No. 25-

IN THE

Supreme Court of the United States

CRAIG JONATHAN WARNER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

SUPPLEMENTAL APPENDIX

BRETT ORDIWAY
Counsel of Record
ORDIWAY PLLC
8350 North Central Expressway,
Suite 1900
Dallas, TX 75206
(469) 205-1600
brett@ordiway.com

131679

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-96,439-01 & WR-96,439-02

EX PARTE CRAIG JONATHAN WARNER,

Applicant.

Filed August 20, 2025

CONCURRING OPINION

ON APPLICATIONS FOR WRITS OF
HABEAS CORPUS CAUSE NOS. 7410-A &
7411-A IN THE 27TH DISTRICT COURT
LAMPASAS COUNTY

FINLEY, J., filed a concurring opinion.

In 2004, a jury convicted Applicant of two counts of aggravated sexual assault of a child under fourteen, after he sexually assaulted his eight-year-old stepdaughter and her eight-year-old cousin. The vaginal swab of one of the complainants tested positive for P30, a prostate-specific antigen (PSA). At the time of trial, the Texas Department of Public Safety (DPS) treated P30 as being specific to semen and only coming from the prostate gland. Two DPS employees testified at Applicant's trial to that effect.

Appendix

About eight years after Applicant's trial, the DPS began treating P30 as an indication, not confirmation, of semen. This change is due to the scientific community producing literature that P30 has been found in non-prostatic sources.[1] Applicant claims that this literature

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1. Applicant's memorandum in support of his habeas application cites one source to support this proposition: "Jason B. Sheffield, *Winning Despite DNA: The Truth You Must Reveal,* 44-APR CHAMPION 18, 22 & n.13 (Apr. 2020) (citing *PSA in Body Fluids,* SERATEC User's Manual: An Overview for Users of the SERATEC PSA Semiquant Tests) (noting that PSA is found "in lesser concentrations in saliva, amniotic fluid, female serum, breast milk, and most importantly female urine.")." The quote from *Winning Despite DNA: The Truth You Must Reveal* states, in full: "The learned truth is th[at] PSA is not specific to just the male prostate! In fact, the crime lab's training included the fact that [PSA] could be found in lesser concentrations in saliva, amniotic fluid, female serum, breast milk, and most importantly *female urine.*" (Original emphasis). The summary portion of cited material says,

> Generally it can be said, that positive test results with the PSA SEMIQUANT assay are a strong hint that seminal fluid is present, if the case material has been processed in the above described way. This statement is confirmed by the observation that female sample material has been tested consistently negative with the PSA SEMIQUANT assay. Only one exception has been described by Denison et al. (2004) who found positive results with vaginal swabs of one volunteer.

SERATEC, *PSA in Bodily Fluids: An Overview for Users of the SERATEC PSA SEMIQUANT Tests* 15, https://tinyurl.com/2x23yrhc. Regarding the presence of PSA in female urine, the manual cites one study in which "PSA was detectable in only 11% of the [urine] samples [of 217 women]." *Id.* at 10.

and how the DPS now treats P30 has retroactively invalidated the DPS employees' trial testimonies and that he is entitled to post-conviction relief under the Due Process Clause and Article 11.073 of the Code of Criminal Procedure. I agree with the Court's decision to deny relief. I write separately to further explain why Applicant is not entitled to relief and to encourage my colleagues to examine our false evidence habeas jurisprudence at the earliest opportunity. A *false evidence* due process claim is unavailable when testimony that accurately represented the scientific community's understanding at the time of trial is later determined to be inaccurate.

As interpreted by this Court, the Due Process Clause prohibits the State from knowingly or unknowingly using false or misleading testimony to obtain a conviction. The testimony must be false or misleading at the time of trial. Testimony that becomes inaccurate after trial because of new scientific understandings is not false for purposes of the Due Process Clause. Rather, such testimony may be germane to a new science claim under Article 11.073.

Consequently, I would take the opportunity to file and set this application on the following issues:

1. For purposes of a false evidence claim under the Due Process Clause of the Fourteenth Amendment, does trial testimony retroactively become false in light of new science?

2. If so, should we apply a different materiality standard than we ordinarily do for false

evidence claims, because at the time of trial neither the State nor the witness(es) could know that new science will eventually undermine the testimony?

3. Given the Supreme Court's recent opinion in *Glossip v. Oklahoma,* 604 U.S. ___, 145 S. Ct. 612, 626 (2025), in which the Supreme Court reiterated that the Due Process Clause of the Fourteenth Amendment prohibits the state's knowing use of false testimony against a defendant, should this Court continue to recognize an unknowing use of false testimony claim?

4. If so, is our current materiality standard as articulated in *Ex parte Weinstein,* 421 S.W.3d 656 (Tex. Crim. App. 2014), correct?

In a future case, I would take the opportunity to address the four issues set out above.

I. Background

a. Trial

In April 2003, a grand jury returned two indictments against Applicant. The indictments accused Applicant of committing aggravated sexual assault of a child, and indecency with a child by sexual contact, against his eight-year-old stepdaughter M.J., and M.J.'s eight-year-

old cousin Y.R.[2] Prior to trial, the State abandoned the indecency counts. At trial, the State alleged Applicant intentionally or knowingly (1) caused the penetration of M.J.'s and Y.R.'s sexual organs with his finger when they were younger than fourteen years of age, (2) caused M.J.'s and Y.R.'s sexual organs to contact his mouth when they were younger than fourteen years of age, or (3) caused M.J.'s and Y.R.'s anuses to contact his sexual organ when they were younger than fourteen years of age. *See* Tex. Penal Code § 22.021(a) (West Supp. 2004-2005).

On the evening of March 22, 2003, Y.R. came to the Warner home to spend the night with M.J. After a family cookout, the girls asked Ms. Warner, M.J.'s mother, if Applicant "could sleep with them in the playroom." Ms. Warner found this request "unusual" because they had never before asked for Applicant to join their sleepover. After falling asleep, Ms. Warner awoke to laughter emanating from the playroom. The playroom door was locked, and she used a bobby pin to unlock it. Before Applicant was whisked by Ms. Warner out of the playroom, she believed that she saw Y.R. spanking Applicant.

The following night, Ms. Warner helped M.J. put on pajamas. Ms. Warner noticed a reddish smudge in M.J.'s pajama pants. When asked about the smudge, M.J. responded that it came "from pushing Daddy," specifically from "pushing Daddy off of [Y.R.]." M.J. became "quiet," and "looked away" from Ms. Warner. Ms. Warner had

2. M.J. and Y.R. were nine years old at the time of trial in January 2004.

a feeling "that there was something wrong." She asked what happened, to which M.J. responded that she "would get mad at [her]." After being assured that Ms. Warner would not get mad, M.J. said that Applicant touched Y.R. and pointed down.

Ms. Warner called her mother and a neighbor and then dropped off the other kids at another neighbor's home. She drove herself, M.J., Y.R., and her other daughter to Metroplex Hospital's emergency room. They were then referred to Scott & White Hospital for a full medical and sexual assault examination. Dr. Pamela Green, a physician in obstetrics and gynecology at Scott & White conducted the examinations of the girls. For both M.J. and Y.R., Dr. Green opined that there had been penetration at least of the female sexual organ "past the outer lips" and potentially the vagina.

Y.R. testified at trial that Applicant placed his mouth on her vagina when she, M.J., and Applicant were outside the house, and when she and M.J. were sitting on a pile of wood together. Later that night, Applicant slept with her and M.J. in the playroom. Applicant then sexually assaulted Y.R. by vaginal and anal penetration and touched her breasts. The next morning, Applicant sexually assaulted Y.R. again by vaginal penetration in a different room. M.J. also testified that Applicant sexually assaulted her on that same pile of wood, in the playroom, and in a different room.[3] M.J. testified that Applicant sexually

3. In addition to the live testimony, the State also admitted into evidence at Applicant's trial videotaped interviews of M.J. and Y.R., who were interviewed by Amy Penny, a forensic interviewer with the Hill County Children's Advocacy Center in Burnett.

assaulted her for the first time when she was possibly in kindergarten and around five or six years old. There was confusion about whether Applicant could have sexually assaulted M.J. during that time, because Applicant was serving in Korea from 1999 to 2000 and returned to Texas around June 2000, at which point M.J. may not have been in kindergarten. Even if M.J. was not in kindergarten when Applicant returned, she was still five years old.[4]

While it is unclear from the record, according to Ms. Warner, Applicant had asked M.J. to watch pornographic videos with him in his shed. The sheriff's office took possession of some of the videos. Officers seized six videos in total. None of the seized materials depicted children.

Brent Watson and Blake Goertz, two DPS employees, testified for the State about the testing and results from M.J. and Y.R.'s Sexual Assault Nurse Examiner kits and other evidence associated with the case. Watson told the jury that M.J.'s vaginal and anal swabs contained acid phosphate, and Y.R.'s vaginal swabs also tested positive for acid phosphate. Watson testified that finding acid phosphatase creates a presumption of semen but still requires further testing. Watson explained why further testing is needed: "[Acid phosphatase] is not unique to

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4. M.J. was born on October 22, 1994. Ms. Warner testified that M.J. attended kindergarten twice and that M.J. may have been in kindergarten for the second time when Applicant returned from serving in Korea. However, Ms. Warner was confused by the line of questioning, so it is unclear whether M.J. was in kindergarten for the second time or in first grade when Applicant returned in June 2000.

semen, but it is present in semen at 400 times greater concentration [than] in other fluids." He then explained that further testing of M.J. and Y.R.'s swabs did not detect semen or sperm cells. He did, however, find P30 in Y.R.'s vaginal swabs, which "confirm[ed] the presence of semen." Watson also explained that P30 is "unique only to semen" and "the female body does not create" P30. Goertz testified that "P-30 is specific for semen because it only comes from the prostate gland, and only men have a prostate gland; therefore, only men can produce P-30."

After closing arguments, the jury deliberated for thirty-nine minutes. The jury convicted Applicant of aggravated sexual assault of both M.J. and Y.R. and sentenced him to ninety-nine years' imprisonment on each count.

b. Habeas proceedings

Applicant filed this instant application for a post-conviction writ of habeas corpus alleging two claims. The first claim is a new science claim under Article 11.073 of the Code of Criminal Procedure. The second claim is a false evidence due process claim. Both claims are supported by an accompanying affidavit from forensic scientist Elizabeth A. Johnson, Ph.D., in which she avers that Watson's and Goertz's 2004 trial testimonies about P30 are now incorrect under the scientific community's new, prevailing understanding of P30.

Dr. Johnson noted that, after reviewing the lab reports, trial testimony, and other records, "spermatozoa

were not detected on the body swabs or clothing that was collected from either girl approximately 24-36 hours after the alleged offenses." Yet "[v]aginal swab 2B from Y.R. was reported to be positive for P30," and "[b]oth Brent Watson and Blake Goertz testified at trial that P30 is specific to semen and that P30 only comes from the prostate gland." According to Dr. Johnson, that testimony is incorrect. She averred:

> P30 was initially believed to be a prostate-specific protein, as described by literature in the 1970s and 1980s. But by 1989, the P30 protein was found at lower levels in non-prostatic tissues. P30 has since been found in many different nonprostatic sources, including breast milk and some female urine. P30 is merely found at elevated levels in seminal fluid.

She further stated that because no spermatozoa or male DNA were detected by YSTR testing on vaginal swab 2B from Y.R., "the presence of P30 should not be considered evidence of contact with a male. To the contrary, the YSTR testing results indicate that the P30 test result may be an outlier and possibly a false positive result."

Dr. Johnson also discussed when the scientific understanding of P30 began to change. By 2011, some crime labs were adopting a cautious approach to P30, "treating P30 as a presumptive test for seminal fluid and reporting that semen was indicated but not confirmed if spermatozoa could not be identified." She explained that by 2012, DPS adopted that approach and its "Standard

Operating Procedure in 2012 stated: 'P30 is considered to be a presumptive test for semen. The presence of P30 indicates but does not confirm the presence of semen. Semen can only be confirmed by the presence of spermatozoa.'"

Habeas counsel e-mailed Watson, one of the DPS employees who testified at Applicant's trial and asked whether his understanding of P30 had changed since Applicant's trial. Watson responded in the affirmative: "There is scientific literature that indicates p30 (aka PSA or prostate-specific antigen) has been found in amniotic fluid, breast milk, breast cyst fluid, nipple aspirate fluid, and breast tumor cytosol. Because these are non-prostatic sources of p30, DPS now treats p30 as an indication, not confirmation, of semen."

The habeas court entered findings of fact and conclusions of law and recommended that the Court grant relief on Applicant's Article 11.073 claim and his due process claim.

II. Under this Court's current false evidence jurisprudence, Applicant is not entitled to relief.

Even assuming the falsity of Watson's and Goertz's testimonies, Applicant failed to prove materiality.[5] To

5. Applicant's false testimony claim is based solely on the weight that the jury should have put on the presence of P30. At trial, Watson and Goertz testified that P30 is "specific for" and "unique only" to semen. Under the DPS's current understanding of P30, it is an "indication," rather than a "confirmation," of semen.

do so, Applicant needed to prove by a preponderance of the evidence "that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Ex parte Weinstein,* 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

If we excise Watson's and Goertz's testimonies, then we are still left with overwhelming evidence of Applicant's guilt. Y.R. and M.J., two prepubescent girls, testified in person that Applicant sexually assaulted them on multiple occasions during the course of twenty-four hours. Their recorded forensic interviews were introduced to the jury. Y.R.'s vaginal swabs and M.J.'s vaginal and anal swabs tested positive for acid phosphatase, which "is present in semen at 400 times greater concentration than in other fluids." Ms. Warner testified about Applicant's strange behavior on the night of the sexual assaults, that she found a red smudge in M.J.'s pajamas, and that Applicant had tried to watch pornographic videos with M.J. Furthermore, M.J. testified that Applicant first sexually assaulted her when she was around the age of five or six.

However, the habeas court's findings of fact and conclusions of law stressed the following in concluding that the P30 evidence was material to Applicant's conviction:

> 39. The medical evidence was largely the P30 evidence. Investigators did not identify spermatozoa on swabs of the complainants or their clothing. No DNA evidence tied

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Had Watson and Goertz testified in accordance with the current DPS understanding, the jury would still have been told that the presence of P30 in Y.R.'s swab was an "indication" of semen.

Warner to the alleged offenses. And armed with Warner's hair samples and hairs found on the complainants' clothing, the State found no matches. Dr. Green testified that the complainants exhibited injuries that were consistent with penetration, but she could not say by what. And contrary to the State's closing argument, Dr. Green observed no acute trauma.

40. Like in many sexual-abuse trials, "the credibility of both the complainant[s] and the defendant" therefore should have been the "central, . . . dispositive, issue." *Hammer v. State,* 296 S.W.3d 55, 561-62 (Tex. Crim. App. 2009). And without the P30 evidence, there was reason to question the complainants' credibility.

41. At trial, both claimed that Warner also sexually assaulted them on top of a woodpile during the family cookout. The girls apparently made no mention of this to Dr. Green, however, and M.J.'s mother testified that the cookout, with all of its guests, took place "[r]ight outside the shop," near the woodpile.

42. M.J. further testified that Warner had sexually abused her since she was in kindergarten. But Warner was serving in the army in Korea when the abuse allegedly began.

43. It's no wonder, then, that the State called two witnesses to testify about P30 and emphasized

their expected testimony in its opening statement, claiming that testimony would show that P30, "a protein found only in . . . semen," was found on YR.'s vaginal swab. In closing, the State then urged that "'seminal fluid [got] in [YR.'s] vaginal opening . . . only one way, and that's from sexual contact by [Warner]." *See Chaney,* 563 S.W.3d at 261-63 (granting relief on Article 11.073 claim where State emphasized incorrect scientific evidence in closing).

44. As the County Attorney acknowledged in a post-trial letter to the State's experts, he "could not have expected the jury to do as good a job with the case[s]" without their "dedicated work."

45. In its answer, the State did not explain what '"overly emphasi[zing]" the P30 evidence in closing argument would look like. But in fact, the State urged the jury that "seminal fluid [got] in [Y.R.'s] vaginal opening . . . only one way, and that's from sexual contact by [Warner]." This Court finds this was hardly a passing reference. *Cf. Harris v. State,* 790 S.W.2d 568 (Tex. Crim. App. 1989) (holding improperly admitted evidence harmless where State made only "passing reference" to it in closing argument).

* * *

> 57. Accordingly, for all the reasons that this Court concluded that Warner satisfied Article 11.073(b)(2) of the Code of Criminal Procedure, among them the State's emphasis of the testimony in its closing argument, this Court concludes there is a reasonable likelihood that the P30 evidence affected the jury's guilty verdicts. *See Thomas,* 2023 WL 7382706, at *1 (holding false testimony material where the State emphasized it in closing argument).

The Court is correct in not adopting the habeas court's findings of fact and conclusions of law. The jury exited the courtroom for deliberations at 3:06 p.m. and finished its deliberations in less than forty minutes. The jury found Applicant guilty of aggravated sexual assault of a child under fourteen years of age for both M.J. and Y.R. To the jury, this was an easy case. The evidence was overwhelming even without the P30 testimony.

M.J. and Y.R. exhibited injuries consistent with penetration. Ms. Warner found a reddish smudge in M.J.'s pajama pants the night after Applicant sexually assaulted her. When confronted about the reddish smudge, M.J. eventually confided in Ms. Warner that Applicant sexually assaulted Y.R. the night before. The nighttime sexual assault is consistent with Applicant's suspicious behavior that Ms. Warner observed. Applicant slept alone with M.J. and Y.R. in the playroom on the night in question and locked the playroom door so that they would not be disturbed. After being awoken with laughter emanating from the playroom, Ms. Warner knocked on the door

and then opened the door, either with a bobby pin or by pulling on the doorknob. She entered the playroom, saw "Y.R. spanking [Applicant] on the behind," and briefly spoke with Applicant. Applicant then "whisked" Ms. Warner out of the room. Both M.J. and Y.R. testified about the circumstances surrounding their sexual assaults, including how and when Applicant committed the acts.

Even so, the habeas court found that "without the P30 evidence, there was reason to question the complainants' credibility." But M.J.'s testimony corroborated Y.R.'s, and Y.R.'s testimony corroborated M.J.'s; M.J.'s and Y.R.'s videotaped interviews were admitted to the jury; and Ms. Warner's testimony supported M.J.'s and Y.R.'s testimonies. The only reason to question the credibility of M.J. and Y.R. was Applicant's version of events.

The habeas court questioned the veracity of M.J.'s and Y.R.'s testimonies about how Applicant sexually assaulted them on top of a woodpile during a family cookout. Applicant, Ms. Warner, M.J., Y.R., and Ms. Warner's two other children attended the cookout. The jury had a full and fair opportunity to weigh the credibility and believability of M.J. and Y.R., and the circumstances surrounding that sexual assault, including Y.R.'s testimony that Applicant "told them" to "come to the wood pile," which was located "[o]n the side of the house" and "[b]etween the house and the shop." This woodpile sexual assault, like the sexual assaults that happened later in the playroom and on the next day, show Applicant's brazen behavior in the course of twenty-four hours.

The jury could have further concluded that Applicant first sexually assaulted M.J. after he returned from service in Korea. As Ms. Warner testified, M.J. completed kindergarten twice, the latter of which likely aligned with Applicant returning from Korea. Even if M.J. was not in kindergarten when Applicant first sexually assaulted her, the jury was free to understand that (1) M.J. was a nine-year-old child when she testified; (2) children often lack the ability to recall and articulate their memories as well as adults; (3) M.J. was testifying about the first time Applicant sexually assaulted her, which is a traumatic experience; and (4) M.J. testified that she was first assaulted when she was five or six, which coincided with Applicant's return from Korea, regardless of her elementary-school-grade status.

Finally, the testimony at issue only concerned Y.R.'s vaginal swab. No one testified that M.J.'s vaginal swab was positive for P30. And yet the jury convicted Applicant for sexually assaulting M.J., too. Watson explained that, when looking at vaginal swabs, the first test "perform[ed] to look for semen is called [the] 'presumptive test'" and looks for acid phosphatase. Watson further testified that M.J.'s vaginal and anal swabs and Y.R.'s vaginal swabs tested positive for acid phosphatase, which is present in semen at a concentration 400 times greater than in other fluids. Dr. Johnson's affidavit does not explain whether that testimony is now considered inaccurate or false by the scientific community. Thus, those positive findings provided the jury with scientific evidence that M.J. and Y.R. were sexually assaulted.[6]

6. And if the Court had reservations about whether the P30 evidence was material, the jury convicted Applicant in less than

Applicant has not shown by a preponderance of the evidence "that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Weinstein,* 421 S.W.3d at 665. Applicant is not entitled to relief on his false evidence claim.[7]

III. A false evidence due process claim is limited to testimony that was false or misleading at the time of trial.

With that said, I address lingering issues that the Court declines to answer in this habeas application. The Due Process Clause of the Fourteenth Amendment prohibits a state from obtaining a conviction "through use of false evidence, known to be such by representatives of the State." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). That result applies even "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* As the Supreme Court recently clarified in *Glossip v. Oklahoma,* to establish a false evidence claim,

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forty minutes and sentenced him to ninety-nine years' confinement for each offense.

7. To be entitled to relief under Article 11.073, an applicant must show that "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." Tex. Code Crim. Proc. art. 11.073(b)(2). Under our false evidence jurisprudence, false evidence is material "if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Weinstein,* 421 S.W.3d at 665 (citing *Ex parte Chavez,* 371 S.W.3d 200, 206-07 (Tex. Crim. App. 2012)). Because materiality is a lower burden than that required by Article 11.073, and Applicant fails to establish materiality, he is not entitled to relief under Article 11.073.

"a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it 'to go uncorrected when it appear[ed].'" 604 U.S. ___, 145 S. Ct. 612, 626 (2025) (quoting *Napue,* 360 U.S. at 269). The Supreme Court has never held that an unknowing use of false evidence violates due process. *See id.* (requiring a scienter of knowledge). Yet this Court recognizes such a claim. *See Ex parte Chaney,* 563 S.W.3d 239, 263 (Tex. Crim. App. 2018) ("Due process of law is violated when a conviction is obtained using false evidence irrespective of whether the false evidence was knowingly or unknowingly used against the defendant." (citing *Weinstein,* 421 S.W.3d at 665)). Assuming that we should continue to recognize an unknowing use false evidence due process claim, I would use this case to hold that testimony that is neither false nor misleading at trial cannot form the basis of a false evidence claim.

A false evidence claim may be established by non-perjured testimony, *Weinstein,* 421 S.W.3d at 665, and it is "designed to ensure that the defendant is convicted and sentenced on truthful testimony," *id.* at 666 (quoting *Chavez,* 371 S.W.3d at 211 (Womack, J., concurring)). "It is sufficient if the witness's testimony gives the trier of fact a false impression." *Ex parte Ghahremani,* 332 S.W.3d 470, 477 (Tex. Crim. App. 2011); *see also Alcorta v. Texas,* 355 U.S. 28, 31 (1957) (same). The false evidence must have also been material to the applicant's conviction. *Chaney,* 563 S.W.3d at 263 (citing *Weinstein,* 421 S.W.3d at 665). False evidence is material when "there is a 'reasonable likelihood' that [the false evidence] affected the judgment of the jury." *Id.* at 263-64 (citing *Weinstein,* 421 S.W.3d at 665).

Had the Court granted Applicant relief on his false evidence claim, we would have stretched our false evidence jurisprudence to yet another circumstance the Supreme Court has not addressed. In 2024, Justice Sotomayor issued a statement respecting the Supreme Court's decision to deny certiorari in a petition involving a "conviction resting on science that has now been wholly discredited[.]" *McCrory v. Alabama*, 144 S. Ct. 2483, 2483 (2024) (Sotomayor, J., respecting denial of certiorari). Justice Sotomayor, even before the Supreme Court handed down *Glossip*,[8] reiterated that a *Napue* false evidence claim requires the State to *know of* evidence's falsity. *Id.* at 2488. She even noted the disconnect between newly-discredited expert evidence and *Napue:* Unlike evidence the state knew to be false at trial, "[w]ith newly-discredited expert evidence . . . nobody knew that the evidence was faulty at the time of the trial." *Id.*; *cf. id.* ("Similarly, it is hard to argue that trial counsel was ineffective for failing to object to science that was discredited only decades after the initial trial."). Justice Sotomayor credited Texas for "lead[ing] the way in forensic science reform in criminal procedure" to address this problematic false evidence scenario. *Id.* Article 11.073 is an example of legislative reform that that allows habeas applicants to challenge their convictions by demonstrating that new scientific evidence seriously undermines their convictions. *Id.* at 2488-89.[9]

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8. Justice Sotomayor delivered the Supreme Court's decision in *Glossip.*

9. The House Research Organization's bill analysis provides further support for the conclusion that Article 11.073 is intended

Appendix

Applicant's factual situation is governed by Article 11.073 and is not cognizable as a false evidence due process claim under either the Supreme Court's framework or this Court's framework.

Under the Supreme Court's framework, a false evidence due process claim requires the State to either "knowingly solicit[ ] false testimony or knowingly allow[ ] it 'to go uncorrected when it appears.'" *Glossip,* 604 U.S. ___, 145 S. Ct. at 626 (quoting *Napue,* 360 U.S. at 269). The State must somehow assist the presentation of the false testimony before the jury. *See id.* The State may, for example, present false testimony or evidence to the jury, thereby sponsoring it for the jury to consider. Alternatively, the State may acquiesce when someone else creates a false impression before the jury. Under either scenario, the State is to blame because it knowingly participated in an unfair trial that resulted in the conviction of the accused. *See Napue,* 360 U.S. at 269-70. In those circumstances, a clear procedural error has occurred. But a prosecutor's "responsibility and duty to correct what he knows to be false and elicit the truth," *id.* at 270 (quoting *People v. Savvides,* 136 N.E.2d 853,

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to provide a statutory safety net for "scenarios in which scientific experts sincerely thought something was true at the time they testified, but the science and the experts' understanding and opinions ha[ve] changed." House Comm. on Crim. Jurisprudence, *Bill Analysis,* Tex. S.B. 344, 83rd Leg., R.S. (2013); *see also id.* ("SB 344 would fill a gap in habeas corpus law, ensure that the law kept pace with science, and provide a path for relief where false and discredited forensics may have caused the false conviction of an innocent person.").

854-55 (N.Y. 1956)), does not arise in a situation like Applicant's. The State is not omniscient. A prosecutor cannot correct "false evidence" that is demonstrably true, as far as any party or witness knows, *at the time of trial.* Nor does demonstrably true evidence "create a misleading impression of the facts" at trial, *Ghahremani,* 332 S.W.3d at 479, because scientifically grounded testimony leads the jury to a correct interpretation of the evidence according to the well-accepted understandings of the scientific community at the time of trial.

Watson's and Goertz's testimonies could not have given the jury a false impression about P30 because in 2004 they, and the scientific community, believed that P30 was specific to semen and only came from the prostate gland. Because their opinions were neither false nor misleading at the time of Applicant's trial, Applicant fails to demonstrate falsity under *Napue* and *Glossip.*

Applicant likewise failed to demonstrate falsity under this Court's false evidence framework. In *Weinstein,* the witness testified that his mental illness had never "caused [him] to have any type of autial [sic] or visual hallucinations." 421 S.W. 3d at 666. That "testimony was flatly incorrect." *Id.* It was undercut by five pre-trial instances in which the witness admitted to suffering from auditory hallucinations. *Id.* This testimony, like the testimony in *Glossip,* was false *at the time of trial.* Because the P30 testimony was not false at the time of trial, it would be incorrect to hold that Applicant established falsity.

Indeed, this Court, with some hesitations, has continually required the challenged testimony to be false at the time of trial. In *Chaney,* for example, we were presented with a post-conviction writ application that claimed relief under: (1) Article 11.073; (2) our false evidence jurisprudence; (3) *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) our actual innocence jurisprudence. *See generally* 563 S.W.3d at *passim.* At trial, the State called two forensic odontologists to testify about a mark left on John's (one of the victims) left forearm. *Id.* at 250-51. One of the experts, Dr. Hales, testified that there was merely a "'[o]ne to a million' chance that someone other than Chaney bit John because the mark was a 'perfect match' with 'no discrepancies' and 'no inconsistencies.'" *Id.* at 250 (first bracket in original). The "one to a million" statistic, according to Dr. Hales, was grounded "in 'the literature.'" *Id.* Another expert, Dr. Campbell, further tied Chaney to the scene of the murder, as he "testified that the mark was actually at least four separate human bitemarks and that, after comparing dentition models and examining photographs, he was certain to a 'reasonable degree of dental certainty' that Chaney was the one who bit John." *Id.* at 251.

Later developments in the field of bitemark comparisons contradicted Drs. Hales's and Campbell's testimonies to such a degree that nearly all their testimony "about the mark on John's left forearm and Chaney being a 'match'" became discredited. *See id.* at 258-60. Their testimony later became understood to be false due to later scientific advancements, and the Court granted relief under Article 11.073. *Id.* at 261-63.

The Court then considered Chaney's false evidence claim that involved Dr. Hales's "one to a million" testimony, Dr. Hales's testimony that the bitemark was inflicted at the time of the murders, and Dr. Weiner's testimony – who "alone signed a supplemental autopsy report showing that 'the bitemark on [John]'s left forearm occurred at or about the time of death" – concerning when the bitemark was inflicted. *Id.* at 263-65. Dr. Hales's "one to a million" testimony was false because it was unsupported by relevant science at the time of trial. *Id.* at 264. Pre-trial, Drs. Hales and Weiner concluded that the wound on John's left forearm was inflicted two to three days before John's murder. *Id.* After this initial conclusion, Dr. Hales met with the prosecutor and then changed his opinion. *Id.* "[Dr.] Hales told [Dr.] Weiner that 'the bite mark occurred at or about the time of death.' [And] [h]e attributed the change in his opinion to the fact that he had confused crusting – i.e., evidence of healing – with serum drying." *Id.* On the same day Dr. Weiner learned of Dr. Hales's changed opinion, Dr. Weiner alone signed the supplemental autopsy report, and this "new opinion exactly conformed with the State's theory that Chaney was the murderer because he bit John and that he did so at the time that John was murdered." *Id.* at 264-65. Both Dr. Hales and Dr. Weiner testified according to their changed opinion. *Id.* at 265. This testimony was misleading because neither expert disclosed "the purported scientific basis for the change in their opinion and because that basis was also not disclosed during their testimony." *Id.*

As illustrated by *Chaney,* the timing of when the evidence is determined to be false is dispositive as to

whether the claim is cognizable under the Due Process Clause or Article 11.073. Indeed, there are different categories of false evidence claims when the claim involves scientific testimony, and these categories help illustrate the timing principle. Judge Hervey previously outlined four such categories:

> 1. scientists who intentionally make false statements at trial about the field of scientific knowledge,
>
> 2. scientists who unintentionally make false statements at trial about the field of scientific knowledge,
>
> 3. scientists who make statements at trial about the field of scientific knowledge that were correct based on the science as it was understood at the time but which have since been undermined (rendered misleading) by intervening scientific developments, and
>
> 4. scientists who make statements at trial about the field of scientific knowledge that were correct based on their scientific knowledge but which have since been undermined (rendered misleading) because the scientist would now revise those statements after acquiring additional knowledge about the field.

Ex parte Hightower, 622 S.W.3d 371, 373 (Tex. Crim. App. 2021) (Hervey, J., concurring). The first and second

categories fall within *Weinstein*'s ambit because the State is offering false testimony that is false at the time of trial, either knowingly or unknowingly. The third and fourth categories – testimony or evidence that becomes inaccurate after trial – provide the basis to bring a habeas application under Article 11.073. The third and fourth categories do not, however, support a false evidence due process claim.

The Court should take the earliest opportunity to file and set a habeas application to determine whether the third and fourth categories, as articulated by Judge Hervey, can support a false evidence due process claim.[10]

IV. What standard of materiality applies?

It is unclear what standard of materiality applies to scientific evidence that becomes invalid after trial. In 2023, the Court filed and set *Thomas* to determine whether the "knowing use" and "unknowing use" of false testimony should be subject to different materiality standards. But in granting the applicant relief, the Court concluded that its "decision to file and set on that issue was improvident." *Thomas,* 2023 WL 7382706, at *1.

10. The only case in which this Court has granted habeas relief on a false evidence claim premised upon the retroactive invalidation of scientific evidence is *Ex parte Thomas,* No. WR-94,420-01, 2023 WL 7382706, at *1-2 (Tex. Crim. App. Nov. 8, 2023) (per curiam) (not designated for publication). The opinion in *Thomas* did not explain why relief was warranted. Moreover, as an unpublished opinion, it has no precedential value. If *Thomas* was correct, then we should hold as such in a published opinion, which would provide much needed clarity to practitioners and prospective habeas applicants.

Before *Thomas,* the Court filed and set *Weinstein* to answer that same question. Unlike *Thomas, Weinstein* did not expressly eschew answering it. Rather, the Court did not differentiate between knowing use claims and unknowing use claims: "[F]alse testimony is *material* only if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Id.* at 665 (original emphasis) (quoting *Chavez,* 371 S.W.3d at 206-07). As Presiding Judge Keller noted, the Court did not adopt the Supreme Court's materiality standard, which "applies to claims involving the State's *knowing* use of false testimony." *Id.* at 669-70 (Keller, P.J., concurring) (original emphasis). Under the Supreme Court's standard, "a new trial is warranted so long as the false testimony 'may have had an effect on the outcome of the trial,' – that is, if it 'in any reasonable likelihood [could] have affected the judgment of the jury." *Glossip,* 604 U.S. ___, 145 S. Ct. at 626-27 (citation omitted) (first quoting *Napue,* 360 U.S. at 272; and then quoting *Giglio v. United States,* 405 U. S. 150, 154 (1972)). "[A] reasonable likelihood" – used by this Court – and "any reasonable likelihood" – used by the Supreme Court – differ. This Court's use of "a reasonable likelihood," rather than "any reasonable likelihood," to knowing use claims is troubling because we may be artificially increasing the materiality standard, thereby making it harder for knowing use applicants to obtain relief. *See Weinstein,* 421 S.W.3d at 670 (Keller, P.J., concurring) (noting that it is unclear "whether the Court's use of the 'reasonable likelihood' language (and citations to *Giglio* and *Fierro*) is intended to signify the use of *Napue/Chapman*['s] standard or whether the Court's omission of the word 'any' from the standard is intended to signify

that a different, less-favorable-to-the-defendant standard is being employed").

If we eventually conclude that the Due Process Clause does, in fact, prohibit the State's use of then-scientifically sound evidence that retroactively becomes invalid, then we should take the opportunity to determine whether *Weinstein*'s materiality standard should apply and, if not, clarify what standard should apply. For the first inquiry, *Weinstein* involved the State's unknowing use of false testimony that was false at the time of trial. 421 S.W.3d at 659, 666. *Weinstein* was once removed from *Napue* because the only difference between the claims was the lack of a scienter requirement. But claims like Applicant's are twice removed from *Napue,* and once removed from *Weinstein,* because there is no scienter requirement, *and* the "false" evidence is not false until some unknown future date. In short, the claims' backdrops are materially different, such that *Weinstein* does not clearly extend here. For the second inquiry, because a false evidence claim is rooted in federal due process, the Supreme Court's standard for materiality should apply, at least to knowing use claims. That standard is found in *Chapman v. California,* 386 U.S. 18, 24 (1967). *Glossip,* 604 U.S. ___, 145 S. Ct. at 627. Yet under *Weinstein,* this Court applies a different materiality standard. We should fix that difference. Moreover, to the extent that we continue to extend *Napue* to the State's unintentional use of false evidence, we should apply a higher materiality standard than we do for knowing use claims, and we should clarify what that standard is.

At this juncture, and assuming Applicant's claim is cognizable as a due process false evidence claim, it is unclear what standard of materiality should apply. Given that "[i]t's almost the norm now that an applicant who raises an Article 11.073 junk-science claim will also raise a false-evidence claim," *Hightower*, 622 S.W.3d at 372 (Hervey, J., concurring), we should clarify the applicable standard for materiality. Likewise, we should reexamine *Weinstein* to determine whether its articulated materiality standard is correct and whether the standard is static, regardless of whether the false testimony is knowingly or unknowingly used. The Court should take the earliest opportunity to file and set a habeas application to answer these questions.

V. Conclusion

While the Court declines to do so, I would file and set this application for the Court to resolve the four issues that I discussed previously. However, I agree with the Court's decision today that denies Applicant post-conviction habeas relief on his false evidence due process claim and his Article 11.073 claim. Assuming the testimony at issue is false for purposes of his due process claim, Applicant failed to establish materiality, foreclosing relief on his Article 11.073 claim. With these thoughts, I join the Court's order denying relief.

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