No. 24-7186

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALBERTICO CORRAL CRUZ — PETITIONER
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALBERTICO CORRAL CRUZ
(Your Name)

TDCJ# 02367582, 2661 FM 2054
(Address)

TENNESSEE COLONY, TEXAS 75884-5000
(City, State, Zip Code)

PRO SE LITIGANT, NO PHONE OR EMAIL
(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE:

Did the Eleventh Court of Appeals, at Eastland, Texas, deny Petitioner's Due Process to an appeal in the normal course by ordering Petitioner to file a pro se response pursuant to Ander's, when his appeal was not an Ander's proceeding?

QUESTION TWO:

Did retained Appellate Counsel render ineffective assistance by filing an Ander's Brief misguiding Petitioner to file a pro se response pursuant to Ander's and not a brief in the normal course of an appeal, or hire new counsel. Denying effective assistance, due process, and forfeiture of an entitled proceeding?

QUESTION THREE:

Did trial Counsel render ineffective assistance for failing to investigate, interview, depose, and prepare defense first witness, Ariana Hernandez, which elicited extraneous offense testimony, denying a fundamentally fair trial and punishment?

QUESTION FOUR:

Did trial Counsel render ineffective assistance by failing to object that the admission of the audio recording was forcing Petitioner to choose one constitutional right over another, violating his constitutional rights to a fundamentally fair trial and punishment?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

State of Texas v. Albertico Corral Cruz, Cause No. CR55110, 441st Judicial District Court of Midland County, Texas. (Jury Trial).

Albertico Corral Cruz v. State of Texas, 2022 Tex. App. Lexis 482 (Tex. App.--Eastland, January 26, 2023)(Direct appeal affirmed/ retained counsel/Ander's)

In re Cruz, 2023 Tex. Crim. App. Lexis 388 (PDR Refused, June 07, 2023)

Exparte Albertico Corral Cruz, WR-96,248-01 (Tex. Crim. App. December 18, 2024) (Writ of Habeas Corpus denied without written order).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

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

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

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

The opinion of the Eleventh Judicial District court appears at Appendix L to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

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

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

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

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

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

The date on which the highest state court decided my case was Dec. 18, 2024. A copy of that decision appears at Appendix Y.

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

[XX] An extension of time to file the petition for a writ of certiorari was granted to and including May 17, 2025 (date) on _____ (date) in Application No. 24A809.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI: 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 of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, Section 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.

STATEMENT OF THE CASE

The Petitioner was indicted in Midland County, Texas, for two (2) counts of Indecency with a Child by Contact. Petitioner proceeded to trial by jury and the jury returned a verdict of guilty. Petitioner elected to have the Court assess his punishment. The Court assessed fifteen (15) years on each count. However, upon the State's motion to cumulate the sentences, the Court granted their motion.

The Petitioner filed his motion to bring notice of appeal due to retained appellate counsel's failure to communicate. November 15, 2021. CR, 55. Counsel filed an Ander's Brief pursuant to **Anders v. California**, 386 U.S. 738 (1967) even though Anders does not pertain to retained counsel. Petitioner filed his pro se response to the Anders brief pursuant to the Court of Appeals order to do so. The Court of Appeals affirmed the case was not an Anders proceeding and affirmed the trial court's judgment. **See Cruz v. State**, 2023 Tex. App. Lexis 482 (Tex. App.--Eastland, January 26, 2023). Petitioner filed his Petition for Discretionary Review in the Texas Court of Criminal Appeals, and the Court refused the petition. **See In re Cruz**, 2023 Tex Crim. App. Lexis 388 (June 07, 2023). Petitioner then filed his writ of habeas corpus pursuant to **Tex. Code Crim. Proc. Art. 11.07** and the Court denied the writ without written order. **See Ex parte Cruz**, No. WR-96, 248-01 (Tex. Crim. App. December 18, 2024).

REASONS FOR GRANTING THE PETITION

QUESTION ONE

DID THE ELEVENTH COURT OF APPEALS, AT EASTLAND, TEXAS, DENY PETITIONER'S DUE PROCESS TO AN APPEAL IN THE NORMAL COURSE BY ORDERING PETITIONER TO FILE A PRO SE RESPONSE PURSUANT TO ANDER'S, WHEN HIS APPEAL WAS NOT AN ANDER'S PROCEEDING?

The Petitioner argues that the Court of Appeals denied Petitioner's Due Process to a protected proceeding, an appeal in the normal course, by the court's

order and direction for Petitioner to file a "pro se response" pursuant to Ander's v. California and Texas Ander's procedures. See Kelly v. State, 436 S.W.3d 313 (Tex. Crim. App. 2014).

A. FACTS SURROUNDING THE COURT OF APPEALS ORDER AND DIRECTION TO PETITIONER INSTRUCTING HIM TO FILE A PRO SE RESPONSE PURSUANT TO THE STANDARD OF ANDER'S PROCEDURES.

On October 28, 2021, Petitioner's "family" retained Manual Diaz Law Firm to review the trial transcripts of the case. The Petitioner never signed any contract with the law firm, nor was he aware that the "contract" signed by family was only to review the record. Furthermore, the Petitioner never received any correspondence from Manual Diaz Law Firm prior to receiving their Ander's Brief and Motion to Withdraw.

Due to Appellate Counsel's failure to comunicate with Petitioner, he was unaware that counsel filed a motion for new trial to delay the deadline for a notice of appeal, thus, the reason for Petitioner to bring notice of appeal to the court pro se on November 15, 2021. The trial court re-certified his right to appeal on November 19, 2021. CR, 44-50; Appendix S.

On July 07, 2022, Counsel filed an Ander's Brief and Motion to Withdraw. In July 2022, Petitioner received counsel's letter, motion to withdraw, Ander's Brief, and motion for access to the appellate record. The letter and Motion to withdraw tracked the language of Ander's proceedings requiring "appointed counsel" to inform client of his: 1) right to file a "pro se response" to the Ander's brief pursuant to Anders v. Californnia, 386 U.S. 738 (1967) and Kelly v. State, 436 S.W.3d 313 (Tex. Crim. App. 2014); and 2) right to review the appellate record; and 3) right to file Petition for Discretionary Review.

The Court of Appeals sent an order directing Petitioner he had thrity (30) days to file a "pro se response" to counsel's Ander's Brief due on August 11,

2022. However, Petitioner could not file a response due to counsel's failure to provide the appellate record, as is the custom when appointed counsel files an Ander's brief in Texas. **Kelly**, 436 S.W.3d 313.

Petitioner filed a motion for an extension of time and to be provided with a copy of the appellate record on July 12, 2022. **Appendix D.** Petitioner received his extension of time up to October 10, 2022. **Appendix F.** Petitioner received guilt & innocence transcripts, exhibit's, and Clerk's Record. **Appendix E.** Petitioner received voir dire about 3 weeks later due to counsel not initially providing it. **Appendix H.**

The Petitioner filed his pro se response pursuant to the standard in **Ander's and Kelly.** He raised one ground geared to this standard that only required the Petitioner to present one arguable ground to the Court, then the Court would appoint new counsel to brief the issue in the normal course of an appeal, and review the record independantly. The issues would be argued in the normal course of an appeal.

B. THE PURPOSE OF AN ANDER'S BRIEF AND THE PROCEEDINGS DO NOT APPLY TO RETAINED COUNSEL.

The purpose of the Ander's brief is to satisfy the appellate court that the appointed counsel's motion to withdraw is, indeed, based upon a conscientious and thorough review of the law and facts: "the Anders brief is only the proverbial 'tail' [while] the motion to withdraw is the 'dog.'" That being the case, the court of appeals may not immediately grant the motion to withdraw, even though the granting of a motion to withdraw is inevitable once an Ander's brief has been filed. Once an Ander's brief is filed in Texas, there are two possible outcomes, both of which involve eventually granting original appointed counsel's motion to withdraw. Either the appellate court confirms that there are no non-frivolous grounds for appeal, thus extinguishing the appellant's right to coun-

sel, and grants the motion to withdraw, or the appellate court finds that there are plausible grounds for appeal, in which case the appellate court still grants the motion to withdraw, but remands the cause to the trial court for appointment of new appellate counsel. **Kelly v. State**, 436 S.W.3d 313, 318-19 (Tex. Crim. App. 2014)(Quoting **Meza v. State**, 206 S.W.3d 684, 689 (Tex. Crim. App. 2006) (citing **Anders**, 386 U.S. 738 (1967)).

However, the above **Ander's** requirements do not apply to any counsel that is retained. There is a completely different standard when "retained Counsel" files a motion to withdraw. When retained Counsel files a motion to withdraw, the Petitioner has the right to: 1) hire new counsel; or 2) file a pro se Appellate Brief in the normal course of an appeal. Therefore, Petitioner was denied Due Process to a protected proceeding and this is where the Court of Appeals erred. **Knotts v. State**, 31 S.W.3d 821, 822 (Tex. App.--Houst. [1st Dist.] 2000, no pet.).

C. THE HOLDINGS OF THIS COURT, COURT OF APPEALS OF TEXAS, COURT OF CRIMINAL APPEALS OF TEXAS, STANDARD OF REVIEW, AND THE APPELLATE COURTS SUPERVISORY ROLE.

The Court's have several clearly established precedents that support Petitioner's position. The appellate courts have a supervisory role in guaranteeing representation by counsel, retained counsel is allowed to withdraw only "upon such terms and conditions as may deemed appropriate by the appellate court." **Tex. R. App. Proc. 6.5**; **Oldham v. State**, 894 S.W.2d 561, 562 (Tex. App.--Waco 1995)(duties of appointed counsel and appellate court pursuant to **Anders**, 386 U.S. 738 (1967), not applicable to retained counsel.). To fulfill this minimum obligation, retained appellate counsel's motion to withdraw must be accompained by a showing that a copy of the motion was furnished to the convicted defendant along with information concerning impending deadlines. In addition, the retained

appellate counsel who wishes to withdraw must provide the appropriate appellate court with the last known address and phone number for the appellant that counsel represents.

The Court here, failed to strike appellate counsel's Ander's Brief and advise Petitioner he had the right to: 1) hire new counsel; or 2) file a pro se appellate brief in the normal course of an appeal, and that the proceeding was not an Ander's proceeding. The Court's failure is no different than counsel failing to properly advise a client. The failure of appellate counsel to "follow these requirements" (advising client of option to file PDR, etc.) is meaured by a **Sixth Amendment** standard for prejudice that is more "limited" than the ordinary standard for ineffective assistance of counsel: "the appellant need not show that the proceeding that was forfeited due to Counsel's ineffectiveness would have resulted in a favorable outcome, rather, it is only required that the appellant show that he or she was **deprived of that proceeding** and that the appellant would have availed himself of the proceeding had the conduct of Cousnel [the court] not caused a forfeiture. **Ex parte Crow**, 180 S.W.3d 135, 137-38 (Tex. Crim. App. 2005).

The Texas Court of Appeals held that "there is no principled reason" that these standards for Counsel and determining prejudice for ineffective assistance should not apply equally to an appellant whose attorney files a "no merit" Ander's brief. **Ex parte Owens**, 206 S.W.3d 670-74 (Tex. Crim. App. 2006). The Court of Appeals failure to properly advise Petitioner his appeal was not an Ander's proceeding and to strike Appellate Counsel's (retained) brief is no different than Counsel failing to properly advise his client.

This Court in **Smith v. Robbins** held, "the two services of appellate counsel are on point here. Appellate Counsel examines the trial record with an advocate's

eye, identifying and weighing potential issues for appeal. This is review not by a dispassionate legal mind but by a committed representive, pledged to his client's interests, primed to attack the conviction on any arguable ground the record may reveal. If counsel's review reveals arguable trial error, he prepares and submits a brief on the merits and argues the appeal." Id., 528 U.S. 259, 292-93 (2000).

Indeed, a defendant's right to the first point is, a partisan scrutiny of the record and assessment of potential issues, goes to the irreducible core of the lawyer's obligation to a litigant in an adversary system, and we have consistently held it is essential to substantial equality of representation by counsel. The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. Penson v. Ohio, 488 U.S. 75, 84 (1988); see e.g., Ellis v. United States, 356 U.S. 674, 675 (1958); Douglas v. California, 372 U.S. 353, 357-58 (1963); McCoy v. Court of App. of Wis., Dist. 1, 486 U.S. 429, 438 (1988). The right is unqualified when a defendant has retained counsel, and I can imagine no reason that it should not be so when counsel has been appointed. In Petitioner's case, appellate counsel was only retained by "family" to review the appellate record, according to counsel's affidavit. Appendix S.

Moreover, because the right to the second point is, merits breifing, it is not similarly unqualified. The limitation on the right to a merits brief is that no one has a right to a wholly frivolous appeal. When a defendant has retained counsel, the defendant is entitled to file a pro se appellate brief in the normal course of an appeal or hire new counsel, upon retained counsel's motion to withdraw.

This Court in Anders v. California addressed the problem as "confronted"

by assigned/appointed counsel, though in theory it can be equally acute when counsel is retained. It is unlikely to show up in practice, however. Paying clients generally can fire a lawyer expressing unsatisfying conclusions and will often find a replacement with a keener eye for arguable issues or a duller nose for frivolous ones. As a practical matter, the states may find it too dificult or costly to prevent monied Petitioner's from wasting their own resources, and those of the judicial system, by bringing frivolous appeals. This does not mean, however, that the states are obligated to subsidize such efforts by indigents. **Smith**, 528 U.S. 259, FN 2 (2000).

The Court of Appeals ordered Petitioner to file a pro se response pursuant to **Ander's** even though the Court knew the proceeding was not an **Ander's** proceeding. See **Court's Op. at page 3**. The Court erred and denied Petitioner's Due Process by failing to advise him his appeal was not an **Ander's proceding** and he had the right to: 1) hire new counsel; or 2) file a pro se appellate brief in the normal course of an appeal. Instead, the Court lead Petitioner into believing he was filing a pro se response pursuant to the **Ander's** standards, and this is what the Petitioner did. **See COA Op. Pgs. 1-3**. **Appendix C, D, F, G, I, J, K, L, AND M**.

This Court has held, "the likelihood of a better outcome from a waived or forfeited proceeding is not the correct reliability standard because 'we cannot accord any presumption of reliability' to judicial proceedings that never took place." **Roe v. Flores-Ortega**, 528 U.S. 470, 483 (2000)(citing **Smith v. Robbins**, 528 U.S. at 286).

Taken together, the facts and record, and authority above, this Honorable Court must grant certiorari and decide the issues above.

QUESTION TWO

DID RETAINED APPELLATE COUNSEL RENDER INEFFECTIVE ASSISTANCE BY FILING AN ANDER'S BRIEF, MISGUIDING PETITIONER TO FILE A PRO SE RESPONSE PURSUANT TO ANDER'S AND NOT A BRIEF IN THE NORMAL COURSE OF AN APPEAL, OR HIRE NEW COUNSEL, DENYING EFFECTIVE ASSISTANCE, DUE PROCESS, AND FORFEITURE OF AN ENTITLED PROCEEDING?

Appellate Counsel (retained) rendered ineffective assistance by filing an Ander's brief, that misguided Petitioner to file a pro se response pursuant to the standard set in **Anders v. California**, 386 U.S. 738 (1967) and **Kelly v. State**, 436 S.W.3d 313 (Tex. Crim. App. 2014), when counsel should have advised Petitioner he could: 1) hire new counsel; or 2) file a pro se "brief" in the normal course of an appeal. Therefore, counsel's performance fell below an objective standard of reasonableness when he improperly advise Petitioner to file a pro se response to Ander's and filed an Ander's brief and simply a motion to withdraw. Counsel's error caused the Petitioner's appeal in the normal course to be waived/forfeited, resulting in prejudice. **Strickland v. Washington**, 466 U.S. 668, 688-94 (1984).

STANDARD OF REVIEW

The Court set the standard for ineffective assistance of counsel in **Strickland**. The Court held to show a claim of ineffective assistance, there must be a showing that: 1) Counsel's performance fell below an objective standard of reasonableness; and 2) but for counsel's error, the result of the proceeding would have been different, or the result cannot be held to be a reliable result rendering the trial and/or proceeding fundamentally unfair. **Id.**, 466 U.S. 688-94. (1984).

The failure of retained appellate counsel to properly advise his client is

measured by a **Sixth Amendment** standard of prejudice that is more limited than the ordinary standard for ineffective assistance of counsel: "the appellant need not show that the proceeding that was forfeited due to counsel's ineffectiveness would've resulted in a favorable outcome, rather, it is only required that the appellant show that he or she would've availed himself of the proceeding had the conduct of counsel not caused a forfeiture." The Court has held that "there is no principled reason" that these standards for counsel and determining prejudice for ineffective assistance should not apply equally to an appellant whose attorney files a "no merit" Ander's brief. **Roe v. Flores-Ortega**, 528 U.S. 470, 484 (2000).

A. FACTS OF COUNSEL'S DEFICIENT PERFORMANCE LEADING UP TO THE FILING AN ANDER'S BRIEF AND IMPROPERLY ADVISING PETITIONER TO FILE A PRO SE RESPONSE PURSUANT TO ANDER'S PROCEEDINGS.

Petitioner's family retained Manual Diaz Law Firm to represent him during his direct appeal. However, Petitioner never signed any agreement with the law firm, their agreement was with the family member that retained there services. Appellate Counsel filed a motion for a new trial on October 28, 2021, to delay the deadline to file a notice of appeal. This was due to the agreement signed between Petitioner's family member and the law firm was only to review the appellate record for error, and any actual appeal would cost a significant fee.

However, Petitioner brought a motion to bring notice of appeal on November 15, 2021, due to the law firm never corresponding with the Petitioner about the delay tactic of their Motion for New Trial. Truly, Petitioner received his first communication from the law firm when he received counsel's motion to withdraw and Ander's brief. The trial Court re-certified Petitioner's right to appeal. **See Trial Court's Clerk's Record.**

On July 11, 2022, Petitioner received his first communication from Manual Diaz Law Firm, which, included their motion to withdraw, Ander's Brief, and pro se motion for access to the appellate record to be filed in the Court of Appeals. Counsel's letter and motion tracked the language of **Ander's** proceedings requiring appointed counsel to inform appellant of his: 1) right to file a "pro se response" to the Ander's Brief pursuant to **Anders v. California**, 386 U.S. 738 (1967) and **Kelly v. State**, 436 S.W.3d 313 (Tex. Crim. App. 2014); 2) right to review the appellate record; and 3) right to file a pro se petition for discretionary review.

The Court of Appeals sent an order, directing Petitioner that he had thirty (30) days to file a "pro se response" to counsel's Ander's brief due on August 11, 2022. **Appendix C.** However, Petitioner could not file a response due to Counsel failing to provide a copy of the appellate record with his motion to withdraw and Ander's brief. Petitioner filed a motion for access to the record and an extension of time to file his response. **Appendix D.** The Petitioner received an extension to **October 10, 2022**. **Appendix F.** Petitioner received the record from counsel except the vior dire. **Appendix E.** About three (3) weeks later he received the voir dire. **Appendix H.**

The Petitioner filed a pro se response pursuant to the standards in **Ander's** and **Kelly** as directed by the Court and appellate counsel. Petitioner raised one ground geared to this standard that only required Petitioner to present one arguable issue to the court, then the court would appoint new counsel to brief the issue and review the record. Further, the issue[s] would be argued in the normal course of an appeal. **Id.**, 386 U.S. 738; 436 S.W 313.

Moreover, the provision's in **Ander's** and **Kelly** do not apply to retained Counsel. When retained Counsel believes the appeal has no merit, he is required to file a motion to withdraw, and to inform client he has the right to: 1) hire

new counsel to perfect the appeal; or 2) file a "pro se Brief" in the normal course of an appeal. Due to counsel's error, the Petitioner was denied his due process right to an appeal in the normal course by either hiring new counsel or proceeding pro se in the normal course of an appeal.

B. THE SUPERVISORY ROLE OF APPELLATE COURTS TO PROPERLY CORRECT COUNSEL, BUT MORE IMPORTANTLY COUNSEL'S INEFFECTIVENESS FOR FAILING TO PROPERLY ADVISE HIS CLIENT AND HIS ERRONEOUS FILING OF AN ANDER'S BRIEF WHEN THE PROCEEDING WAS NOT AN ANDER'S PROCEEDING.

Truly, Appellate Courts have a supervisory role in guaranteeing representation by counsel, retained counsel is allowed to withdraw only "upon such terms and conditions as may be deemed appropriate by the appellate court." **Tex. R. App. Proc. Rule 6.5**; **Oldham v. State**, 894 S.W.2d 561, 562 (Tex. App.--Waco 1995)(duties of appointed counsel and appellate court under **Anders v. California**, 386 U.S. 738 (1967), not applicable to retained counsel.). To fulfill this minimum requirement, retained counsel's motion to withdraw must be accompanied by a showing that a copy of the motion was furnished to the convicted defendant along with information concerning impending deadlines. In addition, retained counsel who wishes to withdraw must provide the appropriate court with the last known address and phone number for the appellant that counsel represents.

The failure of appellate counsel to "follow these requirements" (advising client of option to file PDR etc.) is measured by a **Sixth Amendment** standard for prejudice that is more "limited" than the ordinary standard for ineffective assistance of counsel; the appellant need not show that the proceeding that was forfeited due to Counsel's poor performance would've resulted in a favorable outcome, rather, it is only required that the appellant show that he or she was **deprived of that proceeding** and that the appellant would've availed

himself of the proceeding had conduct of counsel not caused a forfeiture. Ex parte Crow, 180 S.W.3d 135, 137-38 (Tex. Crim. App. 2005). The Texas Court of Criminal Appeals held, "there is no principled reason" that these standards for counsel and determing prejudice for ineffective assistance should not apply equally to an appellant whose attorney files a "no merit" Ander's brief. Ex parte Owens, 206 S.W.3d 670, 674 (Tex. Crim. App. 2006)(Quoting Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

However, this Court in Smith v. Robbins held, "appellate counsel examines the trial record with an advocate's eye, identifying and weighing potential issues for appeal. This is review, not by a dispassionate legal mind but by a committed representative, pledge to his client's interests, primed to attack the conviction on any ground the record may reveal [this is true regardless of the heinousness of the crime or the financial situation of defendant]. Id., 528 U.S. 259, 292-93 (2000). If Counsel's review reveals arguable trial error, he prepares and submits a brief on the merits and argues the appeal.

A defendants right to the first point is, a partisan scrutiny of the record and assessment of potential issues, goes to the irreducible core of the lawyer's obligation to a litigant in an adversary system, and we have consistently held it is essential to substantial equality of representation by counsel. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice." Penson v. Ohio, 488 U.S. 75, 84 (1988); See e.g., Ellis v. United States, 356 U.S. 674, 675 (1958); Douglas v. California, 372 U.S. 353, 357-58 (1963); McCoy v. Court of App. of Wis., Dist. 1, 486 U.S. 429, 438 (1988). The right is unqualified when a defendant has retained counsel, and I can imagine no reason that it should not be so when counsel has been appointed. Id., at 292-93.

A defendants right to the second point is merits briefing, and is not similarly unqualified. The limitation on the right to a merits brief is that no one has a right to a wholly frivolous appeal. However, when a defendant has retained counsel, the defendant has the right to: 1) hire new counsel; or 2) file a pro se brief in the normal course of an appeal and proceed in the self-representation status. Id.

This Court's clearly established prejudice standard in several precedents held, "the likelihood of a better outcome from a waived or forfeited proceeding is not the correct prejudice standard because 'we cannot accord any presumption of reliability' to judicial proceedings that never took place." Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000)(citing Simth v. Robbins, 528 U.S. 259, 286 (2000). In those circumstances the different outcome question may be relevant to the extent that it sheds light on whether the deficient performance really did affect the defendant's decision making, but, it is not the measure of prejudice. In the Petitioner's case, his decision was made by Counsel's advise in his letter and ultimately the Court of Appeals order based on Counsel's poor performance, directing him to file a "pro se response" pursuant to Anders v. California and Kelly v. State. 387 U.S. 738; 436 S.W.313.

C. PETITIONER HAS SHOWN COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND PREJUDICE.

The Petitioner has shown deficient performance by counsel and prejudice. As this Court held in Strickland, "prejudice may be reasoned in one of two ways: 'a reasonable probability of a different outcome or a reasonable probability of a different decision by the defendant.'" Id., at 688-94. Choosing between the two depends on the possible result of the deficient performance. Id. For example, if the deficient performance pertained to a guilty verdict, then prejudice would depend on "a reasonable probability that, absent the error[s], the fact-

finder would've had a reasonable doubt respecting guilt." **Strickland**, 466 U.S. at 695. If the deficient performance pertained to punishment, then prejudice would depend on a reasonable probability that the sentencer would've assessed a more lenient punishment absent the error[s]. Id. But if the deficient performance might have cause the defendant to waive a proceeding he was otherwise entitled to, then a reasonable probability that the deficient performance caused the waiver/forfeiture fulfills the prejudice requirement. **Lee v. United States**, 137 S.Ct. 1958, 1965 (2017).

Indeed, the possibility of a different outcome is the wrong prejudice standard in Petitioner's case. The different-outcome question is relevant only to the extent that it sheds light on whether the deficient performance affected the Petitioner's decision making. **Roe v. Flores-Ortega**, 528 U.S. at 486.

Appellate Counsel did not communicate with Petitioner whatsoever before he filed an Ander's brief. Counsel failed to ask Petitioner how he wished to proceed and this denied the Petitioner to be the master of his appeal which is no different than being the master of defense during trial. The Petitioner would have hire new counsel or proceeded in the pro se status (self-representation) and filed an appellate brief in the normal course of an appeal had he been advised that the proceeding was not an Ander's proceeding. **McCoy v. Louisiana**, 584 U.S. 414 (2018); **Faretta v. California**, 422 U.S. 806 (1975). Further, the H.H. Coffield Unit Mailroom Supervisor will provide this court with an affidavit stating that Petitioner did not receive any mail from Manual Diaz Law Firm prior to July 12, 2022.

Appellate Counsel states in his affidavit that: "During the representation of Mr. Cruz, it became apparent to Affiant that the family that was paying the legal bills did not have a lot of money as it was difficult for Affiant to

get the money from the family for the transcripts. Knowing that the family's financial situation was tight, even though Affiant was now flung into Appellate court unwittingly by Mr. Cruz's notice of appeal, Affiant did not want to charge the family any additional money (a retainer for an actual appeal would be substantially higher than that contained in the agreement between the parties)[Petitioner was never a party to any agreement] until such time as affiant could determine from his review whether there was actually a basis for an appeal." Appellate Counsel, basically states he filed an Ander's brief based on the assumption that "the family paying the bills did not have a lot of money and didn't care what the Petitioner wished to do." Appendix S, Pg. 4-5.

Even though, the merits and outcome of Petitioner filing an Appellate Brief in the normal course of an appeal is irrelevant, Petitioner would've raised the following issues on appeal: 1) sufficiency of the evidence in count 1; 2) Petitioner was denied Due Process, Fifth Amendment, Fourteenth Amendment, and fundamental fair trial rights by forcing him to choose one constitutional right over another by the admission of the audio recording; 3) Ineffective Assistance of Counsel for failing to properly object to the admission of the audio recording that forced Petitioner to choose one constitutional right over another by forcing him to testify on his behalf; 4) Ineffective Assistance of Counsel for eliciting testimony of an sexual extraneous offense by Complainant's sister (defense 1st witness) due to Counsel's complete failure to investigate, interview, depose, and prepare the witness. If any doubt remained with the jury about guilty or not-guilty, there minds were sealed here.

Moreover, the ultimate decision on the advisability of an appeal rests with the defendant. If the defendant wishes to appeal despite the advice of retained

Counsel to forgo the appeal, retained counsel should decide whether to continue representation. If the decision is made to withdraw, Counsel should ensure that the defendant has retained other competent counsel or know how to effectuate the appeal. See **Martin v. Texas**, 694 F.2d 423, 426 (5th Cir. 1982)(denial of effective assistance when counsel fails to advise appellant of appellate rights and to implement them.). Obviously, retained counsel failed to ensure that the Petitioner knew that he was to file an "appellate brief" in the normal course of an appeal or hire new counsel. Furthermore, counsel failed to advise Petitioner that his appeal was not an Ander's proceeding.

Taken together, the facts/record, and appendix volume with the authority above, the Petitioner has shown a clear conflict among the State courts with this Court's authority and even the Fifth Circuit Court of Appeals authority. Therefore, there is not a member or solictor general of this Court that could rationally decide that the issue above is not worthy of granting certiorari. This Court must GRANT certiorari.

QUESTION THREE

DID TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE FOR FAILING TO INVESTIGATE, INTERVIEW, DEPOSE, AND PREPARE DEFENSE FIRST WITNESS, ARIANA HERNANDEZ, WHICH ELICITED EXTRANEOUS OFFENSE TESTIMONY, DENYING A FUNDAMENTALLY FAIR TRIAL AND PUNISHMENT?

Trial Counsel's performance fell below an objective standard of reasonableness by his failure to investigate, interview, depose, and prepare defense first witness, Ariana Hernandez, the Complainant's older sister. Due to Counsel's deficient performance he elicited testimony of extraneous offense in a sexual nature that: "Petitioner put his hand up her shirt; touched her sister; and she believes her sister." This was a fatal blow to Petitioner's defense at this point, and coupled with the unconstitutional admission of the audio recording,

it was "check mate." Truly, there was no way to overcome the prejudice to his defense, because of counsel's deficient performance the end result was a fundamentally unfair trial and punishment proceeding. See **Strickland**, 466 U.S. 668, 688-95 (1984).

STANDARD OF REVIEW

This Court set this standard in **Strickland v. Washington**. To prove a claim of ineffective assistance of counsel, a Petitioner must show: 1) counsel's performance fell below an objective standard of reasonableness; and 2) but, for counsel's error, there is a reasonable probability that the outcome would have been different or the result cannot be held to be reliable rendering the trial and/or punishment fundamentally unfair. Id., 466 U.S. 668, 688-95.

A. FACTS LEADING TO COUNSEL ELICITING EXTRANEOUS OFFENSE TESTIMONY FROM DEFENSE FIRST WITNESS ARIANA HERNANDEZ.

Trial Counsel rendered ineffective assistance to a fundamental degree, when his performance fell below an objective standard of reasonableness by his failure to investigate, interview, depose, and prepare the defense first witness, Ariana Hernandez. Counsel's complete failure caused him to "not know" that the witness was going to make allegations of inappropriate touching by Petitioner, that he "put his hand up her shirt and touched her breasts," "touched her sister," and that "she believes her sister." Ariana Hernandez was the defense first witness in guilt-innocence. Ms. Hernandez testified that she was sixteen years old and would be seventeen soon. She remebered the movie "It," the clown movie. It wasn't a special day. It was just like the first time that he [Petitioner] had touched me and my sister.**RR3, 135-40**. On cross-examination, Ariana identified the Petitioner as the person that put his hand up her shirt. And she "believes" her sister. **RR3, 140**. Counsel was constitutionally ineffective to a fundamental degree for not doing the minimum that any reasonable attorney

would to prepare a witness, and most importantly to know what the witness is going to testify to.

The result of counsel's failure was a denial of the advocacy counsel is to a criminal defendant. This was a blow to the defense and Petitioner. There was absolutely no way to get the testimony out of the minds of the jury. There is not any jury instruction in the world that would actually convince a jury to disregard the extraneous offense testimony. Counsel never requested for any curative instruction. The defense case-in-chief was essentially over at this point. One could say that this error compares to a **Cronic**, claim. The prejudice was so severe that it was impossible to overcome.

B. COUNSEL'S FAILURE TO INVESTIGATE, INTERVIEW, DEPOSE, AND PREPARE THE WITNESS CANNOT BE CONSIDERED PART OF A REASONABLE TRIAL STRATEGY FOR HIS FAILURE TO PREVENT THE ELICITED EXTRANEOUS OFFENSE TESTIMONY, AND THE TESTIMONY BOLSTERING THE COMPLAINANT'S TESTIMONY

This Court in **Buck v. Davis**, found Counsel to be ineffective for eliciting testimony that, Buck's race was "competent evidence of an increased probability of future violence." **Id.**, 580 U.S. 100 (2017).

At trial, Buck's counsel, despite knowing Dr. Quijano's view that Buck's race was competent evidence of an increased probability of future violence, defense counsel called Dr. Quijano to the stand and asked him to discuss the "statistical factors," he had "looked at in regards to this case." **Id.**, at 145a-146a. Dr. Quijano responded that certain factors were "know[n] to predict future dangerousness," and consistent with his report, identified race as one of them. **Id.**, at 146a. "Its a bad commentary," he testified, "that minorities, hispanics, and black people, are over represented in the criminal justice system." **Ibid.** Through further questioning, counsel elicited testimony concerning factors Dr. Quijano thought favorable to Buck, as well as his ultimate opinion

that buck was unlikely to pose a danger in the future. At the close of Dr. Quijano's testimony, his report was admitted into evidence. Id., at 150a-152a. The Fifth Circuit Court of Appeals vacated the judgment in regards to Buck's counsel's ineffective assistance at the punishment phase. **Buck v. Davis**, 865 F.3d 215 (5th Cir. 2017).

In Petitioner's case, trial counsel elicited testimony from the defense first witness during guilt-innocence that, Petitioner "put his hand up her shirt and touched her breasts, touched her sister, and that she believs her sister that he rubbed her vagina with his hand and fingers, and rubbed his erect penis against her butt." The alleged touching was to have occurred over the clothes. **RR3, 135-40**. The elicited testimony here is much more prejudicial than the testimony elicited in **Buck's** punishment phase. **RR3, 135-40**; **Buck**, 580 U.S. at 104-07.

The Court of Appeals of Texas in **Stone v. State** held, "we hold that under the facts of this case, Counsel's decision to elicit testimony regarding the prior murder conviction cannot be considered part of reasonable trial strategy. We believe that where, as here the record affirmatively demonstrates that counsel took some action in defending his client that no reasonably competent attorney could have believed constituted sound trial strategy, the defendant has shown he received ineffective assistance of counsel. We hold, therefore, that counsel's performance in eliciting that testimony was deficient representation that fell below the objective standard of reasonableness." Id., 17 S.W.3d 348, 353 (Tex. App.--Corpus Christi, 2000, pet ref'd). See **Thompson v. State**, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); **McFarland v. State**, 928 S.W. 2d 482, 500 (Tex. Crim. App. 1996).

Evidence of extraneous offenses is inherently prejudicial and harms a

defendant, in part because it forces the defendant to defend against charges that are not part of the present prosecution and also because it encourages the jury to convict on bad character instead of proof of the specific crime charged. Here, the outcome of the trial essentially depended on the jury's evaluation of the credibility of Petitioner and his accuser, whose testimony was significantly corroborated by Ariana's testimony about her own similar encounter with Petitioner. Ariana's testimony therefore harmed the defense by diminshing Petitioner's credibility and bolstering the Complainant's testimony about the abuse. Furthermore, Ariana's account of her encounter with Petitioner prevaded the trial and defense, such that trial counsel's error had a significant impact on the representation as a whole. RR3, 135-40.

When viewed in the context of the entire record, counsel's deficient performance undermined Petitioner's credibility which was at the vary heart of his defense after being forced to testify due to the admission of the audio that forced him to choose one constitutional right over another. The course of conduct undertaken by trial counsel cannot be considered sound trial strategy. Therefore, counsel's deficient performance is sufficient to undermine this court's confidence in the verdict. **Strickland**, 466 U.S. at 694.

Petitioner's trial counsel's performance was deficient and the harm to the defense was fatal. Petitioner's defense and case-in-chief was absolutely over. The damage was done and he was convicted before the trial ended. Taken together, this Court should grant certiorari.

QUESTION FOUR

DID TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT THAT THE ADMISSION OF THE AUDIO RECORDING FORCED PETITIONER TO CHOOSE ONE CONSTITUTIONAL RIGHT OVER ANOTHER, VIOLATING HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT, DUE PROCESS, AND CONSTITUTIONAL RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND PUNISHMENT?

The Petitioner argues, that trial counsel's performance fell below an objective standard of reasonableness by his failure to object to the fact that "the admission of the audio recording was forcing Petitioner to choose one constitutional right over another." RR3, 101-14. Cousnel's error forced Petitioner to testify, because he was the only person that could put context with this audio recording, when their was absolutely no wrong doing admitted.

STANDARD OF REVIEW

This Court set the standard in **Strickland v. Washington** and held to prove a claim of ineffective assistance of counsel, a Petitioner must show that: 1) Counsel's performance fell below an objective standard of reasonableness; and 2) but for Counsel's deficient performance there is a reasonable probability that the outcome would have been different or the result cannot be held to be reliable, rendering the trial and/or punishment fundamentally unfair. Id. 466 U.S. 668, 687-95 (1987).

A. FACTS SURROUNDING THE AUDIO OF INTERROGATION THAT WAS ADMITTED AND FORCED PETITIONER TO CHOOSE ONE CONSTITUTIONAL RIGHT OVER ANOTHER, DENY HIS CONSTTITUTIONAL RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND PUNISHMNET DUE TO COUNSEL'S DEFICIENT PERFORMANCE.

The Petitioner was arrested on May 01, 2020, and booked into the Midland County Jail. On May 01, 2020, Detective Edelmira Subia, (MCSD) was notified Petitioner was in custody. Due to COVID-19, Det. Subia had to make special

arrangements to interview Petitioner. On May 04, 2020, during the interview the Petitioner never admitted to any wrong doing or crimial offense[s]. RR3, 100. Det. Subia was the state's last witness in their case-in-chief. The audio recording is State's Exhibit #6.

Trial Counsel objected to the admission of the audio recording under the hearsay rule and Fifth amendment violations. Counsel admitted he had reviewed the recording and there was no admission of any wrong doing. Counsel believed the recording was not admissible due to Petitioner never admitting to any wrong doing or criminal offense[s].

However, counsel never made an objection that this recording was forcing Petitioner to take the stand and testify, in turn, waiving his Fifth Amendment. The state made the move to admit the audio recording to force Petitioner to testify because the Petitioner was the only person that could put context with his statements in the recording.

Indeed, this admission was the very reason why defense counsel told Petitioner: "you have no choice but to get on the stand and testify to the context of the recording." The admission of this forced Petitioner to choose one Constituional right over another, and forgo his Fifth Amendment right to not testify on his own behalf.

B. IT IS INTOLERABLE TO FORCE A DEFENDANT TO CHOOSE ONE CONSTITUTIONAL RIGHT OVER ANOTHER.

This Court held in Simmons v. United States that: "The rule adopted by the courts below does not merely impose upon a defendant a condition which may defer him from asserting a Fourth Amendment objection -- it imposes a condition of a kind to which this court has always been peculiarly sensitive. For a Defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which

have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's self-incrimination clause because the testimony was voluntary. Steller v. United States, 57 F.2d 627. As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.

However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. Where this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in Simmons, Garrett was obliged either to give up what he believed, with advise of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. Id, 390 U.S. 377, 393-94 (1968).

This Court in Kentucky v. Stincer held that, "this court has on occasion held that a forced choice between two fundamental constitutional guarantees is untenable. Id., 482 U.S. 730, 753 (1987)(quoting Simmons, 390 U.S. 377, 394 (1968))(Defendant's testimony in support of motion to suppress evidence under the Fourth Amendment may not, under the Fifth Amendment be admitted over an objection at trial as evidence of defendant's guilt.). A trial according to Due Process of Law is a trial according to the "law of the Land"—the law as enacted by the Constitution or the Legislative Branch of Government, and not

"laws" formulated by the Courts according to the "totality" of the circumstances." Simmons, 390 U.S. at 396.

C. STATEMENTS DEEMED TO BE TESTIMONIAL AND NON-TESTIMONIAL

This Court has clearly explained what statements constitute to be testimonial and non-testimonial. Whether a particluar out-of-court statement is testimonial is a question of law.

The primary focus in determining the threshold issue of whether a hearsay statement is "testimonial" is upon the objective purpose of the interview or interrogation, not upon the defendant's expectations. Davis v. Washington, 547 U.S. 813, 822-23 (2006). A statement is more likely to be testimonial if the person who heard, recorded, and produced the out-of-court statement at trial is a government officer. In Petitioner's case, the person who heard, recorded, and produced the audio was a Midland County Sheriff Detective.

D. IS A DEFENDANT'S CONFESSION, INTERROGATION, OR INTERVIEW DEEMED TO BE TESTIMONIAL?

This Court's decision in Crawford v. Washington only applies to "testimonial" out-of-court statements, the "comprehensive definition," of which the Court intentionally left to be worked out in future cases. Id., 541 U.S. 36, 38 (2004). Nonetheless, the Court made it clear that a statement made in response to police interrogation falls squarely within its "core class" of testimonial statements. Id., 51, 52, 53. To reach this position, Justice Scalia, writing for the majority in Crawford, started with the language of the Confrontation Clause: "In all prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. V. Justice Scalia, then turned to history to determine whether the founders understood "Witnesses against a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between." Craw-

ford, 541 U.S. at 42-43. Notwithstanding this indication of a somewhat broader inquiry, Justice Scalia's focuse thereafter is almost exclusively upon out-of court statements that might have been offered in evidence at trial and whether cross-examination of such a statement was a prerequisite to its admissibility. Id., 43-46. One source of evidence similar to a modern police interrogation was the "Marian" bail and Committial proceedure, which "required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court." Id., at 44. And while there was once some doubt whether the cross-examination requirement applied to these interrogations, "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." Id., at 46.

Those who must be cross-examined (i.e., witnesses) are those who give testimony that is "[a] solemn declaration of affirmation made for the purpose of establishing or proving some fact." According to Justice Scalia, it is therefore such "testimonial" statements, when offered into evidence at trial, which must have been cross-examined at the time made if the person who made the statement is unavailable to testify. Since "statements taken by police officers in the course of interrogations are testimonial," as a definitional matter, a defendant's own confession, interrogation, and interview should be included within this category.

D. ARE CONFESSIONS, INTERROGATIONS, AND INTERVIEWS HEARSAY?

While there is a "general agreement that the prosecution is entitled to introduce confessions, the conceptual basis for this position is somewhat unclear." 1 McCormick on Evid. § 144, at 20 (John W. Strong, 5th ed. 1999). The advisory Committee Notes (ACN) to the Federal Rules of Evidence do little to

elucidate what that conceptual basis might be. The ACN categorize statements by a party opponent as not hearsay because their admissibility "is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." One explaination of the Advisory Committee's position is:

The exceptions to the hearsay rule apply to admit hearsay when surrounding circumstances provide guarantees of reliability. There are no guarantees of reliability in the case of an admission. Therefore, admissions do not qualify for an exception to the hearsay rule. Nevertheless, admissions have been received into evidence since time immemorial. If they do not qualify as an exception, then they must have been received because they are not hearsay at all. **Roger C. Park et. al., Evidence Law**: A student's Guide to the Law of Evidence as Applied in American Trials § 7.07, at 274 (2nd ed. 2004); See also **Christopher B. Mueller & Laird C. Kirk Patrick, Evid**, § 8.27, at 797 (4th ed. 2009)("Individual Admission).

However, there is circularity in this rationalization that begs the real question. The essence of hearsay, as it is defined in the **Rules of Evidence**, is "an out-of-court assertion, offered to prove the truth of the matter asserted." **2 McCormick**, 5th ed., supra note 55, § 246, at 96; See **FRE & TRE 801**. Since a defendant's confession, interrogation, and interviews unambiguously meets this definition, how is it somehow mysteriously dubbed "not hearsay" just because it has been received in evidence from "time immemorial"?

One prominent twentieth century commentator tackled this conundrum head on. After examining and rejecting several theories for the admissibility of party statements for reasons other than as exceptions to the hearsay rule, Professor Edmund M. Morgan concluded:

Certain it is that extra-judicial admission are received in evidence. Equally certain is that they are received for the purpose of proving the truth

of the matter admitted. It is likewise certain that they do not fall within that exception to the rule against hearsay which admits declarations against interest. These are the facts, and from them the conclusion is inevitable that they are received as an exception to the rule against hearsay, and not that they are received on any theory that are not hearsay.

Indeed, such statements are admitted into evidence as exceptions to the hearsay rule because "all the substantial reasons for excluding hearsay" do not apply to these statements. The party against whom they are offered cannot complain about the "lack of confrontation," the "lack of opportunity for cross-examination," or the fact that he/she "was not under oath." Thus, Professor Morgan faced an inescapable fact that confessions, interrogations, and interviews fall squarely within the definition of hearsay and that they are admissible as an exception to that rule. Given the definition of hearsay, the logic of this position is unassailable. This is unconstitutional as applied to Petitioner's case. Therefore, confessions, interrogations, and interviews should be classified as "testimonial hearsay" where there is absolutely no admission to any wrong doing, nor any criminal offense[s] for Crawford purposes.

F. CRIMINAL DEFENDANT'S ARE NOT UNAVAILABLE TIL HE OR SHE EXERCISES THEIR FIFTH AMENDMENT RIGHT TO NOT TESTIFY.

Despite the catergotization of a confession, interrogation, and interviews as "testimonial hearsay," Crawford's cross-examination requirement would apply only if the declarant is unavailable as a witness at trial. Id., 541 U.S. at 59. But what exactly does unavailable mean? Does it mean unavailable entirely, or unavailable to the party seeking to introduce the out-of-court statement? If unavailable means, unavailable to the party offering the evidence of an out-of-court statement, then a criminal defendant is clearly unavailable as a witness when the prosecution offers his confession, interrogation, and interv-

view in its case-in-chief. The Federal Rules of Evidence and Texas Rules define the relevant form of unavailability as; "A declarant is considered to be unavailable as a witness if the declarant: 1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies ... ." This test of unavailabilty clearly applies to a criminal defendant who has a valid claim of privilege that prevents the prosecution from calling him or her as a witness. So, at least in that sense, a defendant is unavailable as a witness at the time the prosecution offers his or her confession during its case-in-chief. See United States v. Lilley, 581 F.2d 182, 187 (8th Cir. 1978)(holding that the defendant's husband was unavailble to prosecution as a witness during its case-in-chief due to defendant's invocation of maritial privilege).

On the other hand, a criminal defendant is clearly not unavailable as a witness in any absolute sense. He or she has the right to testify on their behalf. Rock v. Arkansas, 483 U.S. 44, 51 (1987). Moreover, he or she has an advantage that other witnesses do not have -- the Confrontation Clause guarantees his or her right to be present in court while the prosecution witness[es] testify. Indeed, the fact that the defendant has that advantage, as well as the option to testify, seems to undergrid the admissibility of confessions, interrogations, and interviews as exceptions to the hearsay rule.

G. A DEFENDANT CANNOT BE FORCED TO CHOOSE ONE CONSTITUIONAL RIGHT OVER ANOTHER DUE TO THE LAW OF EVIDENCE.

This Court has rejected the view that the Confrontation Clause applies of its own force to in-court testimony, and its application to out-of-court statements introduced at trial depends upon "the law of evidence for the time being." Leaving the regulation of out-of-court statements to the law of evidence would render the confrontation clause powerless to prevent even the most flagrant

inquisitorial practices.

The results of this Court's decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of their rationales. This Court's decision in **Ohio v. Roberts** conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Id., 448 U.S. 56, 66 (1980). This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analyis whether or not the hearsay consists of ex parte testimony. This often results in close Constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, the test is too narrow: it admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

However, where testimonial statements are involved, this Court does not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the Rules of the Evidence, much less to amorphous notions of "reliability." Certainly, none of the authorities discussed above acknowledge any general reliability exception to the common-law rule. Admitting statements deemed reliable by a Judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about desirability of reliable evidence, but about how reliability can best be determined.

In the end, this Court must GRANT certiorari because Tex. R. Evid. Rule 801(e)(2)(A) and Fed. R. Evid. Rule 801(d)(2)(A) is unconstitutional as applied to Petitioner's case, because it forced Petitioner to choose one Constitutional right over another. The Petitioner was denied Due Process right, Fifth, Sixth, Fourteenth Amendment, and a fundamentally fair trial when he was forced to testify by the admission of the audio recording that caused him to forgo his right not to testify by the ineffective assistance of counsel failing to properly object.

H. PETITIONER HAS SHOWN COUNSEL'S DEFICIENT PERFORMANCE AND PREJUDICE.

This Court in United States v. Dominguez-Benitez, 542 74, 83 n.9 (2004) ("The reasonable-probability standard is not the same as, and should not be confused with a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different. See Kyles v. Whitley, 514 U.S. 419, 434 (1995)). Moreover, a hung jury on one count in an indictment is enough to show prejudice and there is no authority from this court that requires a showing that a defendant would have been acquitted.

Therefore, the Petitioner has made the required showing in the facts and record, along with this Court's authority that the Petitioner received ineffective assistance of counsel to a fundamental degree that denied him a fundamentally fair trial and punishment. This Court must GRANT certiorari to stop the question above to keep occurring.

CONCLUSION

Taking into consideration the four questions above and the magnitude of the impact it has on criminal defendant's fighting for their life to be free, this Court must GRANT certiorari to prevent this injustice from reoccurring. The American Justice System depends on this Court to set the precedent and

to ensure that criminal defendants receive a fundamentally fair trial and punishment. Without this Court's intervention then errors will keep occurring in our American Justice System.

Respectfully Submitted,

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