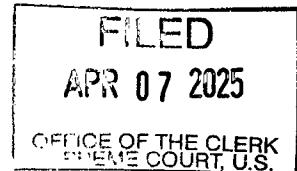


24-7017  
No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



Jose Antonio Cortez — PETITIONER  
(Your Name)

VS.

The State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Jose Antonio Cortez  
(Your Name)

11637 Kilkirk Lane  
(Address)

Dallas, Texas. 75228  
(City, State, Zip Code)

(210) 365-0185  
(Phone Number)

## QUESTION(S) PRESENTED

Question No. 1: Can a State allow a Judgment & Sentence of Conviction stand when under the probative facts and Jury Charged instructed the jury to convict the Defendant of an offense that was factually and legally impossible to have been committed; or where there is no legal basis for the offense does not exist?

Question No. 2: Can a State forego the application of the Double Jeopardy Clause of the 5TH Amendment to the United States Constitution made applicable to the States under the 14TH Amendment to the United States Constitution when under the probative facts of the case the standing Judgment & Sentence is barred by the Double Jeopardy Clause?

Question No. 3: Does the State deprive a criminal defendant of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution when it fails to consider and address all the claims and/or grounds presented for habeas corpus relief when the claims and/or grounds rest on a vested constitutional right?

Question No. 4: Does the Double Jeopardy Clause of the 5TH Amendment to the United States Constitution made applicable to the States under the 14TH Amendment to the United States Constitution present a valid claim of Actual Innocence?

Question No. 5: Does a State deprive a criminal defendant the review of a new rule of criminal procedure announced by the United States Supreme Court when its own post-conviction procedure does not limit the retrospective of the rule on State collateral review?

Question No. 6: Can a State forego review of a illegal and unauthorized sentence on a procedural ground when the sentence is clearly void and not merely voidable.

## LIST OF PARTIES

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: **Matthew B. Howard, Assistant Criminal District Attorney, Bexar County, 101 W. Nueva, San Antonio, Texas, 78205.**

## RELATED CASES

**Cortez v. State, No. #04-93-00128-CR (Tex.App. 4th Dist. 1994)**  
**In re Cortez, PD No. #1432-94 (Tex.Cr.App. 1994)**  
**Ex Parte Cortez, No. #87,766-02, 03 (Tex.Cr.App. 2018)**  
**Cotez v. Lumpkin, No. #SA-18-CA-0923-FB (Tex. W.D. 2019).**

TABLE OF AUTHORITIES CITED

CASES:

	PAGE NUMBER
Blockburger v. U.S., 52 S.Ct. 180 (1932)	11
Boyd v. California, 110 S.Ct. 1190 (1990)	10
Cupp v. Naughten, 94 S.Ct. 396 (1973)	10
Edward v. Vannoy, 141 S.Ct. 1547 (2021)	16
Ex Parte Chabot, 371 S.W.3d 200 (Tex.Cr.App. 2021)	17
Ex Parte Milner, 394 S.W.3d 502 (Tex.Cr.App. 2013)	11
Ex Parte Robbins, 478 S.W.3d 679 (Tex.Cr.App. 2014)	17
Grady v. Corbin, 110 S.Ct. 2084 (1990)	11
Middleton v. McNeal, 124 S.Ct. 1830 (2004)	10
Mizell v. State, 119 S.W.3d 804 (Tex.Cr.App. 2003)	14
Montgomery v. Louisiana, 136 S.Ct. 718 (2016)	17
North Carolina v. Pearce, 89 S.Ct. 2072 (1969)	11
Ramos v. Louisiana, 140 S.Ct. 1390 (2020)	16, 17
Sandstorm v. Montana, 99 S.Ct. 2450 (1979)	10
Schlup v. Delo, 115 S.Ct. 851 (1995)	8
Williams v. Taylor, 120 S.Ct. 1495 (2000)	19

STATUTES AND RULES:

Supreme Court Rules; Rule 10	8
United States Constitution; 6TH Amendment	10, 16, 17, 19
United States Constitution; 8TH Amendment	14, 15, 17
United States Constitution; 14TH Amendment	10, 11, 16, 19
Texas Code of Criminal Procedure;	
Article 11.07	17
Article 11.07, Section 4(a)(1) & (2)	9
Article 11.07, Section 4(a) - (c)	9
Article 11.07, Section 4(a)(2)	10, 12, 15, 17, 19

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4-7
REASONS FOR GRANTING THE WRIT .....	8-20
CONCLUSION.....	20

## INDEX TO APPENDICES

APPENDIX A: Indictment, Case No. #92-CR-6828, Styled: The State of Texas v. Jose Antonio Cortez

APPENDIX B: Order delivered by the Texas Court of Criminal Appeals on October 02, 2024, dismissing application for writ of habeas corpus without written order.

APPENDIX C: Order delivered by the Texas Court of Criminal Appeals on January 13, 2025, denying Petitioner's Motion for Reconsideration and/or Motion for Rehearing

APPENDIX D: Application for A Writ of Habeas Corpus filed on December 15, 2023, Case No. #1992-CR-6828-W3

APPENDIX E: Order delivered by the 290TH Judicial District Court, Bexar County, Texas, on August 28, 2024, recommending dismissal of the application.

APPENDIX F

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.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B 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 290TH Judicial District court appears at Appendix E to the petition and is \_\_\_\_\_.

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6TH Amendment - United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8TH Amendment - United States Constitution: Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishment.

14TH Amendment - United States Constitution: 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.

Texas Code of Criminal Procedure - Article 11.07, Section 4:(a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

## STATEMENT OF THE CASE

Petitioner was accused of the alleged offense of Aggravated Sexual Assault of A Child and Indecency with A Child in Cause No. #1992-CR-6828, before the 290TH Judicial District Court of Bexar County, Texas, Styled: The State of Texas v. Jose Antonio Cortez. (Appendix A).

Upon a plea of not guilty, trial commenced before a jury, and on February 16, 1993, the jury convicted the Petitioner for the alleged offense of Aggravated Sexual Assault of A Child and Indecency with A Child By Contact. Punishment was assessed at forty-five (45) years concurrently in the Texas Department of Criminal Justice-Correctional Institutions Division. A copy of the process upon which the Petitioner is confined cannot be obtained.

Petitioner's conviction was affirmed by the Fourth Court of Appeals for The State of Texas on October 12, 1994, in Case No. #04-93-00128-CR, Styled: Jose Antonio Cortez v. The State of Texas. The Texas Court of Criminal Appeals refused the Petitioner's Petition for Discretionary Review on March 01, 1995, in Case No. #PD-1432-94, Styled: In re Jose Antonio Cortez.

On December 23, 2024, Petitioner initiated a habeas corpus proceeding pursuant to Article 11.07 et seq. of the Texas Code of Criminal Procedure, in Case No. #1992-CR-6828-W3, before the 290TH Judicial District Court of Bexar County, Texas. The Texas Court of Criminal Appeals dismissed the application pursuant to Article 11.07, Section 4(a)-(c) of the Texas Code of Criminal Procedure on October 02, 2024, in Case No. #WR-87,766-06, Styled: Ex Parte Jose Antonio Cortez. (Appendix B). Petitioner timely

file a Motion for Reconsideration and/or Motion for Rehearing. The Texas Court of Criminal Appeals denied the motion on January 13, 2025. (Appendix C).

Before the State habeas court, Petitioner argued that: (1) He is Actual Innocent of the offense charged because the jury could not have found the offense charged factually and legally accurate as instructed; there is no evidence that he caused the penetration of the anus of the alleged victim by placing his male sexual organ in the female sexual organ of the alleged victim, (2) He is Actual Innocent of the offense of Indecency with A Child By Contact because the conviction was prohibited under the 5TH & 14TH Amendment to the United States Constitution as being the same under the Double Jeopardy Clause, and (3) He was deprived of his constitutional rights under the 6TH & 14TH Amendment because the conviction was not found upon a unanimous verdict. (Appendix D).

Petitioner argued as part of an Actual Innocence Claim that the Jury Charge was erroneous, and that the claim was not procedurally barred from consideration under the provisions of Article 11.07, Section 4(a) of the Texas Code of Criminal Procedure because it was presented in the initial application and was not considered and addressed through no fault of his own. Petitioner furthered that the given claim was not procedurally barred from consideration under a clearly established precedent of the Texas Court of Criminal Appeals set out in Ex Parte Barber, 879 S.W.2d 889 (Tex.Cr.App. 1994) that was instructive as to his case. The Jury Charge instructed the jury that it could find the Petitioner guilty of the offense

of Aggravated Sexual Assault of A Child, if it found beyond a reasonable doubt, that the Petitioner caused the penetration of the alleged victim's anus, by placing his male sexual organ in the female sexual organ of the alleged victim. (Appendix E).

This was legally and impossible conduct alleged to have been committed by the Petitioner, and no rational jury could have found the Petitioner guilty of the offense charged, that Petitioner caused the penetration of the alleged victim's anus, by placing his male sexual organ in the female sexual organ of the alleged victim. It was for this reason, Petitioner claimed he was actually innocent, because he was convicted of a non-existing offense, notwithstanding the material variance between the Indictment and Jury Charge.

Petitioner argued as part of an Actual Innocence Claim, that his conviction for Indecency with A Child By Contact was jeopardy barred under the 5TH & 14TH Amendment to the United States Constitution, and was not procedurally barred from consideration under Article 11.07, Section 4(a) of the Texas Code of Criminal Procedure because the claim fell within the provisions of Section 4(a)(2) of the Texas Code of Criminal Procedure, because it was an alleged constitutional violation found under the decision delivered in *Ex Parte Milner*, 394 S.W.3d 502 (Tex.Cr.App. 2013); a showing of a double jeopardy violation presents a claim of actual innocence.

Petitioner argued that he could not be convicted and punished for a completed sexual assault by penetration and also for conduct such as exposure or contact that was demonstrably and inextricably part of that single sexual assault that was a continuous act,

## REASONS FOR GRANTING THE PETITION

Petitioner recognizes as part of Rule 10 of the Supreme Court Rules, that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated law. Further, as part of the Rule 10 statement, review on a writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for compelling reasons. Although, the Rule 10 considerations governing review on certiorari are neither controlling nor fully measuring the Court's discretion they indicate the character of the reasons the Court considers. As outlined hereinafter, it is believed that the instant petition meets at least one of the three (3) reasons this Court considers in granting review, notwithstanding, it would be a manifest of injustice not to grant review or provide Petitioner with relief given the matters presented hereinafter.

(1)

The matter of a "Free Standing Claim of Actual Innocence." This Court held that a claim of actual innocence based on newly discovered evidence is not a ground for federal habeas corpus relief absent an independent constitutional violation. *Herrera v. Collins*, 113 S.Ct. 853 (1993). Cf., *Schlup v. Delo*, 115 S.Ct. 851 (1995); a claim of actual innocence can be raised to avoid a procedural bar to the consideration of the merits of the defendant's constitutional claims. However, a freestanding actual innocence claim should prevail under sufficiently persuasive circumstances.

To this day, whether a federal right based on a claim of actual

innocence exists is an open question. This Court has provided scant guidance on the cognizability of a freestanding right to habeas relief based on a claim of wrongful conviction after a fair trial free of error, especially in a non-capital case.

The substance of Article 11.07, Section 4(a)(1) & (2) of the Texas Code of Criminal Procedure is straight forward text that: "if a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt."

In the instant case, the Texas Court of Criminal Appeals (CCA), as advised by the Clerk of that court, Petitioner's State habeas application was dismissed as a subsequent application, citing Article 11.07, Section 4(a) -(c). In general a boilerplate decision.

Petitioner's claim of actual innocence was mounted by his claim of Jury Charge error, wherein the jury was instructed to convict upon a non-existing charge, or upon conduct that was both factually and legally impossible to have been committed.

In a criminal trial, the State must prove every element of the offense, and a Jury Charge and accompany instructions violates the Due Process Clause of the 14TH Amendment to the United States Constitution if it fails to give effect to that requirement. *Sandstrom v. Montana*, 99 S.Ct. 2450 (1979).

The question remains whether a criminal defendant is deprived of this constitutional rights to a fair and impartial trial under the 6TH Amendment to the United States Constitution when the ailing instruction is so infected that the entire trial that the resulting conviction is a nullity and void. *Cupp v. Naughten*, 94 S.Ct. 396 (1973), *Boyd v. California*, 110 S.Ct. 1190 (1990), and *Middleton v. McNeil*, 124 S.Ct. 1830 (2004).

It is the matter of Article 11.07, Section 4(a)(2), by a preponderance of the evidence, but for the violation of the United States Constitution: no rational juror could have found the Petitioner guilty beyond a reasonable doubt of committing the alleged offense of aggravated sexual assault by causing the penetration of the alleged victim's anus, by placing his male sexual organ in the female sexual organ of the alleged victim. Such conduct is not only factually impossible, but legally impossible to have been committed, and the evidence clearly cannot adduce such a finding that is nevertheless impossible to have been committed.

Can a State uphold a conviction and restrain a defendant of his life and liberty upon an incident that was totally impossible to have been committed by the defendant? This is the statement of the metter being presented by the CCA in upholding the Petitioner's conviction. Given that the jury followed the instruction as given,

Is it within the province of the Petitioner to argue that he is actually innocent of having being convicted of aggravated sexual assault by causing the penetration of the alleged victim's anus, by placing his male sexual organ in the female sexual organ of the alleged victim?

Clearly, this is a matter that has not been settled by this Court, and to prevent a manifest of injustice, should be considered by this Court.

(2)

The productivity of the Double Jeopardy Clause of the 5TH Amendment to the United States Constitution made applicable to the States under the 14TH Amendment to the United States Constitution is broad and sweeping. *North Carolina v. Pearce*, 89 S.Ct. 2072 (1969). It's mandate is not question for the court(s) determination.

Traditional double jeopardy analysis focused on the statutory provisions at issue in both the initial and subsequent prosecutions.

To determine whether the violation of two (2) different provisions constituted two (2) distinct offense or only one, the court examined whether each provision required proof of a fact which the other does not. *Blockburger v. U.S.*, 52 S.Ct. 180 (1932).

However, this Court's decision in *Grady v. Corbin*, 110 S.Ct. 2084 (1990) significantly altered the jurisprudential landscape of Double Jeopardy. In *Grady* this Court concluded that the all familiar Blockburger test was simply a guide to determining whether the legislature intended multiple punishment, and developed the "same conduct" test that broaden the scope of protection from multiple prosecutions and punishment. However, this Court made

clear that this test was not a same evidence or transaction standard.

The CCA has established that a claim of Double Jeopardy presents a claim of "Actual Innocence," and meets the requirements of Article 11.07, Section 4(a)(2). *Ex Parte Milner*, 394 S.W.3d 502 (Tex.Cr.App. 2013). However, this Court has not held or established that a claim of Double Jeopardy states a valid claim of actual innocence. The CCA has held that in cases claiming Double Jeopardy violations, an applicant may prove actual innocence by providing facts sufficient to establish by a preponderance that, but for a double jeopardy violation, no rational juror could have found the applicant guilty of the challenged offense beyond a reasonable doubt. *Id.*

As a matter, it is clear that this issue has not been mandated by this Court. Therefore, this Court should take the opportunity to decide whether or not under federal law, that a criminal defendant can establish a claim of actual innocence by presenting a *prima facie* claim of a double jeopardy violation. Given that the Double Jeopardy Clause of the 5TH Amendment to the United States Constitution is unique within its own constitutional standing apart from other constitutional provisions that protect the rights of a criminal defendant.

In the instant case, Petitioner was charged with the alleged offense of Aggravated Sexual Assault of A Child by (1) causing the penetration of the female sexual organ by placing his male sexual organ in the female sexual organ of the alleged victim, and (2) causing the penetration of the anus by placing his male sexual organ in the anus of the alleged victim. Upon the same

indictment, Petitioner was charged with the alleged offense of Indecency with A Child By Contact alleging (1) by touching the female sexual organ of the alleged victim, and (2) touching the anus of the alleged victim. The alleged offenses were alleged to have occurred on the same date.

On the matter, at least one State intermediate court of appeals has held that a defendant's conviction is improper for a completed sexual assault by penetration and also indecency with a child by contact when the are demonstrably and inextricably part of the single sexual assault because the Double Jeopardy Clause of both State and Federal constitution prohibits multiple punishments.

The court of appeals held that if the alleged offense occur during a single continuous act, with a single impulse, in which several different statutory provisions are necessarily violated along that conviction, some of the offenses may merge together or be subsumed, and the defendant may be punished only once.

In the instant case, the act of "contact" was necessarily subsumed by the act of "penetration." Notwithstanding, under Texas law, the offense of Indecency with A Child is the lesser included offense of Aggravated Sexual Assault. Therefore, the Petitioner's conviction for Indecency with A Child By Contact was jeopardy barred.

This Court should take the opportunity to discuss whether a criminal defendant can be prosecuted and convicted under the Double Jeopardy Clause for a statutory offense different from another statutory offense when both statutory offenses are demonstrably and inextricably part of a single offense or mode

of conduct.

In the instant case, the State has not provided the Petitioner with a corrective process to vindicate his right to be free from jeopardy.

(3)

The productivity of the 8TH Amendment to the United States Constitution that protects a defendant from being subjected to Cruel & Unusual Punishment.

A sentence or conviction imposed in violation of a substantive rule is not just erroneous be contrary to law and, as a result void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule regardless of whether the conviction or sentence became final before the rule was announced, or during the criminal proceedings itself.

Unlike most trial errors which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence. A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal, and a defendant may obtain relief from an unauthorized sentence on direct appeal or by a writ of habeas corpus. *Mizell*, 119 S.W.3d 804 (Tex.Cr.App. 2003).

Traditionally, the State can seek mandamus relief to rectify an illegal or unauthorized sentence, and in these instances, the State could even seek a resentencing by filing a motion to reopen punishment in the trial court, long after that court has lost plenary jurisdiction over the case. There has never been

anything in Texas law that prevents any court with jurisdiction over a criminal case from noticing and correcting an illegal sentence. Id.

Petitioner argues that Texas law allows a illegal sentence or unauthorized sentence to be corrected at any time. Clearly, a illegal or unauthorized sentence meets the requirements of Section 4(a)(2) of the Texas Code of Criminal Procedure, as a illegal or unauthorized sentence violates the 8TH Amendment to the United States Constitution.

Surely, the State is not going to move to correct a illegal or unauthorized sentence to promote the fair administration of justice or to prevent a manifest of injustice.

In the instant case, Petitioner was charged with the alleged offense of Indecency with A Child a Second Degree Felony. (Appendix A). The indictment did not alleged any prior convictions for enhancement of punishment, thus, the maximum punishment that could be assessed against the Petitioner was twenty (20) years confinement and not less than two(2),years confinement.

As matter before this Court, this Court has not authority to leave in place a sentence that violates a substantive rule or the United States Constitution. The sentence assessed against the Petitioner is not merely voidable but is void as a matter of law and Constitutional dimension.

Therefore, this Court should initiate it's supervisory authority to correct the illegal or unauthorized sentence in this case, or it's review process to correct the illegal or unauthorized sentence in this case

(4)

The productivity of a Unanimous Verdict as it now pertains to a defendant's constitutional right to a fair and impartial trial under the 6TH Amendment as incorporated against the States by way of the 14TH Amendment to the United States Constitution.

The Texas Constitution requires a "Unanimous Verdict" in all felony cases tried before a jury. However, until this Court's decision in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) a defendant in the State of Texas had no federal constitutional right to an Unanimous Verdict, a matter of which is an uncertainty and not strictly followed.

This Court in *Ramos* held that the 6TH Amendment right to a jury trial, as incorporated against the States by way of the 14TH Amendment, requires a unanimous verdict to convict a defendant of a serious offense. Although, this Court did not define what a serious offense is to be considered since the focus of this Court is always with "Capital" offenses. This Court elaborated that at the time of the 6TH Amendment adoption, the right to trial by jury included a right to a unanimous verdict, and it was not the Court's role to reassess whether the right to a unanimous jury was important enough to retain. Notably, in *Edward v. Vannoy*, 141 S.Ct. 1547 (2021) this Court held and made explicitly clear that the *Ramos* rule does not apply retroactively on federal collateral review, and the States, if they chose, to retroactively apply the jury unanimity rule as a matter of State law or State post conviction proceedings. The only choice remain for the States is whether and how to apply the new rule of criminal procedure

to cases on collateral review.

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) this Court recognized that the "Constitution" requires State collateral review court's to give retroactive effect to new substantive rules. The Court held that in view of Louisiana's collateral review procedures, such review procedures are open to claims that a decision of this Court has rendered a certain sentence illegal, as a substantive matter, under the 8TH Amendment to the United States Constitution.

In view of the fact that this Court held that the retroactivity of the Ramos would not be entertained of federal habeas corpus review, it did not limit such on State habeas corpus review.

Article 11.07 of the Texas Code of Criminal Procedure is open to claims where this Court has declared a new criminal procedure or substantive rules. The CCA has recognized the retroaspect of new legal basis to establish a claim for State habeas relief and to meet the requirement of Section 4(a)(2) of the Texas Code of Criminal Procedure. *Ex Parte Robbins*, 478 S.W.3d 679 (Tex.Cr.App. 2014) and *Ex Parte Chabot*, 371 S.W.3d 200 (Tex.Cr.App. 2021).

When Petitioner brought his claim before a federal tribunal, the claim was denied, because the claim did not present a federal constitutional right. Then when this Court delivered the Ramos decision, upon federal habeas corpus review, Petitioner's claim was denied because it was not entertainable, via federal habeas corpus review. Thus, Petitioner has not been provided with the opportunity have his claim considered and addressed on a bases as framed by this Court under the 6TH Amendment to the United

States Constitution.

It is the Petitioner's argument that if the Constitution establishes a rule and requires that rule to have retroactive application, then a State court's refusal to give the rule retroactive effect is reviewable by this Court, because the States may not disregard a controlling constitutional command in their own courts.

On this matter, this Court limited the retroactive application only to cases on federal habeas review and not State habeas review, and this Court should review the State of Texas refusal to give the rule retroactive effect in view of its own criminal post conviction procedure and process.

In the instant case, Petitioner was charged by way of indictment with separate and distinct offenses of Aggravated Sexual Assault of A Child that occurred on the same date, by (1) causing the penetration of the female sexual organ of the alleged victim, and (2) causing the penetration of the anus of the alleged victim

The offenses were submitted to the jury in the disjunctive, thus, six (6) members of the jury could have found the Petitioner guilty of aggravated sexual assault by causing the penetration of the female sexual organ, and six (6) members of the jury could have found Petitioner guilty of aggravated sexual assault by causing the penetration of the anus of the alleged victim. The jury was never instructed that they had to be unanimous as to each of the alleged offenses.

The same error is found in regards to the alleged offense of Indecency with A Child. Touching the female sexual organ or by touching the anus of the alleged victim.

(5)

The productivity the stated procedural barred. With respect to each of the claims presented by the Petitioner, such claims were either procedurally defaulted and/or waived as the proximate result of Ineffective Assistance of Counsel (IAC) as mandated by the 6TH Amendment to the United States Constitution made applicable to the States under the 14TH Amendment to the United States Constitution.

The State habeas court never gave any consideration to the IAC claims as meeting the requirements of Section 4(a)(2) of the Texas Code of Criminal Procedure, when the CCA has clearly established that a claim of IAC meets and fulfills the requirements of Section 4(a)(2) of the Texas Code of Criminal Procedure.

The State habeas court's decision is silent on the matter and does not provide a reasonable explanation as to why the IAC claims does not meet and fulfill the requirements of Section 4(a)(2) of the Texas Code of Criminal Procedure.

Where the State court offers no reasoning, it is less likely to be reasonable than where thorough review is given the claim. *Williams v. Taylor*, 120 S.Ct. 1495 (2000).

It is mindful, that this case does not come before it as the result of the denial of federal habeas corpus relief, but is directly from the result of the State's denial of habeas corpus relief upon federal constitutional rights.

Every criminal defendant enjoys the right to effective assistance of counsel, that this Court should respect with all earnest.

This Court should not condone the State court's failure to consider and address a criminal defendant's IAC claim when such claim is probative to the consideration of the constitutional claims alleged to have been procedurally defaulted.

This Court should take the time to consider whether or not a State court has the obligation to consider and address an IAC claim when such claim material to the claims alleged to have been procedurally defaulted. It is well-spoken, that an individual is entitled to present evidence and have judicial findings based on that evidence.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jose Antonio Cortez  
Jose Antonio Cortez

Date: April 07, 2025