

22-7671

IN THE  
SUPREME COURT OF THE UNITED STATES

EDUARDO CATARINO PALACIOS

Petitioner,

v.

Supreme Court, U.S.  
FILED

MAY 24 2023

OFFICE OF THE CLERK

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**

Eduardo Catarino Palacios  
Connally Unit  
TDCJ Id No. 1156135  
899 F.M. 632  
Kededy, Texas 78119

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**MAY 30 2023**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

MURDER CASE

QUESTIONS PRESENTED

Eduardo Catarino Palacios was convicted of Murder in Texas State Court largely based on False Testimony evidence and sentenced to 50 years. Petitioner's Mother requested through the Freedom of Information Act an audio tape recording from the Police in Laredo, Texas, Discovering that the chain of custody of said audio tape lead to the District Attorney's Office and was in the custody of the District Attorney through out trial. Which had failed to disclose this to the defense. The Habeas court found through 11.07 section 3 that there were unresolved issues and called for an evidentiary hearing to resolve these issues. Through this hearing the Habeas court found that the District Attorney's office had lost the audio tape since the trial, But through testimony had discovered the contents of the audio recording. The Court recommended that relief be granted on his federal due process rights of a Brady violation and also ineffective assistance of counsel. The State initially opposed this relief under 11.07 section 4 that relief should be denied. However, Through this Evidentiary hearing Counsel had shown they ~~met~~ the standard for 11.07 section 4. The habeas Court agreed that it had been ~~met~~ and forwarded it to the Texas Court of Criminal Appeals Recommending relief be granted.

Despite the favorable ruling from the ~~habeas~~ court the CCA found that Petitioner 's Attorney had not filled out the Application properly and dismissed under Non-compliance with Texas Rules of Appellate Proc. 73.1 Multiple grounds raised on a single

page and no certificate of compliance documenting the word count. Petitioner had resubmitted the corrected Application and complied with Texas Rules of Appellate Procedure 79.2(d) which does not violate said rules.

Question 1. Is the Prosecutor allowed to override a Habeas Courts findings of fact and conclusions of law.

Question 2. Is the Prosecutor allowed to use Art. 11.07 Sec. 4 as a means to deny a corrected 11.07 that is only being resubmitted due to prior 11.07 being dismissed for non-compliance.

Question 3. If the CCA dismisses a 11.07 for non-compliance is there any law or policy or procedure that prohibits one from filing a corrected Application of habeas corpus.

Question 4. Is a Habeas Corpus that was dismissed for non-compliance with Texas Rules of Appellate Procedure 73.1 cause a bar for a corrected 11.07 under rule 11.07 section 4.

RELATED PROCEEDINGS

1. April 30, 2020 11.07 writ WR-65,150-02 was filed in the court in Laredo Texas.
2. An evidentiary hearing was given on May 9, 2022 and then again on June 16-17, 2022. Petitioner was granted relief.
3. Court of Criminal Appeals Dismissed WR-65,150-02 for Non-Compliance issues under Rule 73.1 on 5/18/2022.
4. Petitioner's Attorney corrected and resubmitted under application submitted 6/9/2022. Only to be dismissed under Sec. 4. on 7/27/2022.
5. Petitioner's attorney filed a motion for reconsideration only to be Denied.
6. Petitioner filed an 11.07 trying to correct the Non-compliance issues only to be Dimissed under Section 4 on 3/1/2023.

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## REASONS TO GRANT THE PETITION

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1. so basic to this court's jurisprudence is the right to a fair trial that it has been called the most fundamental of all freedoms. 21

2. The CCA did not doubt the habeas court's findings that Escobedo's testimony presented to the jury was false, Instead, the CCA dismissed Petitioner's case without a written order. 22

SUMMARY REVERSAL IS WARRANTED BECAUSE THE STAKES COULD NOT BE HIGHER, THE UNDERLYING ISSUES ARE IMPORTANT AND THE HABEAS COURT'S VIEWS DESERVE TO BE ADDRESSED. 24

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

U.S. Const. amend. XIV

STATUTES

Tex. Code Crim. Proc. Art. 11.07 Sec. 3 (d)

Tex. Crim. Crim. Proc. Art. 11.07 Sec. 4(a)(1)(2)

Tex. R. App. Proc. 79.27

OTHER AUTHORITIES

Stephen M. Shapiro et. al. Supreme Court Practice (11th ed 2019)

### PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that the Court Grant a Writ of Certiorari summarily reversing the judgment of dismissal from the Court of Criminal Appeals below and remanding or alternatively, for plenary review.

#### DISMISSAL BELOW

The dismissals stem from first a Non-Compliance issue which was Petitioner's second application for 11.07. The Third was also dismissed under 11.07, Section 4 and the forth was also dismissed under 11.07 Section 4.

#### JURISDICTION

The Court of Criminal Appeals dismissed Petitioner's second application for Non-Compliance issues on 5/18/2022. The Petitioner's attorney filed a third application to correct the previous applications deficiencies, but was dismissed under Section 4 on 7/27/2022. He subsequently filed for a motion for rehearing which was denied outright. Petitioner filed a fourth application for 11.07 still trying to correct the deficiencies of the second application of its non-compliance issues. However, was dismissed under section 4 again on 3/1/2023.

#### INTRODUCTION

This case is about the roles in our adversarial system. The Prosecutor is suppose to decide whether the evidence supports bringing a Murder charge or not. The defense is suppose to be able to probe the reliability of witness/statements or testimony at trial. The jury is suppose to decide whether the defendant

is guilty. The Courts are suppose to be neutral arbiters of the arguements made by the parties.

Here, testimony was not given in the form of witness accounts by written and audio statements about the actual events, Rather testimony from the co-defendant, one that was also charged with the same murder, Who told a very different story on what happened that day January 31, 2001. The written statement and audio recording was deprived from the defense, from viewing or listening, to the evidence of the only eyewitness of the actual events other than the two charged with the murder. The defense never had a chance to present this evidence to the jury with the information it needed to accurately evaluate the reliability of the written/audio statement, from a woman that opened the door to the house and witnessed who the shooter actually was, to impeach the only one that the Prosecutor had, Omar Escobedo, who stated that Petitioner did the shooting of the victim.

The Texas Court of Criminal Appeals (CCA) stepped outside of the judicial role by dismissing Petitioner's applications based solely Rule 73.1 of the Appellate Procedure, first Non-compliance issues, then outright dismissals under 11.07 section 4 for the Petitioner's Corrected applications, using only the prosecutors arguments that Petitioner had not met the standard in 11.07 Sec. 4.

The CCA's decision was plainly wrong under the Court's precedents. The Prosecutor relied on testimony of the one that was not only involved in the case against Petitioner, but also

one that was charged with the same murder. The witness statement, which was from a woman that opened the door to the house, was in the form of a written statement and a audio tape recording.

The woman, Tricia Salazar/Romero, had given her account to the Police that the person she had known had did the shooting, One Homer or Omar Escobedo. That he had walked into the bedroom and started shooting, Not the Petitioner as the Prosecutor led the jury to believe. Escobedo had been given a short sentence for his testimony telling the jury that Petitioner had done the shooting.

Defense counsel had tried and failed to use this same Police statement that was given by the only eyewitness to the crime that pointed only to Omar Escobedo instead of the Petitioner. Under the excited Utterance, defense Counsel failed to get this statement in. However, after Omar had made his Statement that he had only watched the shooting and that the same woman had opened the door, the defense failed to use Optional Completeness or Absent Witness rule. The Prosecutor claimed that the Excited Utterance was no good because he had a taped recording that when Tricia gave the statements to the Police that she was calm. Defense didn't take the bait as it was, to get the prosecutor to play the tape; the very undiscovered evidence that shows Petitioner did not shoot anyone. Defense counsel was shocked that he didn't know of this recording; that if played, would have revealed that Escobedo had done the shooting, pointing to the true killer. These statements were never admitted into evidence

and never went before the jury. The jury had a question as to the statements, sending a note to the judge during deliberations, inquiring about Tricia's eyewitness statements but were actually deprived of her account of whom actually pulled the trigger. That evidence would have affected the jury's judgment. See United States v. Agurs 427 U.S. 97,103(1976). That conclusion supported by the only summation of eyewitness statements, ran counter to the view of the Prosecutor. The jury during deliberations asked for the statement given by the woman, but could not have it because it was never admitted into evidence. The tape, gotten lost after trial, was found to be undisclosed exculpatory and material evidence, as to whether Petitioner was guilty or not. Alternatively this Court should grant the Petition and set the case for argument.

#### STATEMENT OF THE CASE

It is alleged that on January 31, 2001. Petitioner and co-defendant Omar Escobedo went to the house of the victim Jose Luis Palomares Gallegos at 4215 Salinazs Ave. When they got there a woman answered the door. Now it is also alleged that Petitioner entered and a fight ensued between Petitioner and Gallegos, which ended with Petitioner first shooting Gallegos in the mid-section, Gallegos then running outside into the street where Petitioner allegedly followed shooting Gallegos again and hitting Gallegos with the butt of the gun.

Its alleged that when Petitioner and Escobedo heard sirens they both fled only to be apprehended later.

The woman, Tricia Salazar a/k/a Tricia Romero, was taken to

the Police station, being the only Eyewitness to the actual events and being the woman made reference to by Escobedo, as to the person who answered the door and let both Petitioner and Escobedo inside. She made both a written statement and an audio recording as to the facts of the occurrence of the events on January 31, 2001. The incident report, regarding the shooting was generated by investigator Fernando Lozano Jr., included a synopsis of the written and audio tape recording statements of Salazar/Romero.

That she lived at the place where the incident occurred. That after midnight someone knocked on the door. It was Escobedo, who she had met previously on several other occasions and a man she didn't know, later Id as Petitioner. That Escobedo entered the house asking for Gallegos, that Escobedo went towards Gallegos, which is when she heard gunshots. Gallegos stating "NO, NO".

Salazar/Romero was unavailable for trial, having been incarcerated in Dallas, Texas sometime after the events of January 31, 2001. When she was released, she was unable to be located by the State.

Petitioner faced trial on Feb., 3, 2003 for murder. The State elicited testimony from several witnesses. However, relied heavily on the testimony of the co-defendant Escobedo which gave testimony that Petitioner was the trigger man, the one that shot and killed Gallegos. The prosecutor told the jury that Petitioner was the shooter, the one that killed Gallegos, proving Petitioner's culpability with the evidence of co-defendant, the only other witness to the murder.

The Prosecutor did everything possible to avoid having this eyewitness statement evidence of the actual events brought before the jury. The defense had tried to get the written statement of Salazar/Romero admitted as Excited Utterance, but failed to get in either through Police reports and investigators testimony or as a counter to Escobedo's testimony that Petitioner had done the shooting.

#### PROCEDURAL HISTORY

A. Petitioner faced trial on Feb. 3, 2003 for murder, was convicted of murder, jury sentenced Petitioner to 50 years and a fine of \$10,000 for the offense of Murder.

Petitioner appealed to the Fourth Court of Appeals on Nov. 10, 2004. Petition for discretionary review on PD -0187-05 which was rejected on April 13, 2006. On May 2, 2006 Petitioner filed his first application for 11.07 on May 2, 2006, denied relief on August 16, 2006 WR-65,150-01. Petitioner filed a Federal application for habeas corpus which was denied September 12, 2008. Petitioner appealed to the 5th Circuit, January 30, 2009, denied of June 24, 2010.

Petitioner's second application for 11.07 was filed April 30, 2020, state responded and on May 29, 2020, the Habeas Court found unresolved issues and ordered a hearing regarding the issues presented in the writ and based on Article 11.07 Section 3 (d), Texas Code of Crim. Proc. (Appendix A) and by an order of June 4, 2020, found that there existed controverted and previously unresolved, fact issues material to the legality of the Petitioner's confinement pursuant to Grounds One and Two of

an evidentiary Hearing.

1. Whether the Petitioner's Due Process Right and his Right to effective Assistance of legal counsel were violated because of trial counsel's failure to request and/or discover an audio tape recording of an eyewitness to the offense for which Petitioner was convicted, which was favorable and material to petitioner, in that it was both exculpatory and Impeachment evidence.

2. Whether Petitioner's Due Process right and his Right to Effective Assistance of legal counsel in that trial counsel failed to properly have introduced into evidence both a written statement and audio tape recording of an eyewitness to the offense for which Petitioner was convicted, which was favorable and material to Petitioner, in that they were both exculpatory and Impeachment evidence.

The Habeas Court found that that this Application is a successive petition and is not permitted unless the Petitioner could establish under Art. 11.07 Sec. 4 (a)(2)(Appendix B) either current claims could not have been presented before because it was unavailable in the first application or, 2. by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the Petitioner guilty beyond a reasonable doubt; was found in the evidentiary hearing to have fulfilled those requirements, and that given the history of the evidence not being presented to the jury, Yes, it would have changed the verdict of guilty to not guilty of shooting the victim and killing him.

B. The Habeas Court below recommended granting Petitioner's second state habeas Application.

Petitioner filed the second state habeas application below. relevant here, Petitioner claims that his federal Due process right to a fair trial was violated because his conviction was secured using false, unreliable, and misleading testimony evidence. The habeas court agrees that a defendant's Federal Due Process right to fair trial is violated when the State presents false evidence at trial and the false evidence is material to the jury's verdict. The habeas court agrees that false evidence is material if there is any reasonable likelihood" that the false evidence "could have affected the judgment of the jury". United States v. Agurs 427 U.S. 97,103(1976).

i. The court found that the Testimony of co-defendant was false, misleading, and unreliable.

Through a series of freedom of Information inquiries and complaints submitted to elements of prosecutorial team and the Texas attorney General, These POI inquiries established a definite and irrevocable pattern of deceitful and outright lies concerning the actual possession of Exculpatory evidence by the District Attorney throughout trial. These inquiries generated documented responses by the prosecutorial members that ranged from outright ignoring the requests, to responding that such information/evidence did not exist, to admitting after the Texas Attorney General intervened, that an audio recording in question was indeed made, recovered and turned over to the District Attorney at the onset of the trial. This newly discovered documents/reports

contradicted the D.A.'s statement to the trial court judge that he had no knowledge of the audio recording. Trial record page 17 Volume 1, Quoting, "Your Honor, I mean, I'll be honest with the Court. I was there. I reviewed three boxes of evidence. There is no video There's no audio tape in there." In any case the Exculpatory evidence was never disclosed to the defense.

The same District Attorney testifying in the Evidentiary hearing Volume 10, page 77, 86, 88, 91. (Appendix C)

Q. Okay. And we're talking — when you say "he testified," you're talking about the co-defendant, Mr. Escobedo?

A. Omar Escobedo

Q. -- is, that correct?

A. Yes Sir.

Q. There was a — a plea agreement that was entered into between the State and Mr. Escobedo; is that correct?

A. Yes, I believe so.

Q. Okay. And that plea agreement called for Mr. — Mr. Escobedo getting a reduced sentence — I believe it was Ten years — if he testified in trial — or at trial, rather — on your behalf against Mr. — Mr. Palacios; is that correct?

A. If I remember correctly, it — the offer was, you testify truthfully,

Q. And it says that she, home to, lived at the place where the incident took place 4215 Salinas; that after midnight someone knocked on the door, and that it was Escobedo, the co-defendant. And that she knew Escobedo from before, along with a man she did not know, later identified as Palacios. That Escobedo entered the house asking for Gallegos; that Escobedo went towards Gallegos. That is when she heard gunshots, and Gallegos stating, "No, No." That she had not seen Gallegos, and thought he had been shot in his room. Do you recall that synopsis which I've — I've read to you that was taken by the — from the report that was prepared by Fernando Lozaon Jr. The lead investigator?

A. That sounds about right.

Q. Okay. But with regards to the actual shooting of the decedent, Palomares Gallegos, and that the shooter was, in fact, Escobedo, not Palacios, would you consider — would you — would it be fair to say, Mr. — Mr Ramos, that that statement, the written statement itself, was — or would have been both favorable and material to the defense?

A. Yeah. That — that — that taken alone, that — that someone else did the shooting, of course that would have been favorable to the defendant.

Q. And — and so at the same time, Mr. Ramos, would that have been exculpatory evidence?

A. Of Course.

Q. Okay. And the fact that — I have read to you earlier — the fact that

Escobedo got on the stand and testified that it was Palacios and not he that actually shot Gallegos Palomares, would that have been impeachment evidence, Mr. Ramos?

A. I mean, I'm not going to argue with you about the rules of evidence, but I don't think it would have been a piece of evidence. Of whom But-

Q. Okay. So, it wouldn't have been -- it would have been contradictory to what the testimony and in that way -- that testimony given by -- by Escobedo, and in that way, it wouldn't have been impeachment. It wouldn't have been, hey, you know, what, that's not what happened?

A. Mr. Arce, I don't want to -- I'm not going to argue with you about the rules of evidence, but I'm not -- in my opinion, no, it wouldn't have been impeachment evidence unless Omar Escobedo made a prior inconsistent statement.

Q. Okay

A. That's when it's -- that's when it's impeachment.

Q. And in your perception, Mr. Ramos, the reason that the State -- I'm sorry, the reason that the defense was attempting to get this in is because it was exculpatory for the -- for the -- for the defendant. Is that correct?

A. Well, I don't know what -- what Mr. Pena wanted to do, but that sounds about right.

Mr. Ramos was the lead prosecutor in the case. Mr. Ramos testified that all the evidence relevant to the case would have been in his possession, including the written statement and audio recording of Salazar/Romero, that he would have provided all items of evidence, especially if they were exculpatory and/or impeachment evidence to the defense. But that he could not remember if the written statement and audio recording of Salazar/Romero were actually provided to defense counsel.

However, in the habeas court proceedings the Assistant District Attorney who prosecuted the case admitted that the undisclosed evidence was indeed exculpatory towards Petitioner. The habeas court found that co-defendant Escobedo's testimony, which was the main evidence used by the District Attorney to convict the Petitioner, was false, misleading and unreliable.

ii. The habeas court found in evidentiary hearing that defense counsel Mr. Pena. Volume 10 page 44 quoting.

Q. Okay, but you -- you're stating, Mr. -- Mr. Pena, That the written statement by Tricia Romero was that Escobedo was the one that pulled the trigger and not Palacios is that correct?

A. That is my recollection that Palacios did not do the shooting.

Thus regarding the written statement of the only eyewitness because the fact was that Salazar/Romero was unavailable for trial. So counsel attempted to introduce the statement through the hearsay exception of "Excited Utterance" which was denied by trial court. Habeas court however made an inquiry regarding whether he was aware of the "Rule of Optional Completeness" as being another exception to the hearsay rule, which could have been utilized in order to get the statement into evidence and counsel testified that he was aware of this rule, but that he believed that the rule did not apply to the circumstances at trial. (Appendix C)

Because the habeas court also inquired about other things such as the missing audio tape, Mr. Pena testimony again on, Volume 10, pages 48, 49, 50 51, 55, and 56.

A. I do not recall. Like I said it -- it posed a dilemma because part of it was helpful. The part that showed that Palacios did not kill the victim. That was good for us.

Q. Okay. Now you -- you testified, Mr. -- Mr. Pena that you do have some- -- vague recollection with regards to the content of that written statement that you said, I believe, that it showed, that Mr. Palacios, your client at the time, did not do the shooting, Is that correct?

A. That is absolutely correct.

Q. Okay. Now -- now, given that understanding, Mr. -- Mr. Pena, would you -- would it be fair to say that that evidence, or the evidence that included anything having to do with that, if it was in the form of a written statement or audio recording. That that would have been favorable to you, or favorable to the defense?

A. Yes.

Q. Okay. Would you also agree, Mr. Pena, that both that written statement, with its contents and the audio recording as well, if it contained the same thing, would also been material to defending Mr. Palacios in this matter?

Q. Okay all right - Okay - So, would you, based on all your experience, Mr. -- Mr. Pena, at that time, and to the present, would you believe that that -- both -- both of those items of evidence both the written statement and the audio recording would have been -- was or would have been Brady material, Mr. Pena?

A. Yeah.

Q. It was Brady material?

A. Yes.

Q. Okay. So, Mr. Pena, it being Brady Material, both the written statement and audio recording would have been Exculpatory to Mr. Palacios?

A. Yes Sir.

Q. Okay Did Mr. -- Mr. Escobedo testify at trial. Mr. - Mr. Pena?

A. I believe he did.

COURT: Did the co-defendant testify at trial, Escobedo. Do you remember?

Witness : Yeah. He was called Homar Escobedo. And they made a deal with the state and my recollection is that he did testify against him.

Q. Yeah, wasn't he the star witness for the State?

A. I want to say that he was a very persuasive witness. He as a big gun, actually.

Q. Okay. So he's -- were his claims that it was Mr. Palacios and not him that shot the -- decedent. Mr. Gallegos?

A. He was trying to blame Mr. Palacios for what he had done.

Mr. Escobedo was blaming Palacios, was saying that Palacios had done the shooting which he had not. As far as Mr. Pena was able to believe or determine, it was Escobedo who did the killing. The habeas court reviewed the reports and the chain of custody of the documentation and had significant concerns about the integrity of the witness statements and the audio recording in this case. (Appendix C)

iii. The habeas court found through Fernando Lozano Jr. was the lead investigator in this case. Lozano testified in the Evidentiary hearing. His testimony is this.

Volume 10. Pages, 133, 136, 138, 140, 150, 151, 153, 154, 159.

Q. Okay. So there was an audio recording of the interview that was conducted of Ms. Romero/Salazar?

A. Yes.

Q. Okay. And there was also, your -- your testimony is, there was also a written statement executed by Ms. Romero/Salazar?

A. There was a written statement as well.

THE COURT: He's just trying to determine what people knew at what time the -- I think for the first time there is a live witness saying, yes, there was an audio recording. For some reason, some of the stuff that I read early on went back and forth with regard to whether there was

one or not and, you know, back and forth with that. for the first time, someone who actually was there is saying, yes, there was an audio recording. All right, So the offense report produced by the witness, and it will just corroborate his testimony.

Q. Escobedo and Palacios entered the house. Escobedo went towards Naneen. And at that time. Salazar heard -- Salazar heard gunshots. Salazar stated that she heard Jose, also known as 'Naneen', say 'no,no'. Salazar stated that she saw Escobedo with a gun when naneen said 'no,no', that's -- that's included, and that's part of the report itself. Is that correct?

A. Yes.

Q. So -- so, as part -- now, would -- would this have -- would this have come from -- in your report, would that -- would this have been a synopsis of either the written statement that was made by Ms. Salazar, the audio recording, or both?

A. I think it's a combination of both sir.

Q. Okay. So, this would have been part of the audio recording itself?

A. Yes.

The COURT: Let me ask you this question before Mr. Arce finishes with you if the audio recording would have said something -- how does that -- let me ask you this. How does that typically happen in an interview? And if you -- if you can remember how it happened, tell me, but if you can't because of the numerous cases and interview that you've made and -- and and reports that you've written after such interviews, how does that typically happen? In other words, you have the interview going on. And when does -- obviously, the interview gets audio-recorded when the interview is occurring, right, Yes?

The Witness Yes, Sir, that's correct.

The Court: One thing -- yeah, something where in one sense it implies that it was a particular shooter and in the other one it implies it was different shooter. I mean, you would definitely make a note of that.

The Witness: Yes, Absolutely. You know, it's been my experience, whenever you take a -- a written statement from -- from, you know, a witness or an individual, you know, they give you a few sentences, opposed to when we're -- they're verbally being interviewed, they give you a whole bunch more.

The Court: Details

The Witness: You know, more details. And as I mentioned herein my report, that's the reason I make reference to both the voluntary statement and the audio.

The Court Very Good.

Q. Homar asked to see Naneen. Naneen was laying in bed. Naneen welcomed Homar in the room. I heard gunshots, and then I see Homar with a gun-

The Court: Can -- can -- can you stop real quick? She -- she references -- I think she says Homar. She references a gentleman by the name of Homar in her statement. She seems to know that person. Would you say that?

The Witness: I think Homar, she's referring to Omar.

The Court: Okay. So she seems to have already known him. In other words, it wasn't somebody who she -- she -- she did not know who it was. She actually knew who the potential perpetrator may have been.

The Witness: I think she -- she -- she knew who Omar was.

The Court Okay. So that's why she references him by name, Homar.

The Witness: Homar.

Q. Okay. And then eventually, doesn't all that, all those materials, inclu-

ding, in this case, the statement -- the written statement by Ms. Romero and the -- the audio recording, don't they go to the District Attorney's Office?

Q. Okay. And so you were obviously involved in that trial, and so you would think Mr. Lozano, that both the audio recording and the written statement eventually wound up at the District Attorney's Office?

A. I presumed it did.

Q. So, after it goes to the records, you don't know what happens to either written statement or the audio recording?

A. It's maintained there. I mean, it's a custody that we need to kind of show.

The Court: Yes, in -- in your statement -- I'm sorry, in your offense report, it -- there's a section that says, "Salazar stated that she saw Escobedo with a gun when Naneen was saying, "No, no, no".

The Witness: Yes.

The Court: Right.

The Witness: I think the -- the -- the audio statement would be more precise.

Finally, the habeas court has "serious concerns that Palacios errors were genuine." After listening to all that testimony and also the testimony that was told to him of what co-defendant said during trial and having inquired regarding who answered the door on the day in question, Escobedo's testimony follows.

Q. You say the girl answered the door. What was she doing this whole time?

A. She was in the floor, shouting, Scared.

Q. Do you know where Ms. Salazar is now?

A. No.

Q. Do you know Ms. Salazar?

A. Just in that space of time in there when I went there to the house.

Q. When you first got there, Mr. Escobedo, you said Tricia was on the ground scared, is that right?

A. Uh-hum.

Q. How did she get on the ground?

A. Eduardo pulled her to the ground. And she went to the ground, and come out.

Q. Did he tell her anything when he put her on the ground. If you remember?

A. I can't recall. I think something like, don't move or something like that.

Q. What was she doing when she was on the ground?

A. She was screaming. She was like saying no, no. Don't fight. Don't fight.

Q. What?

A. She was scared. She was shouting, don't fight, don't fight.

Q. And would you say every now and then, she would look up and say No. No?

Q. Did they ever stop fighting?

A. No.

Q. Not until Naneen died?

A. Yeah.

iv. The habeas court found that the written statement and the audio recording existed at some point. This evidence was material to the jury's determination.

Based on the foregoing findings of fact, the habeas court found that Petitioner had established a reasonable likelihood that the written statement and the audio recording were Exculpatory evidence, that the district Attorney had hidden the Audio tape recording and used false and misleading and unreliable testimony from Escobedo, all affected the judgment of the jury; and that because of the State's use of this testimony and withholding the audio recording, gave a false, misleading and unreliability of the evidence to secure the Petitioner's conviction, which violated fundamental concepts of justice. The use of this flawed evidence violated Petitioner's rights to Due Process as guaranteed by the United States Constitution. The court recommended that his conviction be reversed.

The habeas court found that Petitioner through his mother and the Freedom of Information Act established the chain of custody for the audio tape that lastly showed that it was in the District Attorney's hands and that the perjured testimony of Escobedo gave the jury the wrong impression as to who killed Gallegos.

The audio recording and the written statement saying Escobedo was the one that walked towards Gallegos was the linchpin of the habeas courts findings. The repeated emphasized of the importance of the written statement and the audio recording evidence throughout the proceedings showing the habeas court

what it needs to know to reverse Petitioner's case.

At the beginning the State complained that Petitioner had not met the bar concerning Article 11.07, Section 4, saying that Petitioner is barred due to Section 4.

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The Court: All right. Were those your only objections to it. Those are your strongest objections to it? Other than the fact that he hasn't met the burden/

Mr. Reuthinger: From the State, Your Honor?

The Court: from the -- from the procedural stand point, those are your strongest objections?

After this inquiry to Section 4 of 11.07 as to whether or not Petitioner had met the bar for his case. The habeas court had overruled the State's objection to it and went forward with the evidentiary hearing. Petitioner's attorney explained to the court that under the Sixth and Fourteenth Amendment of the United States Constitution as required in 11.07 Section 4, they met the bar and the burden in demonstrating to the court that Petitioner qualified under 11.07 Section 4(a)(2) (Appendix -B ) By a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the Petitioner Guilty beyond a reasonable doubt.

The habeas court's factual findings matched what the Petitioner's attorney stated to it. That Petitioner had been convicted based solely on the testimony of the co-defendant, Mr. Escobedo, through false evidence, and agreed that Petitioner should be granted a new trial because the written statement and the audio tape recording both showed that it was Mr. Escobedo that pulled the trigger which killed Gallegos, not the Petitioner. Which violated

Petitioner's Sixth and Fourteenth Amendments. His Constitutional rights to Due Process and Effective assistance of counsel. Citing *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois* 360 U.S. 264 (1959), *Ex parte Chabot* 300 S.W.3d. 768 (Tex. Crim. App. 2009). *Strickland v. Washington*, 104 S.Ct. 2052 (1984), *Hernandez v. State* 726 S.W.2d. 53, says the attorney's performance standard of reasonableness under prevailing professional norms according to the necessity of the case. It also requires that the attorney's behavior performance also be prejudicial, by taking into account the totality of the evidence, that there would have been reasonable probability that but for the attorney's actions the outcome of the proceedings would have been different.

Under ineffective assistance of counsel, the matter that in Mr. Pena, the Petitioners Attorney, failed to request *Brady* material in the form of the audio tape recording, through testimony of the witnesses, the lead investigator and the Prosecutor, Mr. Pena's performance fell below the reasonable standard because the audio tape recording was available at the time and circumstances now show that the material was Exculpatory towards the Petitioner.

The habeas court found that Petitioner's writ had merit and that Petitioner had established by a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror would have found him guilty beyond a reasonable doubt, meeting the requirement of Article 11.07, Section 4(a)(2), Texas Code of Criminal Procedure. (Appendix B).

Habeas court found that the record shows that Petitioner's Due Process Rights pursuant to the 14th Amendment were violated in that Brady material was either not provided by the State to the defense or the defense failed to request the material. (Appendix D).

Further, the record would also reflect the Ineffective assistance of counsel in violation of Petitioner's Constitutional Rights afforded him by the 6th Amendment (Appendix D), in that the trial counsel failed to properly introduce Exculpatory and Impeachment evidence at trial.

The habeas court concluded that Petitioner has met his burden (i.e.) preponderance of the evidence to establish, but for the violations to his Due Process rights and Effective Assistance of Counsel, no rational juror could have found him guilty beyond a reasonable doubt. 11.07 Sec. 4(a)(2). (Appendix B).

C. The CCA dismissed relief without acknowledging the habeas courts findings of facts and conclusions of law.

The CCA dismissed Petitioner's second Habeas Corpus 11.07 for Non-Compliance issues with Texas Rules of Appellate procedure 73.1. Specifically Multiple grounds raised on a single page and that Petitioner has exceeded the two pages allowed for each ground for relief and supporting facts and a computer generated memorandum of law that does not include a certificate of compliance as to the word count. Writ Number WR-65,150-02 (Appendix E) was dismissed 5/18/2022.

Petitioner's attorney corrected the application and the memorandum to be in compliance. Petitioner's Attorney talked to with the habeas court and the district attorney and neither initially had a problem with correcting the non-compliance issues and resubmitting as per office memo's (Appendix F) being sent back and forth between parties.

The CCA did not dispute the habeas court's Evidentiary hearing showing the extensive findings on the flaws of the evidence or doubt that those findings would establish a Federal Due Process if the Brady evidence had been properly introduced as evidence. The court further agreed that it was Brady material when there is a reasonable likelihood that it would have affected the judgment of the jury. But the CCA said nothing to discredit the habeas courts findings that Petitioner's case should not be reversed.

The CCA dismissed Petitioner's third writ of habeas corpus, (Appendix G) which was only a corrected version of number two, under sub-section 4 of the 11.07 Dimissed on 7/27/2022. WR-65,150-03.

Petitioner did not receive a copy of the corrected version until sometime after it was Dismissed for Section 4 of the rules. Petitioner upon finding out, immediately made another version of the number two writ, which had the habeas courts blessings for a reversal, correcting the non-compliance issues and then resubmitting the writ to the court (Appendix H) not understanding why or how it could have been dismissed under 11.07 Section 4 when he had met the required burden of showing that but for

a preponderance of the evidence, but for a violation of the U.S. Constitution, no rational juror could have found him guilty beyond a reasonable doubt. The CCA again failed to address the habeas court's finding that the substantial errors committed by way of the Brady evidence shows that Petitioner did not pull the trigger of the gun to kill Gallegos, that it was indeed his co-defendant Escobedo.

CCA did not follow the rules regarding correction to writ's under Texas rules of appellate procedure 79.2. Appendix I) which authorizes the CCA to reconsider the dismissal of an earlier writ, which does not violate Article 11.07's bar on subsequent writs.

Petitioner then resubmitted his corrected version of number two writ. Specifically stating, it was not a new application, which if viewed under section 4 be barred. However, Petitioner's resubmitted writ was dismissed under Section 4 again without reviewing the Habeas Courts findings of fact and conclusions of law. (Appendix K)

The CCA did not dispute the habeas court's extensive findings on the Brady violation for the audio tape recording evidence or doubt that those findings would establish a federal due process violation, because the audio tape recording evidence had been material to the conviction. (See Appendix C). The court further agreed that the audio tape recording evidence "is Material" when there is the likelihood that the Audio tape recording would have affected the judgment of the jury.

However, the CCA said nothing to discredit the habeas court's findings that all of the evidence shows that there was a Brady violation and ineffective assistance of counsel. The CCA also failed to address the habeas court's finding that substantial errors were committed by the District Attorney and his trial counsel.

After the CCA dismissed the Petitioner's Second Application, Petitioner's Attorney filed a third application to correct the second application. The CCA still dismissed without a written order. (See Appendix "J".) The Petitioner not understanding what happened, watched as his Attorney filed a Motion to reinstate and/or Motion for suggestion of reconsideration 5/9/2022. This was subsequently denied outright without a written order. Petitioner then submitted a Fourth Writ of Habeas Corpus to correct the issues and was dismissed without written order. See Appendix K).

Thus in the interest of justice, Petitioner requests that this court set the case for hearing or grant the necessary relief as he has shown by the habeas courts findings that Petitioner's due process right under the Constitution of the United States have been violated and that he is entitled to relief on this date.

#### REASONS TO GRANT THE PETITION

1. So basic to this Court's jurisprudence is the right to a fair trial that it has been called the most fundamental of all freedoms. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976)

(Brennan J. Concurring in the judgment) (quoting *Estes v. Texas*, 382 U.S. 532, 540 (1965)). For that reason, this Court takes special care to ensure that the requirements of federal due process are faithfully applied, including in state courts. This Court, of course, has jurisdiction over the final judgments in state postconviction courts, and exercises that jurisdiction in appropriate circumstances to consider whether false inculpatory evidence or Exculpatory evidence improperly withheld under *Brady* is material. *Wearry v. Cain*, 577 U.S. 385, 395-96 (2016) (per curiam) See *Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (reversing state habeas court findings on immateriality because withheld evidence was "plainly material". To be sure, whether evidence is material is a "fact intensive" issue. *Wearry*, 577 U.S. 392, 394-95. But this "Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." In *Wearry*, for example, this Court summarily reversed a state court's determination that the evidence the State withheld, which cast doubt on the State's witness, was immaterial in the Petitioner's murder case. That was because "any juror", according to the Court, "might have thought differnly" about the credibility of the State's witness had they heard the withheld evidence. *Id.* at 393-94 (emphasis added). "Even if the jury - armed with all of this new evidence - could have voted to convict" anyway, this court summarily reversed because it had "no confidence that [the jury] would have done so". *Id.* at 294.

2. The CCA did not doubt the habeas court's findings that

Escobedo's testimony presented to the jury was false. Instead, the CCA dismissed Petitione's case without a written order.

The habeas court itself conceded that the evidence was material, a rare occurrence, and that the Written Statement and the Audio tape recording evidence was a "key piece" of the evidence proving Petitioner didn't pull the trigger killing Gallegos.

This Court recently held that unanimity is required in criminal cases, whether federal or state. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1397 (2020), and Texas required unanimity to convict Petitioner of Capital Murder. See Tex. Code Crim. Proc. Art. 37.071. When "any" single juror "might have thought differently" about the case, had the evidence at issue been fairly presented, the evidence is material. *Weary*, 577 U.S. at 393-395. The CCA did not even acknowledge this evidence of the Written statement or the Audio tape recording.

Again, though, the CCA's failed to acknowledge the habeas court's undisputed testimony of Escobedo had been rendered unreliable due to the written statement and the audio tape recording.

The CCA failed to address the habeas court's explicit findings that the written statement and the audio tape recording showed without a doubt that Escobedo killed Gallegos, not the Petitioner. The CCA addressed none of this.

The CCA never explained how the habeas court erred in finding that this other evidence could overcome the impact Escobedo's testimony had on the jury. Cf. *Rippo v. Baker*, 137 S.Ct. 905, 907 (2017) (per curiam) (vacating denial of state habeas where state appellate court "did not ask the question out precedents require"). Here, just as in *Weary*, The CCA

improperly evaluated the materiality of each piece of [false] evidence in isolation rather than cumulatively. See *Kyles v. Whiley*, 514 U.S., 441(1995)(requiring a cumulative evaluation" of the materiality of wrongfully withheld evidence), emphasised reasons a juror might disregard [exculpatory] evidence while ignoring reasons she might not. Cf. *Porter v. McCollum*, 558 U.S. 30,43 (2009)(per curiam)(“it was not reasonable to discount entirely the effect that a defendant’s expert’s testimony might have had on the jury” just because the State’s expert provided contrary) of the reasons the habeas court found to discredit Escobedo’s testimony presented at trial.

*Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) By evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence. The CCA’s errors warrant summary reversal.

SUMMARY REVERSAL IS WARRANTED BECAUSE THE STAKES COULD NOT BE HIGHER, THE UNDERLYING ISSUES ARE IMPORTANT AND THE HABEAS COURT’S VIEWS DESERVE TO BE ADDRESSED.

This is an extraordinary case in which the court below is not only wrong, but the habeas court agreed that the conviction is invalid. Summary reversal is also warranted given that this is a murder case and Escobedo’s testimony evidence is extremely prejudicial when it is false or unreliable, and the CCA failed to even acknowledge the habeas court’s judgment. “Summary disposition is appropriate to correct clearly erroneous decisions of lower courts,” especially “errors of great magnitude”. See *Stephen M. Shapiro et. al. Supreme Court Practice* 5-44-5-45(11th ed. 2019).

1. This Court regularly intervenes at this stage to ensure that federal constitutional rights are respected in practice as well as theory. *Andrus v. Texas*, 140 S.Ct. 1875,1878 (2020) (summarily vacating state habeas case when lower court failed to properly apply legal standard for ineffective assistance

of counsel in capital case) *Wearry* 577 U.S. at 394-95 (summarily reversing state habeas finding that withheld evidence was not material in capital case). *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016), Reversing state habes judgment that failed to retroactively apply rule that juvenile cannot be sentenced to life without parole absent consideration of special circumstances.

Recently, in fact, this Court intervened twice in the same case to directly review and reverse the CCA's denial of a death row inmate's application for state habeas relief. Compare *Moore v. Texas*, 137 S.Ct. 1039,1044(2017) vacating CCA's findings that Capital defendant was not intellectually disabled, with *Moore v. Texas*, 139 S.Ct. 666,557 (2019) summarily reversing after CCA "subsequently considered the matter but reached the same conclusion". This case is the perfect candidate for such review. The Court should not count on federal habeas to correct this mistake, where, due to various procedural barriers erected by the AEDPA, meritorious claims often are unable to receive plenary consideration or remedy.

2. CCA's decision overlooks how persuasive /Actual witness statements and Audio tape recording evidence is to juries, and thus how unfair it is to excuse the use of false testimony evidence by Escobedo. In criminal justice community, Actual witness account evidence is generally regarded as the Gold standard. Thus Actual witness account statement and audio tape recording evidence is absolutely critical where, as here, the case involves testimony from Escobedo, the actual shooter, stating that Petit-ioner did the shooting, to where the actual witness statement

and audio tape recording changes that view to Escobedo pulling the trigger and the Petitioner as a witness.

This Court has previously recognized that some evidence is particularly prejudicial when it should not have been admitted. Testimony from the actual shooter stating that Petitioner shot and killed Gallegos may tempt the jury to rely upon that evidence alone in reaching its decision. Dist. Attorney's Off. for the Third Jud. Distr. v. Osborne, 557 U.S. 52, 62 (2009). It is important that such powerful evidence "be presented in a fair and reliable manner. McDaniel v. Brown, 558 U.S. 120, 136 (2010).

3. Out of respect for the habeas court's function, this Court should address the habeas court's position.

The habeas court has a special duty to seek justice not merely to convict, to protect the defendant's Constitutional rights.

Confession or errors from law enforcement are rare. They should be acknowledge and addressed when they occur. By completely ignoring the habeas courts findings of fact and conclusions of law the CCA disregarded the role of discretion in our criminal justice system.

#### CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment below and remand or alternatively, grant the petition and set the case for argument.

LL. Bl

CERTIFICATE OF COMPLIANCE

NO. \_\_\_\_\_

~~EDUARDO~~, PALACIOS

PETITIONER

v.

THE STATE OF TEXAS

RESPONDENT

As required by Supreme Court rule 33.1(h), I certify that the petition for writ of certiorari contains less than 9,000 words excluding the parts of the petition that are exempt by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 05-09 2023.

Edu. Pl