No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GABRIEL PAUL HALL,
Petitioner,

v.

TEXAS,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

THIS IS A CAPITAL CASE

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Capital Case

Questions Presented

1. When a state habeas applicant makes a prima facie case that the state knowingly presented false and material testimony in the punishment phase of his capital murder trial, does the state habeas court violate the applicant's Fourteenth Amendment right to have a full and fair opportunity to have his claim heard in the state courts by denying him the process necessary to develop the evidence which could prove his allegation true?

2. When a state has both a rule that an attorney must be given an opportunity to explain his conduct before being found to have rendered ineffective assistance at trial and a statute which makes the attorney ineligible for future capital appointments if he is found to be ineffective, does the Fourteenth Amendment's right to due process or the Sixth Amendment right to the effective assistance of counsel require that the habeas court consider evidence that would tend to show the attorney's pecuniary interests are in conflict with his client's interests?

List of Parties and Corporate Disclosure Statement

All parties to the proceeding in the state court are listed in the caption.

Petitioner is not a corporate entity.

List of All Directly Related Proceedings in State Court

Trial:

State v. Hall, No. 11-06185-CRF-272 (272nd Dist. Ct., Brazos, County, Tex. Oct. 7, 2015).

Direct appeal:

Hall v. State, 663 S.W.3d 15 (Tex. Crim. App. Dec. 8, 2021).

State habeas proceedings:

Ex parte Hall, No. WR-86,568-01, 2024 WL 467871 (Tex. Crim. App. Feb. 7, 2024).

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Introduction

The jury that sentenced Petitioner Gabriel Paul Hall to death on October 7, 2015, deliberated his punishment for over seven hours. 100 R.R. 127, 131 (recording punishment phase deliberations began at 12:35 pm and ended at 8:03 pm). [1] According to news reports, some of the jurors cried as he was sentenced to death. Tasneem Nashrulla, *Texas Hands Down its First Death Sentence of 2015*, BuzzFeed News (Oct. 8, 2015), https://www.buzzfeednews.com/article/tasneemnashrulla/texas-hands-out-its-first-death-sentence-of-2015. Especially given the degree to which the

[1] Citations to the Reporter's Record of Petitioner's 2015 capital murder trial appear herein as [volume number] R.R. [page number(s)].

jurors apparently wrestled with their decision to sentence Hall to death, the state courts of Texas should have ensured Hall had a full and fair opportunity to raise claims for relief (especially those related to the punishment phase of his 2015 capital murder trial) in his state habeas proceeding. That, however, is not what transpired in Hall's state habeas proceeding.

First, even though Hall made a prima facie case that the State knowingly presented false and material testimony during the punishment phase of Hall's trial, the state habeas trial court refused to give Hall the process necessary to develop his claim. Because Hall was not given the opportunity to develop the extra-record evidence necessary to confirm the testimony was false, the Texas Court of Criminal Appeals ("CCA") found that his habeas claim could have been, but was not, raised on direct appeal and, for that reason, was procedurally defaulted.

Second, it was revealed at the evidentiary hearing convened on Hall's ineffective assistance of counsel claim that trial counsel had reason to be less than forthcoming about his actions at trial. Specifically, at the January 30, 2023, evidentiary hearing, trial counsel revealed he was attempting to get added to the list of attorneys who can be appointed to represent death-sentenced Texas defendants on direct appeal. A Texas statute, Texas Code of Criminal Procedure article 26.052, makes an attorney who has been found to be ineffective ineligible for such appointments.[2] While the trial attorney's comments made at the bench should

[2] The statute contains a provision which allows the attorney to be added (or added back) to the list of attorneys eligible for appointments, if a committee finds the attorney has improved such that the conduct for which he was found to have

have been included in the record because those comments were critical to determining the credibility of the attorney, the CCA found the comments should be excluded from the record and not considered by it, the state habeas trial court, or any other court.

Counsel respectfully request this Court grant certiorari to determine whether Texas' death penalty scheme runs afoul of the Fourteenth Amendment because it does not permit death-sentenced inmates to develop their habeas claims; or because it excludes from the record comments necessary to discern whether a trial attorney's testimony at a hearing convened to determine whether he rendered ineffective assistance at trial is credible.

Opinions and Orders Below

The Texas Court of Criminal Appeals ("CCA") issued its Order denying Petitioner relief in his state habeas proceeding on February 7, 2024. The Order was not published and is attached as Appendix A.

Statement of Jurisdiction

This Court has jurisdiction to review the CCA's February 7, 2024, Order denying Hall habeas relief pursuant to 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

been ineffective no longer represents his ability. Tex. Code Crim. Proc. art. 26.052(d)(3)(C).

The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides: "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 defence." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "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." U.S. Const. amend. XIV, § 1.

Statement of the Case

A. Trial – Punishment phase

1. State's case

On September 11, 2015, Petitioner Gabriel Paul Hall was convicted of killing Edwin Shaar during the course of an aggravated robbery. 81 R.R. 50. The State's case on punishment consisted mainly of evidence of Hall's conduct and demeanor during the four years he was incarcerated in the Brazos County jail before trial, including an edited video recording of comedian Jeff Ross interviewing Hall. The video recording shows Ross entering the dorm where Hall was then housed and

walking directly to a table at which Hall was seated with two other inmates, Ronnie McQueen and an unidentified male. 101 R.R. 83 (State's MTS Ex. 1). Other inmates are visible loitering in the background or lingering around the table to listen in. *Id.* As Ross sits down, the camera operator moves from behind him and takes up a position directly across the table from, and facing, Hall. *Id.* For most of the next seventeen minutes, Hall is in the center of the frame; the camera rarely moves from him to focus on either of the other two inmates at the table. In fact, for a total of 330 seconds, the camera zooms in to focus exclusively on Hall – five and a half minutes of the recording's total length of seventeen minutes and forty-two seconds.[3]

Ross refrains from asking any of the other inmates about the offenses with which they are charged, but several times directs such questions or statements to Hall. For example, almost immediately, Ross turns to Hall and suggests that he "must've done something crazy":

Ross:	You guys been here a while?
Hall:	Yeah.
Male:	Since May 2nd.
Ross:	May 2nd? That's a good run, man.
Male:	(inaudible)
McQueen:	Eight months.

[3] The camera zooms in on Hall from 0:49 – 1:04 (16 seconds); 2:06 – 2:50 (45 seconds); 3:40 (1 second); 4:01 – 4:09 (9 seconds); 4:57 – 5:08 (12 seconds); 5:23 – 5:24 (2 seconds); 5:46 – 5:50 (5 seconds); 7:00 – 8:17 (68 seconds); 8:20 (1 second); 8:59 – 9:01 (3 seconds); 9:10 – 9:19 (10 seconds); 15:09 – 17:10 (120 seconds); 17:29 (1 second); 17:35 – 17:41 (7 seconds).

Ross: Eight months?

McQueen: [gesturing at Hall] He been here four, almost four years, huh? Three and a half?

Hall: Yeah, three and a half.

Ross: In this place?

Hall: Yeah, I've been around, so.

Ross: While you're on trial?

Hall: Something like that. Legally, I can't discuss about the case.

Ross: Oh, ok.

McQueen: Hypothetically.

Ross: Right. Four years in this place.

Hall: Yeah, I know. It's a bitch.

Ross: That's fucking tough. You must've done something crazy. [camera zooms in on Hall]

Hall: Ah…

McQueen: Alleged.

Ross: Or they think you did something crazy. Allegedly.

Hall: So they say. So they say.

102 R.R 6-7 (State's MTS Ex. 5).

Ross brings up the death penalty several times during the interview.[4] Each time he does, the camera zooms in on Hall. For example, at about the 3:23 mark, the following exchange occurs:

> Ross: [T]hey have the death penalty … in Texas.
>
> McQueen: Yeah.
>
> Ross: This is a scary state.
>
> Male: Yeah.
>
> Hall: Yeah.
>
> McQueen: They're not bashful about giving it out either.
>
> Hall: Yeah, they'll . . . hang you for it though. They'll hang you for it. Well, they've, they'll basically screw you over, over the most . . . ah, petty shit. So.

102 R.R. 14 (State's MTS Ex. 5 at 9).

Later in the interaction, after bantering about comedy and Obamacare, Ross brings up the death penalty again:

> Ross: Exactly right, man. Do the fuck, the death penalty, the whole thing about this, and this particular jail has people on death row and stuff like that and people who are gonna be in here or sent off for life. To me, I have mixed feelings about the death penalty but if you're gonna . . . if we're gonna put people to death, I don't think the electric chair or, ah, lethal injection is the way to do it. I think you should be able [to] pick how you die.

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[4] Of the three inmates at the table, only Hall was charged with a capital or violent offense. McQueen was sentenced in June 2015 for forgery and unauthorized use of a motor vehicle. *See* https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=05307520 [https://perma.cc/B6WH-G7C5]. During the recording the unidentified inmate states that he was charged with drug-related offenses. 102 R.R. 25 (State's MTS Ex. 5).

Hall: Firing squad.

Ross: No. I would . . .

McQueen: I would wanna laugh to death.

Hall: Oh yeah.

Ross: I would probably want to go to a NASCAR race wearing an Obama mask. . . . I'd probably want to fuck Courtney Love without a condom. [camera zooms in on Hall]

McQueen: Yes, yes.

Hall: Yeah, there ya go. Yeah, that's appropriate.

Male: Too late.

Ross: That would work, right?

Hall: No, actually you're not, you're better off with Lindsey Lohan.

Ross: Lindsey Lohan without a condom?

Hall: Yeah.

Ross: That's not bad.

102 R.R. 18-19 (State's MTS Ex. 5 at 13-14).

Finally, toward the end of the recording, Ross turns to Hall and asks him directly, "What are you in here for?" 102 R.R. 28 (State's MTS Ex. 5 at 23). The camera zooms in on Hall and Ross during the exchange, which continues:

Ross: Hon, what'd you do before you came in here and what'd you do for a living?

Hall: Well, I was myself, so . . .

McQueen: High school student, professional high school student.

Hall: Professional high school student.

Ross: Yeah. What are you in here for?

Hall: Ah . . .

Ross: Hacking somebody's computer?

Hall: Something like that, yes.

Male: Tax evasion.

McQueen: Hacking being the, hacking being the operative word.

Hall: Yeah. Yeah, used a machete on someone['s] screen so.

Ross: What's that?

Hall: Used a machete on someone, someone's screen, so.

Ross: Oh boy, Jesus.

Hall: Yep. Stole a lot . . .

Ross: He seems like fuckin' scary dude, I don't know what it is, man.

Male: He is.

Hall: Oh come on, I wouldn't hurt a fly.

Male: (inaudible)

Ross: What's that?

Hall: I wouldn't hurt a fly.

Ross: Really, what about a human?

Hall: Ah, they're annoying.

Ross: Yeah.

Hall: We, we'll leave 'em to their own devices, so.

102 R.R. 28-29 (State's MTS Ex. 5 at 23-24).

At the very end of the recording, Ross thanks the inmates "for their honesty," leading to the following exchange:

Ross:	Well, thank you fellas for your insight, your honesty . . .
Hall:	Honesty?
Ross:	[and] let[ting] me visit your home away from home?
Hall:	Honest, why you think we're honest, man?
Ross:	Did you lie about something?
McQueen:	Honest criminal is a oxymoron, man.
Hall:	Yeah, oxymoron.
Ross:	How many guys are innocent?
Male:	I am.
Male:	For some of my charges.
Male:	I'm totally innocent.
Ross:	How many guys are guilty?
Male:	For some of my charges.
Male:	I'm innocent, I really am.
Ross:	How many guys have lied so much they don't know the difference [any]more?

102 R.R. 30-31 (State's MTS Ex. 5 at 25-26).

Whether the recording of Ross's interaction with Hall would be admissible at trial was the subject of a pre-trial hearing convened on a motion to suppress. Given that Ross immediately focused on Hall upon entering his dormitory, trial counsel

were concerned with, *inter alia*, whether anyone at the Brazos County jail had told Ross or anyone on his team about Hall and asked the team to talk to Hall.[5] During the hearing on their motion to suppress, Hall's trial attorneys asked both jail administrator Wayne Dicky and Courtney Waller (who had escorted Ross and his team through the facility) whether Ross had knowledge about Hall. Dicky testified that he did not ask Ross or anyone from Comedy Central to talk to Hall. 65 R.R. 58. Waller testified that she was not given any specific instructions regarding Hall. 65 R.R. 83-84. Waller testified that no one "from anyone in law enforcement" had told Ross who Hall was before he interviewed Hall. 65 R.R. 97.[6]

2. Defense's case

During the punishment phase of the trial, Hall's attorneys presented voluminous testimony about Hall's mental illness, developmental delays, and organic brain damage. A variety of experts testified that these impairments diminished his capacity to regulate his own emotions and his ability to function in the world. For example, neuropsychologist Nancy Nussbaum testified Hall had subtle organic brain dysfunction. 91 R.R. 130. Dr. Jolie Brams explained the effects of developmental trauma and generational deprivation on Hall's emotional

[5] Trial counsel rightfully believed that if Ross had been instructed to talk to Hall, he was effectively acting as an agent of the State.

[6] While an objection to speculation was subsequently sustained, Waller's testimony was not stricken from the record. After the objection was sustained, Waller testified that to her knowledge, Ross did not know who Hall was. 65 R.R. 98.

development. 93 R.R. 25-27. Psychologist Bethany Brand testified that Hall suffered from severe mental illness. 94 R.R. 12.

Trial counsel had intended for Dr. Richard Adler to be its final expert witness at trial. Defense counsel intended for Dr. Adler to testify about the findings of other experts and then form his own conclusions based on that data. 86 R.R. 105-08. Among the experts whose conclusions Dr. Adler intended to report during his testimony was Dr. Ruben Gur. 86 R.R. 107. Gur's work in the case involved brain imaging and opinions regarding what those images might mean with respect to Hall's culpability. While the State recognized Adler could rely on images Gur obtained and even on Gur's report, the State objected to Adler's testifying about Gur's conclusions and trial counsel's attempting to introduce Gur's report through Adler. 86 R.R. 109; 89 R.R. 9; 97 R.R. 91.

Upon realizing that Dr. Gur's opinions would not be admissible through Dr. Adler, trial counsel appears to have finally begun working to secure Dr. Gur's presence at trial. Specifically, on September 28, 2015, trial counsel informed the trial court that while the defense did not initially intend to have Dr. Gur testify, it now realized he would have to testify so as not to risk portions of Dr. Adler's planned testimony being inadmissible. 93 R.R. 9. Trial counsel informed the court that Gur would not be able to appear in person but would be available to testify by Polycom. 93 R.R. 9. The State agreed that it would not object to Gur's being allowed to testify by Polycom. 93 R.R. 9. The State also made clear it would object to Adler's testifying about Gur's conclusions if Gur did not first testify to those opinions. *Id.* at

9-10. Two days later, on Wednesday, September 30, 2015, trial counsel informed the court that Gur would be able to appear by Polycom on Friday, October 2. 95 R.R. 6. The State made clear that unless Gur testified, it would object to any attempt to admit his report as substantive evidence through Adler's testimony. 95 R.R. 7. The following day (i.e., Thursday, October 1, 2015), co-counsel informed the court that Gur would, in fact, not be available as promised on Friday, October 2, 2015, but could instead appear (by Polycom) on Monday, October 5, 2015. 96 R.R. 217-25.

While the record does not reflect what transpired between the time the court adjourned on Thursday, October 1, and reconvened on Friday, October 2, it appears that during that time, trial counsel, without consulting other members of the defense team, abandoned any attempt to secure Gur's testimony and place it before the jury. On Friday, October 2, Adler testified. Realizing that any hearsay objection from the State to the admissibility of Gur's report through Adler would likely be sustained, trial counsel made no attempt to have Gur's report admitted as substantive evidence, though that had purportedly been of critical importance to the defense team only the day before. The jury did not get to hear Gur testify about the conclusions he drew from his imaging. In a word, the jury did not hear from Dr. Gur because trial counsel was unprepared and did not do the minimum his job required.

On October 7, 2015, the jury unanimously answered "yes" to the first special issue, which asked whether, beyond a reasonable doubt, there was a probability that Hall would commit criminal acts of violence that would constitute a continuing threat to society. 100 R.R. 132; Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). The jury

unanimously answered "no" to the second special issue, which asked whether there were sufficient mitigating circumstances to warrant a sentence of life imprisonment without the possibility of parole. 100 R.R. 132; Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). The trial court subsequently sentenced Hall to death. 100 R.R. 134.

C. State habeas proceedings

1. False testimony claim

Undersigned Counsel filed Hall's Application for Postconviction Writ of Habeas Corpus in the state habeas trial court on October 17, 2019. S.H.C.R. at 1.[7] The first claim raised in the Application alleged that Hall's sentence ran afoul of the Fourteenth Amendment's Due Process Clause because the State failed to correct false testimony from Wayne Dicky and Courtney Waller. *Id.* at 38-59. Specifically, the application alleged that the immediacy with which comedian Jeff Ross focused on Hall upon entering the dormitory where Hall was and the manner in which Ross and his camera crew centered the interview on Hall was sufficient to make a prima facie case that both Dicky and Waller testified falsely at the pretrial motion to suppress when they testified Ross and his crew had neither been told about Hall nor asked to interview him. The application informed the trial court that Counsel had attempted to speak to Jeff Ross and the members of the Comedy Central team who accompanied him at the Brazos County jail, but a Viacom vice president would not

[7] Citations to the state habeas clerk's record in Hall's initial state habeas proceeding appear herein as "S.H.C.R. at [page number(s)]." Citations to the supplemental volume (which contains the trial court's findings of fact and conclusions of law) appear as "Suppl. S.H.C.R. at [page number(s)]."

allow Counsel to speak to these crucial witnesses unless they were subpoenaed to testify. *Id.* at 59.

After the State responded to the Application, Counsel filed a motion which asked the trial court to convene a hearing at which Jeff Ross and the members of his team could testify. S.H.C.R. at 162-64. Counsel argued that this was required pursuant to Texas Code of Criminal Procedure article 11.071, section 8 because the issue of whether the State presented false testimony was a controverted factual issue, which is material to the constitutionality of Hall's confinement. *Id.* In denying Hall a hearing on this claim, the state habeas court incorrectly claimed CCA precedent required an inmate to plead evidence in his application. *See* S.H.C.R. 306. In other words, the trial court found that because Hall had not included testimony in his application that could prove his allegation true, he was not entitled to a hearing on the claim, even though Hall could not acquire that testimony unless the trial court convened a hearing. The trial court concluded that the claim should have been raised on direct appeal (even though it would have been impossible to include extra-record testimony from Jeff Ross or members of his team in a direct appeal brief) and that Hall was therefore precluded from raising the claim in habeas. Suppl. S.H.C.R. 69. The CCA agreed with the trial court and found the claim to be defaulted for this reason. Appendix A at 4-5.

2. Ineffective assistance of counsel claim

The sixth claim raised in the Application alleged that Hall received ineffective assistance during the punishment phase of trial primarily because trial

counsel failed to secure Dr. Gur's testimony at trial. S.H.C.R. 73-80. At Hall's trial, trial counsel repeatedly assured the court he was working diligently to arrange for Dr. Gur to be present in the courtroom and give live testimony. In contrast, at the evidentiary hearing held in the habeas proceeding, the same trial counsel testified that he had been leery of having Dr. Gur testify at trial because of a 2011 opinion from the U.S. Court of Appeals for the Eighth Circuit in which Dr. Gur's work was criticized. E.H.R.R. at 10-12.[8] This story was, of course, irreconcilably different from what trial counsel assured the court at trial, which was that he was trying diligently to secure Gur's presence at trial. At the habeas proceeding, trial counsel offered a reason for not having Gur testify that sounded as if it was a decision grounded in a strategic choice (namely, that he was worried about Dr. Gur's testimony). However, in view of how trial counsel had said precisely the opposite during the capital murder trial, the likely explanation for trial counsel's flip-flop was also revealed during cross examination, when he stated he wanted to be added to the list of attorneys who can represent death-sentenced Texas defendant in their direct appeal proceeding. E.H.R.R. at 71 ("I'm thinking about getting back on the list strictly to do appeals, if I can do that."). If there were any doubt about trial counsel's financial interest, it was resolved during a *sotto voce* colloquy counsel had with the judge presiding over the habeas proceeding: As trial counsel left the stand, he stopped at the bench to talk to the trial court and reiterated his desire to

[8] Citations to the single volume Reporter's Record from the January 30, 2023, evidentiary hearing appear herein as "E.H.R.R. at [page number(s)]."

continue representing indigent capital defendants by asking the trial court to keep him in mind if the court needed to appoint someone to a capital direct appeal. 3 Suppl. R.R. at 13[9]; *see also* S.H.C.R. 588-89 (identifying the speakers in the conversation as being the judge and trial counsel).

When undersigned Counsel received a copy of the January 30 evidentiary hearing record, they noticed trial counsel's conversation at the bench was not included in the record and filed a motion to correct the record, which asked for the discussion at the bench to be included in the record, because Counsel believe trial counsel's statement to the court about keeping him in mind further revealed trial counsel's interest in not being found ineffective and, for that reason, is something the state habeas court should have taken into account in determining the merits of Hall's claim. The trial court, however, refused to consider this conversation when considering the merits of Hall's claim, finding the conversation "was not relevant to any issue in this case." S.H.C.R. 590. In its opinion denying Hall relief on the claims raised in his habeas application, the CCA agreed with the trial court that trial counsel's "remarks at issue should not be made part of the official record of the January 30, 2023[,] evidentiary hearing." Appendix A at 4.[10] After finding it correct

[9] Citations to the four-volume transcript of a hearing convened in the trial court on April 25, 2023, appear herein as "[volume number] Supp. R.R. at [page number(s)]."

[10] On March 15, 2023, undersigned Counsel filed in the trial court a Motion to Find Applicant's Right to Due Process in this Proceeding was Violated due to Article 26.052 of the Texas Code of Criminal Procedure. S.H.C.R. at 457. On January 10, 2024, the trial court issued its Memorandum Order and Ruling finding Article 26.052 to be constitutional. After the CCA subsequently found the January 10 order

to ignore comments that would call into question the trial attorney's credibility, the CCA adopted the trial court's finding that the trial attorney's testimony was credible. Appendix A at 6 (adopting most of the trial court's findings, including number 37, and denying relief); 1 Suppl. S.H.C.R. 30 (finding the trial attorney's testimony to be credible).

Reasons for Granting the Writ

I. Due process requires state habeas applicants be given an opportunity to develop their claims.

As this Court made clear in *Giglio v. United States*, 405 U.S. 150 (1972), "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demeans of justice.'" *Giglio*, 405 U.S. at 153 (*quoting Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Of course, it is the rare occasion when one party can demonstrate during trial that the other party has presented false testimony. As was true of Giglio, the evidence that is necessary to demonstrate testimony is, in fact, false is usually acquired during a post-conviction proceeding. *See id.* at 150-51.

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to be one that is not appealable to any state court, Counsel filed a Petition in this Court asking this Court to find Article 26.052 is unconstitutional. That Petition is currently pending in cause number 23-7322.

While the second question presented in this Petition is related to the one presented in cause number 23-7322, it is slightly different. Essentially, the second question presented in this Petition argues that this Court should find if Texas is going to continue to have both a rule that trial attorneys must be allowed to testify before being found ineffective and a rule that an attorney who is found to be ineffective is ineligible for capital appointments (i.e., Article 26.052), the state courts cannot close their ears to evidence that suggests the attorney is motivated to be less than forthcoming during his testimony because of Article 26.052.

The trial court's findings in this case, subsequently adopted by the CCA, first seem to indicate that it believes false testimony claims should not be cognizable in habeas because there is an opportunity during trial to discern whether a witness is testifying truthfully. *See* Suppl. S.H.C.R. at 69. This conclusion, of course, is at odds with the essence of this Court's ruling in *Giglio*.

The trial court then proceeded to find that because the evidence (i.e., testimony) that would prove Hall's allegations true was not contained in his application, that he was not entitled to relief. Suppl. S.H.C.R. at 68. The trial court believed this was mandated by the holding of the CCA's opinion issued in *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011). *Id.* In *Medina*, the CCA explained that to satisfy the pleading requirement, a claim presented in a habeas application "must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief." *Medina*, 361 S.W.3d at 640. In *Medina*, the CCA made clear, however, that the evidence that could prove the alleged facts true need not be contained in the application. *Medina*, 361 S.W.3d at 639 ("Applicant's counsel told us that applicants should not be required to plead 'evidence.' We agree. There is no requirement in the statute that they do so, just as there is no requirement that the State allege evidence in an indictment."). Perplexingly, in denying Hall relief on February 7, 2024, the CCA adopted the trial court's misinterpretation of its own opinion issued in *Medina*. But insofar as Texas law has shifted such that the evidence of falsity must be included in the habeas application, Texas law violates a habeas applicant's Due Process right to a full and fair hearing because the very

point of an evidentiary hearing is to elicit and present evidence that inherently cannot be obtained otherwise. If Texas law has shifted, in other words, state habeas applicants now face a Hobson's choice where they can present either allegations with no evidence, or no allegations at all – a dilemma necessarily violative of Due Process.

Hall was diligent in seeking the evidence that could have proved his allegation true. Specifically, while preparing Hall's application, Counsel attempted to acquire the evidence that could prove the facts alleged in Hall's claim true. In their effort to acquire this evidence, Counsel attempted to speak to the Viacom employees that participated in the interviewing and filming of Hall at the Brazos County jail. S.H.C.R. 59. These are the people whose testimony could prove that the trial testimony given by Brazos County officials (which was that the Comedy Central team was not informed about Hall before the interview) was false. Viacom's counsel refused to allow undersigned Counsel to talk to these employees unless Counsel subpoenaed the employees. S.H.C.R. 59.

As the CCA recently made clear by denying a mandamus petition in John Ray Falk's case, the trial court had no authority to compel these witnesses to provide testimony before Hall filed his application. *See In re TDCJ*, 668 S.W.3d 375 (Tex. Crim. App. 2023) (Slaughter, J., dissenting). There was simply no mechanism other than an evidentiary hearing convened pursuant to Article 11.071, section 9, after Hall filed his application to compel the testimony that could prove true the facts alleged in Hall's application. For that reason, Counsel identified this issue as

one that the trial court should designate for purposes of the evidentiary hearing. But the trial court refused to do so. S.H.C.R. 162-64, 171-72. By denying Hall's request for a hearing on his false testimony claim, the trial court denied Counsel the opportunity to issue the subpoenas that would have compelled these witnesses to testify.

Hall's state habeas proceeding demonstrates that in order to be entitled to relief on or even a hearing about a false testimony claim, a Texas applicant must develop the facts that would prove his allegation true before submitting his application. However, that applicant has no ability to subpoena witnesses before filing his application. If the persons who possess the knowledge that would prove his allegation true refuse to testify without being compelled to do so by a subpoena, then the habeas applicant cannot possibly be granted relief on his claim.

This Court's jurisprudence recognizes that a trial's being free from false testimony is of paramount importance and should not countenance any state procedure which renders a false testimony claim so easily avoided.

II. In determining whether a habeas applicant is entitled to relief after convening an evidentiary hearing, due process requires a court consider all relevant evidence pertaining to a witness's credibility.

Pursuant to Texas law, most claims of ineffective assistance of trial counsel are not cognizable on direct appeal. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). This is because trial counsel must ordinarily be given an opportunity to explain his complained of actions or inactions during a habeas proceeding before he can be found to have rendered ineffective assistance. *Id.* In this

respect, Texas is far from unique: Counsel believe at least fourteen other states have a similar rule.[11]

However, Texas law does appear to be unique with respect to the consequences of having been found to be ineffective: if an attorney is found to have rendered ineffective assistance at a capital trial, he becomes presumptively ineligible to be appointed to represent indigent capital defendants again.[12] Because of this unique provision in Texas law, if the attorney desires to continue representing defendants facing death, he has both a professional and pecuniary interest in not being found to have rendered ineffective assistance. Consequently, and inevitably, at an evidentiary hearing convened to ascertain whether his former client is entitled to relief because the attorney violated the Sixth Amendment right to the effective assistance of counsel, the attorney's interests are in irreconcilable

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[11] *See Broadnax v. State*, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013); *Barry v. State*, 675 P.2d 1292, 1295 (Alaska Ct. App. 1984); *People v. Lewis*, 786 P.2d 892, 907 (Cal. 1990); *People v. Thomas*, 867 P.2d 880, 886 (Colo. 1994); *State v. Hinckley*, 502 A.2d 388, 395 (Conn. 1985); *Briones v. State*, 848 P.2d 966, 976-77 (Haw. 1993); *State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007); *Pabst v. State*, 192 P.3d 630, 633 (Kan. 2008); *State v. Mitchell*, 894 So. 2d 1240, 1253 (La. Ct. App., 2d Cir. 2005); *Mosley v. State*, 836 A.2d 678, 685 (Md. 2003); *Commonwealth v. Peloquin*, 770 N.E.2d 440, 446 (Mass. 2002); *State v. Jett*, 474 N.W.2d 741, 743 (S.D. 1991); *Brown v. Commonwealth*, 380 S.E.2d 8, 9 (Va. Ct. App. 1989); *Tex S. v. Pszczolkowski*, 778 S.E.2d 694, 702–03 (W. Va. 2015).

[12] Texas law does provide that if a committee later determines that the finding of ineffectiveness no longer reflects the lawyer's ability, that lawyer can be reinstated to the list of attorneys eligible to receive appointments, but how the lawyer is to make this showing, given that he has not been able to represent indigent capital defendants in the interim, is unclear. *See* Tex. Code Crim. Proc. art. 26.052(d)(2)(C), (d)(3)(C).

conflict with those of his former client. This consequence results entirely from a feature of Texas law not present in the laws of other death penalty states.

Lead trial counsel at Petitioner's 2015 capital murder trial was demonstrably ineffective. Specifically, he failed to secure the presence of a critical expert witness at trial – a witness even he apparently believed to be critical at the time of the trial. The trial record makes clear that this failure to secure the appearance of Dr. Gur was because of poor planning on the part of trial counsel and a mistaken belief that the expert's report could be admitted into evidence through the testimony of a different expert. Nevertheless, at the January 30, 2023, evidentiary hearing convened for the purpose of allowing trial counsel to explain his conduct at trial, trial counsel testified that he did not ever intend for the expert to testify at trial because he had previously decided the expert would not be a good witness. In other words, he gave evidence flatly at odds with the trial record but perfectly consistent with his desire to remain eligible for further appointments in capital trials. And the record establishes certainty as to the trial lawyer's intentions: During his testimony and in a subsequent conversation with the trial court at the bench (that the court reporter did not transcribe but which was overheard by habeas counsel), trial counsel explained that he was not then (i.e., in 2023) on the list of attorneys eligible for appointment to capital cases, but that he was actively seeking to be added to that list and hoped the presiding judge would keep him in mind for such appointments. Even though the conversation at the bench was highly probative of

trial counsel's credibility, the trial court found (and the CCA later affirmed) that the conversation should not be included in the state habeas record.

In its seminal case of *Napue v. Illinois*, 360 U.S. 264 (1954), this Court explained that the factfinder's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269. While *Napue* pertains to a witness testifying before a jury at trial, its import is no less applicable to an evidentiary hearing convened during a habeas proceeding. In both, the factfinder must be allowed to consider reasons why a witness might be testifying falsely.

This is especially true of a habeas proceeding in Texas, where a trial attorney must be permitted to testify if he is alleged to have provided ineffective assistance and also where he will pay a steep professional and pecuniary price if he is found to be ineffective: if he is found to be ineffective, the attorney will not be eligible to be appointed to capital cases in the future. Tex. Code Crim. Proc. art. 26.052. The CCA, however, made clear in the portion of its February 7 Order denying Hall's motion to correct the record that evidence that would show the degree to which an attorney has an incentive to be less than credible at such a hearing should not be included in the habeas record unless it is testimony made from the witness stand.

This Court has repeatedly recognized that a criminal defendant has a fundamental right to the effective assistance of counsel. *Yarborough v. Gentry*, 540

U.S. 1, 5 (2003); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding counsel's performance may be so defective that the defendant's Sixth Amendment right was violated). As the Court recognized in *Martinez v. Ryan*, 566 U.S. 1 (2012), "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. Because of that, state procedures which have the effect of impeding a habeas petitioner's ability to press an ineffective assistance of trial counsel claim are particularly troubling. *Id.* at 12-13.

Texas law does just that. First, it makes the trial attorney a necessary witness at any hearing convened to determine whether that attorney rendered ineffective assistance. Second, it gives that attorney incentive to be less than forthcoming by providing he will be ineligible to represent defendants facing or sentenced to death if he is found to be ineffective. Finally, it makes any evidence of the attorney's motivation to be less than truthful, other than that given from the witness stand, evidence that cannot be included in the record.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

DATE: May 7, 2024

Respectfully submitted,

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