No. 25-

IN THE

Supreme Court of the United States

DONTAE TERRELL MOORE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner testified at trial that the deceased tried to take his gun during a robbery inside a car. The gun discharged once during a struggle, and the deceased was unintentionally killed. A bullet was found in the deceased's head. The prosecutor called a witness who testified that, although the first shot was fired unintentionally during a struggle, petitioner then intentionally fired two more shots, one of which killed the deceased. The car doors were closed, the windows were up, and no other bullets or bullet strikes were found in the car. Petitioner was convicted of capital murder instead of felony murder. The state habeas trial court recommended a new trial because the prosecutor intentionally elicited misleading testimony that petitioner fired three shots inside the car and made false and misleading statements during her closing argument. Nonetheless, the Texas Court of Criminal Appeals (TCCA) denied relief, presumably on the basis that the false and misleading testimony and argument were not "material."

The TCCA's standard for determining the "materiality" of perjured testimony is contrary to the "materiality" standard set forth in *Glossip v. Oklahoma*, 604 U.S. 226 (2025). *See Ex parte Warner*, 721 S.W.3d 436, 447-48 (Tex. Crim. App. 2025) (Finley, J., concurring). The TCCA's unreasoned order in petitioner's case failed to apply the correct "materiality" standard.

The question presented is:

> Whether the Court should grant certiorari, vacate the TCCA's judgment, and remand to apply the correct "materiality" standard for false and misleading testimony and argument.

RELATED CASES

- *State v. Moore*, No. 1061081, 177th District Court of Harris County, Texas. Judgment entered April 20, 2007.
- *Moore v. State*, No. 14-07-00366-CR, Fourteenth Court of Appeals of Texas. Judgment entered August 28, 2008.
- *Moore v. State*, No. PD-1507-08. Texas Court of Criminal Appeals. Petition dismissed as untimely filed January 14, 2009.
- *Ex parte Moore*, No. 1061081-A, 177th District Court of Harris County, Texas. Out-of-time Petition for Discretionary Review (PDR) recommended January 11, 2023.
- *Ex parte Moore*, No. WR-89,615-02, Texas Court of Criminal Appeals. Out-of-time PDR granted April 12, 2023.
- *Moore v. State*, No. PD-0329-23, Texas Court of Criminal Appeals. Discretionary review granted July 26, 2023.
- *Moore v. State*, No. 14-07-00366-CR, Fourteenth Court of Appeals of Texas. Judgment entered May 21, 2024.
- *Ex parte Moore*, No. 1061081-B, 177th District Court of Harris County, Texas. New trial recommended August 14, 2025.
- *Ex parte Moore*, No. WR-89,615-03, Texas Court of Criminal Appeals. Judgment entered December 11, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dontae Terrell Moore, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's order denying habeas corpus relief (App. 1a-2a) is unreported and is available at 2025 WL 3551933. The state trial court's findings of fact and conclusions of law (App. 3a-25a) are unreported.

JURISDICTION

The TCCA denied relief in a final judgment entered on December 11, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, "no State shall deprive any person of . . . liberty . . . without due process of law . . . ."

STATEMENT

A. Procedural History

Petitioner pled not guilty to capital murder in cause number 1061081 in the 177th District Court of Harris County, Texas. A jury convicted him, and the trial court assessed his punishment at life in prison on April 20, 2007.

The Texas Court of Appeals affirmed petitioner's conviction in a memorandum opinion issued on August 28, 2008. The TCCA dismissed his petition for discretionary review (PDR) in No. PD-1507-08 as untimely on January 14, 2009. *Moore v. State*, No. 14-07-00366-CR, 2008 WL 4308424 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, pet. dism'd) (not designated for publication).

Petitioner filed a state habeas corpus application on September 30, 2022, alleging that he was denied his right to file a PDR because appellate counsel was ineffective. The trial court recommended that petitioner be allowed to file an out-of-time PDR on January 11, 2023. The CCA granted that relief on April 12, 2023. *Ex parte Moore*, No. WR-89,615-02, 2023 WL 2910727 (Tex. Crim. App. Apr. 12, 2023) (not designated for publication). The case was back on direct appeal.

Petitioner filed a PDR on April 26, 2023. The TCCA granted discretionary review, vacated the judgment, and remanded to the Court of Appeals to address the merits of two points of error on July 26, 2023. *Moore v. State*, No. PD-0329-23, 2023 WL 4758682 (Tex. Crim. App. July 26, 2023) (not designated for publication).

On remand, the Court of Appeals affirmed petitioner's conviction in a memorandum opinion issued on May 21, 2024. Petitioner did not seek discretionary review. *Moore v. State*, No. 14-07-00366-CR, 2024 WL 2284117 (Tex. App.—Houston [14th Dist.] May 21, 2024) (not designated for publication).

Petitioner filed a state habeas corpus application challenging his conviction on June 13, 2024. The trial court

conducted an evidentiary hearing and entered findings of fact and conclusions of law recommending a new trial on August 14, 2025 (App. 3a-25a). The TCCA denied relief in a brief written order on December 11, 2025. *Ex parte Moore*, No. WR-89,615-03 (Tex. Crim. App. Dec. 11, 2025) (not designated for publication) (App. 1a-2a).

B. Factual Statement

1. The Indictment

The indictment alleged that, on or about December 27, 2005, petitioner did "while in the course of committing and attempting to commit the robbery of Jonathan Finkelman intentionally cause [his] death … by shooting [him] with a … firearm" (C.R. 7).[1]

2. The State's Case

Jonathan Finkelman was a 17-year-old sophomore at Bellaire High School in Houston, Texas, in December 2005 (7 R.R. 100-01). Scott Bernstein, Finkelman's best friend, testified that Finkelman had been buying marijuana and prescription drugs in the Third Ward and Fondren areas of Houston and selling them to obtain extra money for about a year (5 R.R. 138, 140-41, 145).

Bernstein testified that he, Mark Taormina, and Finkelman were taking pills and smoking marijuana at

1. The Clerk's Record is cited as "C.R." The Reporter's Record of the jury trial is cited as "R.R." The Reporter's Record of the state habeas corpus evidentiary hearing is cited as "H.R.R." Petitioner's state habeas exhibits are cited as "AX ___."

Finkelman's home on the night of December 27, 2005, when Warren Payne and Mitch Ramey contacted Finkelman in order to buy drugs (5 R.R. 147-49). Finkelman agreed to sell nine pills for $20 and instructed Payne to pay him with a $20 bill (5 R.R. 153).[2] Finkelman and Bernstein went outside to meet Payne and Ramey and took a pit bull to "mess with them" (5 R.R. 152). When Payne paid with smaller bills, Finkelman withheld one pill as punishment (5 R.R. 153-54).[3]

Payne, aged 16, testified that he started using drugs at age 14; that he and his friends regularly used marijuana, Xanax, ecstasy, cocaine, and alcohol; and that he got high every day (6 R.R. 120-22).[4] Payne told Brandon Powell, Payne's friend, that Finkelman had shorted him a pill because he did not pay with a $20 bill (6 R.R. 126-27). Powell and his friend, Steve Lopez, decided to set up another drug deal and "rip off" Finkelman (6 R.R. 127, 129-30, 133). Payne agreed to help them (6 R.R. 132). Steve

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2. Bernstein explained that drug dealers do not want currency less than a $20 bill because small bills do not fit in a wallet (5 R.R. 153).

3. Bernstein testified that he and Finkelman took advantage of Payne and Ramey, who were two years younger than them, because "we could" (5 R.R. 154).

4. Payne testified that he had been charged with capital murder and certified to stand trial as an adult (6 R.R. 116). He pled guilty that same morning to a reduced charge of aggravated robbery without an agreed recommendation on punishment and would be sentenced after petitioner's trial (6 R.R. 117-18). The plea bargain lowered his punishment from an automatic sentence of life without parole to a range of five years to life with the possibility of parole (6 R.R. 191-92). He was sentenced to 18 years in prison after petitioner's trial (AX 5).

Lopez enlisted Jeff Lopez to help intimidate Finkelman and cause him to relinquish the pills (6 R.R. 133).[5] Payne called Finkelman and arranged to meet at Godwin Park in order to buy 250 pills for $500 (6 R.R. 136, 139).

Payne testified that, when Finkelman asked for the money inside his car, a black male pulled a revolver and said, "Give me all your shit" (6 R.R. 146-48). Finkelman put the pills in the console and grabbed the male's gun (6 R.R. 148). The male pulled the gun away, causing it to discharge, but Finkelman was not shot (6 R.R. 150-51).[6] Payne exited the car, heard two or three additional shots fired, and realized that Finkelman had been shot (6 R.R. 151-52). Payne was shot on his right side as he ran down the street (6 R.R. 152-54). Payne identified petitioner as the shooter in a photospread and, thereafter, in court (6 R.R. 161-64).

Taormina testified that he was in the passenger seat, and all the doors were closed, when the black male held a revolver to Finkelman's head and said, "Give it to me" (6 R.R. 70, 73-74, 76-77). Finkelman threw his arm at the gun, they had a brief struggle over the gun, and it discharged three times (6 R.R. 77, 79-80, 104). Taormina did not think that the first shot hit Finkelman, as they continued to struggle for a second or two (6 R.R. 80). Taormina then heard two shots fired in rapid succession

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5. Matthew Prall testified that Jeff Lopez was their drug connection and had a reputation as a "gangster" (5 R.R. 214-16, 223-24).

6. Payne testified that they did not intend to shoot Finkelman, and the gun went off during the struggle (6 R.R. 181-82).

and thought that the second or third shot hit Finkelman (6 R.R. 81). Taormina exited the car and heard three more shots as he ran away (6 R.R. 83-85).

Matthew Prall testified that he used drugs with this group and was present when they made the plan to steal Finkelman's drugs (5 R.R. 218-25). Prall, Ramey, and Powell walked to Godwin Park and sat in the bleachers to watch what Prall assumed would be a robbery (5 R.R. 227-28; 6 R.R. 11). Payne and a black male got in the back seat of Finkelman's car (6 R.R. 13). Five to ten minutes later, Prall heard one shot fired inside the car (6 R.R. 14). Taormina exited the car and said, "Don't shoot me" (6 R.R. 16). Payne exited the car and ran down the street (6 R.R. 17). The black male exited the car and pointed the gun at Taormina, who ran in the opposite direction from Payne (6 R.R. 17-18). Prall heard three or four shots fired outside the car, one of which hit Payne (6 R.R. 16, 19-20).[7]

By the time the police arrived, Finkelman had died from a gunshot wound to the head (5 R.R. 24-25, 38, 206-08). The interior of his car was not damaged (5 R.R. 84).

A pathologist testified that Finkelman had a contact gunshot wound to the head (7 R.R. 62-63, 68). The bullet was found in the back of Finkelman's head (7 R.R. 71). The pathologist acknowledged that Finkelman's hands could have been on the gun when it came in contact with his head and discharged (7 R.R. 79-80). Finkelman had fresh abrasions on his face, fingers, chest, and back that could have occurred during a struggle over the gun (7 R.R.

7. Prall initially gave a sworn statement to the police that this was a drive-by shooting but later retracted it (6 R.R. 27-28).

53-58, 78). He had gunshot residue on his left hand—and, possibly, on his right hand—which indicates that his hands were on or near the gun at the time it discharged and is consistent with a struggle (7 R.R. 91-93).

Houston Police Department (HPD) Homicide Investigator Phillip Guerrero testified that an anonymous caller provided the shooter's first name and location (6 R.R. 196, 201). A computer check revealed that petitioner lived on that block (6 R.R. 202). Guerrero showed petitioner's driver's license photo to Payne, who identified petitioner as the shooter (6 R.R. 206-09). Guerrero obtained a warrant and arrested petitioner on March 10, 2006 (6 R.R. 212). Petitioner gave a recorded statement that he was trying to "jack" the driver, they "were wrestling over a pistol, and the pistol went off …" (6 R.R. 225-26; SX 48; AX 6).

3. The Defense's Case

Petitioner, aged 18 at the time of the offense, testified that he put the gun to Finkelman's head and demanded money (7 R.R. 120, 131). Finkelman grabbed the gun, they struggled over it, and it discharged (7 R.R. 131). That was the only shot fired in the car (7 R.R. 136, 167). Petitioner testified that he did not intend to kill Finkelman (7 R.R. 132). After the shot was fired, the other boys and petitioner exited the car and ran (7 R.R. 131). When petitioner heard another shot fired as he was running, he fired his gun until it was empty (7 R.R. 132). The police photos do not depict any bullet strikes inside Finkelman's car (7 R.R. 175).

4. The Court's Charge

The trial court instructed the jury on capital murder and the lesser-included offense of felony murder (C.R. 190-91).

5. The Closing Arguments

Lead prosecutor Mia Magness argued:

- the only disputed issue was whether petitioner specifically intended to kill Finkelman (8 R.R. 31);[8]
- witnesses testified that more than one shot was fired in the car (8 R.R. 25-26);
- the first shot was fired when Finkelman grabbed for the gun and struggled with petitioner (8 R.R. 40);
- petitioner then pistol-whipped Finkelman, put the gun to his head, and shot him (8 R.R. 42);
- the second or third shot killed Finkelman (8 R.R. 40); and
- the jurors would never know whether there were "additional bullet strikes" found in

8. If the jury had a reasonable doubt that petitioner specifically intended to kill Finkelman, it was required to convict him of felony murder instead of capital murder (C.R. 191).

> the car because Officer Martinez, who processed the car, is the only person who has that information, he had a stroke, and the car had been destroyed (8 R.R. 24-25).[9]

Magness also made the false statement that Prall testified that multiple shots were fired in the car (8 R.R. 33). In fact, he testified that only one shot was fired inside the car (6 R.R. 14).

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9. Magness argued to the jury:

> MRS. MAGNESS: I think you're going to ask yourself in your deliberations, "How can we be sure how many shots were fired in the car?" That seems to be a very crucial, critical bit of information. And in trying to answer that question for yourself, you're going to be saying, "We don't know whether there are additional bullet strikes in the car" and you're not ever going to know because the person who processed that car—
>
> MR. BROWN: I object, Your Honor. That's outside of the scope of the evidence.
>
> THE COURT: Overruled.
>
> MRS. MAGNESS: The person who processed that car, through no fault of his own, is unavailable to testify. You'll recall from the evidence that Officer Frank Martinez had a stroke. . . . Officer Martinez processed the car. He cannot testify. The car has been destroyed. It was unable to be salvaged. You do not have an answer to that question. But you know that there was more than one shot in that car, because the witnesses told you so.

(8 R.R. 24-26).

Defense counsel Charles Brown argued:

- if three shots had been fired inside the car, there would be evidence of three shots, but there was evidence of only one (8 R.R. 17);

- the pathologist's testimony supported that the gun discharged once inside the car during a struggle (8 R.R. 17);

- the presence of gunshot residue on Finkelman's hands means that his hands were on or near the gun at the time it discharged and is consistent with a struggle (8 R.R. 16);

- the fact that petitioner fired shots *outside* the car does not prove that he intended to kill Finkelman *inside* the car (8 R.R. 20); and

- petitioner was guilty of felony murder because he caused Finkelman's death in the course of committing aggravated robbery without intending to kill Finkelman (8 R.R. 14, 16-17).

The jury convicted petitioner of capital murder (with a mandatory sentence of life without parole) rather than felony murder (with a punishment range of five years to life with the possibility of parole).

6. The State Habeas Corpus Proceeding

Petitioner alleged that lead prosecutor Magness violated due process by eliciting Taormina's perjured testimony that petitioner had fired three shots *inside* the car and by making false statements about that matter during her closing argument. The trial court conducted an evidentiary hearing.

Jeff Joachim, Finkelman's uncle, testified at the hearing that Taormina told him at Finkelman's memorial service, before anyone was arrested, that Finkelman tried to grab petitioner's gun, it discharged, and Finkelman was killed during the struggle (AX 15; 2 H.R.R. 17-21). In her testimony, Magness could not explain what happened to the other two bullets if petitioner had fired three shots inside the car (2 H.R.R. 72-73, 77, 95, 104, 131-32). She suggested that the police did not thoroughly process the car and find them (2 H.R.R. 79, 91-92). However, she acknowledged that the police reports state that there were no bullet strikes or broken windows in the car (2 H.R.R. 81).

The state habeas trial court made the following relevant findings of fact:

- Magness's testimony at the hearing was not credible (App. 8a, 12a-13a; Findings of Fact 32, 45).

- Before trial, Magness was aware of the reports of HPD officers E.P. Aguilera and T.R. Cunningham that all the windows were

rolled up when they arrived at the scene, and they saw no evidence of bullet strikes or broken windows inside the car (App. 9a, 10a, 12a; Findings of Fact 34, 38, 43).

- Magness elicited Taormina's "misleading" testimony that petitioner fired three shots inside the car, "knowing that his testimony directly contradicted the physical evidence and officers' investigations and reported findings . . . ." (App. 14a; Finding of Fact 46).

- When Magness interviewed Prall before trial, she wrote in her notes that he told her that only one shot was fired inside the car and additional shots were fired outside the car (App. 12a-13a; Finding of Fact 45). He also testified to this at trial. Nonetheless, Magness made a false statement during her closing argument that he testified that multiple shots were fired inside the car (App 12a-13a; Findings of Fact 44, 45).

- Magness's closing argument was "intention[ally] misleading" concerning the testimony regarding the number of shots fired inside the car (App. 14a; Finding of Fact 47).

The state habeas trial court made the following relevant conclusions of law:

- Petitioner "was harmed by the due process violation of the State's failure to correct

> testimony it knew or should have known to be false" (App. 15a; Conclusion of Law 52).
>
> • Magness's false statements in her closing argument, "made with the intent to deceive the jury, were material," and the "State did not prove beyond a reasonable doubt that these statements did not contribute to the conviction (citing *Miller v. Pate*, 386 U.S. 1 (1967), and *Glossip v. Oklahoma*, 604 U.S. 226 (2025))(App. 15a; Conclusion of Law 54).

The TCCA summarily denied relief in a brief unpublished order in which it addressed petitioner's due process claim as follows:

> Applicant contends that he was denied due process because the State presented false testimony at trial and made false statements during closing argument . . . . The trial court . . . has made findings and conclusions, recommending that this Court grant Applicant habeas relief in the form of a new trial because Applicant's due process rights were violated by the State . . . . We disagree. After considering the trial court's findings and conclusions, as well as conducting our own independent review of the record in this case, the Court determines that Applicant's claims are without merit.

(App. 2a)

REASONS FOR GRANTING CERTIORARI

THE COURT SHOULD GRANT CERTIORARI, VACATE THE JUDGMENT OF THE TEXAS COURT OF CRIMINAL APPEALS, AND REMAND TO APPLY THE CORRECT "MATERIALITY" STANDARD FOR FALSE AND MISLEADING TESTIMONY AND ARGUMENT.

A. The TCCA Had To Have Concluded That The Trial Prosecutor's Use Of False Testimony And Her False Statements During Her Closing Argument Were Not "Material."

The TCCA did not even hint at why it denied relief, stating only that it "disagreed" with the state habeas trial court's conclusion that petitioner's due process rights were violated (App. 2a). The TCCA had to have concluded that petitioner did not demonstrate that the false and misleading testimony and false statements during the closing argument were "material" under *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny.

The TCCA did not reject any of state habeas trial court's factual findings and credibility determinations. The TCCA has previously stated that it will not reject a habeas trial court's factual findings based on credibility determinations that are supported by the record.[10] In *Ex*

10. Indeed, rejecting a credibility determination supported by the record would raise serious constitutional concerns. *Cf. United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) ("[W]e assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal;

parte De La Cruz, 466 S.W.3d 855 (Tex. Crim. App. 2015), the TCCA stated:

> This Court ordinarily defers to the habeas court's fact findings, *particularly those related to credibility and demeanor*, when those findings are supported by the record. . . . We similarly defer to a habeas judge's ruling on mixed questions of law and fact if the resolution of those questions turns on an evaluation of credibility and demeanor. . . . We review de novo both pure questions of law and mixed questions of law and fact that do not depend upon credibility and demeanor. . . . In the specific context of a false-evidence analysis, [w]e review factual findings concerning whether a witness's testimony is perjurious or false under a deferential standard, *but we review the ultimate legal conclusion of whether such testimony was "material" de novo.*

Id. at 665-66 (citations and internal quotation marks omitted; emphasis added).

The state habeas trial court's predicate factual findings that Magness was not credible are supported by Magness's handwritten notes and the police reports in the State's file. Therefore, the TCCA had to have denied relief on the basis that the false and misleading testimony and argument were not "material."

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to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious [constitutional] questions . . . .").

B. The TCCA Failed To Apply The "Materiality" Standard Required By *Glossip v. Oklahoma*.

In *Glossip v. Oklahoma*, 604 U.S. 226 (2025), the Court held that due process is violated when a prosecutor knowingly uses or fails to correct false testimony that was "material":

> In *Napue v. Illinois*, this Court held that a conviction knowingly "obtained through use of false evidence" violates the Fourteenth Amendment's Due Process Clause. 360 U.S. at 269. To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it "to go uncorrected when it appear[ed]." *Ibid.* If the defendant makes that showing, a new trial is warranted so long as the false testimony "may have had an effect on the outcome of the trial," *id.*, at 272 – that is, if it "'in any reasonable likelihood [could] have affected the judgment of the jury,'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271). In effect, this materiality standard requires "'"the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *United States v. Bagley*, 473 U.S. 667, 680, n.9 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (some citations omitted).

Glossip, 604 U.S. at 246. *Glossip*, which addressed a false testimony claim, also applies to a related due process

claim that a prosecutor made false statements during her closing argument. *Cf. Miller v. Pate*, 386 U.S. 1, 4-6 (1967) (prosecutor violated due process by falsely arguing that there was blood on the defendant's shorts when the prosecutor knew that the red substance actually was paint) (citing *Napue*, *supra*).

The TCCA's only published post-*Glossip* decision addressing a false testimony due process claim cited *Glossip*'s "*any* reasonable likelihood" standard, which it equated with its own pre-*Glossip* "reasonable likelihood" standard:

> Even if Dr. Peerwani's testimony was false or misleading, Applicant does not meet the materiality standard. Uncorrected false testimony warrants a new trial only if it "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. at 246 (citation omitted). Stated another way, false evidence is material if there is a "reasonable likelihood" that it affected the jury's judgment. [*Ex parte*] *Weinstein*, 421 S.W.3d [656,] 665 [(Tex. Crim. App. 2013).]

Ex parte Carter, 721 S.W.3d 341, 361 (Tex. Crim. App. 2025).[11]

11. In two unpublished post-*Glossip* false testimony decisions, the TCCA applied a "materiality" standard clearly different from the standard set forth in *Glossip*. *See Ex parte Moreno*, No. WR-96,609-01, 2025 WL 3238682, at *1 (Tex. Crim. App. Nov. 20, 2025), citing *Ex parte Chabot*, 300 S.W.3d 768, 771-72

The TCCA's discussion of the "reasonable likelihood" standard in *Weinstein* is as follows:

> Generally, our review of a habeas corpus claim involves a two-pronged inquiry. First, we decide if the applicant has established a cognizable constitutional violation. Second, if a constitutional violation is shown, we determine whether the applicant was harmed by the error. An applicant demonstrates such harm with proof "by a preponderance of the evidence that the error contributed to his conviction or punishment."
>
> However, habeas claims challenging the use of false testimony are reviewed under a slightly different analysis. The State's use of *material* false testimony violates a defendant's due-process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, in any habeas claim alleging the use of material false testimony, this Court must determine (1) whether the testimony was, in fact, false, and, if so, (2) whether the testimony was material.

(Tex. Crim. App. 2009) ("The knowing use of perjured testimony is a trial error that is subject to a harmless error analysis. Under the applicable standard, the 'applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. . . . [W]e agree that it is more likely than not that Pabst's perjured testimony contributed to the applicant's conviction and punishment."); *Ex parte Warner*, Nos. WR-96,439-01 & WR-96,439-02, 2025 WL 2408707, at *1 (Tex. Crim. App. Aug. 20, 2025).

> The second prong in a false-testimony claim is materiality, not harm. Only the use of *material* false testimony amounts to a due-process violation. And false testimony is *material* only if there is a "reasonable likelihood" that it affected the judgment of the jury. Thus, an applicant who proves, by a preponderance of the evidence, a due-process violation stemming from a use of *material* false testimony necessarily proves harm because a false statement is material only if there is a reasonable likelihood that the false testimony affected the judgment of the jury. The applicant must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove 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, 664-65 (Tex. Crim. App. 2013).

Unquestionably, *Weinstein*'s "materiality" standard—which is only "slightly different" from the TCCA's harmless-error standard governing other constitutional claims raised on habeas corpus review—is significantly different from the *Glossip* Court's "materiality" standard.

Notably, TCCA Judge Finley, who wrote the opinion in *Carter*, recently noted the conflict between the TCCA's "materiality" standard and the *Glossip* standard:

> 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. 226 (citation omitted). "[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 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"). . . . [B]ecause 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. 226. Yet under *Weinstein*, this Court applies a different materiality standard.

Ex parte Warner, 721 S.W.3d 436, 447-48 (Tex. Crim. App. 2025) (Finley, J., concurring).

In view of the TCCA's use of an erroneous "materiality" standard and its failure to analyze "materiality" in petitioner's case, this Court should vacate the judgment

and remand with instructions to apply the "materiality" standard required by *Glossip*. *Cf. Andrus v. Texas*, 590 U.S. 806, 820 (2020) (per curiam);[12] *see also Sears v. Upton*, 561 U.S. 945, 952-56 (2010) (per curiam) (vacating state court's judgment and remanding for proper analysis of *Strickland* prejudice regarding ineffective-assistance-of-counsel claim). *Sup. Ct. R. 10(c).*

CONCLUSION

The Court should grant certiorari, vacate the TCCA's judgment, and remand with instructions to reconsider petitioner's due process claim under the correct "materiality" standard.

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12. In *Andrus*, 590 U.S. at 820, the Court vacated the TCCA's judgment and remanded an ineffective assistance of counsel claim under similar circumstances:

> Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005). We conclude that Andrus has shown deficient performance under the first prong of *Strickland*, and that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland [v. Washington*, 466 U.S. 668 (1984).] We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed in forma pauperis, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE TEXAS COURT OF CRIMINAL APPEALS, FILED DECEMBER 11, 2025

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-89,615-03

EX PARTE DONTAE TERRELL MOORE,

Applicant.

Filed December 11, 2025

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 1061081-B IN THE 177TH DISTRICT COURT HARRIS COUNTY

Per curiam.

ORDER

Applicant was convicted of capital murder and sentenced to life imprisonment without the possibility of parole. The Fourteenth Court of Appeals affirmed his conviction. *Moore v. State,* No. 14-07-00366-CR (Tex. App.—Houston [14th Dist.] May 21, 2024) (not designated for publication). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* Tex. Code Crim. Proc. art. 11.07.

Appendix A

Applicant contends that he was denied due process because the State presented false testimony at trial and made false statements during closing argument; that he was denied the effective assistance of counsel at the guilt-innocence stage; that cumulative prejudice denied him a fair and impartial trial; and that he was denied the effective assistance of counsel on appeal. Although the trial court had entered a timely order designating issues, the district clerk properly forwarded this application to this Court under Texas Rule of Appellate Procedure 73.4(b)(5). The Court, therefore, remanded the application to the trial court to complete its evidentiary investigation and to make findings of fact and conclusions oflaw.

Following multiple extensions, the trial court has now complied with our remand order. It has made findings and conclusions, recommending that this Court grant Applicant habeas relief in the form of a new trial because Applicant's due process rights were violated by the State and by trial counsel. We disagree. After considering the trial court's findings and conclusions, as well as conducting our own independent review of the record in this case, the Court determines that Applicant's claims are without merit. Relief on all claims is denied.

Filed: December 11, 2025
Do not publish

APPENDIX B — TRIAL COURT'S FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER, 177TH DISTRICT COURT OF HARRIS COUNTY, TEXAS, FILED AUGUST 14, 2025

177th DISTRICT COURT
HARRIS COUNTY, TEXAS

CAUSE NO. 1061081-B

EX PARTE

DONTAE TERRELL MOORE,

Applicant.

Filed August 14, 2025

TRIAL COURT'S FINDING OF FACTS, CONCLUSIONS OF LAW AND ORDER TO THE CLERK

The Court has considered the application for Writ of Habeas Corpus, the brief, the appellate record, the official court's record, and the reporter's record of the writ hearing in the afore-reference cause. The Court finds that Applicant's due process right for a fair trial was violated by the presentation of false statements during State's closing argument. Applicant's due process rights were further violated by Defense counsels' ineffective assistance at the guilt/innocence. This Court finds that there are facts material to the legality of the Applicant's confinement that leads to a recommendation of "**granting**" relief as requested by the Applicant based on the following:

Appendix B

FINDINGS OF FACT
PROCEDURAL HISTORY

1. The Court finds the State's reciting of the procedural history, in its June 16, 2025 Proposed Finding of Fact and Conclusions of Law is beared out by the record

2. The applicant is confined pursuant to the judgment and sentence of the 177th District Court of Harris County, Texas, in cause number 1061081, where on April 20, 2007, a jury convicted the applicant of capital murder.

3. The trial court assessed punishment at life confinement without parole in the Texas Department of Criminal Justice—Correctional Institutions Division (TDCJ-CID).

Procedural History

4. Initially, the Fourteenth Court of Appeals affirmed the applicant's conviction, and dismissed his petition for discretionary review (PDR) as untimely. *Moore v. State,* No. 14-07-00366-CR, 2008 WL 43084 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, pet. dism'd) (mem. op., not designated for publication).

5. The mandate of affirmance issued on October 23, 2008.

6. The applicant was represented by Douglas Durham ("appellate counsel") on direct appeal.

Appendix B

7. On September 30, 2022, habeas counsel, Randolph Schaffer, filed an application for writ of habeas corpus on behalf of the applicant, cause no. 1061081-A.

8. The applicant claimed he was denied his right file a PDR.

9. On April 12, 2023, the Court of Criminal Appeals ("CCA") granted the applicant an out-of-time PDR. *Ex parte Moore,* No. WR-89,615-02, 2023 WL 2910727 (Tex. Crim. App. Apr. 12, 2023) (not designated for publication).

10. On April 26, 2023, the applicant filed a PDR in No. PD-0329-23.[1]

11. On July 26, 2003, the CCA granted discretionary review.

12. On May 21, 2024, the Fourteenth Court of Appeals affirmed the applicant's conviction. *Moore v. State,* 14-07-00366-CR, 2024 WL 2284117 (App.—Houston [14th Dist.] May 21, 2024, no pet.) (mem. op., not designated for publication).

13. The mandate of affirmance issued on June 6, 2024.

14. On June 13, 2024, the applicant filed the instant writ of habeas corpus, cause no. 1061081-B.

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1. The applicant was represented by habeas counsel Randolph Schaffer.

15. The Harris County District Clerk's Office electronically notified the State about this application on June 18, 2024.

16. The trial court[2] designated issues on July 16, 2024.

17. The State filed the State's Original Answer on July 18, 2024.

18. On June 13, 2024, the applicant requested an evidentiary writ hearing. *Applicant's Motion for an Evidentiary Hearing.*

19. In response, the State orally requested (and the trial court orally granted) time to gather affidavits relevant to the applicant's claims to assist the trial court in determining whether an evidentiary hearing was necessary (1 S.W.H.R.[3] at 8-9).

20. The trial court requested an extension of time from the CCA due to a new judge taking the bench on January 1, 2025.

21. On November 20, 2024, the CCA granted the trial court's request for an extension of time to March 17, 2025.

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2. Judge Robert Johnson designated the issues in the instant writ.

3. Throughout this document, "S.W.H.R." refers to the supplemental reporter's record of the writ hearing in the instant case, cause no. 1061081-B.

22. The new presiding judge of the 177th District Court of Harris County, Judge Emily Detoto, transferred the instant writ to the Associate Courts. *Order of Referral.*

23. Associate Judge Lydia Clay-Jackson was assigned to preside over the instant writ (1 S.W.H.R. at 1).

24. On February 7, 2025, Associate Judge Lydia Clay-Jackson (hereafter referred to as "trial court"):

> Ordered the State to disclose the trial prosecutor's trial notes from the State's file in the primary case, based on the applicant's Amended Motion for Production; and
> Granted the applicant's request for a writ evidentiary hearing.
>
> (2 S.W.H.R. at 8-10).

25. After the hearing was granted on February 7, 2025, the applicant filed a Supplemental Writ Application. *Applicant's Supplemental Application.*

26. On February 17, 2025, the trial court requested an extension of time from the CCA. *Post Conviction Writ – Extension of Time, Letter to the CCA on Feb. 17, 2025.*

27. On February 25, 2025, the CCA granted the trial court's request for an extension of time to June 30, 2025.

28. On April 8 and 9, 2025, the trial court conducted a writ of habeas corpus evidentiary hearing (2 W.H.R.[4] at 1); (3 W.H.R. at 1).

FINDINGS OF FACT
APPLICANT'S GROUND ONE

"APPLICANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BECAUSE THE PROSECUTOR PRESENTED FALSE TESTIMONY THAT APPLICANT INTENTIONALLY FIRED THE FATAL SHOT AND MADE FALSE STATEMENTS BOUT THE EVIDENCE DURING HER CLOSING ARGUMENT"

29. Mia Magness was the lead prosecutor at trial.

30. Magness was an experienced chief prosecutor who had tried many serious cases by the time of applicant's trial (2 H.R.R. 51-53).

31. Lead trial prosecutor, Mia Magness, provided two affidavits wherein she touted her legal experiences (Clerks Record filings of 9/26/24 and 12/20/24

32. The Court finds that Magness did not exhibit the professionalism, preparedness, or candidness expected of a prosecutor with the experience she claimed to have had, when she presented herself as a witness at the Writ Hearing.

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4. Throughout this document, "W.H.R." refers to the reporter's record of the writ evidentiary hearing in the instant case, cause no 1061081-B.

Appendix B

33. Magness trial notes state physical evidence does not lie from Darrell Stein, point does not get facts confused Writ hearing exhibit 32 pg 9.

34. Magness's trial notes specially state that

- No shell casings in vehicle
- No spent bullets in car
- no firearms @all in the vehicle
- no bullet strikes inside the vehicle Writ hearing exhibit 32 pg 10
- 12-27-05 Frank Martinez and Kriswetter processed vehicle. Writ hearing Exhibit 32 pg 11p 6 indicate her thoughts of Mark Taormina. Gleaned from her chart in exhibit 32 pg 22)

35. The Court finds that Ms. Magness's closing argument, ,based upon her notes (W H exhibits 31 and 32), was a deliberate act of misleading of the evidence.

36. *14* ***Ms. Magness: I thing you're gong to ask yourself in your deliberations, "how can we be sure how many shots were fired in the car?" That seems to Be a very crucial, critical bit of information, And in trying to answer that question for***

yourself, your're
Going to be saying, "We don't know whether there are
additional bullet strikes in the car," and you're not
21 ever going to know,(at RR vol 8 page 24 I.14-21

37. The photo ballistic evidence at trial gave no credence to the State's argument that multiple gun shots were fired in the deceased car (7 R.R. 175)

38. Officer T.R. Cunningham's, (who Magness pointedly did not call as a trial witness), report states that he examined the car at the scene and observed that all the windows were rolled up when the police arrived and there were no broken windows or bullet strikes in the car (AX 12)

39. ***Q. Did the State have any evidence that there were***
7 bullet holes found in the car?
8 A. No.
9 Did the State have any evidence that there were
10 bullet strikes found in the car?
11 A. No.
12 Q. Did the State have any evidence that any bullets were
13 found in the car?
14 A. No.
15 Q. Did the State have any evidence that any spent
16. casings were found in the car?

17. A. No.
18. Q. Did the State have any evidence that there was any
19. damage to the interior of the car?
20. A. Are you asking me was there evidence or was -- did I
21. know if there was evidence?
22. Q. My question stands for what it said. Did the State
23. have any evidence that there was damage to the interior of
the
24 car?
25 A. Do you mean damage other than the pools of blood?
P. 73
1 Q. I don't consider that damage. Damage is like
2 something done by a bullet or a fight or something like that,
3 some mark in the car. Blood can be cleaned up; damage has to
4 be repaired, if that helps you. It's not a --
5 A. I don't -- I -- I don't know whether there was damage
6 to the interior of the vehicle noted from -- I believe it was
7 Officer Martinez's processing of the car. I know that there
8 were no bullet strikes that were noted in the offense report.
9 Q. Certainly, no damage caused by a bullet to the
10 interior of the car?
11 A. I don't believe there was anything like that in his
12 reports

WR vol 2 pg 72 - 73

40. The number of shots fired in the deceased car was crucial from both the defense theory, as to the lesser charge, and to the State's theory as to intent in capital murder; and witness Magness illustrates it painfully in her testimony at the writ hearing (2 W.H. at 98 thru 105)

41. Magness accurately observed during her closing argument that the "only question" was whether applicant specifically intended to kill Finkelman.

42. The jury's determination of applicant's intent depended on whether Finkelman was killed when the gun discharged unintentionally during the struggle or whether that shot missed him, and applicant then intentionally fired more two shots, one of which killed him.

43. Magness made false statements during her closing argument even though she knew that Officer Cunningham's and Officer Aguilera's reports stated that there were no bullet strikes or broken windows in the car; that Officer Martinez's report did not mention finding any bullets, bullet strikes, or broken windows; and that Prall said before trial and testified that he heard one shot fired in the car.

44. Magness made a false statement during her closing argument that Prall testified that multiple shots were fired in car (8 R.R. 33).

45. Magness's testimony at the evidentiary hearing that she made an honest mistake regarding Prall's testimony was not credible. She stated in her first affidavit

that it is her practice to prepare her argument from her trial notes and that she must have made a mistake in her trial notes about what Prall said. When she learned that habeas counsel asked the State to disclose her trial notes—which the State opposed—she filed a supplemental affidavit stating that she "had been informed" that there were no notes of Prall's testimony in the State's file, so her first affidavit was incorrect in that regard. Magness initially testified at the evidentiary hearing that the State sent her the offense report and the Reporter's Record (although she may have reviewed the Reporter's Record online) before she filed her first affidavit (2 H.R.R. 110). She then changed her testimony and acknowledged that she came to Houston to review the State's file before she filed her first affidavit but only looked at the exhibits (2 H.R.R. 121-22). She testified that it never occurred to her to review her trial notes regarding Prall's testimony even though she had to address that matter in her affidavit (2 H.R.R. 111-112, 115). She also denied that she reviewed the State's file when the habeas prosecutor, Emily Thompson, was present (2 H.R.R. 123). After habeas counsel represented to her that Thompson told the Court that Thompson was present when Magness viewed the State's file, Magness again changed her testimony (2 H.R.R. 123-24). The State's file contained Magness's handwritten notes regarding a pretrial interview in which Prall said that he heard one shot fired in the car and three or four shots fired outside the car (AX 31; 2 H.R.R. 132-37). The State's file also contained Magness's trial notes regarding the testimony of every witness except for Prall (and possibly the medical examiner) (AX 32; 2 H.R.R. 139-49).

46. Magness offered Mark Toarmina as a trial witness knowing that his testimony directly contradicted the physical evidence and officers' investigations and reported findings, and with her admitted trial experience she knew or should have known that such a contradiction would be misleading.

47. No other interpretation can be made, given Magness description of her trial expertise, that her closing argument was an intentional misleading of the evidence.

48. Mia Magness was not a credible witness.

CONCLUSIONS OF LAW
AS TO APPLICANT'S GROUND ONE

49. Prosecutors in Texas have their duties prescribed by statute:

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." (CCP 2.01)

50. A prosecutor's improper trial comments violate the Fourteenth Amendment if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

51. Texas courts require that claims of misleading prosecutorial statements be supported by specific evidence showing that the statements created a false impression or introduced demonstrably false information.

52. Applicant was harmed by the due process violation of the State's failure to correct testimony it knew or should have known to be false. *Ex Parte Ghahremani* tells us that it does not matter whether the prosecutor actually know that the testimony is false, rather it is enough that he or she should have recognized the "misleading" nature of the evidence

53. Mark Toarmina's testimony regarding the number of shots fired, was not supported by any of the physical evidence and in fact was in direct contradiction to said evidence, the experienced prosecutor Magness should have investigated further before sponsoring such testimony.

54. Magness's false statements, made with the intent to deceive the jury, were material. The State did not prove beyond a reasonable doubt that these statements did not contribute to the conviction. Thus, applicant was denied due process of law. *See Miller v. Pate,* 386 U.S. 1, 6 (1967) (conviction reversed because the prosecutor falsely argued that stains on the shorts were blood, knowing that they were paint); *see also, Glossip,* 145 S.Ct. at 627; *cf. Dakin v. State,* 632 S.W.2d 864, 866-67 (Tex. App.—Dallas 1982) (conviction reversed because the prosecutor attempted to present harmful facts, unsupported by any evidence, in the form of questions).

55. The materiality of false or misleading statement is a critical factor in determining whether a due process violation has occured. In *Ly v State,* the court held that a false statement is material if it ould have affected the course or outcome of the proceeding. [*Ly v State,* 931 S.W.2d 22 (1996)]

56. Texas courts require that claims of misleading prosecutorial statements (as is this case here) be supported by specific evidence (ie. photo evidence and law enforcement reorts)showing that the statements created a false impression. The court gave instruction on how to measure a false-evidence claim in that it must have a highly persuasive degree of evidence and an identifiable testimony that misleads the jury. *Ukwuachu v. State,* 613 S.W.3d 149 (2020).

57. *Ramirez v State* , instructs us (where the court found that the state's use of false testimony was knowing because the prosecutor was awar of the misleading nature of the testimony prior to trial. Magness knew Toarmina's testimony directly contridicted the physical evidence and the officer's reports. [*Ramirez v State,* 96 S.W.3 386 (2002).]

FINDINGS OF FACT AS TO APPLICANT'S GROUND TWO

"Applicant was denied the Effective Assistance of Counsel at the guilt/innocence stage"

58. Expert witness Rick Wetzel, testified that from the information provided him through Applicant's counsel

and through his legal experience trial counsel had a credible defense).

59. **24 Q Do you believe that Charles Brown had a sound trial 25 strategy?**
P.172
1 A. I do. I think he had a strategy in this case.
2 Q. And what was his strategy as you perceive it to be
3 from reading the record?
4 A. His strategy was to prove that the complainant was
5 killed accidentally during the course of the robbery and
that
6 the client was guilty of felony murder rather than capital
7 murder. (2 W.R. at 171, I. 24-25; 172,.1 I-7

60. Defense counsel's closing argument bears out witness Wetzel's evaluation of the defense's theory.

61. Defense counsel Charles Brown argued:

a. Where were the other two bullets if three shots were fired in the car (8 R.R. 17);

b. The pathologist's testimony supports that the gun discharged during a struggle (8 R.R. 17);

c. The presence of gunshot residue on Finkelman's hands means that his hands were on or near the gun when it discharged (8 R.R.16);

d. That applicant fired shots outside the car does not prove that he intended to kill Finkelman (8 R.R. 20); and

e. Applicant was guilty of felony murder because he caused Finkelman's death in the course of committing aggravated robbery without intending to kill Finkelman (8 R.R. 14, 16-17).

62. Witness Wetzel was asked a number of questions regarding trial counsel's failure to object at certain testimony thus undermining his defensive theory (2 W-H at 191 I. 5-13).

63. Trial counsel Charles Brown was ineffective.

CONCLUSIONS OF LAW
AS TO APPLICANT'S GROUND TWO

64. Special capital trial expertise is mandated by Texas Code Criminal Procedure.

65. CCP.*Art. 26.052 (2) The standards must require that a trial attorney appointed as lead counsel to a capital case:*

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

(C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during

the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

(D) have at least five years of criminal law experience;

(E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies; [emphasis added]

(F) have trial experience in:

(I) the use of and challenges to mental health or forensic expert witnesses; and

(ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.)

66. In 2006 Harris County, was in compliance with CCP 26.052 and had an approved capital attorney list and Charles Brown was approved on the list.

67. These Texas qualifications mirror the ABA guidelines and reasoning, for capital counsel.

68. The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment. (ABA Capital Guidelines Commentary p 923)

69. There are minimum standards of advocacy that must be met to ensure confidence in the verdict. Should the standard not be met, the Applicant's United State's Constitution 6th Amendment guarantee, of effective counsel is violated. This is most assuredly true in a capital murder trial.

70. The fact that trial counsel is deceased and did not avail himself of the opportunity to interface with Applicant's counsel in no way diminishes the fact that he qualified for the capital attorney list and thus had exhibited the proficiency statute mandated. More expertise was expected of Mr. Brown because of his capital qualifications.

Appendix B

71. A habeas applicant has the burden to prove that counsel performed deficiently and, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome"; it requires showing by less than a preponderance of the evidence that the result of the proceeding would have been different. *Id.* at 694.

72. *Greene v State*, [928 S.W.2d 119 (1996)] where counsel was found to be ineffective for impeaching his own witness is analogous to Applicant's trial counsel's questioning of State witness Payne and Investigator Guerrero.

73. Brown asked Payne whether he believed that applicant intended to kill Finkelman (6 R.R. 192). The trial court overruled Magness's objection to "speculation." Brown then asked, "What's your opinion?" Payne responded, "My opinion is that, yes, he tried to kill him after the struggle, yes, yes, sir." This questioning undermined the defense and violated the Applicant's right to effective assistance of counsel.

74. No sound strategy could have justified Brown eliciting this opinion, which harmed his defense (2 H.R.R. 174-75).

75. Guerrero testified, in essence, that he believed that applicant intended to kill Finkleman based on his investigation and witness interviews. Neither a lay nor an expert witness may properly testify to an opinion that a witness is telling the truth or lying. See *Schutz v. State*,

957 S.W.2d 52, 59 (Tex. Crim. App. 1997). A police officer cannot properly testify over objection to an opinion of this nature. See *Matter of G.M.P.,* 909 S.W.2d 198, 205-06 (Tex. App.—Houston [14th Dist.] 1995) (error to admit a detective's opinion that the complainant was telling the truth); cf. *Black v. State,* 634 S.W.2d 356, 357-58 (Tex. App.—Dallas 1982) (error to admit the opinion of a staff counselor at the rape crisis center that the complainant was telling the truth).

76. Brown's allowing such testimony to go unchallenged fell short of the exacting qualifications of a capital attorney, according to the standard set out in Harris County.

77. Brown performed deficiently by (1) failing to file a motion in limine, (2) eliciting Payne's inadmissible opinion that applicant intended to kill Finkelman, (3) failing to object to Taormina's inadmissible testimony that he no longer believed that the shooting was unintentional, and (4) eliciting Investigator Guerrero's inadmissible opinion that he believed Payne and that no evidence suggested that the shooting was unintentional. See *Weathersby v. State,* 627 S.W.2d 729, 730-31 (Tex. Crim. App. 1982) (counsel performed deficiently by failing to object to a detective's opinion that the defendant was guilty); *Garcia v. State,* 712 S.W.2d 249, 253 (Tex. App.—El Paso 1986) (counsel performed deficiently by failing to object to a detective's opinion that the witness was telling the truth). These deficiencies in performance alone require relief. Cf. *Miller v. State,* 757 S.W.2d 880, 883-85, (Tex. App.—Dallas 1988) (conviction reversed on direct appeal because counsel performed deficiently

78. "To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence ... has no strategic value." *Lyons v. McCotter,* 770 F.2d 529, 534 (5th Cir. 1985).

77. Counsel failed to object to, and did in fact elicited inadmissible opinion testimony that applicant intended to kill the deceased.

80. Applicant's trial record indicates an extraordinary number of evidentiary errors, that no legitimate trial strategy would support. Writ hearing witness Wetzil was questioned about a number of these errors. [see W.H. vol 2 173 - 181].

81. Mr. Brown's trial practice fell well below that of a qualified capital attorney.

82. Charles Brown was ineffective as Applicant's trial attorney and thus violated Applicants' due process right to effective assistance of counsel.

GROUND THREE

"THE CUMULATIVE PREJUDICE RESULTING FROM THE PROSECUTORIAL MISCONDUCT AND TRIAL COUNSEL'S DEFICIENT PERFORMANCE DENIED APPLICANT A FAIR AND IMPARTIAL TRIAL."

82. In *Koller v. State,* 518 S.W.2d 373 (Tex. Cr.App. 1975), this Court examined a case in which the prosecutor repeatedly referred to improper evidence. During examination of one of the witnesses, information came

out that a woman who had accompanied the defendant was a prostitute. We held this to be proper testimony because it tended to impute guilt through the associates of the defendant. *Id. at 377.* The State argued that this evidence was introduced accidentally as the result of an unresponsive answer to a question. We replied:

> *"Even if the first reference to the alleged occupation of the defendant's associate was,* as *the State now claims, the accidental result of an unresponsive answer, the renewed questioning cannot be termed as such."*

83. The sponsoring of character evidence through Finklinstein , was clearly inadmissible, was calculated to prejudice Applicant's rights *Gant v State,* 513 S.W.2d 13 (1974).

84. The combination of the calculated final argument reference to "never know...", with the knowingly sponsored inadmissible character evidence by Magness; the deficient performance (even at a rudimentary level , much less that of a lawyer "qualifed" for capital representation as was the case with Charles Brown) assuredly undermined the conviction. *See Chamberlain v. State,* 998 S.W.2d 230, 238 (Tex. Crim. App. 1999).

GROUND FOUR

"Applicant was denied the effective assistance of counsel on appeal"

85. Considering this Court's findings in Grounds One, Two and Three it is not necessary to address this issue.

Appendix B

LACHES

86. This court adopts Applicant's argument and findings on this issue as drafted in his "Applicant's Proposed Finding of Facts and Conclusions of Law".

87. A review of the totality of the representation afforded Applicant, establishes that his burden of proof has been satisfied in demonstrating that his right to a fair trial was abridged. *Strickland v Washington,* 466 U.S. 668, 690 (1984).

88. In all things, Applicant establishes that his conviction and sentence were improperly obtained, accordingly, Applicant is entitled to habeas relief in the form of a new trial.

Respectfully signed this 14th day of August, 2025

/s/ L Clay-Jackson
Lydia Clay-Jackson
Associate Judge Presiding
Harris County, Texas