24-5344

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE ADOLPHO CASTILLO
Petitioner

vs.

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

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

By:

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QUESTIONS PRESENTED

1. Whether this Court's holding in Strickland v. Washington, 466 U.S. 668 (1984), requires reviewing courts to consider the cumulative effect of counsel's errors in determining prejudice.

2. Whether Petitioner was entitled to a certificate of appealability (COA) on his Strickland claims where the district court refused to consider the cumulative effect of counsel's errors in determining prejudice and there is a sircuit split on that specific issue.

3. Whether reviewing courts are required to weigh the factors set forth in Delaware v. Van Arsdall, 475 U.S. 673, 686-87 (1986), to determine Strickland prejudice, where an attorney elicits and fails to object to inadmissible hearsay testimony and that testimony is the only evidence that sufficiently corroborates the accomplice witness testimony.

4. Whether Petitioner was entitled to a COA on his Strickland claims where the district court did not weigh the Van Arsdall factors in determining prejudice for counsel's eliciting of and failure to object to the above mentioned hearsay testimony and at least one other circuit uses the Van Arsdall factors in this same type of situation.

LIST OF PARTIES AND RELATED CASES

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

RELATED CASES

- Castillo v. State, No. 14-15-00753, 2016 Tex. App. LEXIS 13011, 2016 WL 7177729 (Tex. App.—Houston [14th Dist.] 2016). Judgment entered December 8, 2016.
- In re Castillo, PD-1460-16, 2017 Tex. Crim. App. LEXIS 301 (Tex. Crim. App. 2017). Judgment entered March 22, 2017.
- Ex parte Castillo, No. WR-90,521-01, 2019 Tex. Crim. App. Unpub. LEXIS 730, 2019 WL 670469 (Tex. Crim. App. 2019). Remand order entered December 11, 2019.
- Ex parte Castillo, No. WR-90,521-01 (Tex. Crim. App. 2022). Judgment entered September 23, 2022.
- Castillo v. Texas, No. 22-6280, 143 S.Ct. 803, 215 L.Ed.2d 62, 2023 U.S. LEXIS 940, 2023 WL 2123906 (U.S. Supreme Court 2023). Judgment entered February 21, 2023.
- Castillo v. Lumpkin, C.A. No. H-21-2281, 2023 U.S. Dist. LEXIS 96149, 2023 WL 3792649, U.S. District Court for the Southern District of Texas. Judgment entered June 2, 2023.
- Castillo v. Lumpkin, No. 23-20391, 2024 U.S. App. LEXIS 7692, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 1, 2024.
- Castillo v. Lumpkin, No. 23-20391, 2024 U.S. App. LEXIS 10107, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 25, 2024.

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TABLE OF AUTHORITIES

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

The opinion of the United States Court of Appeals appears at Appendix A to this Petition and is unpublished.

The opinion of the United States district court appears at Appendix B to this Petition and is unpublished.

The opinion of the highest state court to review the merits appears at Appendix C to this Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was April 1, 2024. A timely petition for rehearing was denied by the United States Court of Appeals on April 25, 2024, and a copy of the order denying rehearing appears at Appendix A.

The date on which the highest state court decided my case was September 28, 2022. A copy of that decision appears at Appendix C to this Petition.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 Rights of the Accused.

> 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 defence.

Amendment 14, Sec. 1.

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.

28 U.S.C. § 2241 Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions

28 U.S.C. § 2254 State custody; remedies in federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

....

(d) 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 adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(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.

STATEMENT OF THE CASE

1. Facts Material to Consideration of Questions Presented

On New Year's Eve 2010, a Conoco gas station check-cashing booth was

robbed of $4,000 at approximately 6:20 p.m. by three men wearing ski masks. (4 RR 67-73, 136; State's Exhibits 1-3).*

During the robbery, a customer was shot and died. (4 RR 69, 131; 6 RR 216). A Crime Stoppers tip led to accomplice witness Mark Deleon, the only accomplice witness to testify at trial. (5 RR 34). Deleon initially spoke with Detective Blain and his partner, Detective Robles. (5 RR 37). Having incriminated himself, Deleon was charged with capital murder. (5 RR 37-38). Deleon eventually cut a deal with the State to get his capital murder charge dropped to aggravated robbery with a sentence of 20 years in prison in exchange for testifying against Petitioner at his trial. (6 RR 42-43).

At Petitioner's trial, the State opened by informing the jurors that they would hear testimony from Petitioner's brother-in-law Victor Murillo about a conversation outside of Petitioner's apartment a week or two before the capital murder where Edgar Padron (aka "Ricky") was trying to recruit both Petitioner and Murillo to rob a bank with him. (4 RR 13-14). The State then informed the jurors that they would hear testimony from Murillo about a phone conversation on the day of the capital murder between Murillo and Petitioner where Petitioner asked Murillo if he was going to go with them, which he understood to mean Petitioner was asking him if he was going to be a part of the bank robbery they had talked about at Petitioner's apartment. (4 RR 13-14).

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* "RR" refers to the Court Reporter's Record of the trial in state court. "RR" will be preceded by the volume number and followed by the page number. "CR" refers to the Clerk's Record in state court. "CR" will be preceded by the volume number and followed by the page number. "Dkt." refers to the docket entry sheet in the federal district court in Castillo v. Lumpkin, C.A. Number 4:21-CV-2281, in the Houston Division District Court for the Southern District of Texas. "Dkt." will be followed by the page number.

Detective Blain took the stand, and during the cross-examination, defense counsel inquired about a statement that nontestifying codefendant Ricky had given to Detective Blain where Ricky denied involvement in the capital murder but identified Petitioner as being involved in the crime. (5 RR 62-65). Defense counsel elicited the fact that Ricky had identified Petitioner as one of the persons who committed the capital murder. (5 RR 62-65).

Later in the trial, defense counsel attempted to persuade the trial court to allow the defense to present inadmissible hearsay testimony that would support a defensive theory that Ricky was trying to have an intimate relationship with Petitioner's wife, which would have showed that Ricky had a motive to lie on Petitioner to Detective Blain and frame Petitioner for the capital murder. (5 RR 147-50). The trial court denied the request as hearsay and did not allow defense counsel to present that defensive theory. (5 RR 147-53).

After Detective Blain testified, the State put Petitioner's brother-in-law Victor Murillo on the stand. The State questioned Murillo about a time Murillo saw Petitioner and Ricky a week or two before the capital murder. (5 RR 90-94).

According to Murillo, Petitioner and Ricky were together when Murillo's wife visited her sister, Petitioner's wife. (5 RR 91). Murillo and his wife had went to Petitioner and his wife's apartment. (5 RR 91). Murillo, Ricky, and Petitioner talked outside of the apartment. (5 RR 92). During this conversation, Ricky "was talking about doing something in a bank to go rob a bank, and he was trying to get me involved and [Petitioner]." (5 RR 93).

Murillo testified that there was a conversation about a bank robbery. (5 RR 93). That Ricky wanted both Murillo and Petitioner to be involved. (5 RR 93). That it would be an easy thing to do. (5 RR 93). And that Ricky had planned out everything. (5 RR 93).

Murillo further testified that on the day of the capital murder, Petitioner called him and asked him if he "was going to do that stuff and [he] told him no, no." (5 RR 95). His understanding of what Petitioner meant in the phone call by "that stuff" was that Petitioner was calling him to ask him if he was going to do the bank robbery they had talked about with Ricky. (5 RR 96). And Murillo told Petitioner during that phone call that he was not going to do the robbery, and that "he's not supposed to do that, either, because that was something ... it wasn't good." (5 RR 96).

The prosecutor showed Murillo a group of photos on a screen, State's Exhibit 72. (5 RR 122). Murillo identified Ricky. (5 RR 103). The prosecutor asked Murillo, "Is this the man who was talking with you and [Petitioner] about doing a robbery?" "Yes," he answered. (5 RR 103).

Defense counsel asked Murillo several other questions, eliciting more information from Murillo about the conversation between Murillo, Ricky, and Petitioner about a bank robbery. (5 RR 105-111). While counsel elicited this information from Murillo, he asked him more questions about the phone conversation the State had previously elicited from Murillo that Murillo had testified occurred between him and Petitioner on the day of the capital murder. (5 RR 100-111, 113).

Defense counsel asked Murillo, "[D]uring that conversation he's asking, [Petitioner] is asking you to participate along with them in some bank robbery?" (5 RR 108). "Yes, Murillo answered, "You can hear Ricky's

voice, I mean, like, saying he needed some more guys, I think." (5 RR 108).

Counsel initially asked, "Did Ricky ask you again at any time to participate in some type of bank robbery of doing anything?" Murillo said, "No, it was just when he called me that day, when [Petitioner] called me. I can hear [Ricky's] voice on the background saying that[.]" (5 RR 105-08). Counsel then reopened that dialogue and had an in-depth discussion with Murillo about that phone call. (5 RR 105-111, 113).

The evidence at trial showed that the police searched Petitioner's apartment and found several items that made Petitioner look bad but did not place him at the scene of the capital murder. (6 RR 139-43). The cops found a stocking mask with eyes and mouth cut out; a rifle case; a 9-millimeter handgun—which was not the murder weapon—a 9-millimeter magazine; 9-millimeter bullets; work gloves; and a flak jacket. (6 RR 139-43).

Marta Cordova was Petitioner's wife and the mother of his three children. (5 RR 120-23). On April 1, 2011, Ms. Cordova went to the police station to talk about the case. (5 RR 133). At trial, five years later, Ms. Cordova testified that she lied to police on April 1, 2011, about Mr. Castillo getting into a white truck and denied making any descriptions about a truck. (5 RR 135-36). She said she lied because a police officer grabbed her son and threatened her with her child, telling her that if she did not help them, that she needed to talk, and if she did not they would take her son away, and she would get deported. (5 RR 154). She said there were four police officers threatening her, before they took her to the police station. (5 RR 154).

Ms. Cordova testified that Petitioner did not come home on the night of the capital murder until eight the next morning. (5 RR 131). She said Petitioner did not have any money when he came home, and she denied saying that the person in the robbery photograph with short sleeves and a ski mask appeared to be her husband. (5 RR 144, 158). She was surprised when police found a gun in her apartment. (5 RR 141). She said a week before Petitioner's trial, she told the prosecutors that Petitioner was wearing a black shirt and black jeans when he left the apartment on the day of the capital murder. (5 RR 130).

Detective Robles testified that he believed Petitioner was one of the three persons on the surveillance video committing the capital murder, but that he could not tell based on facial features alone. (6 RR 168).

Ricky's brother-in-law Ruben Ayala testified that at about 5:30 or 6:00 p.m., on the day of the capital murder, Ricky came by Ayala's house asking Ayala's wife, Ricky's sister, for money, and she gave it to him. (5 RR 133, 135). Then a white truck came and picked up Ricky, and Petitioner was in the truck. (5 RR 187). At around 7:00 p.m., although it could have been as late as 9:00 p.m., Ricky came by to pay Ayala's wife back and gave her $1,000. (5 RR 139, 202). After viewing the video from the store when the capital murder occurred, Ayala identified the white truck in the video as the same white truck that had picked up Ricky. (5 RR 195).

Mark Deleon testified that on the day of the capital murder, he had been drinking alcohol and snorting cocaine "24/7" for two weeks straight. (6 RR 55). He was snorting an 8-ball of cocaine a day. (6 RR 55-57). He was drinking beer all day every day, and some tequila. (6 RR 55-57). On

the day of the capital murder, he drank more than 30 beers. (6 RR 57).

Deleon testified that on the day of the capital murder, Petitioner called him at around 2:00 in the afternoon. (6 RR 59). He said he picked up Petitioner from Petitioner's apartment at about 3:00 or 3:30 in the afternoon. (6 RR 60). He was drinking and driving a stolen truck with a cooler of beer. (6 RR 61, 106). After he picked up Petitioner, he picked up Ricky and another guy. (6 RR 62). They drove to Ricky's sister's trailer, where Ricky and the other guy got off the truck. (6 RR 63, 111). He dropped them off, drove further down the street, made a U-turn, and picked them up. (6 RR 69, 71).

He said he left the trailer park with Petitioner, Ricky, and the other guy and stopped at a Conoco gas station at around 6:00 p.m. (6 RR 74-76). He stayed in the truck while the other three men got off the truck wearing ski masks and holding firearms. (6 RR 74-76). Ricky was holding a rifle. (6 RR 76-77). The other guy was carrying a black revolver. (6 RR 78-79). And Petitioner was carrying a nickel-plated revolver. (6 RR 77-78).

He did not know they were going to do a robbery. (6 RR 78-79). He thought they were going to do a beer run. (6 RR 78-79). He was snorting coke and drinking beer while they were in the store. (6 RR 79). He heard one gunshot. (6 RR 80). It sounded like a handgun. (6 RR 80). All three men ran out of the store together carrying firearms and a paper bag. (6 RR 82-83). The guys were screaming, "Go go go go!" (6 RR 82-83). Ricky pointed his weapon at him. (6 RR 82). And Petitioner said, "I shot that dude." (6 RR 83-84). After that, he dropped them off at some apartments on Bellfort. (6 RR 83).

During closing arguments, the State conceded that its case against Petitioner was based on circumstantial evidence. (7 RR 25). The State

argued that Deleon "gave you valuable pieces of evidence"; that "we know [Murillo] wasn't there"; and that "we know that was [Deleon] driving, he admitted to it." (7 RR 35, 36).

The State argued that Ayala "just came down here and told you what he saw that night, what he saw at his trailer before those four men left .... He told you the truth.... That was real truth. That's a credible individual." (7 RR 32).

The State argued that Ms. Cordova took the stand and lied and did not tell the truth. (7 RR 31).

The State argued that Murillo "told you that he was hanging out with [Petitioner] and [Ricky], and they started talking about doing a robbery. They started talking about, hey, will you help us; we're thinking about doing a robbery?" (7 RR 29). "[S]ilence can speak louder than words.... [Petitioner] might not have been saying anything [during the conversation outside of the apartment], but he also wasn't saying I don't want to be a part of it either." (7 RR 30). "You've also got corroboration when you have [Murillo] coming in here and telling you about being present during the planning of a robbery .... That's all corroboration." (7 RR 39).

> [Murillo] gets a phone call from [Petitioner] saying, hey, did you want to be involved? It's happening. [Murillo] still doesn't want to be involved. But he came to court and told you about that phone call. On the day of the capital murder, [Petitioner] is rounding up the gang to do this capital murder. And that's what you're going to see play out .... [A]nd then that phone call he gets today—or gets the day of the capital. That's all corroboration.

(7 RR 30, 39). "He wanted this plan to happen. Throughout that day he was gathering the people to commit it." (7 RR 41).

Defense counsel argued that Petitioner was not at all a part of this crime, but in the alternative, Petitioner was guilty only of aggravated

robbery. (7 RR 20, 21).

The State responded as follows:

> The defense kind of throws it in there, but I'm not even really sure how it plays in since he says he wasn't even there. But if in doubt, just convict me of aggravated robbery. Really? Have your cake and eat it too, that's what the defense would like you to do. But, ladies and gentlemen, you don't even need to go down the road of aggravated robbery, stick with what's on the path, which is capital murder.
>
> * * *
>
> And, lastly, you know, I might have been there but maybe not; but if I was there, please only convict me of aggravated robbery because that's all I want. This is what the defense would have you believe, and none of it makes sense.... I call this the kitchen sink defense. Let me fill up my sink with a bunch of stuff and see if I throw it out if anybody will fall for it.

(7 RR 24, 37).

2. Procedural History

Petitioner was convicted by a jury of the offense of capital murder in the 228th District Court of Harris County, Texas, in Cause Number 1301318. (Dkt. 18-15, pp. 101-03). Petitioner was sentenced to mandatory life without parole. (Dkt. 18-15, pp. 101-03).

The Fourteenth Court of Appeals of Texas affirmed Petitioner's conviction and sentence. See Castillo v. State, No. 14-15-00753-CR, 2016 Tex. App. LEXIS 13011, 2016 WL 7177729, at *1 (Tex. App.—Houston [14th Dist.] Dec. 8, 2016, pet. ref'd) (mem. op., not designated for publication). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review. See Castillo v. State, PD-1460-16, 2017 Tex. Crim. App. LEXIS 301 (Tex. Crim. App. Mar. 22, 2017). (Dkt. 18-20).

After the conviction became final, Petitioner filed a state application for writ of habeas corpus, raising 19 claims of ineffective assistance of trial counsel, one claim that counsel's performance was presump-

tively inadequate, and one claim of ineffective assistance of counsel on direct appeal. (Dkt. 18-34, pp. 4-60).

On state habeas review, the trial court entered findings of fact and conclusions of law addressing Petitioner's application. (Dkt. 18-30, pp. 20-25; Attached Appendix C). The Court of Criminal Appeals of Texas denied the application without written order on the findings of the trial court without a hearing and on the Court's independent review of the record. See Ex parte Castillo, No. WR-90,521-01 (Tex. Crim. App. Sept. 23, 2022). (Dkt. 18-23; Attached Appendix C).

Petitioner timely filed his federal petition for writ of habeas corpus in federal district court. (Dkts. 1, 10).

On February 10, 2023, Respondent filed his motion for summary judgment with brief in support. (Dkt. 17).

Petitioner timely filed his reply to that motion. (Dkt. 21). And with leave of the court, Petitioner filed a supplemental response to the motion for summary judgment. (Dkt. 23).

On June 2, 2023, the district court granted Respondent's motion for summary judgment and denied Mr. Castillo's habeas petition on the merits. (Dkts. 25, 26). The district court denied a COA in its order denying the petition. (Dkt. 25, pp. 58, 59).

Petitioner timely filed a motion to vacate, alter, or amend final judgment under Rules 59(e) and 60(b)(1) of the Federal Rules of Civil Procedure. (Dkt. 27). The court denied that motion on December 5, 2023. (Dkt. 36).

Petitioner timely filed notice of appeal with application to proceed on appeal in forma pauperis. (Dkts. 29, 30, 31).

On August 18, 2023, the district court granted Petitioner's application to proceed on appeal in forma pauperis. (Dkt. 33).

Petitioner made timely application for COA in the Fifth Circuit U.S. Court of Appeals. (Appellate Record). The sole issue he raised for a COA was the following:

> Whether the state habeas court's denial of Appellant's ineffective-assistance-of-counsel claims (a) resulted in a decision that was contrary to, or involved an unreasonable application of federal law, as determined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); or (b) 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.

A single judge of the Fifth Circuit denied a COA on April 1, 2024. (Attached Appendix A).

Petitioner timely filed a petition for panel rehearing. And a panel denied that petition on April 25, 2024. (Attached Appendix A).

Petitioner now asks this Court to grant certiorari review of his case.

REASONS FOR GRANTING THE PETITION

1. National Importance

This case is of national importance both because the lower court decisions conflict with the decisions of this Court and several United States courts of appeals, as enumerated below, and because of the thousands upon thousands of men and women incarcerated throughout the United States who raise issues of ineffective assistance of counsel in state and federal appellate and postconviction proceedings every year.

Often is the case, as here, where a collection of errors by a defense attorney works together like gears in a timepiece to deprive a defendant of the right to a fair trial. Moreover, if reviewing courts

are allowed to examine each error of counsel individually for prejudice rather than collectively, then courts will not be able to properly factor in the totality of circumstances in determining whether counsel's strategy was reasonable, since in order to factor in the totality of circumstances in determining reasonableness, all of counsel's errors have to be considered collectively.

Finally, if counsel's errors are to be reviewed only individually for prejudice, as was done here, then relief under Strickland would be practically nonexistent. And if that is the case, then Strickland stands for nothing.

2. Petitioner's Ineffective-Assistance-of-Counsel Claims

Petitioner was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, for the following reasons:

> (1) Counsel failed to follow proper protocol to disqualify juror 67, who said in regards to her close friendship with a law enforcement officer that she could not say that that relationship would not influence her. (3 RR 93).
>
> (2) Counsel failed to follow proper protocol to disqualify juror 42, who said that motive to lie does not play a factor in gaging someone's credibility. (2 RR 104).
>
> (3) Counsel failed to file a proper motion in limine, request a hearing outside of the jury's presence under Rule 104 of the Texas Rules of Evidence, and request a ruling on the admissibility of the inadmissible testimony complained of in this Petition.
>
> (4) Counsel elicited inadmissible hearsay testimony from Detective Robert Blain that codefendant Edgar Padron ("Ricky") identified Petitioner as one of the persons who committed the capital murder. (5 RR 62-65; see also 5 RR 145-50).
>
> (5) Counsel failed to lodge proper objections and request proper instructions when the State elicited inadmissible hearsay testimony from Petitioner's brother-in-law Victor Murillo regarding a discussion between codefendant Ricky, Petitioner, and Murillo

about a bank robbery Ricky wasnted to commit. (5 RR 90-94).

(6) Counsel failed to lodge proper objections and failed to request proper instructions when the State elicited inadmissible hearsay testimony from Murillo about a phone conversation he said he had with Petitioner on the day of the capital murder that related back to the inadmissible hearsay discussion between Ricky, Petitioner, and Murillo about a bank robbery. (5 RR 94-95).

(7) Counsel failed to lodge proper objections and request proper instructions when the State, during Murillo's in-court identification of codefendant Ricky, elicited—for the third time—inadmissible hearsay testimony from Murillo about the inadmissible hearsay discussion between Ricky, Petitioner, and Murillo that Murillo said occurred at Petitioner's apartment about a bank robbery. (5 RR 102-03).

(8) Counsel elicited more inadmissible hearsay testimony from Murillo about the discussion between Ricky, Petitioner, and Murillo about a bank robbery. (5 RR 105-111).

(9) Counsel elicited more inadmissible hearsay testimony from Murillo about the phone conversation he said occurred on the day of the capital murder between him and Petitioner regarding the hearsay discussion he said occurred at the apartment between Ricky, Petitioner, and Murillo, and this time Murillo added that he heard Ricky in the background saying he needed more guys for the robbery, which was more inadmissible hearsay testimony. (5 RR 105-111, 113).

(10) Counsel failed to lodge proper objections and request proper instructions when the State elicited inadmissible testimony from Detective Jason Robles, that Petitioner was the person on the video during the capital murder. (6 RR 168-69; 154-55, 164).

(11) Counsel failed to lodge proper objections, request proper instructions, and move for a mistrial, when the trial court twice commented on the weight of Detective Robles's inadmissible testimony that Petitioner was the person on the video during the capital murder. (6 RR 155, 169).

(12) Counsel failed to lodge proper objections, request proper instructions, and move for a mistrial, when the State, during final arguments, argued regarding the inadmissible testimony from Murillo that related back to the inadmissible discussion between Ricky, Petitioner, and Murillo about a bank robbery, which the State knew or should have known to be inadmissible evidence. (7 RR 29-30, 39).

(13) Counsel failed to lodge proper objections, request proper instructions, and move for mistrial, when the State, during

final argument, argued regarding the inadmissible testimony about the phone conversation Murillo said occurred between him and Petitioner on the day of the capital murder about the inadmissible hearsay about a bank robbery Ricky tried to recruit Petitioner and Murillo to commit, all of which the State knew or should have known to be inadmissible evidence. (7 RR 30, 39, 41).

(14) Counsel failed to lodge proper objections, request proper instructions, and move for mistrial, when the State, during final argument, commented on the veracity of Petitioner's wife's testimony and argued that his wife lied on the stand. (7 RR 31-32).

(15) Counsel failed to lodge proper objections, request proper instructions, and move for mistrial, when the prosecutor, during final argument, stated her opinion regarding the testimony of one of the State's key witnesses, Ruben Ayala, and vouched for his credibility. (7 RR 32, 36).

(16) Counsel failed to lodge proper objections, request proper instructions, and move for mistrial, when the prosecutor, during final argument, stated her opinion regarding the testimony of the sole accomplice witness, Mark Deleon. (See 7 RR 34-35, 36).

(17) Counsel failed to lodge proper objections, request proper instructions, and move for mistrial, when the prosecutor, during final argument, vouched for the credibility of the clerk of the store on the night of the capital murder, commented on the veracity of the clerk's testimony, and stated her personal opinion regarding the clerk's testimony. (7 RR 36-37).

(18) Counsel either erroneously requested that aggravated robbery be included in the charge or failed to object to its inclusion and then argued during closing argument in the alternative that Petitioner was guilty only of aggravated robbery after presenting a defensive theory that Petitioner was not present at the crime scene and was not involved in any way. (1 CR 90; 7 RR 4, 20-21, 24, 37).

(19) Counsel so utterly failed to defend against the charges that the trial was the functional equivalent of a guilty plea, rendering counsel's representation presumptively inadequate.

(20) Counsel failed to raise prosecutorial misconduct on direct appeal. (See Brief for Appellant on Direct Appeal).

3. **The Fifth Circuit U.S. Court of Appeals has entered a decision in conflict with the U.S. Courts of Appeals for the Second, Seventh, Ninth, and Tenth Circuits on the question of whether Strickland's prejudice prong requires courts to consider the cumulative effect of counsel's errors in determining prejudice.**

In Gonzalez v. Thaler, this Court granted certiorari review in a habeas case where the issues presented involved conflicting decisions within the circuit courts. See Gonzalez v. Thaler, 565 U.S. 134, 139-40 & nn. 1 & 2 (2012).

In this case, the Fifth Circuit decision denying review of the cumulative effect of counsel's errors in determining prejudice is in conflict with the decisions of the Second, Seventh, Ninth, and Tenth Circuits on this same issue. (See Attached Appendix B, p. 54; Attached Appendix A).

In Rodriguez v. Hoke, the Second Circuit held that "[s]ince Rodriguez's claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together." See Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991), citing Strickland, 466 U.S. at 695-96.

In Williams v. Washington, the Seventh Circuit held that "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet Strickland's test." See Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995) (citations omitted).

In Harris ex rel. Ramseyer v. Wood, the Ninth Circuit held that the cumulative effect of numerous deficiencies of counsel during the trial proceeding prejudiced the petitioner and might well have rendered a different result. See Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (citations omitted).

And in Stouffer v. Reynolds, the Tenth Circuit held that "[t]aken alone, no one instance establishes deficient representation. However,

cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense." See Stouffer v. Reynolds, 168 F.3d 1155, 1163-64 (10th Cir. 1999).

Here, the district court held that because Petitioner "did not establish that any single error [of counsel] rose to the level of constitutional dimension ... There is no constitutional error to cumulate for purposes of the cumulative error doctrine." Both the district court and the Fifth Circuit Court of Appeals denied a COA on this issue. (See Attached Appendix A; Appendix B, pp. 54, 59).

This holding conflicts with the above cited decisions of the Second, Seventh, Ninth, and Tenth Circuits. Therefore, Petitioner asks this Court to grant certiorari review on the question of whether Strickland's prejudice prong requires courts to consider the cumulative effect of counsel's errors in determining prejudice. See S. Ct. R. 10(a).

4. The Fifth Circuit U.S. Court of Appeals has entered a decision in conflict with this Court's decision in Lozada v. Deeds, 498 U.S. 430, 432 (1991), and decisions of the U.S. Courts of Appeals for the Third, Sixth, and Eleventh Circuits, which all hold that a COA should be granted where the issue presented involves a split in the circuits.

In Lozada v. Deeds, this Court concluded that a certificate of probable cause, the predecessor of the COA, must be granted where there is a circuit split as to the merits of the underlying constitutional claim. See Lozada, 498 U.S. at 432.

At least three courts of appeals have remained faithful to Lozada. See, e.g., United States v. Hill, 98 F.4th 473, 481-82 (3d Cir. 2024); Lowe v. Swanson, 663 F.3d 258, 260 (6th Cir. 2011); Jeffery v. Warden, 817 Fed. Appx. 747, 752 (11th Cir. 2020).

In this case, Petitioner raised the issue of Strickland prejudice

in his habeas petition due to the cumulative effect of counsel's errors at trial. (See, Dkts. 1, 10, Grounds 1, 4, 5, 6, 8, 10-12, 14-19, Last Paragraph of the Facts Supporting Each Claim).

This is an issue that involves a circuit split. Compare Rodriguez, Williams, Harris ex rel. Ramseyer, and Stouffer with Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) ("To the extent this Court has not specifically stated that ineffective assistance of counsel claims ... must be reviewed individually rather than collectively, we do so now."); and Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation.").

In this case, the district court did not review the cumulative effect of counsel's errors in determining prejudice. (See Attached Appendix B, p. 54). The district court denied a COA. (Id., p. 59).

Petitioner asked the Fifth Circuit Court of Appeals to issue a COA on this issue because there is a circuit split on the question of whether a Strickland prejudice review requires consideration of the cumulative effect of counsel's errors. The Fifth Circuit denied a COA. (Attached Appendix B).

Petitioner now asks this Court to grant certiorari review on the question of whether Petitioner was entitled to a COA on his Strickland prejudice claim where the district court did not consider the cumulative effect of counsel's numerous errors in determining prejudice and there is a circuit split on this issue. See S. Ct. R. 10(a) and (c); see also Lozada, 498 U.S. at 432.

5. **The Fifth Circuit U.S. Court of Appeals has entered a decision in conflict with the U.S. Court of Appeals for the Second Circuit in determining Strickland prejudice because the district court did not weigh the five factors set forth in Delaware v. Van Arsdall, 475 U.S. 673, 686-87 (1986), to determine harm for the inadmissible hearsay testimony used to convict Petitioner.**

In reviewing claims of ineffective assistance of counsel for failing to object to inadmissible hearsay testimony, the Second Circuit weighs the factors set forth in Van Arsdall, which provides a clear way for reviewing courts to show their work. See, e.g., Mason v. Scully, 16 F.3d 38, 44 (2d Cir. 1994).

In this case, Petitioner demonstrated in both the district court and the court of appeals that under the Van Arsdall factors, Strickland prejudice was shown for the inadmissible hearsay testimony counsel elicited and failed to object to. But the lower courts refused to weigh the Van Arsdall factors in their Strickland prejudice analysis of the complained-of inadmissible hearsay testimony. (See Petitioner's Reply to Respondent's Motion for Summary Judgment, Dkt. 21, pp. 12-21; see also Petitioner's Brief in Support of Application for COA, pp. 22-25, Fifth Circuit Docket).

In Mason v. Scully, the habeas petitioner was granted relief where the factual bases for the Strickland claim were substantially identical to the factual bases of Petitioner's Strickland claims. Mason was convicted based on both hearsay testimony and the prosecutors' emphases of the hearsay testimony during closing arguments, as was Petitioner.

The only difference between the Mason case and Petitioner's case is that the Strickland hearsay claims Mason raised included counsel's failure to object on hearsay and Confrontation Clause grounds whereas Petitioner's Strickland hearsay claims were based in his habeas petition only on inadmissible hearsay grounds. (See Dkts. 1, 10, Grounds 3-9, 12-13).

But this difference is not significant because a petitioner who shows harm for a Confrontation Clause violation also shows harm under Strickland. The Confrontation Clause harm analysis is based on the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993). And this Court holds that the Strickland standard of prejudice "necessarily entails the conclusion that the [error] have had 'substantial and injurious effect or influence in determining the jury's verdict [under Brecht].'" See Kyles v. Whitley, 514 U.S. 419, 435-36 (1995), citing Brecht, 507 U.S. at 627.

Therefore, harm under Brecht is the same as prejudice under Strickland. And although the Van Arsdall harmless error factors were provided in the context of the standard set forth in Chapman v. California, 386 U.S. 18 (1967), courts of appeals are also using the Van Arsdall factors under the Brecht standard. See, e.g., Mason, 16 F.3d at 44; Whelchel v. Washington, 232 F.3d 1197, 1206 (9th Cir. 2000); Jones v. Gibson, 206 F.3d 746, 757 (10th Cir. 2000).

In other words, under a Strickland prejudice review, if the inadmissible hearsay testimony is sufficiently harmful under the Confrontation Clause then it is sufficiently harmful under the rule against hearsay. The Fifth Circuit's own reasoning in Gochicoa v. Johnson made this same conclusion. See Gochicoa v. Johnson, 238 F.3d 278, 286 (5th Cir. 2000).

In this case, not only did the lower courts refuse to consider the cumulative effect of counsel's errors in determining Strickland prejudice, but they also refused to weigh the Van Arsdall factors in determining prejudice on the inadmissible hearsay testimony. They refused to show their work. And in refusing to show their work, the lower courts have entered decisions that are purely subjective rather than objective.

Petitioner seeks a remand order from this Court with instructions to the court of appeals to remand the case back to the district court with instructions to conduct a review of the cumulative effect of counsel's errors in determining prejudice and to weigh the Van Arsdall factors in determining prejudice on the inadmissible hearsay testimony in conjunction with the review of the cumulative effect of all of counsel's errors together.

6. The Fifth Circuit Court of Appeals has decided Petitioner's Strickland prejudice claim in a way that conflicts with this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980).

The district court concluded that because the jury could have relied solely on the accomplice witness testimony, no Strickland prejudice was shown. (See Attached Appendix B, p. 27).

But Petitioner had a state-created right to not be convicted solely on accomplice testimony. See art. 38.14, Tex. Code Crim. Proc. ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.").

This Court held in Hicks that the denial of a state-created right violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Hicks, 447 U.S. at 346-47. Like Hicks, Petitioner had a substantial and legitimate expectation that he would be deprived of his liberty only upon a jury's finding of evidence that corroborated the accomplice witness's testimony. And under this state-created law, a witness who testifies, as Ayala did here, that he merely saw the defendant with the accomplice before the crime is not sufficient

to corroborate an accomplice witness's testimony. See, e.g., Sanchez v. State, 763 S.W.2d 46 (Tex. App.—Corpus Christi 1985, no writ).

Hence, in concluding that Petitioner did not show Strickland prejudice because the jury could have relied solely on the accomplice testimony, the lower courts deprived Petitioner of due process of law. Under article 38.14 of the Texas Code of Criminal Procedure, the jury could not have relied solely on the accomplice witness's testimony to convict Petitioner. And Petitioner moves the Court to grant certiorari review to correct this injustice. See S. Ct. R. 10(c).

7. Strickland prejudice is shown when counsel's errors are considered cumulatively and the Van Arsdall factors are properly weighed.

A. Counsel's Errors Considered Cumulatively

Without Detective Blain's testimony about Ricky identifying Petitioner as being involved in the capital murder, without Murillo's testimony about a conversation that supposedly occurred at Petitioner's apartment about some other robbery Ricky was planning, without Murillo's testimony about a purported phone call from Petitioner on the day of the capital murder that related back to the inadmissible conversation at the apartment, without a juror whose relationship with a cop could influence her to rule against Petitioner, without a juror who did not believe that motive to lie played a role in gaging someone's credibility, without Detective Robles stating that Petitioner was one of the masked men in the video of the crime, and without all the other complained-of errors of counsel, there is a reasonable probability that at least one juror would not have convicted Petitioner solely on the accomplice's testimony. This is because the State had nothing else to rely on besides the accomplice witness's testimony, and under article 38.14 of the Texas Code of Criminal

Procedure, the jury was not allowed to convict Petitioner solely on accomplice witness testimony.

B. The Van Arsdall Factors

The five Van Arsdall factors are (1) the importance of Detective Blain's and Murillo's inadmissible hearsay testimony in the prosecution's case; (2) whether the inadmissible hearsay testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting Detective Blain's and Murillo's inadmissible hearsay testimony on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. See Van Arsdall, 475 U.S. at 686-87.

In short, the importance of Detective Blain's and Murillo's inadmissible hearsay testimony is shown by (1) the lack of admissible evidence directly corroborating the accomplice testimony; (2) the State beginning its opening statement informing the jury about the inadmissible hearsay testimony it would hear from Murillo; (3) the State and defense counsel repeatedly eliciting the inadmissible hearsay testimony from Murillo during trial; and (4) the State repeatedly emphasizing the inadmissible hearsay testimony during closing arguments.

The inadmissible hearsay testimony was not cumulative because it provided an identification element of the crime that no other evidence presented proved besides, if believed, the accomplice testimony. The inadmissible hearsay testimony provided the support the State needed to rely on the accomplice witness testimony. The hearsay testimony added weight to the accomplice testimony and made it reliable. Therefore, it was not cumulative.

There was no evidence presented to corroborate Detective Blain's hearsay testimony that Ricky had identified Petitioner to the cops during an interview. Nor was there any evidence presented to corroborate Murillo's hearsay testimony about a discussion at Petitioner's apartment about some other robbery Ricky was planning and trying to recruit them for. And there was no evidence presented to support Murillo's hearsay testimony about a phone call he supposedly received from Petitioner on the day of the capital murder that related back to the hearsay about a discussion about a robbery at Petitioner's apartment.

Cross-examination on material issues was restricted during Ayala's and Ms. Cordova's testimony. (5 RR 146-50; 5 RR 212-14). If allowed, Ayala would have testified that Ricky had confessed to Ayala about the crime and did not implicate Petitioner. (5 RR 212-13). If allowed, Ms. Cordova would have testified that Ricky was trying to hook up with her, which showed a motive for Ricky to lie to Detective Blain in pointing the finger at Petitioner. (5 RR 146-50).

Finally, the State's case was so weak that without the inadmissible hearsay testimony, no evidence, besides accomplice testimony, was presented that showed that anyone witnessed Petitioner at the scene of the capital murder. There was no physical evidence linking Petitioner to the crime. And the State itself conceded that the State's case was based on circumstantial evidence. (7 RR 25).

Hence, all five of the Van Arsdall factors weigh in favor of granting Petitioner relief. Furthermore, Strickland prejudice is shown when counsel's errors are considered cumulatively and the Van Arsdall factors are properly weighed. And Petitioner asks this Court to grant certiorari review to correct the injustice that occurred in his case.

8. **The lower courts decided Petitioner's Strickland deficiency claims in a way that conflicts with this Court's decisions in both Strickland and Wiggins v. Smith, 539 U.S. 510, 527-28 (2003), because the affidavit trial counsel submitted in state habeas proceedings is conclusory and replete with fallacious reasoning.**

In Strickland, this Court held that because of the difficulties inherent in making the evaluation of counsel's conduct, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland, 466 U.S. at 689 (citation omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. Id. at 681.

In Wiggins, this Court rejected a state-court decision under 28 U.S.C. § 2254(d)(2) due to a marred fact-finding process. Wiggins, 539 U.S. at 528. The state court had based its conclusion, in part, on a clear factual error—that the social service records at issue recorded incidences of sexual abuse against Wiggins. Id. (citation omitted). But the records contained no mention of sexual abuse. Id. The state court's assumption that the records documented incidences of this abuse was shown to be incorrect by "clear and convincing evidence" under 28 U.S.C. § 2254(e)(1) and reflected "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" under 2254(d)(2).

In this case, we have a state court that relied on an affidavit from

counsel that is conclusory and does not make any sense, when it comes to the inadmissible hearsay testimony and the juror issues. This makes the state-court factfinding on these specific issues incorrect by clear and convincing evidence under 2254(e)(1) and reflects an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding under 2254(d)(2).

With regard to juror 67, who said she could not say that her friendship with a police officer would not influence her (3 RR 93), counsel's affidavit states, "After reviewing my notes from voir dire, I did not make any indication that juror #67 could not be fair or unbiased in applicant's trial.... Had juror 67 given me that impression, I would have inquired further." (Dkt. 18-30, p. 13).

Counsel does nothing here to explain his actions except restate the claim. The problem is that juror 67 did indicate she could not be fair or unbiased and counsel did not inquire further. Moreover, counsel's affidavit lacks any suggestion of trial strategy for not using peremptory or for-cause challenges against juror 67, who ended up on the jury. And counsel failed to explain why the answer given by juror 67 did not indicate prejudice or bias.

With regard to juror 42, who stated that motive to lie does not play a factor in gaging someone's credibility, counsel's affidavit states, "I didn't believe it was necessary to disqualify juror #42 because I did not believe the juror was indicating they couldn't determine credibility, but that, it wouldn't matter if the witness was an accomplice or not, he would look at them the same." (Dkt. 18-13, p. 14).

This is a loaded statement that skirts the issue. First, counsel's

statement does nothing but restate the ground for relief, which was that counsel was ineffective for failing to follow proper protocol to disqualify juror 42. Second, counsel should have known that it was necessary to disqualify juror 42 because motive to lie in a case such as this case, where the defendant's entire defense is based on an alleged accomplice's motive to lie, should play a significant factor in gaging someone's credibility. If motive to lie does not play a role in gaging someone's credibility, then a juror who believes this, in this case, should have been struck. Third, counsel's reasoning is circular. The question at voir dire was not whether juror 42 was indicating that he could not determine credibility, as counsel's affidavit implies. Nor was the question whether it mattered if the witness was an accomplice or not, as counsel's affidavit implies. (Dkt. 18-30, p. 14). The question at voir dire to juror 42 was whether motive to lie plays a factor in gaging someone's credibility. (See 2 RR 104). This question is an entirely different question than the questions counsel answers in his affidavit. And juror 42's answer is no, motive to lie does not play a factor in gaging someone's credibility. (2 RR 104).

Juror 42's answer that motive to lie does not play a factor in gaging someone's credibility is a particularly damaging answer in this particular case because, as stated above, the accomplice had a serious motive to lie—i.e., either take the stand and lie and get 20 years with the possibility of parole in 10 years, or don't take the stand and don't lie and get life without parole.

In answering questions that are not relevant to the issues raised, counsel cleverly applied the age-old fallacy of irrelevant thesis. Moreover, counsel's affidavit failed to explain why the answer given by juror

42, that motive to lie does not play a role in gaging someone's credibility, did not indicate partiality, prejudice, or bias.

Counsel's affidavit further misses the mark in counsel's attempts to explain his reasons for failing to file a motion in limine and for eliciting and failing to object to the bombardment of inadmissible hearsay testimony that implicated Petitioner's rights to a fair trial, to confront the witnesses against him, and to due process of law, where the inadmissible hearsay testimony was the only incriminating evidence strong enough to sufficiently corroborate the accomplice testimony.

Counsel's affidavit states the following:

> The strategy at trial was to show that Ricky and other witnesses (Victor Murillo and Mark Deleon) were lying about the applicant's involvement in the robbery. Counsel felt it was beneficial in mentioning Ricky's identification of co-accomplices in order to show he was not being truthful. [Dkt. 18-30, p. 14.] The strategy at trial was to show that the applicant never agreed to participate in the robbery at the time of the discussion [Murillo said occurred outside Petitioner's apartment] nor when the applicant called Murillo later to ask if he was going to do the stuff. Murillo's testimony was necessary to develop that strategy .... [Dkt. 18-30, p. 15.] Defense strategy centered on the theory that "Ricky" and the other witnesses were lying about the applicant's involvement therefore the focus was on the inconsistencies between what those witnesses told the police and their testimony. [Dkt. 18-30, p. 15.]

A close examination of the circumstances surrounding counsel's conduct shows that this was the worst strategy counsel could have pursued in this case because no reasonable trial attorney would have provided the evidence the State needed to corroborate the accomplice witness testimony, especially where, as here, that evidence is inadmissible hearsay testimony, in order to show that this inadmissible testimony is false.

Counsel chose to disprove this testimony instead of exclude this testimony. This is not reasonable because counsel would not have had to show these men were lying if counsel would have not elicited and properly

objected to the inadmissible hearsay testimony. Counsel's strategy does not make any sense and no reasonable habeas court would have concluded that it does make sense.

In reviewing the Strickland factors relevant to deciding whether this particular strategic choice was reasonable, the factors weigh in Petitioner's favor. First, there was no inconsistency in excluding the complained-of hearsay testimony through proper objections because such objections would have closed any kinks in the armor and shut down all lines of attack from the State. Second, there was no potential for prejudice from properly objecting to this inadmissible hearsay testimony because nothing can be less prejudicial than excluding the only evidence the State has to sufficiently corroborate the accomplice witness testimony. See Strickland, 466 U.S. at 681 (citation omitted).

Where Wiggins comes into play is where the state courts unreasonably adopted counsel's jacked-up reasoning. In doing so, the State based its determination on a marred fact-finding process. No fairminded jurist could base its determination on a marred fact-finding process. (See Attached Appendix C, State Court Findings of Fact and Conclusions of Law, ¶¶ 11-20).

Petitioner asks this Court to grant certiorari review in this case because the lower courts decided Petitioner's Strickland claims in a way that conflicts with this Court's decisions in both Strickland and Wiggins and because there are thousands upon thousands of prisoners in the United States depending on the stability of these two cases. See S. Ct. R. 10(c).

9. The complained-of testimony was inadmissible and any finding otherwise is based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings because the state-court adjudication was based on defense counsel's jacked-up reasoning and because there was no reasonable basis to conclude that the facts show that the complained-of testimony was not hearsay.

The fed district court stated, "The testimony elicited by the State during Murillo's direct examination by [defense counsel] on cross-examination, some of which was hearsay, supported [defense counsel's] theory of defense." (Attached Appendix B, p. 31) (emphasis added).

But the district court's statement is merely in passing, and it is ambiguous at best because the district court did not make it clear whether the court agreed with Petitioner that all the complained-of testimony was hearsay or just a portion of the complained-of testimony was hearsay. Petitioner understands the above quoted statement of the district court to mean that some of the testimony of these witnesses, i.e., the complained-of portions, were, in fact, that "some" the district court refers to.

The district court erred by not stating specifically and exactly which portions of the complained-of testimony the court found to be hearsay. Petitioner asks this Court to correct this error.

Furthermore, the state-court determination that Petitioner did not show that the trial court would have committed error in overruling the objections he states should have been made, (Attached Appendix C, Conclusions of Law, ¶ 2), resulted in an adjudication based on an unreasonable determination of the facts because the state-court adjudication of Petitioner's Strickland claims was based on counsel using shoddy reasoning in his affidavit to avoid the specific issues raised and on top of this flawed fact-finding process, there was no reasonable basis to conclude that the facts show that the complained-of testimony was not hearsay.

The facts show that Murillo's testimony about a discussion at Petitioner's apartment about a bank robbery that Ricky was trying to recruit Murillo and Petitioner to participate in had no relevance to the Conoco robbery murder Petitioner was on trial for. "Evidence is relevant if (a) it has any tendency to make a fact more probably than it would be without the evidence; and (b) the fact is of consequence in determining the action." Tex. R. Evid. 401.

Here, whether or not there was a discussion at Petitioner's apartment about a bank robbery a week or two before the Conoco robbery murder does not make any fact regarding the Conoco robbery murder more probable than it would be without the testimony about a discussion at Petitioner's apartment. Nor was a discussion about a bank robbery a week or two before the Conoco robbery murder of any consequence in determining whether Petitioner was involved in the Conoco robbery murder. So Murillo's testimony about a discussion about a bank robbery at Petitioner's apartment was inadmissible under Rule 401 of the Texas Rules of Evidence.

The facts further show that the complained-of testimony from both Detective Blain and Murillo was inadmissible hearsay. Under the Texas Rules of Evidence, the relevant hearsay rules are as follows:

> "Hearsay" is a statement that:
>
> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Tex. R. Evid. 801(d).

> Hearsay is not admissible unless any of the following provides otherwise:

- a statute;

- these rules; or

- other rules prescribed under statutory authority.

> Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

Tex. R. Evid. 802.

A statement is not hearsay if the statement is offered against an opposing party and "was made by the party's coconspirator during and in furtherance of the conspiracy." Tex. R. Evid. 801(e)(2)(E).

A statement against interest is not excluded by the rule against hearsay. Tex. R. Evid. 803(24). A statement against interest is one that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's propriety or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Tex. R. Evid. 803(24)(A), (B).

However, "[i]n order for a declaration against interest to be admissible under [Rule 803(24)], the statement must be self-inculpatory[.]" Dewberry v. State, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999).

The facts show that Ricky's statement to Detective Blain was not made while testifying at trial and Detective Blain offered this testimony to prove that Petitioner was a participant in the capital murder, for the truth of the matter asserted. Ricky's statement to Detective Blain was not made during and in furtherance of the conspiracy. And Ricky's state-

ment to Detective Blain was not self-inculpatory. Therefore, the facts show that the testimony was inadmissible hearsay. Tex. R. Evid. 801(d), 801(e)(2)(E), 802, 803(24).

The facts here show that Murillo repeatedly testified about a discussion that he said occurred in person outside of Petitioner and his wife's apartment between Petitioner, Murillo, and Ricky, where Ricky was talking about a robbery and trying to recruit both Murillo and Petitioner. (5 RR 90-96, 102-103, 105-111, 113).

The statements that Murillo said he heard from Ricky at Petitioner and his wife's apartment were statements that Ricky did not make while testifying at trial. Ricky did not make these statements during and in furthererance of the Conoco robbery. And the State offered this testimony to prove that Ricky was, in fact, planning a robbery and trying to recruit Petitioner and Murillo to carry it out, to prove the truth of the matter asserted.

Therefore, the facts show that this portion of Murillo's testimony was inadmissible hearsay. See Tex. R. Evid. 801(d), 801(e)(2)(E), 802, 803(24).

The facts in this case show that Murillo also repeatedly testified about a phone conversation he said he had with Petitioner on the day of the capital murder—which related back to the inadmissible hearsay discussion he said occurred at Petitioner and his wife's apartment about an irrelevant bank robbery Ricky had supposedly attempted to recruit them to do with him—and in the background Ricky was supposedly saying he needed more guys to do the robbery.

In the phone conversation on the day of the capital murder, according

to Murillo's testimony, Petitioner asked Murillo if he "was going to do that stuff" (5 RR 95), and Murillo understood that to mean the bank robbery they had talked about outside of the apartment (5 RR 96). Murillo said he told Petitioner, "[N]o, no," and he was not going to do the robbery, meaning, Petitioner "is not supposed to do that, because that was something, I mean, it was not good." (5 RR 96, 90-96, 102-103, 105-111, 113).

Everything that was supposedly said in that phone call on the day of the capital murder was inadmissible hearsay because it all centered on the inadmissible testimony about a discussion Murillo said occurred outside of Petitioner's apartment where Ricky tried to recruit them to rob a bank. Furthermore, the State offered Murillo's testimony about a phone call on the day of the capital murder to prove the truth of the matter asserted, that Petitioner was involved in the capital murder. Therefore, the facts show that the testimony about a phone call Murillo said occurred on the day of the capital murder was inadmissible testimony. See Tex. R. Evid. 401, 801(d), 801(e)(2)(E), 802.

Hence, the state-court determination that Petitioner did not show that the trial court would have committed error in overruling the objections he states should have been made, (Attached Apendix C, Conclusions of Law, ¶ 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 proceedings.

And in any event, all of Petitioner's Strickland claims should be reviewed de novo, including these that involve state-court evidentiary conclusions, because the state-court decision was based on counsel's nonsensical reasoning in his affidavit. And this was an unreasonable

application of clearly established federal law, as determined by this Court, in Strickland v. Washington.

10. **Counsel made errors so serious that he was not functioning as the reasonably effective assistance guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.**

Counsel's errors are set forth on pages 13-15 of this Petition. For the sake of brevity, Petitioner will not repeat those complaints here, but instead reurges those same complaints here.

PRAYER

FOR THESE REASONS, Petitioner, JOSE ADOLPHO CASTILLO, respectfully asks this Honorable Court to grant this Petition for a Writ of Certiorari.

SUBSCRIBED and SUBMITTED on this the 15 day of July, 2024, by placing in the prison mailbox in a postpaid package.

Respectfully submitted,

JOSE CASTILLO
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DECLARATION

"I, JOSE ADOLPHO CASTILLO, TDCJ-CID #2019371, presently incarcerated in the Texas Department of Criminal Justice Correctional Institutions Division, at the Connally Unit in Karnes County, Texas declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing statements are true and correct.

"EXECUTED on this the 15 day of July, 2024."

JOSE CASTILLO
JOSE ADOLPHO CASTILLO