No. 24-562

IN THE

Supreme Court of the United States

NARJES MODARRESI,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITIONER'S REPLY BRIEF

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I. IT WOULD BE AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION TO GRANT CERTIORARI AND DETERMINE WHETHER THE TEXAS COURT OF CRIMINAL APPEALS MISAPPLIED THIS COURT'S PRECEDENT.

Respondent complains that petitioner has asked the Court to resolve a "garden-variety" ineffective assistance of counsel claim and merely correct the errors of the Texas Court of Criminal Appeals (TCCA).[1] *See* Respondent's Brief In Opposition (BIO) 9-10. Respondent inaccurately categorizes the TCCA's errors as "garden variety." The errors are fundamental and warrant correction in the same manner that the Court grants certiorari and corrects similar fundamental errors by lower courts in criminal cases.[2] Moreover, an outright reversal is not the only relief

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1. Respondent asserts, "The state court's unpublished decision also necessarily contemplates the eight-year delay between the time Modarresi filed her state habeas application and the time of trial.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." *See* Respondent's BIO 1. The TCCA did not rely on the doctrine of laches (or any other state law procedural ground) in denying relief and, instead, decided the merits of the constitutional issues. Therefore, this Court cannot rely on that delay as an independent and adequate state law ground to support the judgment. *See Michigan v. Long*, 463 U.S. 1032, 1041-43 (1983). It is irrelevant.

2. *See, e.g.*, *Mays v. Hines*, 592 U.S. 385 (2021) (per curiam); *Shoop v. Hill*, 586 U.S. 45 (2019) (per curiam); *Woods v. Etherton*, 578 U.S. 113 (2016) (per curiam); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam).

that petitioner seeks. She has requested, alternatively, that the Court vacate the judgment and remand to the TCCA to provide specific reasons for rejecting the habeas trial court's findings of fact and conclusions of law that recommended relief. *See* Pet. Cert. 27-29. *See, e.g.*, *Andrus v. Texas*, 590 U.S. 806, 824 (2020) (per curiam).

The habeas trial court found that habeas counsel, during his investigation, sent an email to trial counsel, George Parnham, asking why he did not file a motion to suppress the evidence. Parnham responded by email that his decision was part of his "sound trial strategy" in support of an insanity defense (App. 11a-12a). The habeas trial court also found that Parnham testified at the evidentiary hearing that he made a strategic decision not to file a motion to suppress or object to petitioner's statements, her agreement to take (and act of leading) the officers to the child, and the discovery of the body because her statements supported an insanity defense—although he acknowledged that he may have relied on his staff to watch the video-recorded interrogations instead of watching them himself (App. 12a). Suffice it to say, Parnham did not present an insanity defense.

Despite the habeas trial court's findings, respondent asserts that Parnham's claimed lack of memory "redounds in favor of attorney competence, not against." *See* Respondent's BIO 12. That is a red herring. Parnham acknowledged during his testimony that he was presently representing 41 clients charged with felonies in Houston—including capital murder—but claimed that he could not remember the name of any client (1 H.R.R. 8-10). Assuming *arguendo* that his testimony was true—instead of him faking dementia to avoid answering questions about petitioner's case—he is handling serious criminal cases

but cannot remember anything. The habeas trial court, in assessing his credibility, could properly conclude that he was feigning a loss of memory. That hardly "redounds in favor of attorney competence."

Acknowledging that this Court has previously granted certiorari to resolve "fact-intensive" cases involving "settled law," respondent nonetheless asserts that it would be inappropriate to do so in petitioner's case because the TCCA "properly applied both *Strickland* prongs as discussed below." *See* Respondent's BIO 13-14. Yet the Court previously has granted certiorari because the TCCA did not adequately review an ineffective assistance of counsel claim. *See Andrus*, 590 U.S. at 824. And there are other Texas cases in which the Court has granted certiorari because the TCCA (or the Fifth Circuit) misapplied its well-settled precedent. *See Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (whether the TCCA and the Fifth Circuit misapplied *Batson v. Kentucky*, 467 U.S. 79 (1986)); *Smith v. Texas*, 550 U.S. 297, 300 (2007) (whether the TCCA misapplied *Penry v. Johnson*, 531 U.S. 1003 (2001)); *Buck v. Davis*, 580 U.S. 100, 118 (2017) (whether the TCCA and the Fifth Circuit misapplied *Strickland v. Washington*, 466 U.S. 668 (1984)); *Moore v. Texas*, 581 U.S. 1, 5 (2017) (whether the TCCA misapplied *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins v. Virginia*, 536 U.S. 331 (2002)). Each of the above petitioners ultimately received a new trial. Similar recent grants of certiorari extend to cases beyond Texas. *See Andrew v. White*, 604 U.S. __, 145 S.Ct. 75, 81 (2025) (per curiam) (whether the Tenth Circuit misapplied *Payne v. Tennessee*, 501 U.S. 808 (1991)); *Glossip v. Oklahoma*, 604 U.S. __, 145 S.Ct. 612, 618 (2025) (whether the Oklahoma Court of Criminal Appeals misapplied *Napue v. Illinois*, 360 U.S. 264 (1958)).

To be sure, every ineffective assistance of counsel claim decided by a state or federal court will necessarily be based on the standard of review set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). Respondent's position, taken to its logical conclusion, means that all ineffective assistance of counsel claims are immune from this Court's review. The cases cited above demonstrate otherwise.

II. CERTIORARI REVIEW IS PETITIONER'S ONLY REMEDY BECAUSE SHE IS TIME-BARRED FROM SEEKING FEDERAL HABEAS CORPUS RELIEF.

Respondent also asks the Court to deny certiorari because the claim is more appropriate for a federal habeas corpus proceeding. Respondent relies on Justice Stevens's opinion respecting the denial of certiorari in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990). Respondent's BIO 15-16.

Respondent's position is untenable for two reasons. First, Justice Stevens's opinion was written before the Anti-Terrorism and Effective Death Penalty Act was enacted in 1996 to limit a federal habeas court's ability to grant relief on a state conviction. For this reason, the Court has shown a greater willingness to grant review to decide federal constitutional issues raised in state post-conviction proceedings. *See* Z. Payvand Ahdouta, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 163-64 (2021) ("Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed course and exhibited the exact opposite preference: a propensity for granting cases from state collateral review as against

federal habeas review.") (discussing several of this Court's recent cases).

Second, as respondent acknowledges, a federal habeas petition "would be likely barred by AEDPA's statute of limitations."[3] *See* Respondent's BIO 16. Petitioner's conviction became final on appeal in 2016. Her family did not hire habeas counsel until 2022, five years after the one-year AEDPA deadline had expired. Review by this Court is the only remaining remedy available to her.

III. NO SOUND STRATEGY COULD HAVE JUSTIFIED TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE CONFESSIONS AND THE DISCOVERY OF THE BODY OF THE DECEASED.

Respondent asserts that Parnham made a sound strategic decision not to object to the admission of the confessions and the discovery of the body because petitioner's statements supported her defense that her mental illness negated the specific intent to kill, a necessary element of the offense of capital murder. *See* Respondent's BIO 21-24. The flaw in this argument is that Parnham did not present testimony that petitioner's mental illness prevented her from formulating the intent to kill her child. Importantly, the first video-recorded interrogation depicts petitioner lying to the officers for over two hours until they finally broke her down and obtained her admission of culpability and agreement to

3. Respondent did not offer to waive the AEDPA time bar to enable a federal habeas court to consider the merits of petitioner's constitutional claim.

lead them to the body. Her evasiveness and deception during that interrogation demonstrated she knew that her conduct was wrong and suggested that she intended to kill her child. She said as much during the second video-recorded interrogation, conducted after the police found the body and advised her of her rights. Indeed, the prosecutor argued that petitioner should be convicted of capital murder because her intent to kill her child was proven by "her own words" and by piling mud on him and that her mental illness did not negate that intent (10 R.R. 34-36, 39, 50-51).

Filing a motion to suppress the evidence and presenting the defense that petitioner lacked the specific intent to kill were not mutually exclusive. Competent counsel would have filed a motion to suppress and had an evidentiary hearing. If the trial court denied the motion, counsel would have preserved the issue for appeal and could have directed the jury to any statements in the confessions that he believed supported a lack of intent to kill (there were none). Alternatively, if the trial court had suppressed the confessions and the discovery of the body, the State's capital murder case would have been substantially weakened.

No other witness testified that petitioner admitted that she intended to kill her child when she laid him face down in muddy water. Amir Golabbakhsh, petitioner's husband, testified that she said that she "did what she did" because "the baby was a burden to my mother" (5 R.R. 121). Dr. Debra Osterman, a psychiatrist, testified that petitioner "didn't want him dead. She wanted do get rid of him" (8 R.R. 158).[4] Dr. David Self, a psychiatrist,

4. Dr. Osterman's testimony would have supported an argument that petitioner intended to abandon her child rather than kill him.

testified that petitioner expressed the desire "to get rid of him, to get him out of her life" (9 R.R. 156). Finally, Dr. Mark Moeller, a psychiatrist hired by the State to conduct a sanity evaluation, testified that petitioner told him that she packed a scarf that she might use as a gag and a spoon that she might use to dig a hole (9 R.R. 206-07). Apparently, she did not use either object.

If the trial court had excluded both confessions and the discovery of the body, it would have been difficult for the State to obtain a conviction for capital murder (which carries an automatic sentence of life without parole). If the trial court had excluded the confessions but admitted the discovery of the body, petitioner probably would have been convicted of felony murder (which carries a punishment range of five to 99 years or life with the possibility of parole) instead of capital murder. Thus, the habeas trial court correctly concluded that Parnham performed deficiently by failing to file a motion to suppress (App. 23a-36a).

IV. PETITIONER ESTABLISHED *STRICKLAND* PREJUDICE.

Respondent asserts that petitioner's argument that, if the trial court had granted a motion to suppress, the State probably would have made a more favorable plea bargain offer, is speculative. *See* Respondent's BIO 24-25. Respondent reminds the Court that there is no constitutional or statutory right to a plea bargain, and petitioner did not present evidence regarding plea offers. Petitioner does not suggest that there is such a right, but this Court has recognized that plea bargaining is an essential component in the criminal justice system.

See Santobello v. New York, 404 U.S. 257, 261 (1971) (recognizing the importance of plea bargaining and the necessity that the prosecution keep its promises). It is common sense that, the weaker the State's case, the more favorable the plea bargain offer. Petitioner must show only a "reasonable probability" of a "different outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, the habeas trial court correctly found that the exclusion of the evidence "would have undermined the capital murder case and probably resulted in a more favorable plea bargain offer." (App. 36a).

Respondent asserts that, even if the confessions had been suppressed, the jury probably would have convicted petitioner of capital murder because the police probably would have discovered the body, and petitioner later confessed to her husband and her psychiatrist. *See* Respondent's BIO 25-29. The conduct of the prosecution at trial belies that position. If the prosecutor thought that the jury would convict petitioner of capital murder instead of felony murder without the confessions, she would not have offered them in evidence. And, if the confessions were admitted over objection, the issue would have been preserved for appeal, and there is a reasonable probability that an appellate court would have reversed any capital murder conviction for the reasons set forth in the certiorari petition. Pet. Cert. 12-26.

Although the jury may have debated whether petitioner had the specific intent to kill her child based on her statements to her husband and the psychiatrists, the admission of her video-recorded confessions made it a foregone conclusion that she had that intent. "A confession is like no other evidence. Indeed, 'the defendant's own

confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citation and internal quotation mark omitted). Accordingly, the state habeas trial court correctly concluded that petitioner demonstrated *Strickland* prejudice (App. 37a).[5]

5. If trial counsel had preserved the confession issue for appeal, appellate counsel could have asked this Court, if necessary, to reconsider whether the harmless error rule should apply to an involuntary confession. Four justices previously would have held that it should not apply. *See Arizona v. Fulminante*, 499 U.S. 279, 288 (1991).

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the TCCA or, alternatively, remand to the TCCA for a thorough analysis of the ineffective assistance of trial counsel claim to permit meaningful review by this Court.

Respectfully submitted,

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