No. 25-5397

In The
Supreme Court of the United States

WILLIE JENKINS,
Petitioner,

v.

TEXAS,
Respondent.

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

REPLY TO STATE'S BRIEF IN OPPOSITION

CAPITAL CASE

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PARTIES TO THE PROCEEDINGS BELOW

Willie Jenkins, petitioner here, was the state habeas applicant below.

The State of Texas, respondent here, was the respondent below.

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In support of his petition for writ of certiorari to review the Texas Court of Criminal Appeals' ("TCCA") judgment, Willie Jenkins respectfully files this reply to the State's Brief in Opposition ("BIO").

ARGUMENT

A. Trial Counsel's Purported Strategy for Not Correcting the State's False Evidence is Irrelevant Because it is the Prosecution's Duty to Correct Its Falsehoods

Mr. Jenkins's case is a prime example of why it is the *prosecution's* duty to correct false evidence, not *trial counsel's*, a distinction that serves separate constitutional concerns—the Fourteenth Amendment's protection against prosecutorial misconduct versus the Sixth Amendment's right to effective counsel. *See Glossip v. Oklahoma*, 604 U.S. ----, 145 S.Ct. 612, 630 (2025) ("In any event, the Due Process Clause imposes 'the responsibility and duty to correct' false testimony on 'representatives of the State,' not on defense counsel.") ((citing *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959)) (internal quotations omitted); *Duggan v. State*, 778 S.W.2d 465, 458 (Tex. Crim. App. 1989) ("The prosecutor's constitutional duty to correct known false evidence is well established both in law and in the professional regulations which govern prosecutorial conduct . . . The duty to correct known false evidence is not only a prosecutorial ethic, but a constitutional requirement."). The State asserts that Mr. Jenkins's trial counsel knew of the State's falsities but "strategically" chose to do nothing about them. BIO at 17. Thus, the CCA's novel procedural bar, which rested on whether Mr. Jenkins and his counsel were or should have been aware of the falsities at the time of trial, has allowed the State to shirk that responsibility. *See* Petition for Writ of Certiorari at 9 (listing the false evidence).

At the evidentiary hearing, Mr. Jenkins's trial counsel testified they were aware that Dr. Bell was alive and that he had not concluded there was a rape, but chose not to correct the false testimony because they worried that challenging their

client's guilt at his capital trial would open the door to the introduction of extraneous offenses. Counsel referred to their strategy as the "potted plant" defense.[1] However, trial counsel's purported trial strategy—whether reasonable or not—is irrelevant to the false evidence analysis in this case.[2] Had it been brought to the prosecution's attention it presented false evidence, the *prosecution*, not trial counsel, would have had to correct its blunders. Trial counsel could have remained potted plants because they would not have had to take any action that would have opened the door to whatever alleged prior acts they were concerned about.

The State did not need to put into the jury's minds that Dr. Bell had concluded there was a rape but could not testify to such because he was dead. Yet because the State chose to affirmatively present that evidence, the *State* should have been forced to correct those assertions in front of the jury. Had it been forced to do so, the jury would have learned from the State itself that the pathologist in this case

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[1] Trial counsel referred to their strategy as "the potted plant defense" in which they did not give an opening statement, conducted limited cross-examination, and did not put on their own witnesses in the culpability phase. App.B at 67. Mr. Jenkins vigorously argues that trial counsel's stated strategy was unreasonable.

Second chair counsel's inspiration for the eponymous strategy came from attorney Brendan Sullivan during Congress's Iran Contra hearings, after he objected to a Congressman's question—except Mr. Sullivan strenuously voiced, "I am *not* a potted plant, I'm here as the lawyer. That's my job." "User Clip: Brendan Sullivan Is Not A Potted Plant", at 2:00 (aired July 9, 1987) (on file with c-span.org), *available at* https://www.c-span.org/clip/reel-america/user-clip-brendan-sullivan-is-not-a-potted-plant/4501895.

[2] The State admits this, but asserts that states can create rules to prevent "sandbagging." BIO at 22-23. The constitution should take precedent over such concerns. If the CCA's procedural rule against false evidence claims in initial state habeas proceedings is allowed to stand, the State could use trial counsel to shield itself from review of due process violations in future cases.

was alive and had *not* concluded Ms. Norris was raped. This would have been a powerful correction in and of itself that would have undermined the theory of capital murder in this case.

All of this underscores just how important it is for habeas applicants to have the ability to raise false testimony claims in their initial state habeas proceedings. Trial counsel's strategy in dealing with the State's false evidence cannot absolve the State for presenting such evidence or avert future review.

B. The State is Incorrect in Claiming the CCA has Explicitly Applied a Procedural Bar to False Testimony Claims Raised in Initial State Habeas

In its BIO, the State claims that the CCA's error-preservation bar is adequate because "Texas's should've-been-raised-earlier rules have long been recognized as adequate state grounds capable of barring federal review." BIO at 19. Of course, not every claim is necessarily cognizable or reviewable. The distinction is that the CCA's own case law holds that false evidence claims *are* cognizable and reviewable in initial state habeas. The few cases cited by the State in its BIO do not controvert that fact.

In a 2019 published opinion, the CCA explicitly acknowledged its longstanding precedent to review false evidence claims:

> **A habeas applicant relying on a due process false testimony contention must show both materiality of the testimony and that the error in its use was not *harmless if the defendant could have raised the claim in the trial court or on direct appeal.***
>
> ***But if the applicant could not have raised the matter at trial or on appeal,* in a habeas proceeding he must show materiality but need not show the error was not harmless.**

Ex parte Lalonde, 570 S.W.3d 716, 723 (Tex. Crim. App. 2019) (internal citations omitted) (emphasis added).

Meanwhile, the cases cited by the State are inapposite to the CCA's precedent in *Lalonde*. In *Ex parte Jiminez*, cited by the State, the CCA was tasked with deciding whether a habeas applicant could complain of the denial of an *Ake* motion that was informally brought to the trial court but not formally filed. 364 S.W.3d 866, 880 (Tex. Crim. App. 2012). The case had nothing to do with false evidence claims.

The other two cases cited by the State are unpublished cases in which the CCA adopted the trial court's findings of fact and conclusions of law, but discussed no facts, provided no analysis, and cited no case law or precedent in its opinions. The entity of the CCA's opinion in *Ex parte Rhoades*, cited by the State, is this:

> *ORDER*
>
> Per curiam.
>
> *1 This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.
>
> Applicant was convicted in October 1992 of capital murder committed in September 1991. TEX. PENAL CODE ANN. § 19.03(a). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e), the trial court sentenced him to death. Art. 37.071, § 2(g). [1] This Court affirmed applicant's conviction and sentence on direct appeal. *Rhoades v. State*, 934 S.W.2d 113 (Tex.Crim.App.1996).
>
> Applicant presented thirty-eight allegations in his application in which he challenges the validity of his conviction and sentence. The trial court did not hold a live evidentiary hearing. As to all of these allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.
>
> This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions, except for conclusion of law number four, which we reject. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.
>
> IT IS SO ORDERED THIS THE 1st DAY OF OCTOBER, 2014.

Ex parte Rhoades, No. WR-78,124-01, 2014 WL 5422197, at *1 (Tex. Crim. App. Oct. 1, 2014) (unpublished). The *Ex parte Devoe* opinion that the States cites is identical.

See Ex parte Devoe, No. WR-80,402-01, 2014 WL 148689, at *1 (Tex. Crim. App. Jan. 15, 2014) (unpublished).

The State provides no case in which the CCA has expressly denounced its published line of cases acknowledging the reviewability of false evidence claims in initial habeas proceedings. Two unpublished opinions from 2014 years ago that contain no law or analysis—and do not even reference whether false evidence claims were raised—do not constitute a foreseeable, adequate state law ground to bar Mr. Jenkins's claims. Anyone reading the *Rhoades* and *Devoe* opinions would not even know that a false testimony claim was raised in those cases.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Jenkins prays that this Court grant a writ of certiorari to resolve the Questions Presented.

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

December 4, 2025

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