No. 25-7143

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTIAN HICKMAN-STAUDT — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS APPELLATE COURT OF HOUSTON, 14TH DISTRICT OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHRISTIAN HICKMAN-STAUDT
(Your Name)

Polunsky Unit; 3872 FM 350 South
(Address)

Livingston, Texas 77351
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I.

Was the Texas Appellate Court's Conclusion that "any error in the admission of Detective Vogel's opinion to Appellant's truthfulness" harmless in light of State and Federal legal precedent?

II.

Did a comment in the State's closing argument amount to a comment on Appellant's decision to not testify?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

HICKMAN-STAUDT v. STATE, 2025 Tex.App. LEXIS 4679 (Houston-[14th Dist.]July 3, 2025).

In re HICKMAN-STAUDT, 2025 Tex.Crim.App. LEXIS 779 (October 23, 2025, pet. ref'd).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at 2025 Tex.App. LEXIS 4679; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Oct. 23, 2025. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I.

The Due Process Clause of the United States Constitutional Amendment XIV prohibits states from depriving "any person of life, liberty, of property without due process of law."

II.

The United States Constitutional Amendment V, applicable to the states through the U.S. Constitutional Amendment XIV, guarantees that "no person shall be compelled in any criminal case to be a witness against himself." (Also stated in Texas Const. Art. I §10).

The rule that a defendant's refusal to testify may not be commented on is based on the Fifth Amendment and its statutory analogue §3481 of Title 18: "In trial of all persons charged with the commission of offenses...the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The Texas Code of Criminal Procedures, Ann. Art. 38.08, prohibits counsel from alluding to or commenting on the failure of a defendant to testify at his own trial.

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury of Murder. The jury sentenced Petitioner to 55-years confinement in the Texas Department of Criminal Justice. During trial, defense objected to a detective's statement to the jury of her opinion of the credibility of Petitioner's pre-trial investigative statements. The objection was overruled. During the State's closing argument, defense counsel objected to the prosecutor's improper comment regarding Petitioner's failure to testify. This, too, was overruled. These rulings caused irrepairable harm to Petitioner where evidence presented was purely circumstantial.

On July 3, 2025, in an unpublished opinion, the Court of Appeals, 14th Judicial District - Houston, affirmed the conviction. No motion for rehearing was filed. A Petition for Discretionary Review was filed in the Texas Court of Criminal Appeals. A Motion to Extend Time was granted and Petitioner timely filed the P.D.R. A review was refused on October 23, 2025. The Writ of Certiorari now follows.

REASONS FOR GRANTING THE PETITION

I.

Was the Texas Appellate Court's conclusion that 'any error in the admission of Detective Vogel's opinion to Appellant's truthfulness was harmless' in light of State and Federal legal precedent?

A.
INTRODUCTION

A State Court has decided an important federal question in a way that conflicts with relevant decisions of this court in such a way as to call for an exercise of this court's supervisory power. Petitioner asserts that Officer Vogel provided inadmissible opinion testimony and the trial court abused its discretion by admitting the testimony over Petitioner's objection. Defense counsel properly objected and preserved the error. The jury's determination of guilt was improperly influenced by the detective's improper opinion testimony.

B.
LEGAL PRECEDENT

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits states from depriving "any person of life, liberty, or property without due process of law."

"Texas law prohibits a witness or a lay expert from offering an opinion on whether another person is telling the truth as such determinations fall exclusively within the province of the jury." Marfil v. State, 2025 Tex.App. LEXIS 7447 (San Antonio)(Quoting Schultz v. State, 957 S.W.2d 52,59 (Tex.Crim.App. 1997)). The United States Supreme Court echos this tenet as far back as 1895.

In Allison v. U.S., 160 U.S. 203, 16 S.Ct. 252, the court said, "It was up to the jury to decide whether a defendant had told the truth."

State courts have had a tendency to veer off course from this principle, sometimes needing a reminder from the higher courts that this principle must be enforced. In State v. Denson, 2011 WI 70, the Supreme Court of Wisconsin, in quoting from Allison v. U.S., said, "We believe that same principle holds true today." U.S. v. Smith, 621 F.Supp.2d 1207 (Ala. Mid.Dist. 2009) echos the same: "It was for the jury to test the credibility of the defendant as a witness."

"Similarly, a witness's expert opinion on the truthfulness of a criminal defendant during an investigation is also inadmissible." Brown v. State, 580 S.W.3d 755,765 (Tex.App.-Houston [14th Dist.] 2019)(Quoting Yount v. State, 872 S.W.2d 706, 709-10 (Tex.Crim. App. 1993)); Also, Gonzalez v. State, 301 S.W.3d 393, 398 (Tex. App. - El Paso 2009). "An expert is not permitted to give a direct opinion on the truthfulness of a witness."Yount v. State, 872 S.W.2d at 709-710. This type of testimony is inadmissible "because it does more than 'assist the trier to understand the evidence or to determine a fact in issue;' it decides an issue for the jury." Id at709 (quoting Duckett v. State, 797 S.W.2d 906, 910, 913 (Tex.Crim.App. 1990).

Texas Rules of Evidence [and its Federal counterpart], Rules 702 and 704, do not permit an expert witness to give an opinion to the truthfulness of another witness. Analyzing the admissibility of the testimony under Rule 702, the threshhold determination for admitting expert testimony is whether such testimony 'if believed,

will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue." Duckett, 797 S.W.2d at 914. Thus, expert testimony which assists the jury in determining an ultimate fact is admissible, but expert testimony which decides an ultimate fact for the jury, such as 'a direct opinion on truthfulness, crosses the line and is not admissible under Rule 702. Id at 914, 918-19 (Emphasis in original). The court also recognized that even if admissible under Rule 702 and 704, evidence which has the effect of bolstering a prior witness may be excluded by Rule 403, if its probative value is substantially outweighed by its prejudicial effect.

"Experts...are not human lie detectors," they are not clairvoyant, and we reject the notion that experts can or should replace the factfinders" as the ultimate arbiters of credibility. Ex parte Tiede, 448 S.W.3d 456 (Tex.Crim.App. 2014)(Quoting Yount at 710).

C.
FACTS OF THE CASE

At Petitioner's trial for murder, the State presented the testimony of League City P.D. Detective Gina Vogel, who participated in the interview of Petitioner. The State Prosecutor asked her:

> Q: When you were interviewing the defendant, did you feel like the story that he was telling you was reasonable based on the evidence that you had?
> A: No. (RR:8/62-64).

Defense Objected on the grounds that her opinion on the credibility of the statement made by defendant during an investigation was irrelevant and invalidated the province of the jury. The trial court overruled the objection and granted a running objection. (RR:8/62-64).

Detective Vogel testified to her reasoning, which is incredible. She stated: "If two people were in the house, at least one would have heard the intruders enter." But Petitioner has always maintained that he heard the intruders while he was in the enclosed tiolet area of the bathroom. He has maintained that when he heard a comotion outside of the "toilet closet" he was scared for his life and stayed put..

Detective Vogel also stated as reasoning for her conclusion that Petitioner's statement was not credible was that "valuable items were left in the house and garage." But if the motive for a home invasion was murder and not robbery, it would be logical that the valuables were not removed. Other people knew the front door keypad entry code. Anyone who had a motive to kill the victim, and there were many, simply walked through the front door not to loot the place, but to kill the victim and steal the drugs.

Detective Vogel stated further, "there was no evidence the house was ransacked." But if someone came in to simply murder the victim, it would be logical that the house would not be rensacked, even if at first, Petitioner thought that this was a home invasion.

Finally, Detective Vogel stated as her reasoning for her statement on her opinion of Petitioner's truthfulness in his investigative statements is that the presumed weapon, "a kitchen knife, was not what one would expect to be used in a planned home invasion." But first, the knife was not proved to be the murder weapon, and second, it wasn't a planned home invasion at all, but a planned murder, whose suspect more than likely brought his own weapon..(RR:7/191-92; 8/63-64).

Detective Vogel made serious false assumptions about the facts

of the case to place blame on an innocent bystander because Petitioner was the easiest target in a botched, clumsy police investigation. Thus, her testimony on Petitioner's truthfulness was a direct comment on the credibility of the Petitioner. Her testimony undermined and supplanted the jury's determination of guilt, and the trial court abused its discretion in overruling the defendant's objection.

D.
DETECTIVE VOGEL'S IMPROPER TESTIMONY BOLSTERED THE CIRCUMSTANTIAL NATURE OF THE CASE

Petitioner and the victim were housemates. (RR:3/47). The front door had a keypad-entry and the victim, who owned the house, had many houseguests. (RR:3/49,58,63). The victim's body was discovered on July 30, 2020. The victim was found lying face-down on the floor. (RR:3/44). He was turned over and officers saw that his throat had been slit. (RR:3/70-71, 148).

A knife was located in the bathroom sink. (RR:3/67-68). Photographs of the knife were entered into evidence at trial. (State's Exhibits 4,5). But the DNA forensic scientist testified that blood was not detected on the knife. (RR:6/50). Furthermore, due to the decomposition of the body, it was impossible to tell whether or not this knife was the murder weapon. (RR:6/81). An analysis of the knife revealed the presence of the victim's and Petitioner's DNA. (RR:8/82-84; State's Exhibit 163). But as both occupied the house, this would not be unusual. (RR:8/83-84).

There was no sign of forced entry. (RR:3/63,131). There was no sign of a struggle or fight. (RR:3/131-132). But the victim had many houseguests who knew the keycode to the front door. (RR:3/49,

58,63). A safe found in the bedroom closet had five holes drilled into it, indicating a possible motive for the murder.(RR:3/57; 7/131). The holes did not succeed in opening the safe. No interpretable DNA was found on the drill on the safe. (RR:8/85-86). Drugs were found inside the safe. (RR:3/51-53), which included more than 25 grams of methamphetamine. (RR:4/112-118, 123-124). In 2020, drug dealers were routinely being robbed for drugs. (RR:4/71, 97-98). The victim's house was known as a source of methamphetamine. (RR:4/84-87).

The State used the knife and the no-forced-entry as evidence that Petitioner murdered the victim, even though there was never a motive for Petitioner to commit this crime. Thus, Detective Vogel's opinion testimony the Petitioner was not truthful bolstered the circumstantial evidence of the trial, giving the State's evidence even more weight than it deserved having a substantial prejudicial effect on the jury's determination of guilt.

E.
STATE WITNESSES HAD A REAL, STATED MOTIVE TO COMMIT THIS MURDER

Incredibly, witnesses for the State testified to have had a real motive as well as the ability to commit this murder. Joshua "Trey" Critchlow testified for the State. Critchlow testified he had lived with the victim for a year and that he knew the entry code for the front door. (RR:4/47,84). Critchlow testified that the victim was a rapist who frequently drugged him and others with GHB and sexually assault them, including his friend, Guy Cooper. Cooper was known to despise the victim. (RR:4/80-83, 103; 8/23, 65-66). Critchlow knew that the victim kept drugs in a safe in the bedroom

closet. (RR:4/68). Critchlow also testified that in addition to raping him, the victim had stole methamphetamine from him, and made advances on his girlfriend while he was in jail. (RR:4/55-60). Critchlow told police that the victim liked to "turn people out", meaning to drug straight men and sexually assaulting them. (RR:4/82). Critchlow agreed that rape can get a person killed. (RR: 4/81).

Brad Triplett had lived at the house before Critchlow. Triplett removed the victim as a 'friend' on Facebook several days after his death, but before the body was found. (RR:4/91-95). Facebook records also indicate that Critchlow and the victim had broken up two weeks before the murder. (RR:7/159).

A shortage of methamphatamine had led to robberies and murders in the area in 2020. (RR:4/84-87). Critchlow lived at the victim's house in 2019 and 2020. (RR:3/74). Critchlow drove a Cadillac which was seen at the house before the body was discovered. (RR: 3/212,219).

Because the State's witnesses had a real, stated motive, and a real opportunity to commit this murder, Detective Vogel's opinion testimony on her view that Petitioner was not truthful during her investigation and interview of Petitioner prejudiced the jury's determination of guilt, leading to the jury's ultimate decision to find Petitioner guilty for the murder.

F.
A LACK OF POLICE INVESTIGATION LED TO DETECTIVE VOGEL'S IMPROPER OPINION TESTIMONY TO BE PREJUDICIAL TO THE JURY'S DETERMINATION OF GUILT.

The investigation by League City Police was grossly mishandled, as admitted to by the investigators of the case. This laxi-

dazical nature of the investigation gave Detective Vogel's improper opinion testimony of Petitioner's truthfulness even more undue weight to the jury's determination of guilt.

Captain Ladd recalled that he made numerous mistakes, including not calling enough staff to the scene, failing to conduct progress meetings, and failing to address infighting and tension between investigators, all leading to significant delays and disorginization. (RR:3/86-102). Photos show that outside items were introduced into the scene without proper documentation. (RR: 8/128). Items were moved around a blood-stained area in the living room without proper documentation. (RR:8/129-30). An Altoids tin appears in photos, having been placed on top of the body after its discovery without explanation or documentation. (RR:8/132).

The evidence team took less than ten photos of the crime scene at the house. (RR:3/73). Investigators collected swabs of possible blood stains from several locations. (RR:4/184), but no attempt was made to take fingerprints at the house, and no DNA testing was requested for swabs taken from the frontdoor and back door handles. (RR:6/216; 7/11).

In an admittedly serious error, the investigators processing the scene failed to enter a bedroom closet located within a few feet of the body. (RR:3/110; 4/117-18). The mother of the victim, cleaning out the house days later, found a safe in the closet. (RR: 3/56), with five holes drilled into it, indicating a possible motive for the murder. (RR:3/56; 7/131). The mother is the one who called a locksmith to open the safe, finding drugs inside it, which she then reported to the police. (RR:3/51-53). Even then, League City investigators failed to examine the safe until August

6, 2020, but still did not collect it, process it, or photograph it until October, by which time transient evidence could have decayed or disappeared. (RR:3/57; 6/176,212, 184,195; 7/10; 8/139). Red droplets were visible on the safe. (RR:7/124). Five prints were lifted from the safe, two of which were suitable for comparison. (RR:7/ 30-35). One of the prints did not match any known examples, and Petitioner was excluded. (RR:7/31,3738).

The investigative team acknowledged that several compelling leads were not, but should have been, followed up on. Importantly, the victim's credit card was used on July 28, 2020, after his death and after Petitioner had left the state, but there was no investigation into it. (RR:3/114). There was no investigation of the victim's Grindr account to see who he was communicating with near the time of death. (RR:3/117). Investigators did not subpoena Critchlow's phone records to determine whether he was truthful when he denied being at the scene, even though two neighbors reported seeing his Cadillac at the house two days after the presumed time of death. (RR:3/118,212,219; RR:7/132; 8/24).

The police did not attempt to interview Guy Cooper, even though he was known to despise the victim, had accused the victim of raping him, and had been arrested for aggravated robbery with a knife in 2021. (RR:3/115; 8/24). An analysis of the victim's digital data, including social media accounts, focused solely on Petitioner - no other names were searched, even though the victim had been accused of committing serial rapes against multiple victims in his home. (RR:4/209; 5/25).

Investigators were advised that the victim's cell phone was active in League City on July 30, 2020, at 7:00 a.m., yet no one

followed up on it. (RR:7/141-42).

It is evident that the police targeted Petitioner from the very start while refusing to follow up on very credible leads simply because Petitioner was the easiest one to pin the murder to. Therefore, when Detective Vogel told the jury that her opinion was that Petitioner was not being truthful, she did so without having investigated crucial evidence. The weight of her opinion testimony, therefore, far exceeded the weight of the evidence for guilt and the jury was left with an improper slant, favoring an improper guilty verdict.

G.
DETECTIVE VOGEL'S OPINION ON TRUTHFULNESS WAS PREJUDICIAL

Detective Vogel's reasoning for finding Petitioner's story untruthful is itself biased and improper. She gave several reasons, all of which are flawed:

1) "If two people were in the house, at least one would have heard the intruders enter." This conclusion is not accurate because the intruder knew the front-door keypad code and simply walked into the house. Petitioner has always maintained that he heard the commotion outside the bathroom's 'toilet closet.'

2) "Some valuable items were left in the house and garage." This conclusion is also flawed if the intruder(s) were only after drugs in the safe and/or murdering the victim.

3) "There's no indication that the house had been ransacked." Again, if the intruder(s) were only after the drugs and knew where the safe was, there was no reason for the intru-

der(s) to ransack the house.

4) "A kitchen knife was not what one would expect to be used in a planned home invasion." But if the motive was murder and theft of drugs, then the intruder probably did bring a weapon. The kitchen knife was not the murder weapon.

-(RR:7/191-92; 8/63-64)

Petitioner's story has never changed and is highly probable. Petitioner stated that he heard a commotion and stayed put in the enclosed toilet area of the bathroom. Just because Petitioner thought initially that they were experiencing a 'home invasion' doesn't mean that it actually was. Petitioner's interview with police was absolutely truthful and plausible.

State's Exhibit 208, a recorded interview with investigators, Petitioner emphatically stated that police "had the wrong person." While on the toilet, which is separated from the rest of the bathroom, he heard a commotion and heard the victim say,"stop" several times. Petitioner was terrified that he, too, would be killed. When the noise stopped he came out of the bathroom, terrified that he "was next." He saw "so much blood everywhere," and knew the victim could not be saved. He ran to the front door believing that the intruders were still inside the house. He was highly intoxicated on methamphetamine and afraid he was going to die, so he believed he needed to get far away.

Detective Vogel's testimony was a direct comment on the credibility of Petitioner's statements about the incident. Her opinion on Petitioner's truthfulness did not aid the jury, rather it supplanted the jury's determination. Detective Vogel found it

implausible that neither he nor the victim heard the intruders enter. But the undisputed evidence showed that the front door had a keypad and the victim had many houseguests who knew the keypad entry code on the front door. In addition, Petitioner said in his statement that the back door was unlocked. (SX 208).

Detective Vogel testified that there was no evidence of ransacking and that some valuables remained in the house, contradicting Petitioner's speculation that the intruders were robbers. But Petitioner could only guess as to what was happening while confined to a bathroom toilet-closet, high on methamphetamine.

In an attempt to discredit Petitioner's statement, the State elicited Detective Vogel's expert opinion. Vogel testified that she was a veteran officer with twenty-seven years' experience, including twenty years in the Criminal Investigations Division, as well as extensive training in special investigations, homicide investigations, and crime scene analysis. (RR:7/146-147). The Texas Court of Criminal Appeals has stated that the testimony of an expert investigator would likely "carry exceptional weight and an aura of reliability" which could lead the jury to "abdicate its role" in determining credibility of the witness. Schultz v. State, 957 S.W.2d at 72). A jury tasked with evaluating Petitioner's account in the context of the physical evidence at the scene would find no compelling inconsistencies with Petitioner's original statement to investigators.

But a jury presented with the expert opinion of a seasoned detective that the defendant's statement was untruthful would likely place a high value on that opinion.

H.

TEXAS APPELLATE COURT'S DECISION THAT ERROR WAS HARMLESS WAS IMPROPER IN LIGHT OF ALL OF THE CIRCUMSTANCES; REVERSAL IS REQUIRED

The Texas Appellate Court's conclusion that 'any error in the admission of Detective Vogel's opinion to Appellant's truthfulness was harmless,' (2025 Tex.App. LEXIS 4679 at page 4), was improper in light of the totality of the evidence. Detective Vogel's improper opinion testimony must not be analyzed 'in a vacuum', but reviewed in light of the evidence and lack thereof. When studying the improper opinion testimony in light of the totality of the circumstances, the Texas Appellate Court's counclusion of harmless error is without merit and contrary to the tenets of justice.

A conviction must be reversed unless, after examining the record as a whole, the court has a fair assurance that the errors did not have a substantial and injurious effect or influence in determining the jury's verdict, or had but a slight effect. Casey v. State, 215 S.W.3d 870,885 (Tex.Crim.App. 2007). If the court is unsure whether the error affected the result, reversal is required. Burnett v. State, 88 S.W.3d 633, 637-38 (Tex.Crim.App. 2002).

Considering the entire record, it is likely that expert testimony declaring Petitioner's statement not credible had a substantial impact on the jury's determination of guilt. Evidence against Petitioner was entirely circumstantial. Police investigators admitted that they targeted him simply because he was the only person who could be placed at the house at the time of the murder. (RR:5/25; 7/168-80). In closing argument, the State acknowledged that the investigators focused on "who has been here, who had the

opportunity to make this happen. That's Christian." (RR:8/195).

I.
CONCLUSION

The lead investigator's improper expert-opinion testimony was not mere harmless error. The testimony likely affected the jury's consideration of a crucial piece of evidence, thus affecting the verdict.This was a violation of due process under the Fourteenth Amendment to the United States Constitution. Accordingly, this court should reverse the conviction because the Texas Appellate Court's conclusion conflicts with Federal and State law.

II
Did a comment in the State's closing argument amount to a comment on Petitioner's decision to not testify?

A.
INTRODUCTION

A State Court has decided an important federal question of law in a way that conflicts with relevant decisions of this Court in such a way as to call for an exercise of this Court's supervisory power. Petitioner asserts that, against his Fifth Amendment right to remain silent at his trial, the prosecutor, in his closing argument, made comments directly related to Petitioner's failure to testify. Defense counsel objected and properly preserved error. The Appellate Court improperly concluded that the prosecutor's comment was a "summation of the evidence." (Hickman-Staudt v. State, Tex.App. LEXIS 4679 (14th District-Houston at page 8).

B.
LEGAL PRECEDENT

The Fifth Amendment of the United States Constitution guarantees a criminal defendant the privilege against self-incrimination. This privilege includes the right to remain silent and the right to decide against testifying at one's own trial. The government must not infringe on this right in any way and the jury must not infer guilt from a defendant's decision to remain silent at trial.

The rule that a defendant's refusal to testify may not be commented on is based on the Fifth Amendment and its statutory analogue §3481 of Title 18: "In trial of all persons charged with the commission of offenses...the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Commenting on an accused's failure to testify violates both state and federal constitutional privilege against self-incrimination. Archie v. State, 340 S.W.3d 738-39 (Tex.Crim.App. 2011). Such a violation occurs when the prosecutor's comment "was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." Bustamente v. State, 48 S.W.3d 761,765 (Tex. Crim.Ap.. 2001); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229 (1965); Davis v. U.S., 357 F.2d 438,441 (5th Cir. 1966).

To violate the right against self-incrimination, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. Jones v. State, 693 S.W.2d 406, 407-8

(Tex.Crim.App. 1985); Banks v. State, 643 S.W.2d 129,134 (Tex. Crim.App. 1982); Ramos v. State, 419 S.W.2d 359,367 (Tex.Crim. App. 1967).

In applying this standard, the context in which the comment was made must be analyzed to determine whether the language used was of such character.

C.
APPLICABLE FACTS OF THIS CASE

During closing argument at the guilt/innocence stage of the trial, the prosecutor stated the following:

> "He killed him. And I wish I could tell you what it was about. The one true thing the Defendant said in his statement -- two true things. One, Don Heard did not deserve to die. And two, he's the only person that can tell us what actually happened in that house the night he was killed."
> -(RR:8/184)

The defense objected on the grounds that this statement was a comment on the defendant's right not to testify. The State responded that the prosecutor's argument was a "comment on a direct quote in evidence." The trial court then overruled defendant's objection. (RR:8/185).

But there was no such quote in evidence. At no point in defendant's statement did defendant state that he was the only person that could tell what happened. Quite the contrary. Petitioner reported to police that there were multiple intruders who committed the murder.

Thus, the State's argument did not fall into any of the four types of proper argument:(1) summary of the evidence; (2) reasonable deduction from the evidence; (3) response to opposing counsel's argument; or (4) a plea for law enforcement. Brown v.

State, 270 S.W.3d 564,570 (Tex.Crim.App. 2008).

D.
FURTHER LEGAL PRECEDENT

The United States Constitution, as well as the Texas Constitution, protects a criminal defendant from being compelled to give evidence against himself. U.S.Const.Amend V; Tex.Const. art. I §10. The Texas Code of Criminal Prodecures prohibits counsel from alluding to or commenting on the failure of a defendant to testify at his own trial. (Tex.Code Crim.Proc. Ann. Art. 38.08. To make such a comment is both a constitutional and a statutory violation. Randolph v. State, 353 S.W.3d 887, 891 (Tex.Crim.App. 2011). Viewed in context and from the jury's standpoint, this comment was "manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." Bustamente v. State, 48 S.W. 3d 761,765 (Tex.Crim.App. 2001).

Such arguments have been found to constitute an improper comment on the failure to testify. In McDaniel v. State, 524 S.W. 2d 68, 69 (Tex.Crim.App. 1975), the state argued that there was no competent witness other than defendant who could tell the jury what really happened. The Texas Court of Criminal Appeals reversed the conviction, finding that the inference was that the comment referred to the appellant's failure to testify.

In Dietz v. State, 692 S.W.2d 593,595 (Tex.App.-Beaumont 1985, pet. ref'd), the State argued that only the defendant could testify as to the condition of the victim's body immediately preceding the shooting of the victim. The Court of Appeals found that the entire comment referred to the appellant's failure to testify. The Court

of Appeals found that the entire comment referred to the appellant's failure to testify. The Court reversed the conviction.

In Myers v. State, 573 S.W.2d 19, 20-21 (Tex.Crim.App. 1978), the prosecutor asked the jury rhetorically, "Why would a man have 269 pounds of marijuana?" and then stated, "There has been no explanation for that." The Court of Criminal Appeals found error and reversed because only the defendant or his co-defendant could have given an explanation.

Why is Petitioner's situation any different? By arguing that the petiitoner killed the victim, that the jury did not know why, and that only Petitioner could tell the jury what actually happened, the State explicitly referred to information that only the petitioner could supply.

E.

THE STATE APPELLATE COURT ERRED IN ITS FINDING

At page 8-9, the Appellate Court disagreed with Petitioner's argument, argeeing with the trial judge's determination that the prosecutor's statement was admissible as a "summation of the evidence." (Hickman-Staudt v. State, 2025 Tex.Crim.App. LEXIS 779 at page 9).

Contrary to the Appellate Court's opinion, and the State's response to the objection, this argument was not a reference to the content of Petitioner's statement. While true that the State is absolutely permitted to refer to a defendant's statement that is in evidence, here the argument in question explicitly asserted that only the petitioner could tell what "actually happened" and why he killed the victim. This was not a reference to the content

of his statement but rather was a rejection of Petitioner's account and a direct reference to his missing testimony.

When confronted with such an error, an appellate court must reverse unless it concludes beyond a reasonable doubt that the error did not contribute to the conviction. Snowden v.State, 353 S.W.3d 815,818 (Tex.Crim.App. 2011)(citing Tex.R.App. Proc. 44.2(a)). The Court's analysis should not focus on the propriety of the outcome of the trial, rather, the reviewing court should calculate the probable impact on the jury in light of the evidence. Wesbrook v. State, 29 S.W.3d 103,119 (Tex.Crim.App. 2000). The reviewing court must evaluate the entire record "in a neutral, impartial, and even-handed manner, not in the light most favorable to the prosecution." Lair v. State, 265 S.W.3d 580,591 (Tex.App.-Houston [1st Dist] 2008, pet. ref'd).

In Petitioner's case, the trial court gave a written instruction to the jury:

> "The defendant may choose not to testify. The defendant's decision not to testify cannot be held against him, and is not evidence of guilt. You must not speculate, or even talk about what the defendant might have said if he had taken the witness stand or why he did not." -(CR 309)

But then, the State did the very thing that the written instrustion prohibited; the trial court overruling Petitioner's objection. Overruling the objection conveyed to the jury that it was proper to infer guilt from Petitioner's failure to testify. (See Snowden 353 S.W.3d at 824-25). The trial court's written instructions in the jury charge were insufficient without a curative instruction made immediately after the state's improper comment. (See Crocker v. State, 248 S.W.3d 299,307 (Tex.App.-

Houston [1st Dist.] 2007, pet. ref'd)(Finding improper comment on failure to testify harmful, even though the jury was given a correct written instruction in the jury charge, because the trial court did not give a curative instruction after the improper argument and it "is possible then that a juror gave at least some weight" to the improper argument.)

F.
THE STATE EMPHASIZED THE ERROR

The State emphasized the error by subsequently pointing out that Petitioner was the one present in the house, then arguing, "Something happened inside the home. Again, I can't tell you what spawned it, but it was impulsive." (RR:8/195) This comment again improperly referenced information that only the Petitioner could provide had he testified. This factor weighs towards finding harm.

G.
CONCLUSION

The Texas Appellate Court has decided an important federal question in a way that conflicts with relevant decisions of this court in such a way as to call for an exercise of this court's supervisory power. A prosecutorial comment that impinges on the privilege against self-incrimination is an error of Constitutional magnitude. On this record, it is impossible to conclude beyond a reasonable doubt that the error did not contribute to the conviciton. The conviction, therefore, should be reversed and the case remanded for a new trial.