No. 24-562

IN THE

Supreme Court of the United States

NARJES MODARRESI,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Narjes Modarresi (Modarresi) was convicted for killing her two-month-old son, Masih Golabbakhsh (Masih), by placing him face down in the mud. She contends that the Texas Court of Criminal Appeals (TCCA) erred during state habeas review when it denied her ineffective-assistance-of-trial-counsel claims. Specifically, she argues that the TCCA's decision, by overruling the lower court's recommendation to grant habeas relief, was contrary to this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984).

Respondent (the "State") objects to Modarresi's Questions Presented. Instead, the State suggests the following:

> Should the Court grant certiorari to determine whether the TCCA's denial of garden variety ineffective-assistance-of-trial-counsel claims was contrary to *Strickland* when the decision below is splitless, fact-bound, and correct?

LIST OF PROCEEDINGS

State v. Modarresi, No. 1260243 (339th Dist. Ct. Harris County, Tex.) (convicted and sentenced to life without parole).

Modarresi v. State, 488 S.W.3d 455 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (affirming conviction).

Ex parte Modarresi, No. 1260243-A (339th Dist. Ct. Harris County, Tex.) (Applicant's Revised Proposed Findings of Fact and Conclusions of Law signed by the trial court on July 13, 2023).

Ex parte Modarresi, No. WR-94,504-01, 2024 WL 4284695 (Tex. Crim. App. Sept. 25, 2024) (denying state habeas application).

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BRIEF IN OPPOSITION

The State of Texas respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Narjes Modarresi.

INTRODUCTION

Modarresi fails to identify any questions that warrant this Court's review. The issues decided below involved highly fact-bound applications of settled *Strickland* precedent. As required under *Strickland*, the TCCA firmly restricted its determination to the particular circumstances facing trial counsel in 2014, the time of trial. The state court's unpublished decision also necessarily contemplates the eight-year delay between the time Modarresi filed her state habeas application and the time of trial. Her delay meant that the lead defense attorney could no longer recall the circumstances of trial, or the rationale behind his strategic and tactical decision-making.

Modarresi spends most of her brief arguing that her statements and act of leading officers to her son's body could have been suppressed at trial. She only fleetingly contends that trial counsel's strategic decision against a motion to suppress was not valid because counsel mistakenly stated—in an e-mail to habeas counsel—that such a strategy supported an "insanity" defense. However, the live state habeas evidentiary hearing, again held eight years later, made clear that trial counsel had little recollection of the trial. In any event, the record plainly reveals that trial counsel strategically

chose not to seek suppression so that he might use the resulting mental health testimony for negating the necessary intent required for a capital murder conviction.

Modarresi does not argue any split of authority, and essentially asks the Court to renounce years of precedent granting counsel the wide latitude needed for making tactical decisions at trial. Indeed, Modarresi pursues simple error correction for its own sake, with reference to a conveniently limited description of the state court record.

She alleges nothing more than that the TCCA misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Accordingly, Modarresi's complaints do not warrant certiorari review.

OPINIONS BELOW

The TCCA's opinion denying Modarresi's state habeas application (located at Pet'r App. 1a–2a) is available at 2024 WL 4284695. The state district court's findings and conclusions (located at Pet'r App. 3a–39a) are unreported.

JURISDICTION

The Court has jurisdiction to review the TCCA's judgment denying Modarresi habeas relief under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Question Presented concerns the familiar Sixth Amendment right to "effective counsel" as described in *Strickland*, 466 U.S. 668.

STATEMENT OF THE CASE

In May 2014, a Texas jury convicted Modarresi of capital murder for intentionally or knowingly causing the death of her two-month-old son, Masih Golabbakhsh ("Masih") by placing him "face down in the mud." *Modarresi v. State*, 488 S.W.3d 455, 458 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see* Tex. Penal Code § 19.03(a)(8) (West 2010) (defining the offense). Because the State did not seek the death penalty, "the trial court assessed a mandatory sentence of life imprisonment without parole." *Modarresi*, 488 S.W.3d at 458.

I. Facts Concerning Modarresi's Murder of Her Son, Masih.

The Fourteenth Court of Appeals of Texas provided a lengthy and detailed summary of the evidence at trial in its opinion affirming Modarresi's conviction and sentence on direct appeal. *Modarresi*, 488 S.W.3d at 458–62. At the time of the offense, Modarresi lived with her husband, Amir Golabbakhsh ("Amir"), in Houston,

Texas with their two children, Masih and a three-year-old son, as well as Amir's parents. *Id.* at 458. On the afternoon of April 21, 2010, while Amir and his father were not at home, Modarresi told her mother-in-law that she (Modarresi) was taking Masih to visit one of Modarresi's friends. *Id.* Modarresi then left the house and proceeded on foot with Masih in a stroller. *Id.* The mother-in-law noticed that Modarresi walked in a different direction than she should take to the friend's house. *Id.*

At about 4:00 p.m. the same day, Jessica Shaver was sitting on the porch of her home when she saw Modarresi walking down the street pushing a stroller with a baby carrier attached. *Id.* She witnessed Modarresi begin to run and then slam the stroller into a curb causing the stroller and carrier to separate. *Id.* Modarresi ran away without retrieving them. *Id.* Shaver thought she had just witnessed someone abandoning a baby. *Id.* She and a passerby unrolled a blanket that had fallen out of the stroller but found only a pillow. *Id.* During that time, Rebecca Pike was visiting the home of Modarresi's friend when Modarresi arrived, very upset. *Id.* Despite Modarresi partially speaking in Farsi (their native language), Pyke understood from Modarresi that someone allegedly took her child. *Id.* Based on Modarresi's statements, Pyke relayed to a 911 operator that two black men took Masih. *Id.*

When the first responding police officer arrived, Modarresi reported that she had been walking by a park "when a black man pushed her down, took the baby, and entered a car driven by another black man." *Id.*

Modarresi provided descriptions of the car and the man who allegedly took the baby. *Id.* Notable, however, according to Shaver, "no black man approached Modarresi or took a baby when Modarresi slammed the stroller and ran away." *Id.*

Because of Modarresi's suspicious behavior and statements when police initially contacted her, Officer Jeremiahs Rubio requested Modarresi to show him where Masih was. *Modarresi*, 488 S.W.3d at 458–59. However, as Modarresi was leading Rubio to the bayou, she stopped short and claimed again that Masih was kidnapped. *Id.* at 459. The detective arranged for Modarresi's transportation to the police station for a statement. *Id.*

Upon arrival at the station, another detective, Phil Waters, and Officer Tony Jafari (who speaks Farsi) conducted a videotaped interview of Modarresi which "they characterized as a non-custodial interview, with the goal of finding Masih." *Id.* Modarresi discussed her significant mental health concerns. *Id.* at 461. Eventually, she led the officers to where she had left Masih's body. *Id.* at 459. Masih was found face-down in muddy water and covered in leaves and mud, near the same bayou where she earlier led Detective Rubio. *Id.* Muddy water was found in Masih's lungs, and mud and debris were found grasped in his tiny fists. *Id.*

After her arrest, Modarresi confessed to her husband that she killed Masih because she did not want to burden her mother-in-law. *Id.* at 461. Her husband also testified that Modarresi did not want to be pregnant with Masih

and had previously attempted an abortion using medication. *Id*. at 460. And after Masih's birth, she acted like she did not want to take care of him. *Id*. Modarresi later confessed in an interview that in preparation of killing Masih, she packed both a scarf that she planned use as a gag for Masih, and a spoon that she used to dig the hole in which she put Masih face down. *Id*. at 462.

II. Course of Proceedings

Modarresi was convicted for the capital murder of her infant son and was sentenced to life without parole on May 22, 2014. SHCR at 438–39.[1] As previously established, the intermediate court of appeals affirmed the judgment on April 19, 2016. *Modarresi*, 488 S.W.3d 455. Modarresi did not file a petition for discretionary review (PDR) with the TCCA. *See id*.

Approximately six years after the intermediate court affirmed her conviction, on July 13, 2022, Modarresi sought state habeas relief based on a single *Strickland* claim. Resp't App. 1c–9c. Accordingly, a live evidentiary hearing was held on November 10, 2022. Resp't App. 1a. Both trial counsel George Parnham (Parnham) and Dee McWilliams were present pursuant to Modarresi's subpoena, but Modarresi only called Parnham to testify. SHCR at 123–24; Resp't App. 9a.

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[1] SHCR" refers to the Clerk's Record of state habeas pleadings in *Ex parte Modarresi*, No. WR-94,504-01, 2024 WL 4284695 (Tex. Crim. App. Sept. 25, 2024).

The state habeas trial court[2] entered proposed findings—by signing Modarresi's Revised proposed Findings of Fact and Conclusions of Law—recommending that habeas relief be granted.[3] Pet'r App. 3a–39a. Notably, the district judge presiding over the state habeas proceeding did not preside over Modarresi's trial. SHCR at Summary Sheet; CR.1653; Pet'r. App. 39a. Thus, the state habeas court had no independent recollection of the trial proceedings and relied only upon the trial records and evidence from the evidentiary hearing. Regarding Modarresi's ineffective assistance claim, the state habeas trial court opined that trial counsel "did not have a sound strategic reason not to file

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[2] Under Texas procedure, "[j]urisdiction to grant postconviction habeas corpus relief on a final felony conviction rests *exclusively* with [the TCCA]. *Bd. of Pardons & Paroles ex rel. Keene v. Ct. of Appeals for Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (emphasis added). Hence, the state habeas trial court functions much like a "special master," authorized to make advisory factual findings and legal recommendations, which the TCCA is fully authorized to reject. *See, e.g., Ex parte Reed*, 271 S.W.3d 698, 728 (Tex. Crim. App. 2008) ("When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions.").

[3] In her petition, Modarresi improperly characterizes the trial court signing her proposed findings of fact and conclusions of law as a judgment. However, "[j]urisdiction to grant postconviction habeas corpus relief on a final felony conviction rests exclusively with" the TCCA. *See Keene*, 910 S.W.2d at 483; *see also* Tex. Code Crim. Proc. art. 11.07 § 3(a) ("After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas."). "Any other proceeding shall be void and of no force and effect in discharging the prisoner." *Keene*, 910 S.W.2d at 483.

a motion to suppress or object to [Modarresi]'s statements, her agreement to take (and act of leading) the officers to [Masih], and the discovery of the body." Pet'r App. 13a (Finding 51).

The TCCA, however, rejected the trial court's recommended findings and conclusions and denied relief in a reasoned, albeit briefly, written order. *Ex parte Modarresi*, No. WR-94,504-01, 2024 WL 4284695 (Tex. Crim. App. Sept. 25, 2024). The TCCA explicitly disagreed with the trial court's recommendation and concluded that, based on its own "independent review of the entire record," Modarresi had "not met her burden to obtain relief" under *Strickland*, 466 U.S. 688. *Id.* Modarresi now seeks a writ of certiorari.

SUMMARY OF THE ARGUMENT

Modarresi's issues are not worthy of certiorari. First, Modarresi cannot show that the TCCA's rejection of her ineffective assistance claim was contrary to *Strickland*. She can only propose simple error correction, which this Court's rules generally prohibit. Moreover, she presents no error rendering her state habeas proceeding unconstitutional. Finally, the TCCA correctly applied *Strickland* and its principles when it denied habeas relief. Using the passage of time to her advantage—something within her exclusive control—Modarresi created a strawman in an apparent effort to meet her burden of overcoming the powerful deference owed to trial strategy. Yet she failed to address, or even acknowledge, counsel's *actual* trial strategy. She failed to show that her trial attorneys' performances fell below

an objective standard of reasonableness. And she has not shown that, outside their alleged unprofessional errors, there was a reasonable probability that the result of her criminal proceeding would have been different.

ARGUMENT

I. The TCCA's Decision Was Narrowly Decided Based Upon a Fact-Bound Application of Clearly Settled Law Under *Strickland*.

Modarresi's petition fails from the outset. To begin, the gist of the single *Strickland* claim raised in her state habeas application was the following: at some point during her lengthy interview with police, the interrogation became custodial. Resp't App. 7c–8c. At this point, Modarresi contends police continued to question her, but failed to *Mirandize* her until after she eventually led them to Masih's body. Resp't App. 8c. Thus, the discovery of Masih "was the fruit of the unconstitutional interrogation . . . and [] her confession during the second interrogation was inadmissible as the fruit of the initial unconstitutional interrogation." Resp't App. 9c. According to Modarresi, trial counsel had no choice but to file a motion to suppress "her act of leading [police] . . . to her baby's body," and any other statements she made to police. Resp't App. 9c.

The TCCA rejected this *Strickland* claim, declined to adopt the lower court's findings, and concluded Modarresi simply failed to meet the *Strickland* standard. *Ex parte Modarresi*, 2024 WL 4284695, at *1 ("Based on the record, the trial court has determined

that trial counsel's performance was deficient and that Applicant was prejudiced. We disagree. Applicant has not met her burden to obtain relief under *Strickland* . . . Based on this Court's independent review of the entire record, relief is denied.").

Disagreeing with this record-based conclusion, Modarresi now asks this Court to review the TCCA's decision. But she fails to identify any questions that warrant this Court's review. *See* Sup. Ct. R. 10. The issues decided below are fact-bound resolutions of settled law. And like most applications of established *Strickland* precedent, the decision here creates no split of authority. Instead, Modarresi pursues basic error correction, arguing that the TCCA misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross*, 417 U.S. at 616–17. This point bears repeating: Modarresi asks the Court to review the entirety of a "cold" state record; to re-weigh evidence and resolve record-based factual disputes; and finally, to issue a reasoned opinion regarding a garden-variety *Strickland* claim. *See*, e.g., Pet. Cert. 26 ("The TCCA rejected the state habeas trial court's findings of fact, conclusions of law, and recommendation to grant relief despite the fact that the record and this Court's precedent fully support those findings and conclusions."). But the Court normally does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *accord* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings").

To be sure, Parnham initially told habeas counsel—in an e-mail prior to the evidentiary hearing—that he asserted an "insanity defense" when he did not. Resp't App. 2a–3a. Modarresi suggests that Parnham's strategy against suppressing the evidence of her inculpatory statements and actions to police in favor of pursuing an "insanity" defense was illusory because no such defense was raised at trial. Pet. Cert. 10. In other words, this inconsistency shows that Parnham must not have had a valid strategy for opting not to suppress her statements to police. *Id*. But Modarresi's claims unravel because she relies solely on Parnham's statements surrounding the evidentiary hearing while ignoring his conduct and statements at trial directly and expressly affirming his strategy. She also foregoes addressing other cumulative and admissible evidence presented at trial that supported her conviction.

The record here affirmatively contradicts Modarresi's suggestions. First, the evidentiary hearing made clear that Parnham had little to no recollection of Modarresi's trial. Resp't App. 8a (Q. "Do you remember representing her in this case?" A. "Independent of questions asked, I don't. But, based on questions asked, you know, my memory perhaps comes back to a degree. But I don't have any independent recollection."). But Parnham admitted during the hearing that he did not recall whether he reviewed anything before sending the "insanity defense" e-mail, and that he did not think they used an insanity defense at trial. Resp't App. 3a, 6a–7a. Parnham's inability to remember his planning and strategic thinking cannot satisfy Modarresi's burden of overcoming the strong presumption of reasonable

assistance. Indeed, all things being equal, counsel's failure to remember redounds in favor of attorney competence, not against. *See, e.g., Greiner v. Wells*, 417 F.3d 305, 326 (2d Cir. 2005) ("Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude, *Strickland*'s strong presumption must stand.").[4]

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[4] *See also Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) ("The problem is that by the time Thomas was asked about the matter at the state habeas hearing, a decade had passed and he could no longer remember his reasoning about not using Mrs. Romine's prior convictions to impeach her. But the placement of burdens in a federal habeas proceeding means that the effect of that problem falls on Romine."); *Fretwell v. Norris*, 133 F.3d 621, 623–24 (8th Cir. 1998) ("The trial had taken place nine years earlier, and counsel's files were later destroyed in a flood. Yet counsel testified at the hearing without reviewing the extensive state court record, which is part of our record on appeal. Because he was unprepared, counsel was unable to explain, or even recall, the reasons underlying much of his performance before and during trial. The district court repeatedly used counsel's inability to recall as establishing lack of competent performance. This violates the presumption that attorneys perform reasonably."); *Grayson v. Thompson*, 257 F.3d 1194, 1218 (11th Cir. 2001) (where record is silent why counsel did not file motion to suppress, court presumes counsel acted properly); *Murtishaw v. Woodford*, 255 F.3d 926, 952 (9th Cir. 2001) (a silent record means the allegations are not supportable and court assumes counsel consulted); *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, we will presume

Modarresi's pursuit of her *Strickland* claim over eight years after the trial surely contributed to Parnham's memory lapse. Regrettably, Modarresi takes advantage of Parnham's hazy memory in an effort to strengthen her *Strickland* claim. Second, and relatedly, Modarresi's reliance on Parnham's testimony at the habeas hearing also fails because counsel explicitly explained his strategy to the jury *during trial*. That is, while presenting his closing argument, Parnham invited the jury to use the mental health testimony to find Modarresi lacked the intent to commit murder. Resp't App. 2b–3b.

Finally, while Modarresi appears to acknowledge that this is a "fact-intensive" case involving "settled law," she nevertheless asks the Court for summary reversal. Pet. Cert. 26. In support of this, Modarresi first cites to *Porter v. McCollum*, 558 U.S. 40, 44 (2009), and *Hinton v. Alabama*, 571 U.S. 263, 273 (2014), as examples of where this Court summarily reversed because the lower court erred in rejecting an ineffective assistance claim. Pet. Cert. 26. However, both cases involve a failure to properly apply one of the two *Strickland* prongs by the lower court. In *Porter*, the state court failed to consider whether counsel was deficient. *Porter*, 558 U.S. at 39 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim de novo."). And in *Hinton*, the lower courts failed to properly evaluate the prejudice prong. *Hinton*, 571 U.S. at 276 ("Because

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that he did what he should have done, and that he exercised reasonable professional judgment.'").

no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*.").[5] Whereas here, the TCCA properly applied both *Strickland* prongs as discussed below.

In sum, the TCCA's decision does not "conflict" with any decision of this Court or of any other court. Modarresi advances no special or important reason to grant a writ of certiorari for her garden-variety *Strickland* claims. And none exist. The facts of each *Strickland* claim—particularly the underlying trial strategy of any given attorney—vary case-to-case. Stated again, Modarresi asks for simple error correction, which does not adequately justify the Court's review. *See* Sup. Ct. R. 10; *see also Salazar-Limon v. Houston*, 581 U.S. 946 (2017) (Alito, J., concurring) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case."). This is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)).

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[5] Modarresi also cites two cases supporting her argument that the Court decides fact-intensive cases where the lower courts have "egregiously misapplied settled law" Pet. Cert. 26. However, as discussed below, here, the TCCA did not misapply any settled law.

II. This Case Involves Straightforward *Strickland* Claims More Appropriate for a Federal Habeas Proceeding and Offers No Important or Compelling Reason for Review.

Where, as here, certiorari review is requested for a simple disagreement with a state court decision, consideration of state collateral review proceedings by this Court is particularly inapt. Justice Stevens explained:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of a stay). Justice Stevens's reasoning fits nicely here. Modarresi alleges that trial counsel were ineffective for failing to file a motion to suppress. Again, the TCCA found adversely to Modarresi based on the entire record, which supports trial attorney Parnham's strategic decision against seeking suppression. *Ex parte Modarresi*, 2024 WL 4284695. Parnham clearly explained in closing argument at trial, that "the defense in this case [was] to, in effect, negate the necessary intent, the mens rea that is so intrinsically important in the definition of felony

murder and capital murder in this case. That is the purpose of the mental health testimony that was produced." Resp't App. 2b–3b. And the TCCA implicitly found this strategy reasonable when it rejected Modarresi's claims. When reading the entire trial record, the decisions of counsel to act or not act at any given point line up with that strategy, as explained below.

Considering the above, there are significant prudential concerns raised by the procedural posture of Modarresi's case. It is undoubtedly the better course for the lower federal courts to consider these heavily fact-bound *Strickland* claims pursuant to 28 U.S.C. § 2254. Conveniently, Modarresi excludes or fails to fully discuss sections of the record running contrary to her claim, particularly the inculpatory evidence independent of her confession to the police. These include her confession to her husband, the autopsy of Masih, and other witness statements describing her suspicious behavior. Moreover, while Modarresi could proceed to federal district court to file a federal habeas petition pursuant to 28 U.S.C. § 2254, she would be likely barred by AEDPA's statute of limitations. *Id.*; 28 U.S.C. § 2244(d).

Nevertheless, Modarresi asks the Court to disclaim its historic preference of channeling garden-variety *Strickland* claims through federal habeas because her eight-year delay makes them untimely. In this, she seeks to deny the very purpose of the limitations period in 28 U.S.C. § 2244(d). Congress so designed the statute to ensure finality to state convictions. *See Duncan v.*

Walker, 533 U.S. 167, 179 (2001). The Court should reject Modarresi's invitation to subvert Section 2244(d).

III. Modarresi Presents No Meaningful Error in the Manner Through Which the TCCA Denied Relief.

Modarresi seemingly attacks the state habeas process when she asserts that the TCCA failed to conduct a "'probing and fact-specific' . . . analysis of either *Strickland* prong" because the TCCA did not "provide specific reasons for rejecting the ineffective assistance of trial counsel claim." Pet. Cert. 27. But contrary to this assertion, the TCCA issued a brief, yet reasoned, decision citing the controlling case for ineffective counsel claims.

Although succinct, the TCCA's written order plainly stated why the state habeas trial court's specific findings favorable to Modarresi were wrong, rejected those findings, found Modarresi failed to meet her burden, and then denied relief on its own "review of the entire record." *Ex parte Modarresi*, 2024 WL 4284695. As the TCCA explained in a previous opinion:

> When our independent review of the record reveals findings and conclusions that are unsupported by the record, we will, understandably, become skeptical as to the reliability of the findings and conclusions as a whole. In such cases, we will proceed cautiously with a view toward exercising our own judgment. And when we deem it

> necessary, we will enter alternative or contrary findings and conclusions that the record supports.

Ex parte Reed, 271 S.W.3d at 727. Applying its own procedures, the TCCA found Modarresi failed to meet either prong under the *Strickland* standard and denied relief. *Ex parte Modarresi*, 2024 WL 4284695.

Even with the TCCA's succinct denial of relief without an extended opinion, Modarresi still has no error for this Court to review. Denying relief without an opinion does not violate *Strickland*, or any other constitutional provision as the "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013). Thus, a state court's writing standard does not give rise to an error, and simply reemphasizes that this case should be first heard in federal court under AEDPA. As such, there is no error in the TCCA's written order, and a writ of certiorari should not issue.

IV. The State Court Record Supports the TCCA's Denial of Relief.

Should Modarresi somehow convince this Court to consider performing a *de novo* review of her *Strickland* claim, she still fails to present a valid reason for granting relief. She asks this Court to reject the TCCA's decision and accept the state habeas trial court's perception of the facts and legal conclusions. Yet Modarresi ignores the TCCA's implicit conclusion, which tracks the core legal principles of *Strickland*—deference

is due to trial counsel's performance and their chosen strategies.

Granting Modarresi habeas relief would require a reviewing court to second-guess counsel's strategic decisions, when no evidence supports such hindsight. Because doing so runs contrary to this Court's precedent, the TCCA correctly denied habeas relief. *See Dunn v. Reeves*, 594 U.S. 731, 738–39 (2021); *Burt v. Titlow*, 571 U.S. 12, 22–23 (the defendant carries the burden of rebutting the presumption that counsels' strategies were reasonable, and an "absence of evidence cannot overcome" that presumption).

To prove ineffectiveness under *Strickland*'s familiar standard, an inmate must establish that the attorneys' actions were deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. A failure to prove either requirement results in the denial of the claim. *Id*. at 697. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Establishing a deficient performance requires an inmate to show that "counsel's representation fell below an objective standard of reasonableness," and there is a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Strickland*, 466 U.S. at 688–89. This presumption requires that courts not simply "give [an

inmate's] attorneys the benefit of the doubt, but to *affirmatively entertain the range of possible reasons* [] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (citations omitted) (internal quotation marks omitted) (emphasis added).

Concerning prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had *some conceivable* effect on the outcome of the proceeding." *Id.* at 693 (emphasis added). Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

For deficiency, Modarresi asserts that attorney Parnham was ineffective for failing to file a motion to suppress: (1) Modarresi's statements during the first interview; (2) her agreement to take officers to Masih and the act of leading officers to him; (3) the discovery of Masih; and (4) her confession during the second interview. Pet. Cert. 12–25. Modarresi further alleges that, at the state habeas evidentiary hearing, Parnham testified "that he made a strategic decision not to file a pretrial motion to suppress or object to the admission of the evidence at trial because the videorecorded interrogations supported petitioner's insanity defense"—but Parnham did not present an insanity defense at trial. *Id.* at 10.

For the prejudice prong, Modarresi points to the state habeas court's conclusions that, "if Parnham had filed a motion to suppress, the trial court would have suppressed both videorecorded statements, petitioner's act of leading the officers to [Masih], and the discovery of the body", then "the exclusion of this evidence would have undermined the capital murder case and probably resulted in a more favorable plea bargain offer. . . ." *Id.* at 25. She alternatively argues that "if the trial court had suppressed the statements but admitted testimony regarding the discovery of [Masih], petitioner probably would have been convicted of felony murder." *Id.*

But the record refutes Modarresi's assertion that Parnham had no reasonable strategy. Plenty of evidence supported her conviction had counsel successfully sought suppression of the evidence. And the record further offers no support for her assertion that the State "probably" would have offered a "more favorable plea bargain."

A. No deficiency

While Modarresi focuses solely on Parnham's e-mail to habeas counsel stating that he asserted an insanity defense at trial and his statements at the evidentiary hearing regarding the e-mail, Parnham explicitly explained his trial strategy during voir dire and in his closing argument. Resp't App. 2a–3a. At voir dire, Parnham explained that he was not pursuing an insanity defense but emphasized that the issue of mental illness may be a factor for the jury to consider. 3.RR.164 ("I am not defending Narjes Modarresi with

the defense of insanity, but we expect that an issue of mental illness may be a factor that you all have to consider to make a determination as to whether or not there is a connection between what happened."). And in his closing argument, Parnham once again explained that he was not asserting an insanity defense but using the mental health testimony to negate the intent required for capital murder. Resp't App. 2b–3b ("You've heard us also tell you . . . that this is not an insanity defense . . . [r]ather, the defense in this case is to . . . negate the necessary intent . . . [t]hat is the purpose of the mental health testimony that was produced.").[6]

This strategy was also apparent in counsels' examination of witnesses, e.g., Parnham's co-counsel elicited testimony suggesting that Modarresi did not want Masih dead; she only wanted to get rid of him. 8.RR.158 (Q. "From a psychiatric—from a clinical . . . and from a forensic stand, is it significant that . . . every time she describes it to you is wanting to get rid of the baby?" A. "Yes. She didn't want him dead. She wanted

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[6] Given that Parnham plainly and repeatedly explained, *during the trial*, that his strategy did *not* involve an "insanity defense," the state habeas trial court's suggestions to the contrary are, at best, flimsy, and are at worst flat wrong. Inexplicably, the trial court repeatedly cited Parnham's misremembered belief that he *had* pursued an "insanity defense"—which was proffered eight-years after trial—to conclude that his trial strategy was constitutionally deficient. *See* Petr's App. 12a–13a. Presumably, the trial court failed to read the trial transcript, which directly contradicts this finding. The TCCA could reasonably have rejected the trial court's proposed findings and recommendations on this basis alone. Regrettably, Modarresi repeats this error in his briefing to this Court.

to be rid of him."). Moreover, Parnham strategically decided against filing a motion to suppress so that he could use Modarresi's interviews to emphasize her mental state on the day of the offense. During his closing argument, Parnham read directly from the transcript of Detective Waters's interview of Modarresi. 10.RR.20–22. The interview showed that Modarresi was suffering from severe postpartum depression which was exacerbated by her fear of her father-in-law. *Id*. Parnham explained that the interview showed that because of her mental illness, she could not care for the child, and she would rather have stayed with Detective Waters than go home to her father-in-law. *Id*. at 21–22 ("Detective Waters, in my question to him: Is there any doubt in your mind that she believed that she would be harmed by the family? No doubt . . . Wanted to be with him. Trusted him. Was even willing to go to jail not to be with the in-laws.").

Finally, an agreement made prior to jury selection revealed Parnham's strategic use of the mental health testimony to negate the intent requirement. Before voir dire began, the State agreed with the Defense to permit a lesser offense of felony murder. 10.RR.6 ("We had an agreement prior to jury selection to include felony murder as a lesser included. That is the reason why various doctors, experts testified."). Parnham explained that the issue was to negate Modarresi's specific intent, and the evidence presented, including the testimony of Modarresi's doctor, go directly towards showing her specific intent. 10.RR.6–7. ("And the Court, in its instruction . . . to include lesser offenses states . . . [the jury] must consider . . . all relevant facts and

circumstances going to show the condition of the mind of the accused at the time of the offense, if any."). Parnham made clear that his strategy was to negate Modarresi's specific intent by presenting mental health testimony, including Detective Water's interview. His strategy was not that Modarresi did not kill Masih, rather, it was that she did not *intentionally* kill him. Critically, this "informal" diminished capacity defense exists under Texas law. *See Jackson v. State*, 160 S.W.3d 568, 573–74 (Tex. Crim. App. 2005).[7] Therefore, Parnham's decision against seeking suppression was a reasonable strategy.

B. No prejudice

Regarding prejudice, Modarresi first argues that if Parnham filed a fully successful motion to suppress, then the case would have "probably resulted in a more favorable plea bargain offer." Pet. Cert. 25. However, this contention is wildly speculative for at least two

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[7] "The court of appeals correctly stated that Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity. In contrast, the diminished-capacity doctrine at issue in this case is simply a failure-of-proof defense in which the defendant claims that the State failed to prove that the defendant had the required state of mind at the time of the offense. To counter the State's evidence of the defendant's state of mind, the defense wishes to present evidence that the defendant has mental or physical impairments or abnormalities and that some of his abilities are lessened in comparison to someone without such problems." *Jackson*, 160 S.W.3d at 573–75.

reasons. First, "there is no constitutional right to plea bargain," *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); and the same is true under Texas law, *see Perkins v. Court of Appeals for Third Supreme Judicial Dist. of Texas*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987). Second, she presents no evidence of any prior plea offers or negotiations, and the record reflects that no such offers or negotiations exist. Modarresi also cites to the prosecutor's closing argument that Modarresi "should be convicted of capital murder because her intent to kill was proven by 'her own words' and by piling mud on Masih," which Modarresi admitted in the second interview. Pet. Cert. 25. Modarresi's statements in these interviews, however, would not have affected the outcome of her trial because as discussed below, she confessed to both her husband and her psychiatrist.

Modarresi also argues that if Parnham successfully moved to suppress the interviews with the jury still knowing the discovery of Masih, then she "probably would have been convicted of felony murder." *Id*. Citing again to the state habeas court's findings, Modarresi presents only speculation that the outcome would have been different. And she fails to consider the myriad of evidence, independent of the interviews and act of leading officers to the body, supporting her conviction.

The record reflects that, notwithstanding Modarresi's two interviews and act of leading the officers to the body, Masih would have been found. The record shows:

- Jessica Shaver testified that she saw Modarresi coming from the direction of

the bayou pushing a stroller then slamming it into the curb. 4.RR.45–48. Shaver testified that she did not see anyone confront Modarresi and that Modarresi did not seem in distress at that time. *Id*. at 51, 56.

- Doris Golabbakhsh, Modarresi's mother-in-law testified that on the day of the incident, Modarresi said that her friend was going to pick her up, but she left with the stroller. 7.RR.115–18. When Doris confronted her, she told her that her friend was no longer picking her up. *Id*. at 118. Once Modarresi left, Doris was cooking and looked out the window and was unable to see her. *Id*. at 120. Doris said that she was supposed to go straight to the right, but instead went where "nobody can go" because there was tall grass and "no way to go there." *Id*. Later, when Modarresi called Doris, she said there had been an accident, not that there had been a kidnapping. *Id*. at 120–21. Doris further testified that when the police dogs came to smell Masih's blanket, they left in the opposite direction of where she thought Modarresi was going to her friend's house. *Id*. at 102–03.

- Officer Gonzalez testified that Modarresi told him that two black men

in a beige chevy came behind her, pushed her down, took Masih, then got back in the car and drove off. 4.RR.67–69. He noted that the information he learned prior from Jessica Shaver was inconsistent with what Modarresi told him. *Id.* at 72–73. He also noticed that there was mud on her jacket but the area that she said she was pushed down was not wet and there were no signs as if someone fell and got muddy. *Id.* at 73.

- Officer Perez testified that he took photos of the mud on Modarresi; there was dried mud on her thumbs, shoes, and jacket. 4.RR.124–127. He also noticed that it was dry at the scene. *Id.* at 128. He further testified that another investigator located a blanket in the storm drain which also had dried mud on it. *Id.* at 128–131.

- Officer Rubio testified that anytime he asked her a question, Modarresi would reply "you do believe me, do you?" 4.RR.164. He believed this was suspicious so he told her that Masih may still be alive and asked her to show him where he was. *Id.* at 165–66. She turned around and started walking approximately twenty feet towards the bayou—the location where Masih was found—before stopping, turning

around, and telling Rubio again that the black men took Masih. *Id*. at 166–67. Rubio testified that he felt like "she gave [him] something", so he made arrangements for her to be taken to the homicide office for a statement. *Id*. at 167.

- Officer Chappell testified that he searched the bayou at around 11:00 p.m. for about ten minutes but it was very dark, and he only had his flashlight. 4.RR.185, 189. He further testified that after he was led back down to the bayou by Officer Jafari, he saw a mound of leaves and mud and what appeared to be the back of a human head. *Id*. at 192.

This testimony shows that prior to her interviews with Detective Waters and leading the officers to Masih: (1) Officers were suspicious because Modarresi kept changing her story; (2) Doris saw her leave towards the bayou; (3) Shaver saw her return from the bayou; (4) the police dogs after sniffing Masih's blanket, left towards the bayou; (5) Modarresi herself began leading Officer Rubio twenty feet toward the bayou; (6) She had mud all over her when the area that she said she was pushed down was dry; and (7) the back of Masih's head was visible in the mound of leaves and mud. Considering the above, the officers likely suspected that Masih was in the bayou. And while the officers did not find Masih prior to Modarresi showing them later that same night, they

were searching in the dark. 4.RR.185, 190–92. Even without Modarresi's help, they would have inevitably discovered Masih if they searched the bayou in the daylight the following day.

Furthermore, the suppression of both of Modarresi's interviews would not have changed the outcome of her trial because she confessed to both her husband and her psychiatrist. Amir, Modarresi's husband, visited her at the Neuro Psychiatric Center the day after she was arrested. 5.RR.120–21. He asked her why she killed Masih, and she told him it was because the baby was a burden to his mother. *Id*. at 121 (Q. "Did she tell you why she had done what she did?" A. "She said that's because the baby was a burden to my mother. This is what she did, and she didn't want to put the burden on my mother anymore."). Months later, Modarresi also confessed to Dr. Moeller; she explained how she prepared to kill Masih, including packing a scarf to use as a gag and a spoon to dig a hole. 9.RR.193, 206–07 (Dr. Moeller's testimony describing Modarresi's admission to him regarding the tools and preparation for the murder).

As such, Modarresi fails to argue, much less show, that Parnham's decision against seeking suppression would have changed the outcome of her trial. To wit, her argument fails to consider all the testimony indicating the location of Masih's body, Modarresi's confessions to Amir and Dr. Moeller, and the extensive mental health testimony presented at trial. Thus, the TCCA's rejection of Modarresi's prejudice argument could not be an unreasonable application of *Strickland*. 466 U.S. at 693 (a defendant does not meet his heavy burden by simply

showing trial counsel's "errors had some conceivable effect on the outcome of the proceeding.").

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

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