States Court of Appeals for the Fifth Circuit in Case No. #21-20613, Styled: Francisco Flores v. Bobby Lumpkin, Director, TDCJ-CID. On August 25, 2022, in an unpublished written order a Circuit Judge denied the Petitioner's request for the issuance of a COA. (Appendix B).

On September 6, 2022, Petitioner placed in the prisons internal mail system a Petition for Panel Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, that was verified and contained the required pre-paid postage. On September 16, 2022 at cover, the Clerk of the United States Court of Appeals for the Fifth Circuit informed the Petitioner that no action would be taken on the Motion for Reconsideration because it was untimely because the time for filing the motion had expired under Rule 27 of the Fifth Circuit Rules. (Appendix C). Petitioner contested this matter, as the Petition being timely filed under the "prison mailbox rule." On October 11, 2022 at cover, the Petitioner was informed that that the matter had been re-reviewed, but the motion remained deemed out of time. (Appendix D)./

Petitioner sought the issuance of a COA by the Fifth Circuit Court of Appeals upon three (3) issues, (1) The district court erred when it fail to consider and address the Petitioner's claim for habeas corpus relief as presented in the State court and the federal habeas petition - (A) The Petitioner was deprived os his constitutional right to Due Process under the 14TH Amendment to the United States Constitution because

the district court fail to review, consider and address the Petitioner's claim for federal habeas relief as presented in the State habeas court and the Federal habeas court. (2) The district court erred in its determination that Petitioner's claim that thre was "no evidence" to support the conviction was procedurally barred under the disguise that it was challenge to the sufficiency of the evidence that was procedurally defaulted under State law that provides for an exception to the claim - (A) the State habeas court mischaracterization of the Petitioner's "no evidence" claims as a challenge to the "sufficiency of the evidence" did not render the claim procedurally defaulted as to prevent federal habeas review because the Petitioner asserted the claim in the State habeas court in terms so particular as to call in mind that it was a no evidence claim and exception to the general rule that a challenge to the sufficiency of the evidence cannot be raised in State habeas proceeding. - (B) the district court's accorded presumption of correctness was in vain given the law of the Circuit were the decisional basis was not founded upon a guorum in the Texas Court of Criminal Appeals. - (C) the district court's accorded presumption of correctness was in vain given the State habeas court's determination is not supported by the record given the pleading of the claim. (3) The district court erred in its ad hoc determination that the Petitioner was not deprived of his constitutional right to reasonable competent assistance of counsel by trial counsel's failure to request an instruction

on the Affirmative Defense of Renunciation because the Petitioner counter-manded the solicitation to avoid commission of the offense, and evidence that the Petitioner was merely playing along with the confidential informant for the Houston Police Department. - (A)(The State habeas court's findings was premised upon an unreasonable determination of the facts made under an incorrect legal standard. - (B) The State habeas court conclusion that trial counsel was not ineffective for filing to request an instruction on the affirmative defense of renunciation upon which the Petitioner was entitled was objectively unreasonable.

The court of appeals in denying the Petitioner's request for the issuance of a COA acknowledged the issues upon which the Petitioner sought the issuance of a COA, however, the court of apeal in denying the Petitioner's request merely paid lip service to the standard of review required for the issuance of a COA, Citing., Title 28 U.S.C., Section 2253(c)(2), Slack v. McDaniel, 529 U.S. 473 (2000) and Miller-El v. Cockrell, 537 U.S. 322 (2003), and held that the Petitioner has not made that showing. (Appendix A).

REASONS FOR GRANTING THE PETITION

This Court has jurisdiction to issue a Certificate of Appealability (COA), and review a federal court of appeals' denial of a COA. See., Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), and Hohn v. U.S., 118 S.Ct. 1969 (1998). Cf., Title 28 U.S.C., Section 2253(c)(1)(A); Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals fromom the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. Section 2253(c)(2)(1) provides, that - A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Although, Section 2253(c)(2)(a) is straight forward, that a COA may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right, this Court has interpreted the statute in a two (2) fold application, that in order for a habeas petitioner to make a "substantial showing of the denial of a constitutional right" the habeas petitioner must demonstrate that a reasonable jurist would find the district court's assessment of the constitutional claim debatable or wrong. See., Slack v. McDaniel, 120 S.Ct. 1595 (2000). Under the second application, when the district court has denied a claim on procedural grounds, then the habeas petitioner must demonstrate that a jurists of reason would find it debatable whether the district court was correct in its procedural ruling, and that the petition states a valid

claim of the denial of a constitutional right.

In reviewing the propensity of a request for the issuance of a COA, the court should limit its examination to a threshold inquiry into the underlying merits of the habeas petitioner's claims, and this inquiry does not require full consideration of the factual or legal bases supporting the claims. The habeas petitioner need not convince a judge, or, for that matter, three (3) judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Miller-El, Supra. Any doubts as to whether the habeas petitioner is entitled to the issuance of a COA is revolved in the habeas petitioner's favor. Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000).

The question to be answered by this Court is whether the court of appeals should have issued a COA from the district court's determination of the case?

QUESTION No. 1

Can a Clerk of a federal appellate court refuse to file a pleading by a State habeas petitioner seeking a Panel Rehearing from the denial of an application seeking a certificate of appealability as untimely, when the pleading was tendered for filing was timely filed when placed in prison officials' hands for mailing and filing with the Clerk of a federal appellate court?

(1) The Petitioner was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the Clerk for the United States Court of Appeals for the Fifth Circuit employ a Circuit Internal Operating Procedure to hold that the Petitioner's Petition for Panel Rehearing was untimely filed under the Mailbox Rule and the Federal Rules of Appellate Procedure.

Petitioner argues that review should be granted under Rule

10(a) of the Supreme Court Rules because the court of appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power because the court of appeals' departure violated the Petitioner's rights to Due process emanating the Petitioner's rights of access-to-courts and right to be heard.

Petitioner aruges that review should be granted under Rule 10(c) of the Supreme Court Rules because the court of appeals has decided an important federal question in a way that conflicts with the relevant decision of this Court in Houston v. Lack, 108 S.Ct. 2379 (1998); and is contrary to Rule 40(a)(1) and Rule 25(a)(1)(2)(A)(iii) of the Federal Rules of Appellate Procedure.

Under Rule 40(a)(1) it is provided that "Unless the time is shortened or extended by order or locale rule, a petition for panel rehearing may be filed within 14 days after entry of judgment.

It is clear from the reading of the text, that a petition for panel rehearing must be received by a clerk of a federal appellate court within 14 days after entry of judgment in order to be timely, which is the case at hand. The clerk of the court of appeals held that the Petitioner's petition for panel rehearing was untimely because it was not received within 14 days after entry of the judgment in this case. (Appendix C).

In Houston this Court held that a pro se prisoner's "notice

of appeal" isconsidered filed on the date that the prisoner delivers the Notice to prison authorities for mailing. This became know as the Mailbox Rule. Cf., U.S. Gray, 183 F.3d 762 (10th Cir. 1999); the filing date under the "prison mailbox rule," is the date the prisoner delivers legal mail (Motion To Vacate) to prison authorities for forwarding to the court clerk. However, this Court has never explicitly held that the "prison mailbox rule" extends to pleadings other than a notice of appeal where a time-restraint is concern and attributed to the filing in question.

The court of appeals' standing on this matter, through the authority of the clerk of the court sharply deviates from this Court's decision in Houston, as common sense would announce that this Court's decision in Houston applies not only to a notice of appeal being filed by a prisoner, but extends to all pleadings filed by a prisoner in a federal court, whether it be the district court, court of appeals, or this Court.

It is to note that this Court does not extend the time restraint for the filing of a writ certtiorari as being timely filed when it is received by the clerk of the court, and not the date a pro se prisoner placed the document in the internal mailing system of the institution. What better safe guard does a prisoner have then the decision of this Court in Houston?

Notwithstanding, Rule 25(a)(1)(2)(A)(iii) provides for "Inmate Filing" for a paper not electronically by an inmate is timely if it is deposited in the institutions internal

mail system on or before the last day for filing and it is accompained by a declaration in compliance with 28 U.S.C., Section 1746 or a notarized statement setting out the date of deposit and stating that first class postage is being prepaid; or evidence (such as a post-mark or date stamp) showing that the paper was so deposited and that postage was prepaid.

In the instant case, the court of appeals paid no concern to the Petitioner's declaration on the Petition for Panel Rehearing was placed in the prison internal mail system on September 06, 2022, one (1) day before the expiration date of filing a Petition for Panel Rehearing with the court. The clerk of the court merely extended Rule 27 of the Rules of the Fifth Circuit to the Petition for Panel Rehearing to hold that the petition was untimely. (Appendix C), and (Appendix D).

It is that the clerk of the court of appeals in exercising a "judicial function" without legal and statutory authority circumscribed the accepted and usual court of judicial proceeding under Rule 40(a)(1) and Rule 25(a)(1)(2)(A)(iii) of the Federal Rules of Appellate Procedure by the implementation of the Court of Appeals Internal Operating Procedure (Rule 27 of Fifth Circuit Rules) to hold that the Petitioner's Petition for Panel Rehearing was untimely because the pleading itself was not received by that office before the expiration date for filing a Petition for Panel Rehearing.

The precept issued by this Court in Fuentes v. Shevin, 92 S.Ct. 1983 (1972) clearly and explicitly established that

Constitution regarding a persons right to be heard, and among others such as access-to-court, and the "All Great Writ" and the protection of a secured constitutional right prohibiting the unlawful confinement and illegal restraint of a person, and the unjust incarceration of a person in violation of his or her constitutional rights.

Petitioner argues that review should be granted under Rule 10(a) of the Supreme Court Rules because the court of appeals has determined a matter that is in conflict with the decision of another United States Court of Appeals on the same important matter, where the Court of Appeals for the Eleventh Circuit in Clisby v. Jones, 960 F.2d 925, 935-36 (11th Cir. 1992, en banc), held that under that court's supervisory power, the district courts in that Circuit must address all the claims presented in a habeas petition regardless of whether relief is granted or denied. The Clisby court found that the havoc a district court's failure to address all the claims in a habeas petition may wreak in the federal and State court systems compelled that court to require all district courts in that Circuit to address all such claims and, that remand would be ordered for the consideration of the claims whenever the district court has not resolved the claims. Cf., Rose v. Lundy, 102 S.Ct. 1198, 1204 (1982); to the extent that total exhaustion requirement reduces piecemeal litigation, both the courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claim

claims.

Further, the court of appeals has so far departed from the accepted and usual course of judicial proceeding or has sanctioned the departure by the district court as to call for an exercise of this Court's supervisory power by overlooking the district court's failure to address the Petitioner's claim for federal habeas relief as presented under the facts and arugment of the claim.

In the State habeas proceeding, as well as in the federal habeas proceeding, the Petitioner specifically and unequivocally stated that his constitutional rights to due process were violated because there was no evidence to support the conviction.

The district court did not consider and address the claim as presented and aruged by the Petitioner and simply deferred to the State habeas court's findings and conclusion that the claim was procedurally defaulted under it's mischaracterization that the claim was a challenge to the "sufficiency of the evidence" to support the conviction. The district court viewed the claim from a prism of speculation rather than under the facts of the claim as pled. (Appendix B).

The question to be addressed is whether the court of appeals should have issued a COA from the district court's determination that the claim was procedurally defaulted?

Upon a threshold inquiry into the underlying merits of the claim, the district court's finding that the claim was procedurally defaulted because the claim was a challenge to

to the "sufficiency of the evidence," rather than a claim of "no evidence" is questionable because the claim under the facts never advances an argument or statement that the evidence was insufficient to support the conviction. The district court's determination of the claim being procedurally defaulted is at best suspect.

Petitioner argues that reasonable jurists could debate whether the district court was correct in its procedural ruling or the assessment of the claim as being a challenge to the sufficiency of the evidence. The district court never addressed whether the claim was procedurally defaulted under the State habeas court's purported procedural ruling rested upon an independent ground, which the district court held that in Texas, a claim challenging the sufficiency of the evidence must be raised on direct appeal and is not cognizable in a habeas proceeding. However, the claim was not a claim challenging the sufficiency of the evidence and was a no evidence claim.

It is clear that reasonable jurists could debate whether the claim presented by the Petitioner was a claim of no evidence to support the coviction or a claim which challenged the sufficiency of the evidence to support the conviction, because under the facts as pled there could have only been one determination made, that the claim was one of "no evidence," rather than a challenge to the sufficiency of the evidence. The Petitioner was entitled to have the claim considered and addressed by the district court as presented and not as assumed.

QUESTION No. 3

Does the difference accorded to a State court determination that a federal claim is procedurally defaulted be reviewed by a federal court if the habeas petitioner satisfies the requirement of Title 28 U.S.C., Section 2254(d)(2)?

Notwithstanding Rule 10 of the Supreme Court Rules, the Petitioner argues that review should be granted because the question presented is of great importance to the structure of federal habeas corpus review upon a claim that is stated to be procedurally defaulted and not subject to review under this Court decision in Harris v. Reed, 109 S.Ct. 1038 (1989) when the habeas petitioner can show that the claim satisfies Section 2254(d)(2).

Under federal law, a determination of a factual issue made by a State court shall be presumed to be correct. See., Title 28 U.S.C., Section 2254(e)(1). The Court of Appeals for the Fifth Circuit has held that the presumption of correctness not only applies to the explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the State court's conclusions of mixed law and fact. Young v. Dretke, 356 F.3d 616 (5th Cir. 2004) and Ford v. Davis, 910 F.3d 232 (5th Cir. 2018). However, the State court's factual determination are presumed correct unless rebutted by "clear and convincing evidence." Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000), Section 2254(e)(1).

In Harris, this Court held that a federal court may not consider a claim when (1) a State court has declined to address the claim because the petitioner has fail to meet a State

procedural requirement; and (2) the State judgment rests on an independent and adequate State procedural ground. However, this Court's decision pre-date the provisions of Title 28 U.S.C., Section 2254(d)(1) and (2). Under Section 2254(d)(2) "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudication of the claim - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Thus, a federal court can proceed to resolve a due process claim without difference otherwise required when the State court's merits adjudication has resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Cf., Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004); where the State court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable. The fact finding process might itself be defective; the State court plainly misapprehended or misstated the record in making its findings. See., also Kipp v. Davis, 971 F.3d 939 (9th Cir. 2020); a State court unreasonably determines the facts under Section 2254(d)(2) when it misstates the record in making findings of fact.

The Peitioner is critical of Section 2254(d)(1) and (2) as to its meaining contained within the text of the statute,

specifically Section 2254(d)(2)dto defeat the conundrum of the decision announced in Harris. This is a conscientious observation of Section 2254(d)(2) and the Procedural Default Rule announced by this Court in Harris.

Under Texas law, a challenge to the sufficiency of the evidence cannot be raised under the State's post-conviction remedies, however, there is an exception to this procedural rule, a claim that there is "no evidence" to support the conviction. See., Ex Parte Perales, 215 S.W.3d 418 (Tex.Cr.App. 2007).

It is the Petitioner's position that the difference accorded a State court's determination that a claim is procedurally defaulted is subject to review if the habeas petitioner satisfies the requirement of Section 2254(d)(2).

In the State habeas proceeding the Petitioner specifically claimed and argued that there was "no evidence" to support the conviction, and never once claimed and argued that the evidence was insufficient to support the conviction.

The State habeas court characterized the claim as a challenge to the sufficiency of the evidence to undermine the claim and it's review, that was a legal error in it's fact finding process. The State habeas court misapprehended the record and the Petitioner's claim in making it's findings. The district court proceeded to defer to the State court's findings, and also held that the claim was a challenge to the sufficiency of the evidence, when the record did not support this finding.

This Court should grant review to determine whether a State

court's determination that a claim is procedurally defaulted survives the scrutiny of Section 2254(d)(2) when a federal habeas petitioner can show that the findings was based on an unreasonable determination of the facts, because some merit adjudication was given to the claim finding that the claim was procedurally defaulted that had to be based upon the facts given, and if the State habeas court's findings is not supported by the record, a federal court should be allowed to proceed to consider the claim.

QUESTION No. 4

Whether the Court of Appeals for the Fifth Circuit should have issued a Certificate of Appealability from the district court's determination that the Petitioner was not deprived of his constitutional rights to effective assistance of counsel as assured under the 6TH Amendment to the United States Constitution?

The Fifth Circuit court of appeals has held that a habeas petitioner claim of ineffective assistance of counsel that is denied by a district court based solely on a paper record is not entitled to an automactic presumption of correctness afforded by Section 2254(e)(1) in a habeas proceeding. See., Salazar v. Johnson, 96 F.3d 789 (5th Cir. 1996).

To be entitled to a COA a federal habeas petitioner must make a substantial showing of the denial of a constitutional right, another words the denial of his or her Sixth Amendment right to reasonable effective assistance of counsel. The claim must meet the threshold requirement of Section 2254(d)(1), that the rule of law be clearly established at the time of

the State court conviction. This is because the merits of an ineffective assistance of counsel claim is governed by the well established two (2) prong test announced by this Court in Strickland v. Washington, 102 S.Ct. 2052 (1989). See., Dowthitt v. Johnson, 230 F.3d 733 (5th Cir. 2000).

Before the court of appeals for the issuance of a COA, the Petitioner argued that the district court erred in its ad hoc determination that he was not deprived of his constitutional rights to reasonable competent assistance of counsel by trial counsel's failure to request an instruction on the Affirmative Defense of Renunciation because hecounter-manded the solicitation to avoid commission of the offense, and there was evidence that hewas merely playing along with the confidential informant for the Houston Police Department.

The Petitioner furthered before the court of appeals, that (1) The State habeas court's findings were premised upon an unreasonable determination of the facts made under an incorrect legal standard; and (2) The State habeas court's conclusion thatttrial counsel was not ineffective for failing to reuqest an instruction on the Affirmative Defense of Renunciation upohwhich the Petitioner was entitled was objectively unreasonable.

The Eleventh Circuit Court of appeals has held that a district court improperly accords the presumption of correctness to a State court's "mixed law-fact" determination of absence of ineffective assistance of counsel, and that a remand is required for a district court to re-examine the claim under the

correct Strickland standard of review.

To prevail on a complaint of ineffective assistance of counsel, the habeas petitioner must satisfy the two (2) prong test set-out in Strickland, that requires the habeas petitioner to (1) show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the 6TH Amendment to the United States Constitution; and (2) there is a reasonable probability that but for the deficient performance, the result of the trial would have been different. Cf., Lockhart v. Fretwell, 113 S.Ct. 838 (1993); ineffective assistance of counsel claims are judge by the prevailing law at the time the habeas petition is filed.

It is within understanding, that an attorney's failure to pursue an affirmative defense and request a jury instruction on that affirmative defense as supported by the evidence constitutes ineffective assistance of counsel. See., U.S. v. Span, 75 F.3d 1383 (9th Cir. 1996); trial counsel's failure to pruse an affirmative defself-defense and request a jury instruction on self-defense constitutes ineffective assistance of counsel.

Further, a habeas petitioner can overcome trial counsel's strategy and prevail on an ineffective assistance of counsel claim when he proves that counsel's strategy would not be considered sound. Jones v. Scotts, 59 F.3d 143 (10th Cir. 1995).

Under Texas law, a defendant's testimony by itself may be sufficient to raise a defensive issue and warrant an instruction.

Hayes v. State, 728 S.W.2d 804 (Tex.Cr.App. 1987). Under Texas law, Renunciation is an "affirmative defense" to a prosecution for the offense of Colicitation, and an essential part of such renunciation is that it must be voluntary and it must either avoid the commission or prevent the commission of the offense. Hartbarth v. State, 617 S.W.2d 944 (Tex.Cr.App. 1981).

During the Guilt/Innocence Phase of the Petitioner's trial, the Petitioner testified, that he asked ofr his "money" back before the alleged "hit" was actually supposed to have ocurred, in part because the Petitioner did not want to continue with the "hit" or participate in the matter to avoid commission of the offense, and out of fear that it was the undercover officer/hitman intent to kill the alleged victim. The Petitioner further Testified that he played along with the matter upon the advise of the "confidential informant."

The district court correctly held that Texas law provides criminal defendants with the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence, and that the first question was whether the evidence in the Petitioner's case was sufficient to implicate the renunciation defense. Citing, Granger v. State, 3 S.W.3d 36, 38 (Tex.Cr.App. 1999). (Appendix B).

The district court in outlining the evidence of the Petitioner's trial held, that the evidence showed that the Petitioner solicited

a "piso" of Montelongo. While there was a dispute over whether by "piso" he meant a murder, a burglary, or a battery and while there was some evidence that the Petitioner later tried to avoid the commission of a murder, there is no dispute that the Petitioner intended that some offense be committed against Montelongo.

The district court deferring to the State habeas court's findings, that the evidence did not show the "complete renunciation of his criminal objective" necessary to warrant an instruction on the renunciation defense. The district court furthered that based on these findings, the State habeas court concluded that because the Petitioner could not show that he was entitled to a jury instruction on renunciation, he failed to show harm as a result of trial counsel's alleged failure to request the instruction.

The Petitioner pointed out the fact, that the State habeas court did not consider the fact that there was evidence that the Petitioner was instructed by the confidential informant to play along with the undercover officer/hitman after the Petitioner had countermanded the return of the money.

The Petitioner argued that the State habeas court's determination that the evidence did not show the "complete renunciation of the Petitioner's criminal objective" necessary to warrant an instruction on the renunciation defense,was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, and upon

an incorrect legal standard.

The argued that the State's highest court, the Texas Court of Criminal Appeals, has never held that in order to be entitled to an instruction on renunciation, the evidence had to show a complete renunciation of the defendant's criminal objective.

The district court in deferring to the State habeas court's conclusion of law in McGann v. State, 30SS.W.3d 540 (Tex.App. 2nd Dist. 2000); the court of appeals hadl that the defendant in that case was not entitled to a jury instruction on the affirmative defense of renunciation to the offense of solicitation of capital murder, because the defendant's paying of only a portion of the down payment to the individual hired to kill his wife was not a complete renunciation of the criminal objective, and that in order for renunciation to constitute an affirmative defense to solicitation of capital murder, it must be voluntary and complete, and it must either avoid commission or prevent commission of the offense.

However, the Texas Court of Criminal Appeals, the State's highest court in ciminal law matters, has never held that this is the proper standard of review, in light of the fact that the statute does not mandat such a requirement to be entitled to such an instruction. The McGann court in looking at whether the issue or renunciation was raised by the evidence, held that the only evidence arguably sugesting the defendant's renunciation is the defendant's testimony that he thought the "job" would not happen because he tendered only a portion of the down

of the down payment, because he was told that the "job" would not happen unless and until he came up with the rest of the money. The McGann court held, that this testimony was not enough within itself to sho a countermand of the solcitation.

The State habeas court never considered the Petitioner's countermand of the initial payment made and the fact that he was instructed by the confidential informant to play along with the undercover officer/hitman. This was clear and concised evidence of the Petitioner's countermand of the mony to avoid the commission of the offense as well as to prevent the commission of the offense in the determination of whether he was deprived of his constitutional rights to effective assistance of counsel because of trial counsel's failure to request an instruction on the affirmative defense of renunciation.

The record is void of any evidence and there is no evidence offered by the State to the contrary to show that the offense went beyond the Petitioner's countermand to complete the offense.

Another words, the undercover officer/hitman never ventured to do the alleged offense. It is the fact that the Petitioner's countermand of the money that had been paid was to avoid the commission of the offense aswell as to prevent the commission of the alleged offense. Any reasonable juror could have found that the Petitioner's countermand was in itself sufficient to justify renunciation, and that such countermand was sufficient to show a complete renunciation of the offense. There is no requirement that renunciation be complete. This is not an imprimatur

of the Texas Court of Criminal Appeals.

The district court itself conceded that there was "some evidence" that the Petitioner "tried" to avoid the commission of the alleged offense. By use of the word "tried" the district court and the State habeas court held that the Petitioner's countermand fail to avoid the commission of the alleged offense, however, this is not evidence sufficient to show that the Petitioner wanted to continue with the alleged "piso" as there was no conclusive evidence showing that the word "piso" ment to kill or murder, which would have require pure speculation as to it's terminology. The record reflects, that the confidential informant told the Petitioner that the undercover officer/hitman was crazy and to simply play along...

Frist, was the State habeas court's decision consistent with Texas practice? The answer to this question is No. See., Hayes, Supra. and Harbarth, Supra.

Second, should the court of appeals have issued a COA from the district court's determination of the case? The answer to this question is Yes, because: (1) under Salazar the State habeas court's determination was based on a paper hearing and therefore was not entitled to an automatic presumption of correctness as accorded by the district court; (2) the district court agreed that under Texas law a criminal defendant has a right to an instruction on any defensive issue raised by the evidence and conceded that the Petitioner later tried to avoid the commission of the offense; and (3) the Texas

Court of Criminal Appeals has never held that for a criminal defendant to be entitled to an instruction on renunciation, the evidence had to show a complete renunciation of the defendant's criminal objective.

Thus, the district court's determination that the Petitioner was not deprived of his constitutional rights to effective assistance of counsel is at best suspect. Therefore, the court of appeals should have issued a COA for further briefing and argument regarding the claim. Ittis clear that the court of appeals merely paid lip service to its denial of a COA in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Francisco Flores

Francisco Flores

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