No. 25-5706

IN THE

Supreme Court of the United States

JOHN ALLEN RUBIO,
Petitioner,

v.

ERIC GUERRERO, Director. Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

ELLEN STEWART-KLEIN
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: ellen.stewart-klein@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

Did the Fifth Circuit err in failing to grant John Allen Rubio's request for a certificate of appealability (COA) on:

1. A procedurally defaulted *Napue v. Illinois*, 360 U.S. 264 (1959), claim where no court has found the disputed evidence to be false or material?

2. Rubio's assertion that the district court erred in failing to specifically hold that he failed to overcome the relitigation bar under 28 U.S.C. § 2254 (d)(2), despite the court's clear denial of his ineffective assistance of trial counsel (IATC) claim on both deficiency and prejudice grounds?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

BRIEF IN OPPPOSITION

This is a federal habeas corpus proceeding brought by Petitioner, John Allen Rubio, a death-sentenced Texas inmate. Rubio was properly convicted and sentenced to death for beheading three young children including his own two-month-old daughter. Rubio now seeks a writ of certiorari from the Fifth Circuit's denial of a COA to review the district court's denial of his federal habeas petition. Rubio fails to present a compelling issue for this Court's review. The lower court's denial of a certificate of appealability (COA) is correct and fails to present a compelling question calling for this Court's review.

STATEMENT OF THE CASE

I. Facts of the Crime

On state habeas, the Texas Court of Criminal Appeals (TCCA) provided the following summary of the facts of Rubio's capital crime:

> [Rubio]'s common[-]law wife and co-defendant, Angela Camacho, testified at his second trial that she had three children: Julissa Quesada, who was three years and one month old; John Rubio, who was one year and two months old; and Mary Jane Rubio, who was about two months old. [Rubio] was only the biological father of Mary Jane, but he acted as a father to all three children. In 2002, Child Protective Services ("CPS") removed Julissa and John from the home. The couple was ordered to find suitable housing and take parenting classes, and [Rubio] was ordered to obtain employment and submit to periodic drug testing. The couple eventually complied. However, shortly after CPS returned the children, [Rubio] lost his job and resumed his abuse of spray paint and other substances. At one point when Camacho was pregnant with Mary Jane, [Rubio] asked her what she would do if he killed the children. She thought he was "playing."

Camacho testified that they received a notice informing them that Julissa's food stamp benefits would be terminated because of a problem with her social security number. On the day before the offense, the family went to the hospital to get a copy of Julissa's records, but the hospital did not provide the records. Their rent was due the next day and they did not have enough money to pay it.

Camacho stated that, in the early morning hours, [Rubio] nailed the back door shut. He killed their pet hamsters with a hammer and bleach. He began talking about the anti-Christ and he told Camacho that he was one of the seven good men. He told her that the children were possessed and that he was going to kill them. He ordered her to go into the bathroom. She complied. He then decapitated their two-month-old baby, Mary Jane, and screamed for Camacho. Camacho came out of the bathroom and saw that [Rubio] was trying to stab and decapitate Julissa, but the child was screaming and struggling. [Rubio] told Camacho to hold her legs. Camacho held her legs while [Rubio] stabbed and decapitated her. [Rubio] then washed the girls' bodies in the kitchen sink and put them into trash bags. He put the girls' heads into a bucket.

Camacho recalled that, when [Rubio] came out of the kitchen, he told her to have sex with him, stating that he would call his friends to come over and rape her and then he would kill himself if she did not comply. They had sexual intercourse and took a shower together. Baby John was asleep in his crib during these events. When the baby woke up crying, Camacho went to the bedroom to change his diaper. [Rubio] came into the room and told her that John was possessed. She told [Rubio] "no," and she picked John up and held him. [Rubio] grabbed the baby from her, took him into the kitchen, and stabbed and decapitated him. When Camacho saw John's decapitated body on the kitchen floor, she asked [Rubio] to kill her. He tried unsuccessfully to break her neck, then he placed John's body onto a bed, and he put John's head into a plastic bag.

The couple then walked to the store and bought milk. [Rubio] told Camacho that they would go to prison forever. They discussed plans to bury the children's bodies and flee to Mexico. While they were sitting in the apartment, [Rubio]'s brother and a friend

> arrived for a visit and saw the boy's body on the bed. The visitors left the apartment screaming and then flagged down a passing police office to report the crime.
>
> When the investigating officer arrived at [Rubio] and Camacho's home, [Rubio] admitted him into the apartment. [Rubio] gestured toward the back of the apartment. The officer testified that, as he moved toward the back of the apartment, he saw the headless body of a child, which he at first mistook to be a plastic doll. He asked, "What happened here?" [Rubio] then stood, held out his hands together towards the officer, and said, "arrest me." Other officers arrived and eventually found the decapitated bodies of all three children. [Rubio] was taken to the police station, where he confessed to killing the three children, stating that he believed that the children were possessed by the spirit of his dead grandmother.
>
> In Camacho's second statement to police, she told a different version of these events. In this statement, Camacho said that the reason that she and [Rubio] decided to kill the children was because of money problems and not because they believed that the children were possessed. She said that they decided that it was better for the children to die than for them to suffer. At [Rubio]'s second trial, Camacho admitted making this statement to police, but insisted that it was not true and that the officers tricked her by telling her that [Rubio] had changed his story.

Ex parte Rubio, No. WR-65,784-02 &-04, 2018 WL 2329302, at *1–2 (Tex. Crim. App. May 23, 2018).

II. Course of State and Federal Proceedings

Rubio was first convicted and sentenced to death in 2003, but the TCCA reversed the conviction, holding that the trial court erred during the guilt/innocence phase of trial by admitting the out-of-court statements of Rubio's common-law wife and accomplice, Angela Camacho. *Rubio v. State*, 241 S.W.3d 1, 11 (Tex. Crim. App. 2007). After being retried in July 2010, Rubio

was again convicted and sentenced to death for capital murder in a judgment entered on August 2, 2010. CR 2382–92.[1] The TCCA affirmed Rubio's conviction on direct appeal. *Rubio v. State*, No. AP-76,383, 2012 WL 4833809 (Tex. Crim. App. Oct. 10, 2012) (not designated for publication), *cert. denied* 571 U.S. 852 (2013).

Rubio filed a state application for writ of habeas corpus raising six claims for relief. SHCR-02 at 2–125. After holding an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that relief be denied. EHRR at 1–203; Supp. SHCR-02 (Writ II) at 1–15. After the hearing, Rubio filed a "supplemental" application containing four additional claims. *Ex parte Rubio*, WR-65,784-02, 2018 WL 2329302, at *3. The TCCA issued an order adopting some of the trial court's findings and conclusions, providing additional reasoning related to some of Rubio's claims, and denying habeas relief based on the adopted findings and its own review. *Id.* at *4. Additionally, the TCCA dismissed Rubio's "supplemental" writ, finding it to be subsequent application and an abuse of the writ. *Id*. at *4–5.

---

[1] "CR" refers to the clerk's record of pleadings and documents filed during Rubio's capital-murder trial in cause number 03-CR-457-B. "RR" refers to the Reporter's Record of the testimony from Rubio's retrial. "SHCR" refers to the Clerk's Record of Rubio's habeas pleadings, which is followed by "-#" to indicate which proceeding and may also include a "Supp" or other notation to indicate where in the records to find the document. "EHRR" refers to the state habeas Reporter's Record of the evidentiary hearing in the -02 proceeding.

Rubio then filed a suggestion for reconsideration with the TCCA. ECF No. 17-1 at 1–5. The Director and Rubio agreed to a specified timeline where Rubio would file a "shell petition" after the TCCA's disposition of the suggestion for reconsideration, followed by an amended petition. *Id*. The Director agreed that if Rubio abided by the specified timelines, the Director would expressly waive the statute of limitations defense with respect to all claims appearing in and relating back to those appearing in Rubio's shell petition. *Id*.; Supplemental Appendix (Supp. App.), ECF No. 24-1 at 1–2. Rubio filed his amended petition in the district court. Pet., ECF No. 24.

Rubio later filed a motion to stay the proceedings, which the district court granted. Mot. Stay, ECF No. 42; Ord., ECF No. 53. Rubio returned to state court and filed another subsequent writ application which the TCCA found "failed to satisfy the requirements of Article 11.071, § 5(a)" and thus dismissed as an abuse of the writ "without considering the claims' merits." *Ex parte Rubio*, No. WR-65,784-05, 2022 WL 221485, at *3 (Tex. Crim. App. Jan. 26, 2022) (not designated for publication). Rubio then returned to federal district court and filed a second amended petition. ECF No. 61. After the Director's response, the court denied relief on the merits and refused to issue a COA in a 97-page opinion. F.J., ECF No. 95; Ord. & Op., ECF No. 94; Pet. Appx. B. The Fifth Circuit also denied Rubio's bid for a COA in a per curiam unpublished opinion. Pet. Appx. A.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Rubio fails to advance a compelling reason for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised, Rubio was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Rubio had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. But

Rubio did not meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Rubio sought a COA, but the lower court found his claim unworthy of debate among jurists of reason. Fundamentally, Rubio cannot show the lower court's decision to deny COA was in error much less worthy of this Court's review.

I. Rubio Is Not Entitled to a Writ of Certiorari on His Procedurally Defaulted *Napue* Claim.

In the courts below, Rubio alleged that the prosecution elicited false testimony from Dr. Michael Welner, the State's expert. Pet. at 17–25. Rubio now argues that the lower court improperly denied him a COA on his claim that Dr. Welner falsely testified: (1) that Rubio was not taking antipsychotic medications while incarcerated, and (2) that Rubio did not exhibit symptoms of psychosis before his second trial. Pet. at 17. As the district court concluded, Rubio raised this claim in only his abusive state writ proceeding and it is defaulted. Appx. B at 38–39, 49. Because the circuit court failed to rule on the procedural default, Rubio ignores this fact. But as this Court explained in *Jennings v. Stephens*, "an appellee who does not take a cross-appeal may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court.'" 574 U.S. 271, 276 (2015) (citing *United States v. American Railway Express Co.*,

265 U.S. 425, 435 (1924)). This Court should not grant certiorari because, as both lower courts held, the expert testimony was not false, so no constitutional violation occurred. And regardless of merit, the claim is defaulted.

In *Napue*, this Court held that it is a violation of the Fourteenth Amendment for the prosecution to knowingly use perjured testimony. A conviction must be set aside where the petitioner has demonstrated that: (1) a witness gave false testimony; (2) the falsity was material; and (3) the prosecution used the testimony knowing it was false. *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007). False evidence is deemed material for this analysis "if there is any reasonable likelihood that [it] could have affected the jury's verdict." *Giglio v. United States*, 405 U.S. 150, 153–54 (1972). But as both the lower courts found, Rubio fails to demonstrate "any false testimony." Appx. A at 17; Appx. B at 77–78.

The State called Dr. Welner to rebut Rubio's insanity defense. But Rubio contends that Dr. Welner testified falsely that Rubio was not on antipsychotic medication for the "great majority" of time between his arrest and the 2010 trial. Pet. at 18. He also asserts that Welner's testimony that Rubio exhibited no symptoms of psychosis during that time was false. *Id*. Rubio continues to argue that his own TDCJ records rebut this testimony and prove that it was false. Pet. at 18–19.

The district court acknowledged that "doctors prescribed Rubio medications when he was incarcerated, and that he exhibited some symptoms of mental illness." Appx. B at 77. But "the record also contains controverting evidence, including that Rubio refused to take the medications, and that Rubio feigned symptoms of mental illness." *Id*. Specifically, the district court cited to Rubio's own expert, Dr. Gilbert Martinez's observation in 2008 that Rubio reported refusing to take prescribed medication. *Id*. (citing to record).[2] And that only "[t]wo years later, Dr. Martinez observed that Rubio was taking only an anti-depressant, and not psychotropic medication." *Id*. (citing to record). Another of Rubio's experts, Dr. Raphael Morris, testified that Rubio "has not been on anti-psychotic medications for years, several years now." *Id*. (citing to record). And in a footnote, the district court noted that, "Not only does Rubio ignore the controverting evidence, he also displays a lack of precision when referring to evidence that allegedly supports his position." *Id*. at n.16. Rubio had cited to Wellbutrin which "is typically characterized as an anti-depressant and Vistaril as an antihistamine." *Id*. Neither are psychotropic medications. *Id*. Thus, the court concluded that Dr. Welner's testimony was based on valid evidence. And although he could be impeached with Rubio's proffered records,

---

[2] Rubio's complains that the Fifth Circuit did not include citations, yet the district court clearly provided them as demonstrated here. Pet. at 20; Appx. B.

that dispute is "left to the jury to determine what weight to ascribe to Dr. Welner's statements." *Id*. at 77–78. The court also held that the alleged false testimony was not material. *Id*. at 78. But it did not address the State's knowledge since it had concluded the testimony was not false. *Id*. at 78.

The circuit court found the district's court review to be well supported. It held that "The district court properly determined that the record did not support a conclusion that Dr. Welner falsely testified." Appx. A. at 17. Despite this clear holding, Rubio contends that "the Fifth Circuit failed to test for falsity the testimonial propositions that Rubio was unmedicated and showed no psychotic symptoms." Pet. at 17. He further argues that the court limited its inquiry to "whether Rubio ever 'failed to take his anti-psychotic medication,' and whether there was evidence capable of supporting a guilt-phase jury finding on an [insanity] affirmative defense []." Pet. at 20. But Rubio simply ignores that two federal courts have found his proffered evidence lacking. It is not the court's job to disprove his claim but to review the evidence he submits and properly weigh it.

Moreover, the lower court did not "re-frame" the inquiry into one of perfect medication compliance. *Id*. at 21. Rather it held that the federal district court properly concluded that Rubio failed to prove there was false testimony, an essential element of his *Napue* claim. Appx. A at 17. The court also agreed that the district court had correctly concluded that the statements were not

material, and that Rubio failed to show the State knowingly elicited false testimony. *Id.* at 17–18. In fact, the lower court distinguished this case from *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025). *Id.* at 18, n.13. Thus, the lower court did not err in refusing Rubio further review on a claim he *never* established.

Without the necessary proof of false testimony, the materiality analysis is succinct. Appx. A at 17–18. Indeed, given the overwhelming evidence of Rubio's guilt, the cruelty of the crime, and all the other aggravating factors, Rubio is unable to make any meaningful materiality argument concerning either guilt-innocence or punishment. That is, Rubio is unable to show "any reasonable likelihood" that Dr. Welner's testimony concerning his lack of usage of anti-psychotic medication while incarcerated, coupled with the testimony that Rubio was not exhibiting any psychotic symptoms, "could have affected the jury's verdict." *Giglio*, 405 U.S. at 153–54.

Further, as stated above, in addition to the lack of merit, this Court should not grant certiorari because Rubio's claim is also defaulted from review. To overcome the default, Rubio previously asserted that the fundamental miscarriage of justice exception applies. Appx. B at 76–78. This exception occurs when the petitioner "is 'actually innocent' of the offense underlying his conviction or 'actually innocent' of the death penalty." *Roberts v. Thaler*, 681 F.3d 597, 605 (5th Cir. 2012). Rubio argued that, but for Dr. Welner's

testimony, no reasonable juror would have found him sane, and thus, guilty, nor would he have been sentenced to death. Appx. B at 76–78. But Rubio is unable to show that he is actually innocent of murdering and decapitating three children.

As the district court recognized, "'the actual innocence excuse for procedural default requires factual innocence, not mere legal insufficiency.'" Appx. B at 74 (citing *McGee v. Lumpkin*, No. 22-10188, 2022 WL 18935854, at *1 (5th Cir. Sept. 8, 2022) (cleaned up) (quoting *Bousley v. U.S.*, 523 U.S. 614, 623 (1998)). The law does not clearly enable petitioners to overcome procedural default by arguing that absent a constitutional error, the jury would have found the petitioner not guilty by reason of insanity ("NGBRI"). Appx. B at 76. A petitioner who presents a NGBRI defense is not factually innocent as this is an affirmative defense, which concerns legal, rather than factual innocence.

But even assuming Rubio's position is correct, the court found that the default still applied because Rubio did not demonstrate actual innocence of the crime. *Id.* at 76–78. The court also rejected Rubio's contention that he is actually innocent of the death penalty. *Id.* at 78. In fact, Rubio "shows no error of any kind concerning the challenged statement by Dr. Welner." *Id.* at 78. This is fatal to Rubio's argument that he is entitled to the fundamental-miscarriage-of-justice exception to the procedural bar. *Id.*

Given the meritless nature of a this procedurally defaulted claim, this Court has no reason to grant certiorari even for alleged error correction. The Fifth Circuit's brevity and lack of record citations do not amount to error much less to a constitutional question worthy of this Court's consideration.

II. Rubio Is Not Entitled to a Writ of Certiorari on His Ineffective Assistance of Trial Counsel Claim for Failure to Investigate and Present his Pre-Natal Exposure to Alcohol.

Rubio argues this Court should grant him further review because the lower courts erred. He asserts the courts failed to rule on whether he demonstrated the state court ruling on his ineffective assistance of trial counsel (IATC) claim was factually unreasonable. Pet. at 25–33. This relates specifically to his claim that trial counsel failed to investigate and present evidence of fetal alcohol spectrum disorder (FASD). *Id*. Rubio asserts the district court failed to discuss this claim and the circuit court "made a straightforward error in its interpretation of [28 U.S.C.] § 2254(d)." *Id*. But all Rubio demonstrates is that the lower courts disagree with him.

The familiar standard by which a claim of ineffective assistance of counsel is weighed is set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). "[R]easonably diligent counsel may draw a line when they have good

reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). To establish prejudice Rubio must show that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Further, in the district court because Rubio sought a federal writ of habeas corpus based on an IATC claim raised in the state court, the standard is more arduous. Instead, the test is whether the state court's decision–that the petitioner did not make the *Strickland* showing–was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on his [IATC] claim. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Thus, a federal court's review of a state court's resolution of an IATC claim under AEDPA is "doubly deferential," *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111 (2009)), because the question is "whether the state courts application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101.

The district court's failure to explicitly state that Rubio did not overcome § 2254(d)(2), was not a ground for granting a COA. Rubio cites to no case law that shows otherwise. Therefore, no error has occurred. The district court emphatically and categorically denied this IATC claim on both deficiency and prejudice grounds. Appx. B at 34–38. As this Court has recognized, "both the

performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698. Thus, the denial of Rubio's IATC claim also decided that the state court did not make unreasonable factual determinations.

Rubio's trial counsel "was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies". Appx. B at 36 (citing *Richter*, 562 U.S. at 107). Indeed, the state court noted the double-edged nature of this strategic choice. Appx. A at 9. Thus, the district court properly concluded that "[g]iven the information available to them" trial counsel made a reasonable strategic decision "regarding a FASD defense" that "in no manner fell below objective standards of reasonableness." Appx. B at 36. Finally, the court denied the IATC claim stating:

> Ultimately, Rubio has not established that the TCCA, when concluding that Rubio's counsel did not provide ineffective assistance of counsel with respect to a possible FASD defense, reached a conclusion that conflicts with applicable Supreme Court precedents. At the very least, Rubio fails to show that fairminded jurists could disagree on that point. As a result, he falls short of meeting his burden under AEDPA and is entitled to no relief on this claim.

Id. at 38. This statement leaves no doubt that the court found that Rubio failed to overcome the relitigation bar and presented an unmeritorious claim. This

clear denial of his claim did not require the district court to explicitly state what is implicit in the ruling.

Further, despite Rubio's insistence that the lower courts relied on what he claims are mistaken findings, the district court did *not* just rely on the evidence that counsel had sought such a diagnosis. Pet. at 28–33. The court also found that Rubio failed to obtain an expert FASD diagnosis even at state habeas proceedings:

> In addition, even in the context of the 2013 Habeas Application, Rubio relied on three experts, but none of them conclusively diagnosed Rubio with FASD. At best, Dr. Adler diagnosed Rubio with Partial FAS–a condition that includes some features of FAS–but he also indicated that additional testing was necessary to confirm the diagnosis. In the end, the evidence on which Rubio relied before the state habeas court does not prove that Rubio could have presented a strong FASD defense.

Appx. B at 36.

Rubio then raised this argument in the court below which properly denied his request for a COA. Appx. A at 7–11. The lower court held, "Rubio makes no showing that the state court, in light of all of the evidence in its proceedings, made an unreasonable determination of facts." *Id*. at 11–12, n.7. The court credited the district court's denial and found "there is no indication that it erred in failing to proclaim the same determination under § 2254(d)(2)." *Id*.

And while Rubio disagrees with these holdings, he still fails to show the court erred. Rubio continues to argue that the state habeas court improperly found that Rubio's attorneys were aware of red flags because one "testified under oath that the reason they abandoned an FASD investigation was because he thought FASDs required facial dysmorphia and Rubio had none." Pet. at 33. But as the lower court held, the very next sentence in the testimony was that, while he believed facial dysmorphia was required, he investigated FASD until he "got Dr. Owens's report on Fetal Alcohol Syndrome or *lack of* Fetal Alcohol Syndrome." Appx. A at 12, n.7. Rubio has never provided clear and convincing evidence to the contrary.

Rubio fails to demonstrate that either of the lower courts erred. In fact, the evidence is abundant and clear as Rubio admitted to beheading three children all younger than the age of four. So even if Rubio demonstrated some minor error, where a petitioner asserts only factual errors certiorari review is "rarely granted." Sup. Ct. R. 10. Rubio does not present a compelling issue that merits this Court's review.

CONCLUSION

For the foregoing reasons, the Court should deny Rubio's petition for writ of certiorari.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

*ELLEN STEWART-KLEIN
Assistant Attorney General
Criminal Appeals Division
Texas Bar No. 24028011
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
e-mail address:
ellen.stewart-klein@oag.texas.gov

ATTORNEYS FOR
RESPONDENT–APPELLEE