

No. 25-6510

IN THE
Supreme Court of the United States

TILON LASHON CARTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY TO THE STATE'S BRIEF IN OPPOSITION

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CAPITAL CASE

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REPLY

Petitioner Tilon Carter did not commit a crime for which the death penalty is a legal sentence and, due to the State's presentation of false and misleading evidence about the decedent's cause of death, was denied a fair trial. Yet only this Court stands between Petitioner and execution, because Texas's highest court has shirked its duty to ensure that the post-conviction review state statutes purport to provide for federal constitutional claims is full, fair, and accurate.

As four judges of the Texas Court of Criminal Appeals (TCCA) observed in a detailed 70-page dissenting opinion, the TCCA majority “[chose] to disregard significant portions of the record that are relevant and probative of whether [state medical examiner Dr. Nizam Peerwani] provided false or misleading testimony and relevant and probative of whether Dr. Peerwani's current opinion has changed from his trial testimony.” Pet. App. 0112. After considering the full record developed in the proceedings below, both the presiding judge at the evidentiary hearing and the dissenting judges of the TCCA concluded that had the jury heard this cause-of-death evidence at trial, Petitioner “would not have been convicted of capital murder.” Pet. App. 112. They further agreed that Petitioner's conviction had been unconstitutionally obtained and that he was entitled to a new trial.

The TCCA majority dodged that outcome by contriving a new rule that will frequently—and arbitrarily—bar consideration of plainly relevant evidence. That decision violates fundamental principles of due process and requires this Court's intervention.

ARGUMENT

I. The Texas Court of Criminal Appeals Denied Habeas Relief by Invoking a Novel Procedural Rule with No Precedent in Texas Law to Exclude From its Consideration Plainly Relevant Evidence Developed in the Evidentiary Proceedings it had Ordered.

In Texas, a habeas applicant's burden at the pleading stage is to allege sufficient specific facts which, if true, would entitle him to relief. *See, e.g., Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011) ("Texas law has long required all post-conviction [habeas] applicants ... to plead specific facts which, if proven to be true, might call for relief"). By authorizing Petitioner's claims for relief and remanding them for further evidentiary proceedings, the TCCA necessarily determined that he had satisfied that longstanding and well-settled pleading requirement. *Ex parte Carter*, No. WR-70,722-03, 2017 WL 4276860 (Tex. Crim. App. Sept. 27, 2017) ("remand[ing] applicant's first and third allegations to the trial court for resolution"); Tex. Code Crim. Proc. Art. 11.071 § 5.

Contrary to the State's suggestions, Texas law has *never* required habeas applicants to plead or adduce specific evidence in support of their claims for relief to satisfy this threshold pleading burden. In fact, the TCCA has explicitly disclaimed any such requirement. "There is no requirement in the statute that [habeas applicants plead evidence], just as there is no requirement that the State allege evidence in an indictment." *Medina*, 361 S.W.3d at 639. Thus, attaching affidavits or other documentary evidence to a habeas application, as Petitioner did, is simply a prudential shortcut to ensure that the submission alleges specific facts sufficient to show an entitlement to relief. *See id.* at 637-38 ("The application may, and frequently

does, also contain affidavits ... to establish specific facts that might entitle the applicant to relief.”).

Because a habeas applicant has no legal burden to submit his supporting evidence in the first instance, it follows that once an applicant’s claims have been deemed adequately pled to warrant further evidentiary development—as the TCCA found in this case—he cannot be precluded from developing or presenting relevant testimony or other evidence to prove those claims simply because that evidence was not previously submitted with the application itself.

The State’s contention that “longstanding” Texas law precludes a reviewing court from considering facts or evidence “outside the scope” of the pleading is squarely contradicted by the recent proceedings in *Ex parte Garza*, 620 S.W.3d 801 (Tex. Crim. App. 2021). In *Garza*, the applicant raised a claim that he had been denied effective assistance of counsel at the penalty phase of his capital trial. Garza specifically alleged that his trial counsel failed to request court funding to obtain a mitigation specialist or a mental health expert. He also alleged that his upbringing was “fraught with alcohol and drug abuse, domestic violence, and sexual abuse” and that his mother had consumed alcohol during her pregnancy. In addition, Garza presented a report from a psychologist who recommended neuropsychological testing because of the reported maternal alcohol consumption. However, Garza’s application did not specifically allege that he suffered from Fetal Alcohol Spectrum Disorder or any other disorder.

After the TCCA remanded Garza’s claim for evidentiary development, his post-conviction counsel submitted more than fifty exhibits that greatly expanded the universe of facts in support of his penalty-phase IAC claim. *Garza*, 620 S.W.3d at 816. This additional evidence included affidavits and reports from three new mental health experts, none of whom were mentioned in the habeas application; these experts diagnosed Garza with Fetal Alcohol Spectrum Disorder (FASD) and Post Traumatic Stress Disorder (PTSD), among other psychiatric disorders. *Id.* at 819–21.

The State complained in *Garza*—just as it has here—that Garza’s additional expert reports raised new factual allegations that were “outside” Garza’s habeas application.¹ The trial court entered supplemental findings of fact repeatedly faulting Garza for having failed to allege specifically that he suffered from Fetal Alcohol Spectrum Disorder.²

But the TCCA rejected those findings and granted relief on Garza’s ineffective assistance of counsel claim. Its opinion recites in great detail the additional facts developed in evidentiary proceedings, including the psychiatric diagnoses and conclusions of three experts who evaluated Garza for the first time *after* his habeas application was filed, and never suggests there was anything improper about Garza

¹ See Respondent’s Supplemental Answer, *Ex parte Humberto Garza*, No. CR–3175-04-G(1) (370th Dist. Ct., Hidalgo Co., May 9, 2017), at 157 (“[N]owhere in Applicant’s pleadings is there a specific claim that trial counsel failed to investigate, develop, or present evidence that Applicant suffered from the specific condition of Fetal Alcohol Syndrome Disorder.”).

² See Supplemental Findings of Facts and Conclusions of Law, *Ex parte Humberto Garza*, No. CR–3175-04-G(1) (370th Dist. Ct., Hidalgo Co., May 30, 2017), at 168 (“Nowhere in any of Applicant’s pleadings in this proceeding is there a specific claim that trial counsel failed to investigate, develop, or present evidence that Applicant, in fact, suffered from the specific condition of Fetal Alcohol Syndrome Disorder”).

having not presented that information at the pleading stage. *Garza*, 620 S.W.3d at 816–22. The TCCA’s reliance in *Garza* on specific facts not pled in the habeas application but instead developed for the first time in evidentiary proceedings contradicts any suggestion that some “longstanding pleading requirement” precludes a Texas habeas applicant from presenting, and a reviewing court from considering, evidence that was not alleged in the application itself.

The State cites several Texas cases in support of its assertion that a habeas court may not consider facts or evidence developed in evidentiary proceedings unless they are alleged in the habeas application. None of them support the State’s position.

In *Ex parte Medina*, the TCCA clarified the basic pleading requirements for an application for post-conviction habeas relief. There, post-conviction counsel filed a document that contained no specific factual allegations whatsoever and instead “merely state[d] factual and legal conclusions.” 361 S.W.3d at 635. In holding that such a “conclusory list” did not “satisfy our pleading requirements,” the TCCA explained that Article 11.071’s pleading requirement “is similar to that ... of federal courts considering applications for post-conviction writs of habeas corpus,” which “helps to sort out the obviously unmeritorious claims from those that deserve more attention.” *Id.* at 639. Requiring “sufficient specific facts that, if proven to be true, might entitle the applicant to relief” logically functions in the same way, assisting the TCCA in its role as gatekeeper to determine not only which claims might “deserve more attention” but also, in the subsequent application context, whether a statutory exception to the general rule against successive litigation has been satisfied. *See*

Medina, 361 S.W.3d at 640. Because the habeas application in *Medina* was facially deficient, the TCCA had no occasion to *and did not* in that case reach the conclusion that the State urges here: that a habeas court may not consider facts or evidence developed in evidentiary proceedings unless they were alleged in the habeas application itself.

Similarly, the State cites *Ex parte Kerr*³ and *Ex parte Carr*⁴ to argue that its phantom “pleading requirement” has prevailed in Texas “for decades.” BIO at 18. But *Kerr*, like *Medina*, addressed the sufficiency of pleadings to survive summary dismissal,⁵ not whether a reviewing court may exclude from its consideration relevant evidence developed in evidentiary proceedings after a habeas applicant has been found by the TCCA to have satisfied his burden of pleading. And *Carr*, which considered an allegation that an applicant had “deliberately bypassed” state post-conviction remedies (and which arose under a statutory scheme for post-conviction review that was superseded by new legislation in 1995), hardly supports the notion that evidence presented after the TCCA has deemed an application facially sufficient to warrant further proceedings may be arbitrarily disregarded, as occurred below.⁶

³ 64 S.W.3d 414 (Tex. Crim. App. 2002).

⁴ 511 S.W.2d 523 (Tex. Crim. App. 1974).

⁵ In *Kerr*, the TCCA considered whether the application at issue—styled as a “third ‘writ’ application”—was a subsequent application barred by state statute. 64 S.W.3d at 417–18. In holding that the instant application was *not* subsequent under 11.071, the TCCA observed that it was instead “the first writ application ... which comports with the requirements of article 11.071 in that it ‘seeks relief from a judgment imposing a penalty of death.’” *Id.*

⁶ *Carr* concerned a “novel” situation in which an applicant was found to have “waived and abandoned” the grounds presented in a successive application—which he had “repeatedly

Finally, the State cites *Ex parte Carty*, 543 S.W.3d 149 (Tex. Crim. App. 2018), asserting that “factual claims raised in a ... writ proceeding after the TCCA remanded the case to the habeas court are, likewise, outside of the TCCA’s jurisdiction when the case is returned from the habeas court.” BIO at 20. This characterization wildly misrepresents *Carty*, which involved a situation where the applicant discovered new facts that gave rise to *an entirely new claim*, not simply “new” facts or evidence developed in evidentiary proceedings in support of claims for relief which had already been examined and authorized for further review by the TCCA. In *Carty*, the TCCA authorized several false testimony and *Brady*⁷ claims pertaining to four specific prosecution witnesses at trial. 543 S.W.3d at 150. However, during evidentiary proceedings on the claims related to those four witnesses, Carty discovered evidence of an undisclosed deal with a fifth witness, Comb. *Id.* at 151.

Evidence of the separate undisclosed deal had no relevance to the pending claims related to other witnesses; instead, it gave rise to an entirely new and independent claim for relief. Accordingly, the TCCA concluded that because no claim with respect to Comb had been raised in Carty’s application, that *claim* could not be considered in the pending proceedings. *Id.*; *see also id.* at 177–78 (Richardson, J., concurring). In short, in *Carty*, the new legal claim (due process violation) based on a new factual basis (discovery of a separate deal with a separate witness who was

refused to disclose” during prior habeas proceedings; the TCCA found that Carr’s actions “evinced a deliberate and calculated effort to misuse and abuse the habeas corpus process.” 511 S.W.2d at 524–26. Neither the State nor the courts below suggest that Petitioner withheld knowledge of the evidence developed at the factfinding hearing.

⁷ 373 U.S. 83 (1963).

indisputably *not* the subject of the pending application) was viewed by both the trial court and the TCCA as beyond the scope of what had been properly authorized for review. *Id.* But here, the trial court rightly concluded that all of Petitioner’s evidence *was* relevant to the TCCA-authorized claims related to Dr. Peerwani’s trial testimony.

In sum, no Texas precedent supports the rule invoked by the TCCA below to justify its refusal to consider relevant evidence developed in evidentiary proceedings it had expressly authorized. Put simply, for the very first time in Texas, the TCCA’s opinion converts a pleading requirement into one of proof. This novel and impermissibly retroactive judicial transformation of a routine pleading requirement into a rule excluding consideration of relevant evidence admitted in support of Petitioner’s claims violated due process under the principles of *Bouie v. City of Columbia*, 378 U.S. 347 (1964) and *Chambers v. Mississippi*, 410 U.S. 284 (1973).

II. The Texas Court of Criminal Appeals’ Refusal to Consider Evidence of Additional Instances of False or Misleading Trial Testimony by Dr. Peerwani and the State’s Suppression of Exculpatory Evidence at Trial, Simply Because They Give Rise to Independent Constitutional Violations, is Contrary to this Court’s Precedent.

During evidentiary proceedings conducted in the state post-conviction court below, it came to light that Dr. Peerwani’s trial testimony had been false (or, as he preferred to put it, “erroneous”) in additional material respects that were unknown to Petitioner when he filed his habeas application. *See, e.g.*, Pet. App. 0055–81, 0088–98, 0855–1190, 0853–0983. Dr. Peerwani also disclosed, for the first time and only in response to a subpoena duces tecum related to his deposition, his contemporaneous

handwritten notes from the decedent's autopsy. Dr. Peerwani's notes revealed that during the autopsy, he had observed an implanted pacemaker in the decedent's chest. Despite seeing the pacemaker, Dr. Peerwani failed to make any record of that observation in his autopsy report, failed to preserve the pacemaker as evidence, and failed to make any mention of the pacemaker during his trial testimony when asked whether he had observed any "abnormalities" during his internal examination of the decedent's body.

The State complains that Petitioner's habeas application included no factual allegations related to Dr. Peerwani's discovery of the pacemaker at autopsy or his failure to mention it during his trial testimony. BIO at 13. The application did not contain such allegations, true enough—but only because Dr. Peerwani's contemporaneous notes of the autopsy, revealing his knowledge of the existence of a pacemaker, were suppressed at trial and never produced to any attorney representing Petitioner *until* the evidentiary proceedings on the pending application, 12 years after trial.

While the TCCA acknowledged that evidence that the State had never disclosed the existence of the decedent's pacemaker until that fact surfaced in the trial court proceedings below, it insisted that "[e]vidence of the [pacemaker] and the State's failure to disclose it are not pertinent to resolving the merits of Applicant's instant false evidence claim" and would "[i]nstead ... support a claim under *Brady v.*

Maryland, 373 U.S. 83 (1963).” Pet. App. 0027–28.⁸ The TCCA further held that Petitioner “cannot use evidence of a *Brady* violation to prove his *Napue* claim.” *Id.* at 0028.

The notion that a reviewing court must turn a blind eye to evidence of additional instances of false testimony and state misconduct simply because they were unknown to Petitioner at the time that he filed his habeas pleading defies common sense and basic fairness, as this Court’s precedent well illustrates.

In *Glossip v. Oklahoma*, 604 U.S. 226 (2025), this Court granted relief on a false testimony claim based in part on evidence the State had suppressed through several rounds of state postconviction proceedings. *Glossip*, 604 U.S. at 239–40 (describing production of new evidence during an independent investigation which the “independent counsel” concluded established a *Brady* violation). This Court in *Glossip* considered that *Brady* evidence, which strengthened *Glossip*’s *Napue* claim, in finding that *Glossip* was entitled to relief on the false testimony issue. *Id.* at 252. “Because prejudice analysis requires a ‘cumulative evaluation’ of all the evidence, *whether or not that evidence is before the Court in the form of an independent claim for relief*, [the *Brady* evidence] reinforce[s] our conclusion that

⁸ In fact, because this exculpatory information was never provided to any counsel for Petitioner at any point until the state court ordered Dr. Peerwani deposed in this case, Petitioner promptly filed a subsequent application raising, *inter alia*, claims under *Brady v. Maryland* and *Youngblood v. Arizona* arising from Dr. Peerwani’s failure to disclose this information and his destruction of the pacemaker and any evidence it may have contained. See Pet. App. 0853–0983. Inexplicably, the TCCA summarily dismissed that application “as an abuse of the writ without considering the claims’ merits.” *Ex parte Carter*, No. WR–70,722–04, 2021 WL 1014638 (Tex. Crim. App. Mar. 17, 2021).

the *Napue* error here prejudiced the defense.” *Id.* at 251 (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)) (emphasis supplied).

The TCCA’s refusal to consider evidence in the record that had been disclosed for the first time in the proceeding below, “whether or not that evidence [was] before the Court in the form of an independent claim for relief,” straightforwardly contravenes the appropriate prejudice analysis according to this Court’s reasoning in *Glossip*. *See id.*, 604 U.S. at 251. To be sure, the long-suppressed information revealed during these proceedings raises additional claims of constitutional violations. But as this Court recognized in *Glossip*, that fact does not deprive the previously suppressed evidence of relevance to the question at bar: here, whether Dr. Peerwani’s cause-of-death testimony in this case was false or misleading, as the factfinding court properly found.

Simply put, a court weighing the veracity of Dr. Peerwani’s opinion testimony at trial, and the consistency of his opinions, should—indeed, must—examine the record as a whole. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (due process is violated where “testimony, taken as a whole, gave the jury [a] false impression”). “[I]t cannot seriously be disputed that [Peerwani]’s testimony, taken as a whole, gave the jury the false impression” that an intentional act of smothering occurred “either way.” *See Alcorta*, 355 U.S. at 31; Pet. App. 0093; Pet. App. 0615 (Dr. Peerwani admitting at the habeas hearing that “yes, [smothering] could have never happened”). The TCCA’s refusal to consider the record as a whole, including the numerous instances of false and misleading testimony by Dr. Peerwani that were pled in the application *and*

those that subsequently came to light in the evidentiary proceedings in this case, was a novel innovation unsupported by longstanding state law, and led directly to its decision to deny Petitioner relief. Pet. App. 0043–44.

Petitioner is not guilty of a capital crime and by rights should be given a new trial. The TCCA evaded this conclusion only by improperly refusing to consider evidence plainly relevant to the question before it.

This Court’s intervention is required.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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