No. 24-

IN THE

Supreme Court of the United States

NARJES MODARRESI,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The trial court admitted without objection a confession obtained after police officers ignored petitioner's request to terminate the interview and a second confession taken after she led the police to the location where she buried her baby. Petitioner, who suffered from severe mental illness, was convicted of capital murder and sentenced to life without parole. In a state habeas corpus proceeding, she alleged that her trial counsel was ineffective by failing to move to suppress her confessions and the discovery of the baby's body. The trial court recommended relief after concluding that this evidence should have been excluded because (1) petitioner was not advised of her *Miranda* rights after an officer told her that she could not leave until they found the baby, (2) officers ignored her request to terminate the interview, (3) the first confession was involuntary because it was induced by an officer's promise to help her receive psychiatric treatment if she took them to the baby, and (4) the discovery of the baby and the second confession, given after petitioner waived her *Miranda* rights, were tainted by the involuntary first confession. The Texas Court of Criminal Appeals (TCCA) denied relief, stating only that petitioner "has not met her burden to obtain relief under *Strickland v. Washington*, 466 U.S. 668 (1984)." The questions presented are:

I. Whether the Court should summarily reverse the TCCA's judgment because its rejection of petitioner's ineffective assistance of trial counsel claim contravened this Court's Fifth and Sixth Amendment precedent.

II. Whether, at the very least, the Court should vacate the judgment and remand to the TCCA to provide specific reasons for rejecting the trial court's findings of fact and conclusions of law that recommended relief.

RELATED CASES

State v. Modarresi, No. 1260243, 339th District Court of Harris County, Texas. Judgment entered May 22, 2014.

Modarresi v. State, No. 14-14-00427-CR, Fourteenth Court of Appeals of Texas. Judgment entered April 19, 2016.

Ex parte Modarresi, No. 1260243-A, 339th District Court of Harris County, Texas. Judgment entered July 13, 2023.

Ex parte Modarresi, No. WR-94,504-01, Texas Court of Criminal Appeals. Judgment entered September 25, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Narjes Modarresi, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's unpublished order denying habeas corpus relief (App. 1a-2a) is available at 2024 WL 4284695. The state district court's findings of fact and conclusions of law (App. 3a-39a) are unreported.

JURISDICTION

The TCCA denied relief on September 25, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled not guilty to capital murder in the 339th District Court of Harris County, Texas. On May 22, 2014, the jury convicted her, and the court assessed punishment at life in prison without parole.

On direct appeal, the Texas Court of Appeals affirmed petitioner's conviction in a published opinion issued on April 19, 2016. Petitioner did not seek discretionary review in the Texas Court of Criminal Appeals (TCCA). *Modarresi v. State*, 488 S.W.3d 455 (Tex. App.-Houston [14th Dist.] 2016, no pet.).

Petitioner filed a state habeas corpus application on July 19, 2022. The trial court, after conducting an evidentiary hearing, recommended that relief be granted on July 13, 2023. The TCCA denied relief on September 25, 2024. *Ex parte Modarresi*, No. WR-94,504-01 (Tex. Crim. App. Sept. 25, 2024).

B. Factual Statement

1. The Trial

The indictment alleged that, on or about April 21, 2010, petitioner intentionally and knowingly caused the death of M.G., a child under six years of age, by placing him face down in the mud (C.R. 23).[1]

Petitioner and her husband, Amir Golabbakhsh (hereafter, "Amir"), lived in Houston with their two sons, A.G. (age three) and M.G. (age three months), and Amir's parents (5 R.R. 59, 65, 96). On the afternoon of April 21, 2010, petitioner told her mother-in-law that she was taking

1. "C.R." (Clerk's Record) refers to the court filings. "R.R." (Reporter's Record) refers to the testimony at trial. "H.R.R." (Habeas Reporter's Record) refers to the testimony at the habeas proceeding. "AX" refers to petitioner's exhibits in the habeas proceeding.

M.G. to visit a friend and left on foot with M.G. in a stroller (7 R.R. 114-16, 118).

Jessica Shaver was sitting on the porch of her home near Buffalo Bayou when she saw petitioner pushing a stroller with a baby carrier down the street (4 R.R. 43, 45). Petitioner slammed the stroller into the curb, detaching the carrier, and ran away (4 R.R. 46). Shaver thought that petitioner had abandoned a baby (4 R.R. 47). Shaver unrolled a blanket that fell out of the stroller but found only a pillow (4 R.R. 53). Shaver drove around the area looking for petitioner but could not find her and returned home (4 R.R. 55).

Petitioner went to the home of a friend, appeared to be very upset, and said that someone took her baby (4 R.R. 92-94). The friend called 911 (4 R.R. 94-96). When Officer Gonzales arrived, petitioner told him that she was walking by a park when a black man pushed her down, took her baby, and left in a car driven by another black man (4 R.R. 70-71).

Officer Gonzales drove petitioner to the location of the alleged kidnapping (4 R.R. 70-71). After Shaver told him what she had seen, and he observed that petitioner had mud on her jacket but the ground was dry, he questioned whether there had been a kidnapping (4 R.R. 72-73, 75).

Sergeant Jeremiah Rubio arrived, spoke to petitioner, and became suspicious when she kept asking whether he believed her (4 R.R. 158, 160, 163-64, 170). He asked if she could show him where the baby was (4 R.R. 166). She walked about 20 feet towards the bayou, stopped, and said, "I told you that the black guys took it" (4 R.R. 166-67). He

transported her to the police station to give a statement (4 R.R. 167).

Detective Phil Waters and Officer Tony Jafari (who speaks Farsi, petitioner's native language), conducted a videorecorded interrogation of petitioner at the police station that started at 9:50 p.m. (5 R.R. 182, 184, 188-89, 194).[2] Waters testified that petitioner was not in custody and was not advised of her *Miranda*[3] rights (4 R.R. 187-88, 193). The officers' admitted goal was to get her to trust them enough to take them to M.G., and they continuously brought up the subject of her mental health because they knew that she wanted professional help (5 R.R. 192; 7 R.R. 8, 10). They confronted her with inconsistencies in her story and urged her to reveal M.G.'s location for several hours, but she insisted that he had been kidnapped (SX 44, 77). Finally, after midnight, she asked if they would let her stay with them if she revealed where M.G. was (C.R. 846). Waters responded, "I will take care of you. I will find you a place …. I will get you [psychiatric] help tonight" (C.R. 847).

Detective Waters drove petitioner to the scene of the alleged kidnapping at 1:30 a.m. (7 R.R. 7). They walked past a barricade marking a dead-end street and a chain marking private property and down an embankment to a remote area near the bayou (4 R.R. 185-88). M.G. was buried face down in muddy water, covered in mud, leaves,

2. The videorecording and a certified transcript were admitted without objection (5 R.R. 189-92; SX 44, 77).

3. *Miranda v. Arizona*, 384 U.S. 436 (1996).

and debris (4 R.R. 192, 199-200, 205).[4] Sergeant Roger Chappell concluded that M.G. had been alive and had struggled because he had mud and debris in his clenched fists (4 R.R. 209).[5]

Later that day, after petitioner had been charged, Detective Waters and Officer Jafari conducted a second videorecorded interrogation in which she was advised of her *Miranda* rights for the first time (5 R.R. 193; 7 R.R. 18; SX 45). She admitted placing M.G. face down in the mud and covering him with mud (7 R.R. 19). She did not say that she intended to kill him (7 R.R. 26).

Amir testified that petitioner suffered from post-partum depression and was diagnosed with Bipolar Disorder after their first son was born in 2007 (5 R.R. 65, 80). She was treated at the Harris County Mental Health and Mental Rehabilitation Authority (MHMRA) and placed on anti-psychotic medication (5 R.R. 81-82). She became pregnant again in 2009, was scared, and wanted to have an abortion but did not do so (5 R.R. 87-89). She had a nervous breakdown on an airplane and was hospitalized in Qatar for several days during her pregnancy (5 R.R. 92-95). Amir's mother took care of M.G. after he was born in January 2010 because petitioner was depressed,

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4. Detective Waters testified that there was only a very small chance that M.G. would have been found without petitioner's help, as the officers had been unable to find him with the use of dogs (7 R.R. 7).

5. The pathologist who performed the autopsy determined that M.G. drowned in muddy water, consistent with being placed face down while he was alive (5 R.R. 26, 36).

unmotivated, and slept most of the time (5 R.R. 96-99). Petitioner sounded fine when Amir spoke to her on the afternoon of April 21, 2010 (5 R.R. 114, 116). When Amir visited her in jail after her arrest, she said that she did what she did because the baby was a burden to his mother (5 R.R. 121).

Three psychiatrists testified for the defense that, at the time of the offense, petitioner was bipolar with psychotic features and had severe post-partum depression but was not insane (8 R.R. 16, 88-91, 132, 165; 9 R.R. 78, 88-89, 147).

Dr. Mark Moeller, a psychiatrist hired by the district attorney's office to evaluate petitioner, testified in rebuttal for the State that, at the time of the offense, she was very depressed but was not psychotic or insane (9 R.R. 190-91, 193-94, 202-03).

The court instructed the jury on both capital murder (which requires a specific intent to kill) and felony murder (committing an act clearly dangerous to human life that caused M.G.'s death during the commission of the felony of injury to a child, which does not require a specific intent to kill) (C.R. 1645-46).

Petitioner's trial counsel, George Parnham, argued that petitioner should be convicted of felony murder because her mental illness negated the specific intent to kill, which is an element of capital murder (10 R.R. 11, 13-14, 25, 32-33).

The prosecutor argued that petitioner should be convicted of capital murder because her intent to kill M.G.

was proven by "her own words" and by her piling mud on him and that her mental illness did not negate that intent (10 R.R. 34-36, 39, 50-51).

2. The State Habeas Corpus Proceeding

Petitioner filed a state habeas corpus petition in the trial court alleging that she was denied the effective assistance of counsel because Parnham failed to move to suppress her statements to the police officers, her act of leading them to M.G., and the discovery of the body.

Parnham testified at the evidentiary hearing that he may have relied on his staff to watch the videorecorded interrogations of petitioner instead of watching them himself (1 H.R.R. 31-33, 44). He also stated in an affidavit and testified that he made a strategic decision not to file a motion to suppress or object to the admission of petitioner's statements, her agreement to take and act of leading the officers to M.G., and the discovery of M.G. because this evidence supported petitioner's insanity defense (1 H.R.R. 31-33, 44).

Parnham's testimony at the habeas hearing was thoroughly shown to be false. First, he explicitly informed the jury panel during the voir dire examination that he would *not* present an insanity defense (3 R.R. 164). Second, he did *not* present any testimony at trial that petitioner was insane at the time of the offense; instead, he called three psychiatrists who testified that she was *not* insane (8 R.R. 16, 88-91, 132, 165; 9 R.R. 78, 88-89, 147). Finally, he did *not* request a jury instruction on the insanity defense, and the trial court's charge did *not* contain such an instruction (C.R. 1643-50). Accordingly,

the habeas trial court found that Parnham did not have a sound strategic reason not to file a motion to suppress the evidence (App. 13a).

The habeas trial court found that Parnham performed deficiently by failing to move to suppress petitioner's statements during the first interrogation and her agreement to take and act of leading the officers to M.G. because (1) the officers failed to advise her of her *Miranda* rights after she was in custody (App. 14a-22a); (2) the officers improperly continued to question her after she said that she had "nothing more to say" (thus clearly invoking her Fifth Amendment right to remain silent) (App.22a-25a); and (3) her statements were involuntary, as they were induced by an officer's promises to help her receive psychiatric treatment if she confessed and took him to M.G. (App. 25a-33a). The habeas trial court also found that Parnham performed deficiently by failing to move to suppress evidence regarding the discovery of M.G. because it was tainted by petitioner's involuntary confession and involuntary testimonial act of leading the officers to his body (App. 33a-34a). Finally, the habeas trial court found that Parnham performed deficiently by failing to move to suppress petitioner's confession during the second interrogation on the ground that it was tainted by the initial unconstitutional interrogation (App. 35a-36a).

The state habeas trial court concluded that, but for Parnham's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. In particular, the habeas court found that, if the trial court had excluded both videorecorded statements and petitioner's agreement to take and act of leading the officers to M.G., the State probably

would have offered a more favorable plea bargain (App. 36a-37a). Alternatively, the court concluded that, if the trial court had excluded the statements but admitted testimony regarding the discovery of M.G., petitioner probably would have been convicted of felony murder (which carries a punishment range of five to 99 years or life, with the possibility of parole) instead of capital murder (which carries an automatic sentence of life without parole) (App. 37a). As a result, the court concluded that Parnham's failure to file a motion to suppress undermined its confidence in petitioner's capital murder conviction (App. 37a).

In a brief order, the TCCA denied habeas corpus relief, stating only, "[Petitioner] has not met her burden to obtain relief under *Strickland v. Washington*, 466 U.S. 668 (1984). Based on this Court's independent review of the entire record, relief is denied" (App. 1a-2a).

REASONS FOR GRANTING CERTIORARI

Petitioner was convicted of capital murder based on: (1) her statements during the first videorecorded interrogation in which she agreed to take the officers to M.G., (2) the testimony that she led them to M.G., and (3) her confession during the second videorecorded interrogation that she placed M.G. face down in the mud and covered him with mud. Parnham inexplicably failed to file a motion to suppress her statements and her act of leading the officers to M.G. despite the blatant constitutional and statutory violations that occurred during the initial interrogation.

Parnham testified at the habeas evidentiary hearing that he made a strategic decision not to file a pretrial motion to suppress or object to the admission of the evidence at trial because the videorecorded interrogations supported petitioner's insanity defense. However, the habeas trial court wholly rejected his false testimony, as he did *not* present an insanity defense at trial. The court found that Parnham did not have a sound strategic reason not to file a motion to suppress, that the motion would have been granted, and that petitioner demonstrated the requisite prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The TCCA summarily denied relief without any meaningful explanation of why it rejected the trial court's findings of fact and conclusions of law. The TCCA's refusal to honor this Court's controlling Fifth and Sixth Amendment precedent merits a grant of certiorari and a summary reversal.

I. THE TEXAS COURT OF CRIMINAL APPEALS' REJECTION OF PETITIONER'S INEFFECTVE ASSISTANCE OF TRIAL COUNSEL CLAIM CONTRAVENED THIS COURT'S FIFTH AND SIXTH AMENDMENT PRECEDENT.

A. The Standard Of Review

Petitioner had a right to the effective assistance of counsel at trial. *Strickland*, *supra.* In *Strickland,* this Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. *Id.* at 687-88. The defendant also must show that counsel's deficient performance

prejudiced the defense by depriving him of a fair trial with a reliable result. *Id.* at 687.

The defendant must identify specific acts or omissions of counsel that were not the result of reasonable professional judgment. *Strickland,* 466 U.S. at 690. The reviewing court must then determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A reasonable probability is *less* than a preponderance of the evidence. *Id.* ("The result of a proceeding can be rendered unreliable and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

Petitioner need not show a reasonable probability that, but for counsel's errors, she would have been acquitted. A reasonable probability of any different result—including a deadlocked jury or conviction of a lesser offense—is sufficient. *Cf. Turner v. United States,* 582 U.S. 313, 331 (2017) (Kagan, J., dissenting) (stating that both the majority and the dissent "agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a 'reasonable probability' that disclosure of the evidence would have led to a different outcome—i.e., an acquittal or hung jury rather than a conviction").

B. Deficient Performance

1. Petitioner's statements during the first interrogation, made after she was told she could not leave, and her agreement to take and her act of leading the officers to M.G., were inadmissible under *Miranda v. Arizona*.

Detective Waters testified that petitioner was not in custody during the first interrogation and, for that reason, was not advised of her *Miranda* rights (5 R.R. 187-88, 193). However, the videorecording and transcript reflect that she was in custody before she agreed to take the officers to M.G. (SX 44, 77).

Detective Waters told petitioner at the start of the interrogation that she was not under arrest and was not in custody, as she was "down here voluntarily" to help them find M.G. (C.R. 707-08; AX 2). Over two hours later, she said that she was tired and "want to go to my mom and dad." Officer Jafari responded, "You cannot go to your mom and dad now. *Unless I find your child, you can't go anywhere.* Tell me where he is" (C.R. 822-23; AX 3) (emphasis added). At this point, petitioner clearly was in custody as defined in *Miranda* because her liberty had been significantly restrained. *See Berkemer v. McCarty*, 468 U.S. 420, 435 (1984). However, the officers did not advise her of her *Miranda* rights at that juncture and continued to interrogate her until she agreed to take them to M.G. (C.R. 823-49).

Parnham did not move to suppress petitioner's statements and her agreement to take and her testimonial

act of leading the officers to M.G. on the ground that the officers failed to advise her of her *Miranda* rights once she was in custody. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42, 54-57).

A statement made by the accused in response to a custodial interrogation is inadmissible unless she was warned of her privilege against self-incrimination and right to counsel and voluntarily waived those rights. *Miranda*, 384 U.S. at 444. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*.

The habeas trial court correctly found that the officers engaged in custodial interrogation of petitioner and concluded that her oral admissions and her agreement to take and her act of leading them to M.G. were tainted by the *Miranda* violation (App. 16a). Petitioner's act of taking the officers to M.G., although nonverbal, was testimonial because it communicated her thoughts––just as if she had verbally told them where to find him. *See Pennsylvania v. Muniz*, 496 U.S. 582, 595 n.9 (1990) ("[N]onverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another."); *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966) ("A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words."). Although physical evidence is not subject to suppression because of a *Miranda* violation, petitioner's testimonial act of leading the officers to M.G. is subject to suppression. *See United States v. Patane,* 542 U.S. 630, 642 (2004) Thus, the court correctly concluded that Parnham performed

deficiently by failing to move to suppress the evidence on this ground (App. 20a).

2. Petitioner's statements during the first interrogation and her agreement to take and her act of leading the officers to M.G. were inadmissible because the officers continued to question her after she said that she had "nothing more to say."

Petitioner told the officers during the first interrogation, "I have nothing more to say. If I knew where my baby is, I would not be sitting here" (C.R. 747; AX 4). They continued to interrogate her (C.R. 747-50; AX 4). She then said, "I have nothing more to say. I have repeated several times" (C.R. 751; AX 4). Nevertheless, the interrogation continued without any break (C.R. 751-818). She repeatedly complained that she was tired (C.R. 819, 821, 822, 835, 836, 840; AX 5). Officer Jafari said, "You know where he is. I know you are tired. If you want this to finish, just tell me where he is. . . . Do you want this to end? Do you want this to end? Be brave and tell me where he is" (C.R. 822; AX 5).

Parnham did not move to suppress petitioner's statements and her agreement to take and her act of leading the officers to M.G. on the ground that the officers continued to interrogate her after she said that she had nothing more to say. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42, 58-63).

When a suspect states during a custodial interrogation that she wants to remain silent, the interrogation must cease. *Miranda*, 384 U.S. at 473-74. A confession is

inadmissible when the officer continues the interrogation after the defendant said that she does not want to talk. *Michigan v. Mosley*, 423 U.S. 96, 102-03 (1975).

The habeas trial court found that, shortly after the interrogation began, petitioner told the officers more than once that she had "nothing more to say"; despite her unambiguous assertion of her right to remain silent, they continued to interrogate her until she agreed to take them to M.G (App. 24a). The court concluded that her statements and her agreement to take and her act of leading the officers to M.G. were inadmissible because they did not scrupulously honor her right to remain silent under *Mosley*, 423 U.S. at 102-03 (App. 24a).[6] Thus, the court correctly concluded that Parnham performed deficiently by failing to move to suppress the evidence on this ground (App. 24a).

3. Petitioner's statements during the first interrogation and her agreement to take and her act of leading the officers to M.G. were involuntary because they were induced by an officer's promises to help her receive psychiatric treatment if she confessed and took him to M.G.

Detective Waters testified that the officers' goal was to get petitioner to trust them enough to take them to M.G., and they continuously brought up the subject of her mental

6. *See, e.g., United States v. McCarthy,* 382 Fed. App'x 789, 792 (10th Cir. 2010) (concluding that defendant unambiguously invoked his right to remain silent when he said, "I don't want nothing to say to anyone," responded "no" when officers asked if he had "anything to say to anybody," and then asked about his rights).

health because they knew that she wanted professional help (5 R.R. 192; 7 R.R. 8, 10). They relentlessly interrogated her for almost four hours before she agreed to take them to M.G. The videorecording (and transcript of it) reflect a carefully-orchestrated psychological manipulation designed to convince her that she was not criminally responsible for her conduct because she is mentally ill; that she needs psychiatric treatment instead of incarceration; and that, if she takes them to M.G., they will help her receive psychiatric treatment instead of taking her to jail but, if she refuses, and they find M.G. without her help, this will become a criminal investigation, they cannot help her, and she will go to prison. The following exchanges took place during the interrogation (AX 6):[7]

- "You've got a sickness and because of that something has happened" (C.R. 780).

- "Many people have the sickness that you have. They do certain things under pressure, because of their disease. All psychiatrists and physicians have said that" (C.R. 781).

- "You have a sickness, you've been trying to get it treated, …. and it just doesn't seem like anybody cares … " (C.R. 784).

- "… [T]he only way that you're going to be able to help yourself with your sickness and allow others to help you, is to tell us the truth where [M.G.] is" (C.R. 785).

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7. The statements in bold-type were made by petitioner; the others by an officer.

- "I will tell you personally, I will do whatever I can do to help you afterwards" (C.R. 796).

- "I will give you my word that we will do whatever we need to do to help you, after" (C.R. 799).

- "You have got to trust us. We're not going to let anything happen to you. We're going to do everything we can do to get you more treatment, to help you … get through this … " (C.R. 807).

- "**What will happen if you find him? You'll put the blame on me?**" [An officer responded:] "Why would we put the blame on you? You were sick, ma'am" (C.R. 809).

- "Our purpose is not to blame you for anything. We have nothing to gain by doing that, do you understand? ... Our purpose is to find [M.G.]" (C.R. 810).

- "Our purpose right now isn't to put you in jail, if that's what you're fearful of" (C.R. 812).

- "I want you to look me in the eye because I want you to understand that you can trust me …." [Petitioner responded:] "**Yes, I know, I can trust you.**" [An officer responded:] "If you will just tell us where [M.G.] is, then I'm going to do everything I can do to help you" (C.R. 812-13).

- "You've made a mistake. A bad thing has happened. You have an illness; you have a sickness that needs to be addressed and you need to be helped with" (C.R. 815).

- "You're going to have to leave the protection of you up to us. We're here to help you. We're not here to try to trick you into anything. I'm not even here to put you in jail; I could care less about that" (C.R. 829).

- "If he is alive, we can get your husband to divorce you and send you to Iran" (C.R. 841). [Petitioner responded:] "**When will you make him divorce me?**" [An officer responded:] "First, we need to find the baby" (C.R. 844).

- "We won't be able to help you unless you tell us" (C.R. 843).

- "If we find [M.G.] and you don't take us to him, you are going to have more problems than you ever dreamed of because then it will become strictly a criminal investigation, it will become a legal issue, and the fact that you have an illness or a sickness won't matter if we find [M.G.] and you don't help us. It will not go well." [Petitioner responded:] "**You mean they will take me to prison?**" [An officer responded:] "If you don't tell us, if you don't help us, yes ma'am" (C.R. 845).

- "**Will you let me stay with you guys if I tell you where he is?**" [An officer responded:] "I

> will help you as much as I can." [Petitioner responded:] "**Let me stay with you.**" [The officer responded:] "I promise … I will call your brother to come" (C.R. 846).
>
> • "I will take care of you. I will find you a place …. I will get you [psychiatric] help tonight" (C.R. 847).

Petitioner agreed to take the officers to M.G. only after they made these hollow promises and improper threats (C.R. 849).

A confession is involuntary and inadmissible under the Fifth and Fourteenth Amendments when it is induced by an officer's promise of leniency if the suspect confesses or by an officer's threats if the suspect does not confess, when such promise or threat operates to overbear the will of the suspect. *See, e.g., Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (confession to drug offenses involuntary because officer told defendant that state financial aid would be cut off and her children would be taken from her if she did not "cooperate"); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (confession to murder involuntary because officer promised to protect defendant from angry mob outside jail if he confessed). A confession is involuntary and inadmissible when an officer intentionally exploits a suspect's serious mental illness to obtain it (as the officers did in petitioner's case.) *See Colorado v. Connelly*, 479 U.S. 157, 164-65 (1986) (discussing *Blackburn v. Alabama*, 361 U.S. 199 (1960)).

Parnham did not move to suppress petitioner's statements and her agreement to take and her act of leading the officers to M.G. on the ground that they were

involuntary. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42-43, 63-76).

The habeas trial court concluded that petitioner's statements and her agreement to take the officers to M.G. were involuntary for the following reasons (App. 30a-31a):

- The officers promised to help her only if she confessed and took them to M.G. *See Pyles v. State*, 947 S.W.2d 754, 755-57 (Ark. 1997) (confession to murder involuntary because officer told defendant he would "do everything in the world" he could do for defendant if defendant confessed);

- The officers repeatedly promised that they would help her receive psychiatric treatment instead of incarceration if she confessed and took them to M.G. *See Cole v. State,* 923 P.2d 820, 831-32 (Alaska Ct. App. 1996) (confession to sexual abuse involuntary because officer told defendant he had to confess to receive help for his problem); *State v. Howard*, 825 N.W.2d 32, 41 (Iowa 2012) (confession to sexual abuse involuntary because officer misled defendant that he would receive treatment for sex addiction instead of incarceration if he confessed); *State v. L.H.*, 215 A.3d 516, 534-35 (N.J. 2019) (confession to sexual assault involuntary because officer led defendant to believe that he would receive counseling instead of incarceration if he confessed).

- Detective Waters told her that, if the police found M.G. without her help, it will become "strictly a criminal investigation," that her mental illness will not matter, and "[i]t will not go well." *See State v. Pollard,* 888 P.2d 1054, 1059-61 (Or. App. 1995) (confession to murder involuntary because officer told defendant that he would receive treatment if he confessed; but, if he did not, the case would go to the Grand Jury and, if "the Grand Jury thinks that you've done this, it makes it real rough.").

The court also concluded that the officers' coercive interrogation tactics overbore petitioner's will and rendered involuntary both her statements and her agreement to take them to M.G (App. 31a). Thus, the court correctly concluded that Parnham performed deficiently by failing to move to suppress the evidence on this ground (App. 32a).

4. The discovery of M.G. was inadmissible because it was tainted by the unconstitutional interrogation that rendered petitioner's statements involuntary.

Detective Waters testified that the police transported petitioner to the scene of the alleged kidnapping at 1:30 a.m. (7 R.R. 7). She led them to M.G.'s body at 1:55 a.m. (7 R.R. 12-14).

Parnham did not move to suppress evidence regarding the discovery of M.G. on the ground that it was tainted by the unconstitutional interrogation that rendered

petitioner's statements involuntary. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 43, 76-78).

When evidence is discovered as a result of police misconduct, its admissibility depends on "whether, granting establishment of the primary illegality, the evidence … has been [obtained] by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Physical evidence discovered as a result of a confession obtained in violation of *Miranda* is admissible. *See United States v. Patane*, 542 U.S. 630, 642 (2004). Conversely, physical evidence discovered as a result of an involuntary confession is inadmissible. Id. at 640 ("Those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial.") (citation and internal quotation marks omitted; emphasis added); *see also Pitts v. State*, 614 S.W.2d 142, 142-43 (Tex. Crim. App. 1981) (stolen property recovered as result of defendant's involuntary confession to burglary, made after officer promised he would not file charges, was inadmissible as the "fruits of the poisonous tree").

Petitioner led the officers to M.G. about 25 minutes after the unconstitutional interrogation ended. Detective Waters testified that there was only a very small chance that M.G. would have been found without petitioner's help, as the officers had been unable to find him with the use of dogs (7 R.R. 7). The habeas trial court found, based on photos of this remote, isolated location near a bayou, that it is unlikely that M.G. would have been discovered without petitioner's help based on the manner

in which he was buried (12 R.R. SX 73, 74; AX 7). The court concluded that, because the officers' coercive interrogation resulted in petitioner making involuntary statements and involuntarily agreeing to take them to M.G., evidence regarding the discovery of M.G. should have been excluded (App. 34a). Thus, the court correctly concluded that Parnham performed deficiently by failing to move to suppress the evidence on this ground (App. 34a).

5. Petitioner's confession during the second interrogation was inadmissible because it was tainted by the first unconstitutional interrogation.

Detective Waters testified that petitioner led the officers to M.G. at 1:55 a.m. (7 R.R. 12-14). Petitioner was taken to the Neurological Processing Unit at the jail for evaluation (7 R.R. 16).[8] Later that day, after she had been charged, Detective Waters and Officer Jafari conducted a second videorecorded interrogation in which she was advised of her *Miranda* rights for the first time (5 R.R. 193; 7 R.R. 18; SX 45). She then admitted placing M.G. face down in the mud and covering him with mud (7 R.R. 19).

Parnham did not move to suppress petitioner's confession during the second interrogation on the ground that it was tainted by the first unconstitutional interrogation. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 77-80).

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8. Detective Waters testified that, by arranging for petitioner to have a psychiatric evaluation, he made good on "some of the promises [he] made" during the first interrogation (7 R.R. 16).

When an officer obtains an involuntary confession from a suspect through deliberately coercive or improper tactics, a subsequent confession obtained soon thereafter is tainted and inadmissible, even if the officer advised her of her *Miranda* rights before he obtained the second confession. *Oregon v. Elstad*, 470 U.S. 298, 314 (1985) ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion [to a subsequent confession given after *Miranda* warnings]."); *see also United States v. Taylor,* 745 F.3d 15, 25 (2d Cir. 2014) ("[T]he use of coercive and improper tactics in obtaining an initial confession may warrant a presumption of compulsion as to a second one, even if the latter was obtained after properly administered *Miranda* warnings …. That is so because, 'after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed.'") (quoting *United States v. Bayer*, 331 U.S. 532, 540 (1947)).

Petitioner's statements during the first interrogation were unwarned and involuntary. The habeas trial court concluded that her confession during the second interrogation––which occurred soon after the first unconstitutional interrogation and the discovery of M.G.'s body––was tainted thereby and, thus, was inadmissible (App. 36a). Her confession also was inadmissible because it was tainted by the officers' failure to scrupulously honor her right to remain silent after she repeatedly said that she had "nothing more to say" during the first interrogation. Thus, the court correctly concluded that Parnham performed deficiently by failing to move to suppress the evidence on this ground (App. 36a).

C. *Strickland* Prejudice

The habeas trial court concluded that, if Parnham had filed a motion to suppress, the trial court would have suppressed both videorecorded statements, petitioner's act of leading the officers to M.G., and the discovery of the body; and that the exclusion of this evidence would have undermined the capital murder case and probably resulted in a more favorable plea bargain offer. *See Strickland*, 466 U.S. at 695 (holding that a court assessing prejudice must assume that the trial court would have followed the law if trial counsel had not performed deficiently) (App. 36a). Additionally, the prosecutor emphasized during her closing argument that petitioner should be convicted of capital murder because her intent to kill was proven by "her own words" and by her piling mud on M.G. (10 R.R. 34-36, 50-51). This admission was made in the second confession (App. 37a).

The state habeas trial court alternatively concluded that, if the trial court had suppressed the statements but admitted testimony regarding the discovery of M.G., petitioner probably would have been convicted of felony murder (which carries a punishment range of five to 99 years or life) instead of capital murder (which carries an automatic sentence of life without parole) (App. 37a). She could have raised on appeal that the evidence was legally insufficient to prove the specific intent to kill element of capital murder and that the trial court erred in admitting testimony regarding the discovery of M.G. (App. 37a). Thus, the court correctly concluded that Parnham's failure to file a motion to suppress undermined confidence in petitioner's capital murder conviction (App. 37a).

Petitioner's case raises constitutional evidentiary issues worthy of a law school criminal procedure final examination. Parnham did not discern any of these issues at trial and, when he testified at the habeas hearing, sought to justify his failure to file a motion to suppress by testifying falsely that he wanted the jury to use this evidence to support an insanity defense (that he did not raise). The habeas trial court concluded that reasonably competent counsel would have moved to suppress the evidence and, if Parnham had done so, there is a reasonable probability that the outcome of the proceeding would have been different.

The TCCA rejected the state habeas trial court's findings of fact, conclusions of law, and recommendation to grant relief despite the fact that the record and this Court's precedent fully support those findings and conclusions. This Court should grant certiorari and summarily reverse the TCCA's judgment.

Although petitioner's case is worthy of the Court's plenary review, at the very least it warrants a summary reversal. *See e.g., Porter v. McCollum,* 558 U.S. 30, 44 (2009) (*per curiam*) (summary reversal because lower court erred in rejecting petitioner's ineffective assistance of counsel claim); *Hinton v. Alabama,* 571 U.S. 263, 273 (2014) (*per curiam*) (same). This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain,* 577 U.S. 385, 397 (2016) *(per curiam)* (summary reversal where state habeas court erroneously denied relief on Fourth Amendment suppression of evidence claim); *Kaupp v. Texas,* 538 U.S. 626, 633 (2003) *(per curiam)* (same).

II. ALTERNATIVELY, THE COURT SHOULD VACATE THE JUDGMENT AND REMAND FOR THE TCCA TO PROVIDE SPECIFIC REASONS FOR REJECTING THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM.

The state habeas trial court made 121 findings of fact and conclusions of law in 32 pages thoroughly explaining why the evidence was inadmissible and Parnham was ineffective in failing to file a motion to suppress. In response, the TCCA simply stated, "We disagree. [Petitioner] has not met her burden to obtain relief under *Strickland v. Washington*, 466 U.S 668 (1984). Based on this court's independent review of the entire record, relief is denied." (App. 1a-2a).

This Court has instructed lower courts to conduct a "probing and fact-specific" analysis of an ineffective assistance of counsel claim. *Sears v. Upton*, 561 U.S. 945, 955 (2010) (*per curiam*); *see also Andrus v. Texas*, 590 U.S. 806, 824 (2020) (*per curiam*) (requiring a "weighty and record-intensive record analysis"). The TCCA did not conduct any such analysis of either *Strickland* prong.

In view of the TCCA's clearly inadequate review, in the interests of justice,[9] this Court should grant

9. 28 U.S.C § 2106 ("The Supreme Court … may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."). *See also Stutson v. United States*, 516 U.S. 193, 196-97 (1996) (*per curiam*) (citing *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981)).

certiorari, vacate the TCCA's judgment, and remand ("GVR") for a proper analysis.

Petitioner's case is yet another example of the TCCA's failure to show its work. This Court addressed the TCCA's inadequate review of the prejudice prong of an ineffective assistance of counsel claim in *Andrus v. Texas*, *supra*. The state habeas trial court had recommended a new trial on punishment because trial counsel was ineffective. The TCCA denied relief, curtly stating that Andrus "fails to meet his burden under *Strickland v. Washington,* 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." *Ex parte Andrus,* No. WR-84,438-01, 2019 WL 622783, at *2 (Tex. Crim. App. Feb. 13, 2019). This Court granted certiorari, concluded that counsel performed deficiently, vacated the judgment, and remanded to the TCCA to conduct a proper prejudice analysis. The Court faulted the TCCA for failing to analyze prejudice in any meaningful respect. *Andrus,* 590 U.S. at 824. "Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted the weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above." *Id.* at 1887.

Similarly, at the very least, the Court should vacate the judgment and remand to the TCCA to conduct a probing and fact-specific analysis regarding whether

Parnham performed deficiently and, if so, whether there was prejudice to the defense. A remand would thereby enhance this Court's review of petitioner's substantial ineffective assistance of counsel claim.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE COURT OF CRIMINAL APPEALS OF TEXAS, FILED SEPTEMBER 25, 2024

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-94,504-01

EX PARTE NARJES MODARRESI, Applicant

ON APPLICATION FOR A WRIT OF
HABEAS CORPUS
CAUSE NO. 1260243-A IN THE 339TH
DISTRICT COURT
FROM HARRIS COUNTY

Per curiam.

ORDER

Applicant was convicted of capital murder and sentenced to life imprisonment. The Fourteenth Court of Appeals affirmed her conviction. *Modarresi v. State*, 488 S.W.3d 455 (Tex. App.—Houston [14th Dist.] 2016). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. See Tex. Code Crim. Proc. art. 11.07.

Applicant contends that trial counsel was ineffective by failing to file a motion to suppress. Based on the record, the trial court has determined that trial counsel's performance was deficient and that Applicant was prejudiced.

We disagree. Applicant has not met her burden to obtain relief under *Strickland v. Washington*, 466 U.S. 668 (1984). Based on this Court's independent review of the entire record, relief is denied.

Copies of this order shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and the Board of Pardons and Paroles.

Filed: September 25, 2024

APPENDIX B — APPLICANT'S REVISED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, 339TH DISTRICT COURT OF HARRIS COUNTY, TEXAS, FILED JULY 13, 2023

IN THE 339TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

CAUSE NO 1260243-A

EX PARTE NARJES MODARRESI

APPLICANT'S REVISED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court, having considered the application for a writ of habeas corpus, the brief, the exhibits, and the official court records and testimony from the trial and the habeas corpus proceeding, enters the following findings of fact and conclusions of law:

I.

THE TRIAL

A. The Indictment

1. The indictment alleged that, on or about April 21, 2010, applicant intentionally and knowingly caused the death of M.G., a child under six years of age, by placing him face down in the mud (C.R. 23).

B. The State's Case

2. Applicant and her husband, Amir Golabbakhsh (hereafter, "Amir"), lived in Houston with their two sons, A.G. (age three) and M.G. (age three months), and Amir's parents (5 R.R. 59, 65, 96).

3. On the afternoon of April 21, 2010, applicant told her mother-in-law that she was taking M.G. to visit a friend and left on foot with M.G. in a stroller (7 R.R. 114-16, 118).

4. Jessica Shaver was sitting on the porch of her home near Buffalo Bayou when she saw applicant pushing a stroller with a baby carrier down the street (4 R.R. 43, 45). Applicant slammed the stroller into the curb, detaching the carrier, and ran away (4 R.R. 46).

5. Shaver thought that applicant had abandoned a baby (4 R.R. 47).

6. Shaver unrolled a blanket that fell out of the stroller but found only a pillow (4 R.R. 53).

7. Shaver drove around the area looking for applicant but could not find her and returned home (4 R.R. 55).

8. Applicant went to the home of a friend, appeared to be very upset, and said that someone took her baby (4 R.R. 92-94).

9. Applicant's friend called 91 1 (4 R.R. 94-96).

10. When Officer Gonzales arrived, applicant told him that she was walking by a park when a black man pushed her down, took her baby, and left in a car driven by another black man (4 R.R. 70-71).

11. Officer Gonzales drove applicant to the location of the alleged kidnapping (4 R.R. 70-71).

12. Shaver told Officer Gonzales what she saw. He observed that applicant had mud on her jacket but the ground was dry and questioned whether there had been a kidnapping (4 R.R. 72-73, 75).

13. Sergeant Jeremiah Rubio arrived, spoke to applicant, and became suspicious when she kept asking whether he believed her (4 R.R. 158, 160, 163-64, 170). He asked if she could show him where the baby was (4 R.R. 166). She walked about 20 feet towards the bayou, stopped, and said, "I told you that the black guys took it" (4 R.R. 166-67).

14. Sergeant Rubio transported her to the police station to give a statement (4 R.R. 167).

15. Detective Phil Waters and Officer Tony Jafari (who speaks Farsi, applicant's native language), conducted a video recorded interrogation of applicant at the police station that started at 9:50 p.m. (5 R.R. 182, 184, 188-89, 194).

16. The video recording and a certified transcript were admitted without objection (5 R.R. 189-92; SX 44, 77).

17. Detective Waters testified that applicant was not in custody and was not advised of her *Miranda* rights (4 R.R. 187-88, 193).

18. Detective Waters testified that the officers' goal was to get applicant to trust them enough to take them to M.G., and they continuously brought up the subject of her mental health because they knew that she wanted help to deal with her mental problems (5 R.R. 192; 7 R.R. 8, 10). They confronted her with inconsistencies in her story and urged her to reveal M.G.'s location for several hours, but she insisted that he had been kidnapped (SX 44, 77). Finally, after midnight, she asked if they would let her stay with them if she revealed where he was (C.R. 846). Waters responded, "I will take care of you. I will find you a place ... I will get you (psychiatric) help tonight" (C.R. 847).

19. Applicant agreed to take the officers to M.G. (C.R. 849).

20. Detective Waters drove applicant to the scene of the alleged kidnapping at 1:30 a.m. (7 R.R. 7).

21. Detective Waters, other officers, and applicant walked past a barricade marking a dead-end street, a chain marking private property, and down an embankment to a remote area near the bayou (4 R.R. 185-88).

22. M.G. was buried face down in muddy water and was covered with mud, leaves, and debris (4 R.R. 192, 199-200, 205).

23. Detective Waters testified that there was only a very small chance that M.G. would have been found without applicant' s help, as the officers had been unable to find him with the use of dogs (7 R.R. 7).

24. Sergeant Roger Chappell testified that he concluded that M.G. was alive when placed in the mud and had struggled before dying, as M.G. had mud and debris in his clenched fists (4 R.R. 209).

25. The pathologist testified that M.G. drowned in muddy water, consistent with being placed face down while he was still alive (5 R.R. 26, 36).

26. Later that day, after applicant had been charged, Detective Waters and Officer Jafari conducted a second video recorded interrogation in which she was advised of her *Miranda* rights for the first time (5 R.R. 193; 7 R.R. 18; SX 45).

27. Applicant admitted placing M.G. face down in the mud and covering him with mud (7 R.R. 19).

28. Amir testified that applicant suffered from post-partum depression and was diagnosed with Bipolar Disorder after their first son was born in 2007 (5 R.R. 65, 80). She was treated at the Mental Health Mental Retardation Association (MHMRA) and placed on anti-psychotic medication (5 R.R. 81-82). She became pregnant in 2009, was scared, and wanted to have an abortion, but did not do so (5 R.R. 87-89). She had a nervous breakdown on an airplane and was hospitalized in Qatar for several

days during her pregnancy (5 R.R. 92-95). Amir's mother took care of M.G. after he was born in January of 2010 because applicant was depressed, unmotivated, and slept most of the time (5 R.R. 96-99).

29. Amir testified that applicant sounded fine when he spoke to her on the afternoon of April 21, 2010 (5 R.R. 114, 116).

30. Amir testified that, when he visited applicant in jail, she said that she did what she did because the baby was a burden to Amir's mother (5 R.R. 121).

C. The Defense's Case

31. Three psychiatrists, Dr. Debra Osterman and Dr. Vasantha Janarthanan (who treated applicant at MHMRA) and Dr. David Self, testified that, at the time of the offense, applicant was bipolar with psychotic features and had severe post-partum depression, but was not insane (8 R.R. 16, 88-91, 132, 165; 9 R.R. 78, 88-89, 147).

D. The State's Case-In-Rebuttal

32. Dr. Mark Moeller, a psychiatrist hired by the district attorney's office to evaluate applicant, testified that, at the time of the offense, she was very depressed, but was neither psychotic nor insane (9 R.R. 190-91, 193-94, 202-03).

E. The Court's Charge

33. The court instructed the jury on capital murder and felony murder (committing an act clearly dangerous to human life that caused M.G.'s death during the commission of the felony of injury to a child) (C.R. 1645-46).

F. The Arguments

34. Defense counsel, George Parnham, argued that applicant should be convicted of felony murder because her mental illness negated the specific intent to kill, which is an element of capital murder (10 R.R. 11, 13-14, 25, 32-33).

35. The prosecutor argued that applicant should be convicted of capital murder because her intent to kill M.G. was proven by "her own words" and by her piling mud on him; and, that her mental illness did not negate that intent (10 R.R. 34-36, 39, 50-51).

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. The Standard Of Review

36. A habeas applicant has the burden to prove that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). A "reasonable probability" is

"a probability sufficient to undermine confidence in the outcome"; it requires showing by less than a preponderance of the evidence that the result of the proceeding would have been different. *Id.* at 694.

B. Deficient Performance

37. Applicant was convicted of capital murder based on: (1) her statements during the first video recorded interrogation in which she agreed to take the officers to M.G., (2) an officer's testimony that she led them to M.G., and (3) her confession during the second video recorded interrogation that she placed M.G. face down in the mud and covered him with mud.

38. George Parnham, lead counsel for applicant at trial, has been licensed to practice law for 52 years (1 H.R.R. 6).

39. Parnham testified at the habeas hearing that he does not read the decisions in criminal cases issued by the United States Supreme Court, Fifth Circuit, Court of Criminal Appeals, and Texas Courts of Appeals; instead, he relies on his secretary or law clerk to point out any new cases that might be important (1 H.R.R. 6-7).

40. Parnham did not file a motion to suppress applicant's statements, her agreement to take (and act of leading) the officers to M.G., and the discovery of the body.

41. Reasonably competent counsel has a duty to recognize and research possible suppression issues;

file a motion to suppress when warranted; request a hearing in an effort to exclude the evidence at trial; and, if unsuccessful, preserve error for appeal. Competent counsel would have (1) recognized the issues concerning the admissibility of applicant's statements, her agreement to take (and act of leading) the officers to M.G., and the discovery of the body; (2) conducted legal research; (3) filed a motion to suppress the evidence; and (4) obtained a hearing.

42. Parnham performed deficiently by failing to file a motion to suppress and object to the admission of unconstitutionally obtained evidence. *See Kimmelman v. Morrison*, 477 U.S. 365, 385-87 (1986) (counsel performed deficiently by failing to move to suppress fruits of illegal search); *Williamson v. State*, 771 S.W.2d 601, 606-07 (Tex. App.—Dallas 1989, pet. ref'd) (counsel performed deficiently by failing to move to suppress defendant's oral confession); *Boyington v. State*, 738 S.W.2d 704, 707-08 (Tex. App.—Houston [1st Dist.] 1985 no pet.) (counsel performed deficiently by failing to move to suppress defendant s written confession).

43. As a result of Parnham' s deficient performance, there was a "complete abandonment of [applicant's] well-established constitutional and statutory rights to a reliable determination regarding the admissibility of the [evidence]." *Mitchell v. State*, 762 S.W.2d 916, 924-25 n. 18 (Tex. App.—San Antonio 1988, pet. ref'd).

44. Applicant's habeas counsel sent an email to Parnham during the habeas investigation asking why he

did not file a motion to suppress the evidence. Parnham ultimately responded, "Because of asserting the insanity defense in this case, not filing a Motion to Suppress was a part of our sound trial strategy" (AX 11).

45. Parnham testified at the habeas hearing that he conferred with Wendell Odom, his office mate, about how to respond to the question (1 H.R.R. 28-30).

46. Parnham reiterated in his testimony at the habeas hearing that he made a strategic decision not to file a motion to suppress or object to applicant's statements, her agreement to take (and act of leading) the officers to M.G., and the discovery of the body because her statements supported an insanity defense. However, he acknowledged that he may have relied on his staff to watch the videotaped interrogations instead of watching them himself (1 H.R.R. 31-33, 44).

47. Parnham informed the jury panel during the voir dire examination that the defense *would not* present an insanity defense (3 R.R. 164; AX 12).

48. Parnham did *not* present any testimony at trial that applicant was insane at the time of the offense. Instead, Parnham presented three experts that testified the applicant was *not* insane at the time of the offense. (8 R.R. 16, 88-91, 132, 165; 9 R.R 78, 88-89, 147).

49. The court' s charge did *not* contain an instruction on the insanity defense (C.R. 1643-50).

50. Although, Parnham stated in the email to habeas counsel and his testimony at the habeas hearing that he did not file a motion to suppress because applicant' s statements "because of asserting this case" that contention is not supported by the record. In this case the insanity defense was not argued, and the defense put on their own experts to negate that defense during the trial. (8 R.R. 16, 88-91, 132, 165; 9 R.R. 78, 88-89, 147).

51. Parnham did not have a sound strategic reason not to file a motion to suppress or object to applicant's statements, her agreement to take (and act of leading) the officers to M.G., and the discovery of the body.

52. The United States Supreme Court has recognized that a "confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). "The defendant's own confession is probably the most probative and damaging evidence that can be used against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much that we may justifiably doubt its ability to put them out of mind even if told to do so." *Id.*

53. The State has not been prejudiced by any delay in filing the habeas application, as Parnham testified at the habeas hearing that there were valid legal grounds to file a motion to suppress and offered no sound strategic reason for his failure to do so. Furthermore, the State

will not be materially prejudiced if there is a retrial, as the outcome will depend on the admissibility of applicant's statements, her agreement to take (and act of leading) the officers to M.G., and the discovery of the body.

I. MIRANDA

Counsel failed to move to suppress applicant's statements during the first interrogation and her agreement to take (and act of leading) officers to M.G. on the ground that they failed to advise her of her *Miranda* rights once she was in custody.

54. Detective Waters testified that applicant was not in custody during the first interrogation and, for that reason, was not advised of her *Miranda* rights (5 R.R. 187-88, 193).

55. The video recording and transcript reflect that Detective Waters told applicant at the start of the interrogation that she was not under arrest and was not in custody, as she was "down here voluntarily" to help them find M.G. (C.R. 707-08, AX 2).

56. Shortly after initiating the interview Detective Waters advised the applicant he believes she is not being truthful "... I think that something — you did something to put that baby in a place where you felt the he would be better off than living there with you and you not being able to provide for him." (C.R. 530; AX 3).

Upon hearing the assertion, the applicant denied the allegation, and repeatedly continued to deny knowing where the child was for over two hours. During the course of the first two hours of the interrogation the applicant cried, begged the officers to believe she was telling the truth, asked to call her brother, told the officers she was tired, questioned if her husband had arrived, and told the officers she had nothing more to say. (C.R. 649, 994,1089, 1121, 1147, 1235 ; AX 3) Nevertheless, the interrogation continued without a break.

Over two hours after the interrogation began, applicant said that she was tired and "want to go to my mom and dad." Officer Jafari responded. You cannot go to your mom and dad now. Unless I find your child, you can't go anywhere. Tell me where he is" (C.R. 822-23; AX 3).

57. At this point, applicant clearly was in "custody" within the meaning of *Miranda* because her liberty had been significantly restrained. *See Berkemer v. McCarthy*, 468 U.S. 420, 435 (1984). However, the officers did not advise her of her *Miranda* rights at this juncture and continued to interrogate despite her until she agreed to take them to M.G. (C.R. 823-49).

58. Parnham did not move to suppress applicant's statements and her agreement to take (and act of leading) the officers to M.G. on the ground that they failed to advise her of her *Miranda* rights once she was in custody.

59. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42, 54-57).

60. A statement made by the accused in response to a custodial interrogation is inadmissible unless she was warned of her privilege against self-incrimination and right to counsel and voluntarily waived those rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

61. The officers engaged in custodial interrogation of applicant. Therefore, her oral admissions and her agreement to take (and act of leading) the officers to M.G. were tainted by the *Miranda* violation. *See Pennsylvania v. Muniz*, 496 U.S. 582, 616 n.9 (1990) ("[N]onverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another."); *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966) ("A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words.").

62. Applicant's act of taking the officer to M.G., although nonverbal, was testimonial because it communicated her thoughts—just as if she had verbally told them where to find him. Although physical evidence is not subject to suppression because of a *Miranda* violation, applicant's testimonial act of leading the officers to M.G. is subject to suppression.

II. Tex. Crim. Proc. Code art. 38.22 §§ 2(a) & 3(a)

63. Applicant's statements also were inadmissible under Texas law. An oral statement of an accused made

as a result of a custodial interrogation is not admissible at the trial of a criminal case in Texas unless an electronic recording was made and, prior to the statement but during the recording, the accused was warned (1) that she has the right to remain silent, (2) that any statement she makes may be used against her in court, (3) that she has the right to a lawyer to advise her prior to and during any questioning (including an appointed lawyer if she cannot afford to hire one), and (4) that she has the right to terminate the interview at any time. TEX.

64. Applicant was not in custody when the interrogation began and *Miranda* warnings were not given. Shortly after the inception of the interview, the officers became accusatory and the defendant continued denying any involvement in the disappearance. After repeating her story several times and denying the allegation to the officers the applicant advised the Officers "she had nothing more to say". (C.R. 747; AX 4). Instead of terminating the interview and honoring applicant's invocation of her right to remain silent, the Officers continued with the interrogation.

Later in the interview applicant advised the officers she was tired and wanted to go to her mom and dad, and Officer Jafari responded that she could not go anywhere until the police found M.G. Once again instead honoring her invocation of her right to terminate the interview the Officers continued with the interrogation. This case is most analogous to *State v. Consaul*, 960 S.W.2d 680, 686-87 (Tex. App.–El Paso 1997), *pet. dism'd as improvidently granted*, 982 S.W.2d 899 (Tex. Crim. App. 1998)

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In *Consaul*:

- On January 21, 1996, the defendant reported her 18-month-old child missing;

- On January 22, 1996, an officer asked if she would go to the police station to discuss the matter;

- Two officers interviewed the defendant at the station;

- The defendant was read her *Miranda* warnings at the outset of the interview and waived her rights;

- The officers became accusatory and the defendant continued denying involvement in the disappearance;

- The defendant twice asked if she was a lawyer, and then finally said she wanted a lawyer;

- After the defendant invoked her right to counsel, the officers terminated the interview,

- In the following days, the FBI became involved and interviewed the defendant without knowing that she had invoked her right to counsel;

- Another detective reached out to the defendant about taking a polygraph test and she agreed;

- On January 24, 1996, the defendant was taken back to the police station to take a polygraph test;

- The same officers who had interviewed the defendant met with her after the polygraph test, which indicated deception;

- The officers asked if she wanted to talk about it and she agreed;

- The defendant was once again advised of her *Miranda* rights;

- During the course of the second interview, the defendant stated that she discovered her child had fallen from her crib and suffocated on a plastic bag and there were no signs of life, so she took the child to the desert and left her there;

- The trial court found that January 22, 1996 interview was a custodial interrogation and that the defendant had invoked her Fifth Amendment right to an attorney;

- The Court of Appeals of El Paso affirmed the trial court's order that *all statements*

> *made by the defendant after invoking her right to counsel* on January 22, 1996, be suppressed.

In this case despite the fact that the Officers failed to give her Miranda warning, the applicant invoked her right to remain silent, and her right to terminate the interrogation.

65. Because applicant was in custody before she agreed to take the officers to M.G., but was not advised of her *Miranda* rights, all statements she made after she was in custody, and her agreement to take (and act of leading) the officers to M.G. were inadmissible under the law in effect at the time of trial.

66. Parnham performed deficiently within the meaning of *Strickland* by failing to move to suppress the evidence on this ground.

67. Seven years after applicant's trial, the Court of Criminal Appeals held that the "public safety exception" established in *New York v. Quarles*, 467 U.S. 649, 655 (1984), Does not require the police to give Miranda warnings to a suspect who is in custody before asking the location of a kidnapped child. *State v. Mata*, 624 S.W.3d 824, 828-29 (Tex. Crim. App. 2021).

Kidnapping is defined by Texas Penal Code 20.03 as:

> Sec. 20.03. KIDNAPPING. (a) A person commits an offense if he intentionally or knowingly **abducts** another person.

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> (b) It is an affirmative defense to prosecution under this section that:
>
> (1) the abduction was not coupled with intent to use or to threaten to use deadly force;
>
> (2) the actor was a relative of the person abducted; and
>
> (3) the actor's sole intent was to assume lawful control of the victim.
>
> (c) An offense under this section is a felony of the third degree.

In this case the applicant is the mother of the complaint. Officers did not believe the child had been abducted, or they were dealing with a kidnapping. "... I think that something – you did something to put that baby in a place where you felt the he would be better off than living there with you and you not being able to provide for him." (C.R. 530; AX 3).

Furthermore, there are distinct differences in this case and Quarles and Mata. In both of the abovementioned cases, the officers had more than just a mere suspicion the people detained had committed an offense. In Quarles, the victim of the offense made an immediate outcry, described Mr. Quarles, and was able to immediately direct the officers to the store he just ran inside with the gun. Furthermore, when the officers found Mr. Quarles, he had an empty holster on in an occupied grocery store. In

Mata the defendant was detained on the phone with the complaints mother attempting to secure a $300 ransom for the child.

In both of those instances the police had the requisite level of suspicion to arrest, and did arrest the defendants for the alleged offenses. In this case, the officers at best had a suspicion the applicant was being less than truthful, and secreted her own child.

My review of Mata and Quarles does not seem to suggest that the Court has authorized Officers to take a person into custody and interrogate them on nothing more than on a mere suspicion, and not only fail to give the Miranda warnings, but deny them the right to exercise the rights afforded when they attempt to do so. Accordingly, this court will not exceed the limitations that the Supreme Court, and the Texas Court of Criminal Appeals have established when outlining this exception to Miranda.

69. The United States Supreme Court has not yet decided whether to extend *Quarles* to attempts by the police to located a kidnapped child.

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III. RIGHT TO REMAIN SILENT

Counsel failed to move to suppress applicant's statements made during the first interrogation and her agreement to take (and act of leading) the officers to M.G. on the ground that they continued to question her after she said that she had "nothing more to say."

71. Applicant told the officers during the first interrogation, "I have nothing more to say. If I knew where my baby is, I would not be sitting here" (C.R. 747; AX 4).

72. The officers continued to interrogate applicant after she invoked her right to remain silent (C.R. 747-50; AX 4).

73. Applicant again said, "I have nothing more to say. I have repeated several times" (C.R. 751; AX 4).

74. The interrogation continued without any break (C.R. 751-818).

75. Applicant repeatedly complained that she was tired (C.R. 819, 821, 822, 835, 836, 840; AX 5).

76. Officer Jafari said, "You know where he is. I know you are tired. If you want this to finish, just tell me where he is. ... Do you want this to end? Do you want this to end? Be brave and tell me where he is" (C.R. 822; AX 5).

77. Parnham did not move to suppress applicant's statements and her agreement to take (and act of leading) the officers to M.G. on the ground that the officers continued to interrogate her after she said that she had nothing more to say.

78. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42, 58-63).

79. When a suspect states during a custodial interrogation that she wants to remain silent, the interrogation must cease. *Miranda*, 384 U.S. at 473-74. A confession is inadmissible when the officer continues the interrogation after the defendant said that she does not want to talk. *Michigan v. Mosley*, 423 U.S. 96, 102-03 (1975); *Ramos v. State*, 245 S.W.3d 410, 418-19 (Tex. Crim. App. 2008) (written confession inadmissible); *Simpson v. State*, 227 S.W.3d 855, 858 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (videotaped confession inadmissible).

80. Shortly after the interrogation began, applicant repeatedly told the officers that she had "nothing more to say." Despite her unambiguous assertion of her right to remain silent, they continued to interrogate her until she agreed to take them to M.G. Her statements and her agreement to take (and act of leading) the officers to M.G. were inadmissible under the law in effect at the time of trial because the officers did not scrupulously honor her right to remain silent. *Mosley*, 423 U.S. at 102-03.

81. Parnham performed deficiently within the meaning of *Strickland* by failing to move to suppress the evidence on this ground.

82. Neither *Quarles* nor *Mata* decided whether a confession and the act of leading the police to a missing child must be suppressed if the defendant exercised her right to remain silent, and the police failed to scrupulously honor that right and continued to interrogate her until they obtained a confession.

83. The analyzes prong 2 of Strickland below.

IV. Involuntary Confession

Counsel failed to move to suppress applicant's statements during the first interrogation and her agreement to take (and act of leading) officers to M.G. on the ground that they were induced by the officers' promises to help her receive psychiatric treatment if she confessed and took them to M.G.

84. Detective Waters testified that the officers' goal was to get applicant to trust them enough to take them to M.G., and they continuously brought up the subject of her mental health because they knew that she wanted help for her mental problems (5 R.R. 192; 7 R.R. 8, 10).

85. The officers relentlessly interrogated applicant for over three hours until she agreed to take them to M.G. (SX 44, 77).

86. The videotape and transcript reflect a carefully-orchestrated psychological manipulation designed to

convince applicant that she was not criminally responsible for her conduct because she is mentally ill; that she needs psychiatric treatment instead of incarceration; and that, if she took them to M.G., they would help her receive psychiatric treatment instead of taking her to jail but, if she refused, and they found M.G. without her help, it would become a criminal investigation, they could not help her, and she would go to prison.

87. The following exchanges took place during the interrogation (AX 6):

- "You've got a sickness and because of that something has happened" (C.R. 780).

- "Many people have the sickness that you have. They do certain things under pressure, because of their disease. All psychiatrists and physicians have said that" (C.R. 781).

- "You have a sickness, you've been trying to get it treated, ... and it just doesn't seem like anybody cares..." (C.R. 784).

- "...the only way that you're going to be able to help yourself with your sickness and allow others to help you, is to tell us the truth where [M.G.] is" (C.R. 785).

- "I will tell you personally, I will do whatever I can do to help you afterwards" (C.R. 796).

- "I will give you my word that we will do whatever we need to do to help you, after" (C.R. 799).

- "You have got to trust us. We're not going to let anything happen to you. We're going to do everything we can do to get you more treatment, to help you ... get through this..." (C.R. 807).

- "**What will happen if you find him? You'll put the blame on me?**" (C.R. 809). "Why would we put the blame on you? You were sick, ma'am."

- "Our purpose is not to blame you for anything. We have nothing to gain by doing that, do you understand? ... Our purpose is to find [M.G.]" (C.R. 810).

- "Our purpose right now isn't to put you in jail, if that's what you're fearful of' (C.R. 812).

- "I want you to look me in the eye because I want you to understand that you can trust me ..." (C.R. 812). "**Yes, I know, I can trust you.**" "If you will just tell us where [M.G.] is, then I'm going to do everything I can do to help you" (C.R. 813).

- "You've made a mistake. A bad thing has happened. You have an illness; you have a sickness that needs to be addressed and you need to be helped with" (C.R. 815).

- "You're going to have to leave the protection of you up to us. We're here to help you. We're not here to try to trick you into anything. I'm not even here to put you in jail; I could care less about that" (C.R. 829).

- "If he is alive, we can get your husband to divorce you and send you to Iran" (C.R. 841). "**When will you make him divorce me?**" (C.R. 844). 'First, we need to find the baby."

- "We won't be able to help you unless you tell us" (C.R. 843).

- "If we find [M.G.] and you don't take us to him, you are going to have more problems than you ever dreamed of because then it will become strictly a criminal investigation, it will become a legal issue, and the fact that you have an illness or a sickness won't matter if we find [M.G.] and you don't help us. It will not go well." "**You mean they will take me to prison?**" "If you don't tell us, if you don't help us, yes ma'am." (C.R. 845).

- "**Will you let me stay with you guys if I tell you where he is?**" (C.R. 846). "I will help

you as much as I can." "**Let me stay with you.**" "I promise ... I will call your brother to come."

- "I will take care of you. I will find you a place .... I will get you (psychiatric) help tonight" (C.R. 847).

88. Applicant agreed to take the officers to M.G. only after they made the specific promises and threats set forth above (C.R. 849). Their promises and threats contained a sufficient "if-then" relationship that "implicitly or explicitly suggest[ed] a 'deal, bargain, agreement, exchange, or contingency.'" *Chambers v. State*, 866 S.W.2d 9, 20 (Tex. Crim. App. 1993).

89. A confession is involuntary and inadmissible when it was induced by an officer's promise of leniency if the suspect confesses, or by an officer's threats if the suspect does not confess, when such promise or threat operates to overbear the will of the suspect. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (confession to drug offenses involuntary because officer told defendant that state financial aid would be cut off and her children would be taken from her if she did not "cooperate"); *Payne v. Arkansas*, 356 U.S. 560, 561 (1958) (confession to murder involuntary because officer promised to protect defendant from angry mob outside jail if he confessed); *Hardesty v. State*, 667 S.W.2d 130, 134 (Tex. Crim. App. 1984) (confession to multiple offenses involuntary because detective promised that he would file only one charge if defendant confessed).

90. Parnham did not move to suppress applicant's statements and her agreement to take (and act of leading) the officers to M.G. on the ground that they were involuntary because they were induced by promises and threats.

91. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 42-43, 63-76).

92. Applicant's statements and her agreement to take (and act of leading) the officers to M.G. were involuntary for the following reasons:

- The officers promised to help applicant only if she confessed and took them to M.G. *See Pyles v. State*, 947 S.W.2d 754, 755-57 (Ark. 1997) (confession to murder involuntary because officer told defendant he would "do everything in the world" he could do for defendant if defendant confessed);

- The officers repeatedly promised that they would help applicant receive psychiatric treatment instead of incarceration and make her husband divorce her if she confessed and took them to M.G. *See Cole v. State*, 923 P.2d 820, 831-32 (Alaska Ct. App. 1996) (confession to sexual abuse involuntary because officer told defendant he had to confess to receive help for his problem); *State v. Howard*, 825 N.W.2d 32, 41 (Iowa 2012) (confession to sexual

abuse involuntary because officer misled defendant that he would receive treatment for sex addiction instead of incarceration if he confessed); *State v. L.H.*, 215 A.3d 516, 534-35 (N.J. 2019) (confession to sexual assault involuntary because officer led defendant to believe that he would receive counseling instead of incarceration if he confessed).

- Detective Waters told applicant that, if the police found M.G. without her help, it will become "strictly a criminal investigation," that her mental illness will not matter, and "[i]t will not go well." *See State v. Pollard*, 888 P.2d 1054, 1059-61 (Or. App. 1995) (confession to murder involuntary because officer told defendant that he would receive treatment if he confessed; but, if he did not, the case would go to the Grand Jury and, if "the Grand Jury thinks that you've done this, it makes it real rough.").

93. The officers' coercive interrogation tactics ultimately overbore applicant's will and rendered involuntary both her statements and her agreement to take (and act of leading) the officers to M.G. In addition, the discovery of the body was inadmissible as the "tainted fruit" of the involuntary confession. *See United States v. Chavez*, 985 F.3d 1234, 1246 (10th Cir. 2021) (physical evidence discovered as result of involuntary confession must be suppressed).

94. Parnham performed deficiently within the meaning of *Strickland* by failing to move to suppress the evidence on this ground.

95. *Quarles* did not apply the "public safety exception" to an involuntary confession as opposed to a mere *Miranda* violation. *See New York v. Quarles*, 467 U.S. 649, 654-55 (1984) ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist. . . . Thus the only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*.).

96. The Supreme Court remanded *Quarles* to the New York Court of Appeals with the observation that Quarles was free on remand to argue that his statement was coerced under traditional due process standards. *Id.* at 655.

97. On remand, the New York Court of Appeals remanded the case to the trial court with instructions to address the voluntariness issue. *People v. Quarles*, 473 N.E.2d 30 (N.Y. 1984).

98. The constitutional protections against involuntary confessions—including the fruits of such confessions—are not limited to situations when an officer extracts a false confession. "It is now axiomatic that the defendant is deprived of due process of law if his conviction is founded, in whole or in part, on an involuntary confession,

regardless of its truth or falsity." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961); *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Martinez v. State*, 127 S.W.3d 792, 794-95 (Tex. Crim. App. 2004) (holding that "the truth or falsity of a confession is irrelevant to a voluntariness determination not only under federal constitutional law but also under state law.").

Counsel failed to move to suppress evidence regarding the discovery of M.G. on the ground that it was tainted by the unconstitutional interrogation that rendered applicant's statements involuntary.

99. Detective Waters testified that applicant was transported to the scene of the alleged kidnapping in order to take the police to M.G. at 1:30 a.m. (7 R.R. 7).

100. Applicant led the officers to M.G. at 1:55 a.m. (7 R.R. 12-14).

101. When evidence is discovered as a result of police misconduct, its admissibility depends on "whether, granting establishment of the primary illegality, the evidence ... has been [obtained] by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

102. Physical evidence obtained by the police as a result of an involuntary confession, that is not otherwise discoverable, must be suppressed. *See Pitts v. State*, 614

S.W.2d 142, 142-43 (Tex. Crim. App. 1981) (stolen property recovered as result of defendant's confession to burglary, made after officer promised he would not file charges, was inadmissible as "fruits of the poisonous tree").

103. Parnham did not move to suppress evidence regarding the discovery of M.G. on the ground that it was tainted by the unconstitutional interrogation that rendered applicant's initial statements involuntary.

104. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 43, 76-78).

105. Applicant led the officers to M.G. about 25 minutes after the unconstitutional interrogation ended. Detective Waters testified that there was only a very small chance that M.G. would have been found without applicant's help, as the officers had been unable to find him with the use of dogs (7 R.R. 7). The photos of this remote, isolated location near a bayou demonstrate that it is unlikely that M.G. would have been discovered without applicant's help based on the manner in which he was buried (12 R.R. SX 73, 74; AX 7).

106. Because the officers conducted a coercive interrogation that ultimately resulted in applicant making involuntary statements and involuntarily agreeing to take them to M.G., evidence regarding the discovery of M.G. should have been excluded had Parnham filed a motion to suppress.

107. Parnham performed deficiently within the meaning of *Strickland* by failing to move to suppress the evidence on this ground.

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Counsel failed to move to suppress applicant's confession during the second interrogation on the ground that it was tainted by the initial unconstitutional interrogation.

108. Detective Waters testified that applicant led the officers to M.G. at 1:55 a.m. (7 R.R. 12-14).

109. Applicant was taken to the Neurological Processing Unit at the jail for evaluation (7 R.R. 16).

110. Detective Waters testified that, by arranging for applicant to have a psychiatric evaluation, he made good on "some of the promises [he] made" during the initial interrogation (7 R.R. 16).

111. Later that day, after applicant had been charged, Detective Waters and Officer Jafari conducted a second videorecorded interrogation in which she was advised of her *Miranda* rights for the first time (5 R.R. 193; 7 R.R. 18; SX 45).

112. Applicant admitted placing M.G. face down in the mud and covering him with mud (7 R.R. 19).

113. Parnham did not move to suppress applicant's confession during the second interrogation on the ground that it was tainted by the first unconstitutional interrogation.

114. Parnham testified at the habeas hearing that this would have been a valid objection (1 H.R.R. 77-80).

115. When an officer obtains an involuntary confession from a suspect, a subsequent confession obtained soon thereafter is tainted and inadmissible, even if the officer advised her of her rights before he obtained the second confession. *Oregon v. Elstad*, 470 U.S. 298, 310 (1985); *Clewis v. Texas*, 386 U.S. 707, 710-12 (1967); *Pitts v. State*, 614 S.W.2d 142, 142-43 (Tex. Crim. App. 1981) (where defendant's first confession to burglary was involuntary as a result of officer's promise not to file charges if he confessed, his second confession, obtained after he was confronted with the recovered property, also was inadmissible as tainted fruit of first confession).

116. Applicant's initial statements were involuntary. Her confession during the second interrogation—which occurred soon after the first unconstitutional interrogation and the discovery of M.G.—was tainted and, thus, was inadmissible.

117. Parnham performed deficiently under *Strickland* by failing to move to suppress the evidence on this ground.

C. Prejudice

118. Had Parnham filed a motion to suppress evidence, the trial court would have been required to suppress both video recorded statements and applicant's agreement to take and act of leading the officers to M.G. The exclusion of this evidence would have undermined the capital murder case and probably resulted in a more favorable plea bargain offer. *See Strickland*, 466 U.S. at

695 (holding that a court assessing prejudice must assume that the trial court would have followed the law had trial counsel not performed deficiently).

119. The prosecutor emphasized during her closing argument that applicant should be convicted of capital murder because her intent to kill was proven by "her own words" and by her piling mud on M.G. (10 R.R. 34-36, 50-51). This information came from the second confession.

120. Alternatively, had the trial court suppressed the statements but admitted testimony regarding the discovery of M.G., applicant probably would have been convicted of felony murder (which carries a punishment range of five to 99 years or life) instead of capital murder (which carries an automatic sentence of life without parole). Thereafter, she could have raised on appeal that the evidence was legally insufficient to prove the specific intent to kill element of capital murder and that the trial court erred in admitted testimony regarding the discovery of M.G.

121. Parnham's failure to file a motion to suppress undermines confidence in applicant's capital murder conviction.

Appendix B

IN THE 339TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

CAUSE NO. 1260243-A

EX PARTE

NARJES MODARRESI

RECOMMENDATION AND ORDER

The court recommends a new trial.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send it to the Court of Criminal Appeals as provided by article 11.07 of the Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

a. the indictment and judgment;

b. the application for a writ of habeas corpus;

c. the brief;

d. the exhibits;

e. the motions;

f. the State's answer;

g. all other documents filed by the applicant;

h. the appellate record in cause number 1260243;

i. the Reporter's Record from the evidentiary hearing;

j. the applicant's proposed findings of fact and conclusions of law,

k. the State's proposed findings of fact and conclusions of law;

l. the Court's findings of fact and conclusions of law; and

m. any objections filed by either party to the Court's findings of fact and conclusions of law.

The District Clerk shall send a copy of this order to applicant, his counsel, and counsel for the State.

SIGNED and ENTERED on 7-13-23

/s/ Te'iva Bell
Te'iva Bell
Judge Presiding