

No. 25-884

IN THE
Supreme Court of the United States

DONTAE TERRELL MOORE,
Petitioner,

vs.

TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Dontae Terrell Moore was convicted of capital murder and sentenced to life without parole for killing Jonathan Finkelman during an attempted robbery. In state habeas proceedings, Moore alleged that the prosecution presented false testimony and made false statements during closing argument, but he expressly disclaimed any requirement that the prosecution *knew* the testimony and statements at argument were false. Instead, he relied on a broader state-law standard that dispenses with the knowledge element required by *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The state habeas trial court recommended relief on that basis. The Texas Court of Criminal Appeals (CCA) disagreed and denied relief in an unpublished, unreasoned order that does not reveal whether the court resolved the claim on the ground of falsity, prosecutorial knowledge, or materiality. Petitioner now asks this Court to assume the CCA found both falsity and knowledge in his favor, and vacate solely on the ground that the CCA applied an incorrect materiality standard—a standard petitioner identifies by contrasting the CCA’s use of “a reasonable likelihood” with *Glossip v. Oklahoma*’s reference to “any reasonable likelihood,” 604 U.S. 226, 246 (2025), even though both *Napue* and *Glossip* use these formulations interchangeably.

Should certiorari be granted to review an unpublished, unreasoned state habeas order where Moore failed to raise the knowledge element of a *Napue* claim below, the state court’s reasoning is unknown, and the purported conflict between the state court’s materiality standard and the standard set forth in *Glossip v. Oklahoma* is illusory?

PARTIES TO THE PROCEEDING

The Petitioner is Dontae Terrell Moore. The Respondent is the State of Texas. Because no party is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED CASES

State of Texas v. Moore, No. 1061081 (177th Dist. Ct. Harris County, Tex. Apr. 20, 2007) (convicted and sentenced to life without parole).

Moore v. State of Texas, No. 14-07-00366-CR, 2008 WL 4308424 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008), *rev'd* 2023 WL 4758682 (Tex. Crim. App. July 26, 2023).

Moore v. State of Texas, No. PD-1507-08 (Tex. Crim. App. Jan. 14, 2009) (petition for discretionary rev. dismissed as untimely filed), *rev'd sub nom, Ex parte Moore*, 2023 WL 2910727, (Tex. Crim. App. Apr. 12, 2023).

Ex parte Dontae Terrell Moore, No. WR-89,615-02, 2023 WL 2910727, (Tex. Crim. App. Apr. 12, 2023) (granting habeas corpus relief to file an out-of-time petition for discretionary rev.).

Moore v. State of Texas, No. PD-0239-23, 2023 WL 4758682 (Tex. Crim. App. July 26, 2023), *overruling* 2008 WL 4308424 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008) (remanding to appellate court).

Moore v. State of Texas, No. 14-07-00366-CR, 2024 WL 2284117 (Tex. App.—Houston [14th Dist.] May 21, 2024) (affirmed).

Ex parte Dontae Terrell Moore, No. WR-89,615-03, 2025 WL 3551933 (Tex. Crim. App. Dec. 11, 2025) (denying habeas corpus relief).

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BRIEF IN OPPOSITION

The Respondent (“the State”) respectfully submits this brief in opposition to the petition for a writ of certiorari (“Petition”) filed by Petitioner Dontae Terrell Moore.

INTRODUCTION

The Court should deny the Petition. Moore’s question is best addressed in federal courts through a habeas petition. Further, the CCA’s opinion is unpublished and does not establish state court precedent.

Moreover, Moore’s petition amounts to a request for error-correction in a single case. He asks the Court to presume the CCA found falsity and knowledge about the testimony and statements in his favor, and then infer that the CCA reached and rejected the materiality of the State’s evidence and argument, and, finally, conclude that the CCA applied the wrong standard in doing so. But the CCA’s unreasoned order provides no basis for any of those assumptions, let alone for the further inference that the CCA misapplied *Glossip*’s materiality standard. Certiorari is unwarranted.

OPINION BELOW

The CCA’s denial of Moore’s habeas application can be found under *Ex parte Moore*, No. WR-89,615-03, 2025 WL 3551933 (Tex. Crim. App. Dec. 11, 2025).

JURISDICTION

The CCA’s judgment denying habeas relief is a final judgment of the highest state court in which a decision

could be had, and this Court has jurisdiction under 28 U.S.C. § 1257(a). However, the Court’s jurisdiction to reach the *Napue* question Moore presents may be limited, because he expressly disclaimed the knowledge-of-falsity element below and no state court addressed it. *See Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

CONSTITUTIONAL PROVISION INVOLVED

The Question Presented concerns the Fourteenth Amendment right to due process as described in *Napue v. Illinois*, 360 U.S. 264 (1959).

STATEMENT OF THE CASE

I. Facts from Moore’s Capital Murder Trial

Jonathan Finkelman was killed during a drug transaction between him and Moore, which was conducted in Finkelman’s vehicle with Finkelman, Finkelman’s friend Mark Taormina, Moore, and Moore’s acquaintance Warren Payne inside. *Moore v. State*, No. 14-07-00366-CR, 2008 WL 4308424, at *1 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008), *rev’d*, No. PD-0239-23, 2023 WL 4758682 (Tex. Crim. App. July 26, 2023). Witnesses at trial testified to “[d]ifferent accounts of the events” that evening surrounding the drug purchase. *Id.*

Payne testified that Moore had “brandished a silver gun” when Finkelman asked for payment for the drugs. *Id.* He saw the gun discharge once, exited the car, then

fled after hearing two or three additional gunshots and saw Finkelman's "body 'jerk' forward." *Id.*

Taormina testified he saw Moore "aim[a] gun in the vicinity of Finkelman's head and demanded the drugs." *Id.* Taormina fled the vehicle after he saw both men "struggle[] for control of the gun," which discharged once, and then he heard two or three shots fired, one of which hit Finkelman. *Id.* As Taormina was escaping, he saw Moore exit Finkelman's car, open the driver-side door, and "rummage through Finkelman's clothing."¹ *Id.* Taormina testified Moore then pointed the gun at him "and told him to keep walking," and he heard additional shots fired.

Eyewitness Matthew Prall testified that Moore and Moore's friend Payne spent "five to ten minutes" in Finkelman's car before Prall "heard a gunshot from within the car." *Id.* He testified that he then saw both Payne and Taormina rush out of the vehicle, witnessed Moore threatening Taormina, then heard "three to four more gunshots outside of the vehicle and saw [Moore] shoot at Payne." *Id.*

Moore also testified in his own defense. He attested that he and Finkelman discussed the price of the drugs he was purchasing while they were in Finkelman's car, but he did not have enough money to pay for them. *Id.* at *2. Moore then left but returned with a friend's gun, pointing it at Finkelman to "scare" him. *Id.* A struggle ensued after Finkelman grabbed the gun, during which Moore had his finger "pressed against the gun's trigger," and the gun discharged the only shot fired

¹ Finkelman's wallet was never found. *Id.* at *2

inside Finkelman’s car. *Id.* Eventually, Moore fled after Payne and Taormina ran outside the vehicle, then “returned fire, emptying the gun” after he heard gunshots while he was running away. *Id.*

II. Procedural History of Moore’s Criminal Appeal and State Habeas Proceedings

A. Procedural history

The Fourteenth Court of Appeals of Texas affirmed Moore’s conviction on appeal. *Moore*, 2008 WL 4308424, at *1. Moore filed a petition for discretionary review (“PDR”) which the CCA dismissed as untimely. *Moore v. State of Texas*, No. PD-1507-08 (Tex. Crim. App. Feb. 6, 2009). Fourteen years later, the CCA granted Moore leave to file an out-of-time PDR, finding his appellate counsel was ineffective for failing to timely file Moore’s PDR in 2008. *Ex parte Moore*, No. WR-89,615-02, 2023 WL 2910727 (Tex. Crim. App. Apr. 12, 2023).

Moore filed a now-timely PDR, “in which he contend[ed] that the court of appeals erred in refusing to address the merits of his claims.” *Moore v. State of Texas*, No. PD-0239-23, 2023 WL 4758682, at *1 (Tex. Crim. App. July 26, 2023). The CCA ultimately agreed with Moore and vacated the intermediate appellate court’s 2008 judgment affirming his conviction. *Id.* at *2. The CCA then remanded the case for that court to address two points of error raised in Moore’s original appeal. *Id.*

On remand, the Fourteenth Court of Appeals again affirmed Moore’s conviction. *Moore v. State of Texas*, No. 14-07-00366-CR, 2024 WL 2284117 (Tex. App.—Houston [14th Dist.] May 21, 2024, no pet.). Following that affirmation, Moore filed a state application for

habeas corpus, which the CCA denied in an unreasoned, unpublished opinion. *Ex parte Moore*, 2025 WL 3551933. Moore then filed this petition for certiorari before the Court.

B. Moore’s most recent state postconviction proceedings

Among several claims raised in his most recent state habeas application, Moore alleged the State presented false testimony when it allowed Taormina to testify without correction that the decedent had reached for and struggled over Moore’s gun, the gun accidentally discharged once during the struggle *without* striking the decedent, and Moore then fired off two additional shots. Resp’t App. 2a–3a. Moore alleged this was false because an unnamed party had informed him that Taormina, after trial, had told the unnamed individual that the first discharged shot had killed Finkelman. *Id.* at 3a, 9b–10b.

But when Moore raised this “false testimony” claim below, he expressly disclaimed any requirement that he must show “that the prosecutor knew that the testimony was false or misleading to obtain relief.” Resp’t App. 2b–3b (citing *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009)). He applied “[t]he same principles” to his false-statements claim. *Id.* at 4b–5b (citing *Miller v. Pate*, 386 U.S. 1 (1967); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993); *Walker v. State*, 624 P.2d 687, 691 (Utah 1981)).

Moore also alleged the State presented two false statements during closing argument. Resp’t App. at 4a, 13b–17b. First, Moore argued the State falsely

summarized their witness Prall's testimony as multiple shots were fired in the car when Prall had testified shots were fired outside the car, after the initial discharge inside the car. *Id.* at 4a, 16b. Instead, Moore asserted the Houston Police Department police reports conflict with that testimony because they indicate that one shot was fired in the car, but no bullets, bullet strikes, or broken windows were observed, nor was there supporting evidence to show Moore fired two gunshots at the decedent after the gun had first discharged. *Id.* at 4a, 13b–16b. Thus, according to Moore, the State necessarily presented a false statement at argument. *Id.*

Moore also alleged in his state habeas application the State falsely told the jury they “would never know whether there were ‘additional bullet strikes’” because an officer on the crime scene was medically unable to testify and no other officer had that information. *Id.* at 4a. Moore claimed that statement was false because the State knew the vehicle had been examined and processed at the scene by two other officers who had not observed any bullet strikes. *Id.* at 4a, 16b.

Relatedly, former prosecutor Mia Magness submitted an affidavit and a supplemental affidavit responding to Moore's claims. *See, e.g., id.* at 8c–9c, 19c–26c.

The state habeas trial court eventually held an evidentiary hearing in which several witnesses testified. Moore called three witnesses: Finkelman's uncle; former prosecutor Magness; and his expert witness on ineffective assistance of counsel. *Id.* at 2c–31c. The State called one witness, Taormina. *Id.* at 1c, 33c–39c.

Finkelman's uncle testified that he briefly spoke with Taormina at Finkelman's funeral, and affirmed that Taormina had told him that "a black male put a gun to [Finkelman]'s head and demanded drugs or money," Finkelman "went for the gun," and the "gun discharged and [Finkelman] was killed"—but Taormina did not "say anything about the first shot missed [Finkelman] and two more shots were fired in the car." Resp't Appx. at 3c–5c. Finkelman's uncle then testified he had "attended the end of the sentencing" at Moore's trial, but denied hearing the State's closing argument that included the statement "about three shots being fired in the car, the last two deliberately[.]" *Id.* at 5c.

Former prosecutor Magness testified to her actions and underlying intentions, objectives, and strategy during trial, including during closing argument at trial, related to how many shots were fired in the car where the drug transaction had occurred. She affirmed she had misstated in her closing argument how many shots Prall had testified were fired in the vehicle, but that her misstatement was unintentional. *Id.* at 17c–26c. She also denied wanting to leave an impression with the jury that an officer "could have testified to two other bullet strikes, but [she] couldn't call him, so the jury would never know[.]" *Id.* at 13c, 15c. Instead, she explained that she "wanted the jury to make their decision [about the number of bullet strikes] based on the evidence presented in the courtroom and not to speculate as to what any witness who was not called would say." *Id.* at 9c–10c, 13c–14c, 28c–30c. The state habeas trial court questioned Magness about "why bring up a witness who was unavailable," thus "highlight[ing] the fact that he . . . had no testimony for

them to consider?” Resp’t App. at 14c. Magness answered that she “was going through the charge and explaining the various admonitions in the charge . . . relating it to the facts presented at trial.” *Id.* at 15c.

Former prosecutor Magness also testified about the affidavits she had provided earlier in Moore’s state habeas proceeding, pertaining to her unintentional misstatement of Prall’s testimony in her closing argument. *Id.* at 17c–28c. She denied her statement was false, but just her “recollection of his testimony was not correct,” based on the likelihood she “had used trial notes to draft [her] closing argument,” as she had previously attested. *Id.* at 19c–20c. Upon questioning by Moore’s state habeas counsel, she stated that her statement regarding using her trial notes for argument wasn’t false, but that it “didn’t occur to [her] to ask” to review her trial notes before executing her affidavit where she attested “[i]t appears I made a mistake when I made notes regarding Matthew Prall’s testimony during trial.” *Id.* at 21c–25c.

Taormina, Finkelman’s friend, testified at the state habeas evidentiary hearing that he was with his friend, Finkelman, the night that he was murdered. *Id.* at 34c. He recalled that he knew Finkelman’s uncle at the time of Finkelman’s funeral but did not specifically recall having a conversation with him. *Id.* at 33c–35c. Taormina also testified that, even after reading the affidavit submitted by Finkelman’s uncle during Moore’s state habeas proceeding, he did not doubt his testimony given at trial because he has “relived that night in [his] head thousands—hundreds of thousands and millions of times and still remember it the same”—including that three shots were fired in the car. *Id.* at

35c–36c. He also affirmed that the offense report and his testimony at trial would be the most accurate. *Id.* at 38c–39c.

The trial court later entered its findings and conclusions, which included a comparison of Magness’s trial notes to her closing argument and her confusion about the facts; Magness deliberately misled the jury about the evidence regarding how many shots were fired in the car; evidence presented at trial did not support her closing argument statements; her statement that Moore intentionally fired his gun after one shot had missed Finkelman during their struggle over the gun was false; her statement that Prall testified that multiple shots were fired in the car was false; and she “offered Mark Taormina 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;” and she was not a credible witness. Pet. App. at 9a (¶¶ 33–35), 10a–14a (¶¶ 37–48).

Relevant to Moore’s petition here, the trial court entered conclusions which included that Moore was harmed by “the State’s failure to correct testimony it knew or should have known to be false,” and “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;” Taormina’s testimony about the number of shots was not supported, and was contradicted by, evidence presented at trial; and those statements were material. Pet. App. at 15a (¶¶ 52–54).

The State filed objections to these findings and conclusions, noting that the trial court's obvious distrust of Magness was evident before the hearing began; that habeas counsel had raised questions that were not founded in the trial record, which the trial court later used as one basis to find Magness "lacked preparedness;" the trial court denied Magness the opportunity to show candor to counteract the trial court's finding that Magness lacked candor; Magness was unprofessionally questioned by habeas counsel and subjected to critical, condescending commentary by the trial court that was accompanied by "despising facial expressions," which the trial court impliedly admitted in stating "the expressions you definitely see on my face sort of mirror what I'm thinking;" observations of the trial court's demeanor were not reflected in the cold record, and which "may have had a chilling effect on Magness'[s] ability to testify fully and without intimidation." Resp't. App. at 1e–10e. The State also argued there was no credible evidence of false testimony, nor credible evidence to support the State intentionally presented false statements at closing argument, or that such statements were materially prejudicial. *Id.* at 11e–15e.

The CCA denied Moore's application in a written order, upon review of the trial court's findings of facts and its own review of the record, without explicitly sharing a determination of whether the testimony and statements were false, whether the State presented those with the knowledge they were false, and whether the testimony and statements were material.

Moore now seeks a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Court should deny the petition for three independent reasons. First, Moore did not raise a complete *Napue* claim below. He expressly disclaimed the requirement that the prosecution knowingly presented false testimony, instead relying on a broader state-law standard. The CCA was never asked to address—and never addressed—the knowledge element that *Napue* requires. The Court should not grant certiorari to review the application of a standard that was never invoked.

Second, the CCA’s unpublished, unreasoned order provides no analysis for this Court to review. Moore’s petition rests on a chain of assumptions: that the CCA found the testimony and argument were false, that the CCA found the State knew they were false, and that the CCA then reached and rejected materiality. But the order says none of these things, and the Court should not grant certiorari to review reasoning that does not exist.

Third, even on the merits, the purported conflict between the CCA’s materiality standard and *Glossip*’s is illusory. Both *Napue* and *Glossip* use “a reasonable likelihood” and “any reasonable likelihood” interchangeably, and *Glossip* did not announce a new standard. Moore’s case is a poor vehicle to resolve a distinction that does not exist. In any event, a federal habeas proceeding is the more appropriate avenue for review of Moore’s constitutional claims at this stage of litigation.

ARGUMENT

I. The Court Should Deny Certiorari for Moore’s Claim of False Testimony Because He Failed to Raise a *Napue*-Claim Below, and The Courts Did Not Address It.

Moore’s *Napue* claim pertaining to Taormina’s testimony is not properly before the Court because it was neither raised in its entirety nor addressed below. Again, Moore failed to allege and prove up one of the three *Napue* factors to demonstrate a violation of due process, given that he disclaimed the requirement that the State “*knowingly* solicited false testimony or *knowingly* allowed it ‘to go uncorrected when it appear[ed].’” Resp’t App. at 2b–3b; *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025) (quoting *Napue*, 360 U.S. at 269) (emphasis added) (alteration in original)). And now, Moore argues that the CCA erred when it rejected his supposed-*Napue* claim on the basis that it failed to use the “*materiality*” standard set forth in *Glossip v. Oklahoma*. Pet. at i. While he raised a materiality claim below, Resp’t App. at 17b–18b, the absent and disclaimed requisite “knowing” factor renders the jurisdiction of this Court over Moore’s false-testimony claim questionable, at best.

Nearly twenty years ago, the CCA created a stricter due process analysis than the Court set out in *Napue*, dispensing with the “knowing” requirement in the State’s use of false and material testimony. See *Ex parte Ghahremani*, 332 S.W.3d 470, 478 & n.17 (Tex. Crim. App. 2011) (citing *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009)). But this Court has never recognized such a claim. In *Cash v. Maxwell*, Justice

Scalia reiterated that the Supreme Court has “never held” that the unknowing use of false testimony violates the Due Process Clause and that it is “unlikely ever to do so.” 565 U.S. 1138, 1145 (2012) (Scalia, J., joined by Alito, J., dissenting from denial of certiorari) (“All we have held is that ‘a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.’”) (quoting *Napue*, 360 U.S. at 269); see *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir. 2011) (“[T]he Supreme Court has held that the Due Process Clause is violated when the government *knowingly* uses *perjured testimony* to obtain a conviction.”) (emphasis added).

In his memorandum supporting his state habeas application, Moore relied on *Chabot* to support his claim of false testimony, with a mere passing reference to *Giglio v. United States*, 405 U.S. 150, 154 (1972). Resp’t App. at 2b–3b. Even more telling that he did not allege a true *Napue* claim, Moore directly argued that “he need not show that the prosecutor knew that the testimony was false or misleading to obtain relief,” and that the same principles of false testimony apply to false arguments. *Id.* at 2b–5b (citing *Chabot*, 300 S.W.3d at 771; *Miller*, 386 U.S. 1; *Brown*, 951 F.2d 1011; *Kojayan*, 8 F.3d at 132; *Walker*, 624 P.2d at 691).

He submitted these same arguments to the state habeas trial court in his Proposed Findings of Fact and Conclusions of Law. Resp’t App. at 1d–4d (¶¶24–26). The state habeas trial court agreed that, under state law, Moore need not demonstrate that “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.” Pet. App. at 15a

(¶52). Thus, when the CCA ultimately denied Moore’s “false testimony” claims, it did so without an opportunity to pass upon *Napue*’s requirement that the prosecution *knows* a given witness’s testimony was false.

In essence, when he disclaimed *Napue*’s “knowledge” requirement with his direct statement and reference to *Ex parte Chabot*, Moore did not raise—and the state habeas trial court did not recommend granting relief for—a true *Napue* violation. Given Moore’s argument and the state habeas court’s findings, in addition to the CCA’s unreasoned opinion denying Moore habeas relief, the Court may not review Moore’s instant false-testimony claim, which is ultimately grounded in state law. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (“[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.”); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) (“Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.”).

With “very rare exceptions,” the Court has adhered to the rule that it will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee*, 503 U.S. at 533).

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and

the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.

Id. at 86–87 (emphasis added). Although the Court has not yet resolved whether the failure to raise all of the elements of a constitutional claim in the state courts is jurisdictional, it might be. *Yee*, 503 U.S. at 533. Because Moore disclaimed any requirement that he demonstrate prosecutorial knowledge of falsity, and because the state courts were silent on that issue, the Court may lack jurisdiction to consider the first Question Presented under *Yee* regarding Moore’s claim of false testimony.

Even if the principles in *Adams* and *Yee* are merely prudential, there are good reasons for prudence here.² Where neither party is challenging or defending the CCA’s decision to expand the protections of the Due Process Clause to a prosecutor’s *unknowing* use of false

² Even if Moore’s failure to properly raise this claim below is not jurisdictional, such a failing does inform the Court’s decision to grant certiorari. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383–84 (1989) (“[T]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.”). The State does not waive this defect, rather, the State cites the defect and urges this Court to deny review for this reason. *See id.* at 384 (“Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent’s brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived.”).

and material testimony,³ it will be difficult for the Court to reach the Question Presented. *See Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 138 (1977) (“[B]ecause issues of ripeness involve, at least in part, the existence of a live ‘Case or Controversy,’ we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the ‘Case or Controversy’ sense.”). Certainly, the Question Presented regarding false testimony is not mature for consideration, and this Court should exercise judicial restraint and decline Moore’s invitation to resolve antecedent constitutional questions by fiat.

II. The Question Presented Is Premature and Is More Appropriate for Federal Habeas Review.

Rule 10 provides that certiorari review is not a matter of right, but of judicial discretion, and will be granted only when special and important reasons are presented. *See* Sup. Ct. R. 10. Moore has not shown that his petition pertaining to both false evidence and false testimony is worthy of review under Rule 10, particularly when a more appropriate avenue for review exists.

Certiorari review of state habeas decisions is generally inappropriate where a claim is ripe for federal habeas review. Indeed, the Court’s review is “rarely

³ The State did not cross appeal in this case and has made no effort to invoke the Court’s jurisdiction to reverse the CCA’s holding in *Ex parte Chabot*. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) (demonstrating that a state may invoke the Court’s jurisdiction to reverse a state court’s expansive interpretation of the Constitution).

grant[ed]” at this litigation stage since “the more appropriate avenue[]for consideration of federal constitutional claims”—even those that are potentially meritorious—is “usually deem[ed]” to be a federal habeas proceeding. *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J. concurring). As Justice Stevens articulated, a federal district court is better situated to review Moore’s constitutional challenges by way of a petition for habeas relief, rather than the Court review the CCA’s denial of habeas relief. Prudence calls for the Court to deny certiorari.

III. Moore Presents No Compelling Reason for the Court to Review His Question Presented that Arises from an Unpublished, Unreasoned Opinion.

Moore fails to present this Court with a question that compels the Court to grant review of the CCA’s unreasoned determination to deny Moore habeas relief. Moore glosses over the lack of precedential value of the CCA’s unpublished opinion when he contends that the court below misapplied the *Napue* standard for “materiality” of false testimony and false statements presented at trial, known to be false.⁴ Moreover, because the CCA did not detail its reasoning behind its decision

⁴ “*Napue* establishes that ‘a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction.’ If a witness gives false testimony, which the prosecutor knows to be false but fails to correct, then a new trial is warranted if there is ‘any reasonable likelihood’ that the false testimony could ‘have affected the judgment of the jury.’” *Glossip*, 604 U.S. at 285–86 (Thomas, J., joined by Alito, J., and by Barrett, J. (in part), dissenting from denial of certiorari) (quoting *Napue*, 360 U.S. at 269, 270–71).

to deny habeas relief, there is nothing substantive for the Court to review, should certiorari be granted. Lastly, for the Court to determine the correctness of the CCA's application of *Napue*, the Court must make assumptions to begin its analysis; such an undertaking diminishes the authoritativeness of any opinion issued in the case at bar. For these reasons, certiorari should not be granted.

A. The CCA's unpublished opinion renders Moore's petition unworthy of review.

First, an unpublished opinion does not create binding authority; at best, it may provide guidance in resolving similar issues raised in the highest state court of review. But here, there is not even dicta in the CCA's opinion that could guide future decisions. *See Ex parte Moore*, 2025 WL 3551933 at *1. Instead, the CCA simply stated that it “disagree[d]” with the trial court's recommendation that habeas relief should be granted, owing to Moore's trial counsel and the State having violated his due process rights under *Napue*. Regardless, because the CCA's opinion is unpublished and provides no legal analysis upon which this Court can shape legal landscaping, Moore has not shown his petition is worthy of review.

B. Moore's question before the Court is based upon assumptions of the CCA's actions, which thus disfavor granting certiorari.

Moore asserts that the CCA misapplied this Court's precedent on materiality under *Napue*, as reiterated in *Glossip*. Petition at 16–21. In support, he shares his assumptions that the CCA ultimately determined that

the State presented false evidence and statements at closing argument that it knew were false, and implies that the CCA properly arrived at those conclusions. *See* Petition at i. But again, the CCA did not provide a reasoned opinion beyond its explicit rejection of the trial court’s recommendation to grant Moore habeas relief on these grounds. Moore cannot show he presents a question worthy of this Court’s review when the Court would be required to presume the CCA determined two of three *Napue* factors in Moore’s favor.

In starting off his argument that the Court should grant certiorari on his *Napue* claims, Moore admits that the CCA “did not even hint at why it denied relief.” Petition at 14. Indeed, in its opinion, the CCA recognized that the trial court had “made findings and conclusions, recommending [the CCA] grant [Moore] habeas relief,” but only stated that it “disagree[d]” with that recommendation.” *Ex parte Moore*, 2025 WL 3551933 at *1. The CCA continued that it determined Moore’s due process claims were “without merit,” after it had “consider[ed] the trial court’s findings and conclusions, as well as conduct[ed] [its] own independent review of the record.” *Id.*

The absence of an articulated legal analysis means there is nothing but conjecture about a large portion of the CCA’s ruling for this Court to review Moore’s question presented. More specifically, prior to reaching Moore’s materiality issues, the Court is required to rest its analysis upon the presumption that the CCA determined Taormina’s testimony was false, the State’s erroneous statements at closing argument were false, and the State presented such testimony and argument at closing, *knowing* those to be false. But such

presumptions create a structurally flawed foundation when creating guidance for applying the well-established *Napue* standard for materiality.

Specifically, Moore openly shares that he presumes the CCA determined that Taormina’s testimony and two of the State’s statements at closing argument were false and misleading. Petition at 14. Moore follows this with citing *Glossip*’s reiteration of the *Napue* factors—“that due process is violated when a prosecutor knowingly uses or fails to correct false testimony that was ‘material.’” Pet. at 16. However, Moore does not contend that the CCA *determined* the State presented testimony and statements which they *knew* were false. Petition at 14–15. Rather, he skips over that prong and forges ahead on the presumed conclusion that the CCA resolved falsity under *Napue* in his favor. He then purports that the court necessarily reached and rejected the materiality of Taormina’s testimony and the State’s arguments at closing. But without connecting and addressing both the “false” and “knowing” factors under *Napue*, Moore has not met his burden to show his petition for certiorari should be reviewed.

Further, Moore does not cite a CCA case with a nearly-summary opinion that denies habeas relief as in the instant case. The only case Moore cites that approaches the brevity of the lower court’s opinion is *Ex parte Warner*, Nos. WR-96,439-01 & WR-96,439-02, 2025 WL 2408707 (Tex. Crim. App. Aug. 20, 2025). Petition at 17 n.11. But even in that case, the CCA expanded upon its mere “disagree[ment]” with the trial court’s recommendation for relief, explaining in a single sentence that it found Warner had “not established that the complained of testimony was material to his

convictions.” *Id.* at *1. Accordingly, the Court need not address whether the CCA has previously applied “material” as set out in *Napue* and reiterated in *Glossip* in a manner that differs from the federal due process standard, as the CCA did not state which, if any, prong under *Napue* was established.

For the above reasons, this Court should deny reviewing Moore’s petition.

C. Alternatively, the CCA’s use of a purportedly different standard of *Napue*’s materiality, as reiterated in *Glossip*, is illusory.

Again, Moore alleges the CCA “applied a ‘materiality’ standard clearly different from the standard set forth in *Glossip*.” Petition at 17. He attempts to draw a distinction between the CCA’s use of “*a* reasonable likelihood” that the use of false testimony and at closing argument affected the judgment of the jury, rather than *Glossip*’s use of “*any* reasonable likelihood.” Petition at 17–19, quoting *Ex parte Carter*, 721 S.W.3d 341, 361 (Tex. Crim. App. 2025) & *Ex parte Weinstein*, 421 S.W.3d 656, 664–65 (Tex. Crim. App. 2013) (emphasis added). In support of his argument, Moore quotes the concurring opinion of Judge Finley in the CCA, who posited that the CCA “applies a different materiality standard” than that restated in *Glossip* because of the CCA’s use of “*a*” versus “*any*” reasonable likelihood. Petition at 20 (citing *Ex parte Warner*, 721 S.W.3d 436, 447–48 (Tex. Crim. App. 2025) (Finley, J., concurring) (emphasis added)).

But the *Glossip* Court did not announce a new rule for determining materiality.

In *Glossip*, this Court continuously cited *Napue* in its materiality analysis. 604 U.S. at 248–56. Further, when examining whether the testimony at issue was material, the Court determined it was material because there was “a reasonable likelihood that correcting [the witness’s] testimony would have affected the judgment of the jury.” *Glossip*, 604 U.S. at 228–29 (citing *Napue*, 360 U.S. at 271 (emphasis added)). Thus, at this point, the distinction between “a” and “any” reason likelihood is illusory, or at least not well-established, and Moore’s case is a poor vehicle to resolve a potential distinction between these articles.

Moreover, as stated above, the CCA did not provide its reasoning behind the decision to deny Moore relief on his claims of a due process violation in relation to *Napue*. The order simply stated, “We disagree,” after recognizing the trial court entered findings of fact and conclusions of law, underlying its recommendation to the CCA to grant habeas relief upon Moore’s *Napue* claims. *Ex parte Moore*, 2025 WL 3551933 at *1. And, since the CCA is the “ultimate fact finder,” *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017), it was not required to explicitly reject part, or all, of the recommendations, simply to indicate it had not adopted them. *See, e.g., Ex parte Reed*, 271 S.W.3d 698, 728 (Tex. Crim. App. 2008).

For these reasons, Moore’s petition is unworthy of the Court’s review.

D. In the Final Alternative, Moore’s Claim Regarding False Statements at Argument Is Not Worthy of Review Because There Is No Established Due Process Violation and This Is a Poor Vehicle To Do So.

This Court has not decided that, as Moore argues here, a due process violation under *Napue* occurs when the State purportedly presents false statements at argument. This case makes a poor vehicle to extend such a rule, given its distinction from the sole case cited by Moore for whether a false statement made at the State’s closing argument violated a defendant’s right to due process. *Miller v. Pate*, 386 U.S. 1 (1967), cited in Pet. at 16–17.

In *Miller*, the State *admitted it had known* the evidence they presented at trial misled the jury because it was unfounded in its investigation. There, the State had presented an exhibit of “a pair of men’s underwear shorts covered with large, dark, reddish brown stains,” and State witnesses had referred to those shorts as “bloody” or “stained with blood.” *Id.* at 3. Additionally, the State presented testimony from the decedent’s mother about her daughter’s blood type, which differed from Miller’s blood-type. *Id.* at 4. Lastly, an expert witness testified that he twice tested the stains, and concluded the stains were bloodstains. *Id.*

But testing at the evidentiary stage of Miller’s state habeas proceeding revealed the stains were paint stains—and the State “*had known at the time of the trial that the shorts were stained with paint,*” admitted that a police memorandum was prepared to explain the presence of paint on those shorts, and “contended [at Miller’s state habeas hearing] that ‘(e)verybody’ at the

trial had known that the shorts were stained with paint.” *Id.* at 5–6. Further, “[t]he prosecution’s whole theory with respect to [the shorts] depended upon” the deliberate misrepresentation of the paint stains as bloodstains. *Id.* at 6.

In contrast here, the State has consistently and explicitly maintained that the references in its closing argument to Prall’s testimony, the number of bullet strikes, and the unavailability of one of the investigating officers were not intended to mislead the jury. Resp’t App. at 9c–11c, 13c–16c, 22c–25c. The State also elicited at Moore’s state habeas hearing that, while former prosecutor Magness “admitted [she] misstated what [Prall] said,” the jury also had for their consideration Prall’s testimony, the officers’ testimony about the bullet strikes, “two witnesses who said there were multiple shots inside the car,” and Moore’s testimony that “there was one shot inside the car.” *Id.* at 30c, 29c.

Unlike here, *Miller* involved a prosecutor who knowingly built the State’s entire theory of guilt on fabricated physical evidence—a deliberate fraud on the court. Here, by contrast, the State has consistently maintained that any misstatement at closing was inadvertent, and the jury heard the underlying testimony for itself. Whatever the trial court’s credibility findings, Moore’s case bears no resemblance to the kind of deliberate prosecutorial deception at issue in *Miller*, and it is a poor vehicle for extending *Napue*’s protections to purportedly false statements made during closing argument.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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No. 25-884

IN THE
Supreme Court of the United States

DONTAE TERRELL MOORE,
Petitioner,

vs.

TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S APPENDICES

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Respondent's Appendix A

**(Excerpts from Petitioner's Tex. Code Crim.
Proc. Art. 11.07 Form Habeas Application)**

Resp't App. 1a

Marilyn Burgess – District Clerk Harris County
Envelope No. 88776788
By: Bryan Hudson
Filed: 6/13/2024 2:22pm

Case No. 10610810101B

(The district clerk of the county of conviction will fill in
this blank.)

**IN THE COURT OF CRIMINAL APPEALS OF
TEXAS APPLICATION FOR A WRIT OF HABEAS
CORPUS SEEKING RELIEF FROM FINAL FELONY
CONVICTION UNDER CODE OF CRIMINAL
PROCEDURE ARTICLE 11.07**

NAME: [DONTAE TERRELL MOORE] _____

DATE OF BIRTH: [6-29-87] _____

PLACE OF CONFINEMENT: [POLUNSKY UNIT]

WARDEN: [RONALD IVEY] _____

TDCJ-CID NUMBER: [1433301] _____

SID NUMBER: [07689842] _____

(1) This application concerns (check all that apply):

- | | |
|--|--|
| ☒ a conviction | ☐ parole |
| ☐ a sentence | ☐ mandatory supervision |
| ☐ time credit | ☒ out-of-time appeal or petition for
petition of discretionary review |

(2) What are the court number and county of the district court in which you were convicted?

[177th District Court of Harris County]

(3) What was the case number in the trial court? (Put only one case number here, even if it includes multiple counts. You must make a separate application on a separate form for other case numbers.) [1061081]

(4) What was the name of the trial judge?

[Devon Anderson]

...

GROUND ONE:

THE STATE PRESENTED FALSE TESTIMONY AND
MADE FALSE STATEMENTS DURING CLOSING
ARGUMENTS.

FACTS SUPPORTING GROUND ONE:

Mark Taormina testified that he and Jonathan
Finkelman were engaged in a drug deal with applicant and
Warren Payne in Finkelman's car when applicant put a gun
to Finkelman's head and demanded the drugs. Finkelman
threw his arm at the gun, they struggled over it, and

it discharged, but Finkelman was not shot. Applicant then fired two more shots, one of which killed Finkelman. The State conceded that the first shot was fired accidentally but argued that applicant was guilty of capital murder because he intentionally fired two more shots and killed Finkelman.

An anonymous person (the CS), after depositing funds in applicant's inmate trust account for many years, sent a letter to applicant in 2022, disclosed his name, and asked applicant to place him on a visitation or telephone list so he could send more money. They eventually spoke. The CS told applicant that Taormina had told him before anyone was arrested that Finkelman went for the gun, it had discharged, and Finkelman was killed. The CS said that he had attended part of the trial and knew that applicant had been convicted of capital murder based on false testimony. He sent money to applicant for years because he was "eaten up with guilt" that he did not speak up at the time. Ultimately, the CS spoke to applicant's habeas counsel and has provided an affidavit regarding his conversation with Finkelman.

Matthew Prall, who watched the events unfold while seated in bleachers in the park, testified that he heard one shot fired inside the car and three or four additional shots fired outside the car. The prosecutor made the false statement during her closing argument that Prall had testified that multiple shots were fired in the car.

The HPD Incident Report confirms that only one shot was fired in the car. Two officers examined the interior of the car at the scene and observed that all the windows were rolled up and there were no bullets, bullet strikes, or broken windows. The fatal bullet was found in Finkelman's head during the autopsy. No physical evidence supports that applicant intentionally fired two more shots at Finkelman, and that the second or third shot killed him.

The prosecutor made the false statement during her closing argument that the jury would never know whether there were "additional bullet strikes" found in the car because the crime scene officer had a stroke, could not testify, and no other officer had that information. The prosecutor knew that two other officers had examined and processed the car at the scene and did not observe any bullet strikes.

Resp't App. 5a

Thus, the State presented false testimony and false arguments that caused applicant to be convicted of capital murder instead of felony murder.

...

*[Remainder of Application and Signature Pages
Omitted]*

Respondent's Appendix B

**(Excerpts from Petitioner's
Brief in Support of Application for
a Writ of Habeas Corpus)**

Resp't App. 1b

6/13/2024 2:22 PM
Marilyn Burgess – District Clerk
Harris County
Envelope No. 88776788
By: Bryan Hudson
Filed: 6/13/2024 2:22 PM

**IN THE 177TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS**

EX PARTE

§
§
§

CAUSE NO. 1061081-B

DONTAE TERRELL MOORE

**BRIEF IN SUPPORT OF APPLICATION FOR A
WRIT OF HABEAS CORPUS**

Randy Schaffer, P.C.
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DONTAE TERRELL MOORE

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 ABOUT THE EVIDENCE DURING HER CLOSING ARGUMENT.

A. The Standard Of Review

The prosecutor's use of false or misleading testimony violates the Due Process Clause of the United States Constitution. U.S. CONST. amends, V and XIV; Giglio v. United States, 405 U.S, 150, 154 (1972) (conviction reversed because prosecutor used false testimony that key witness would not receive leniency for testimony); Ex parte Adams, 768 S.W.2d 281, 288-89 (Tex, Crim. App. 1989) (habeas relief granted because prosecutor used false testimony that witness identified defendant in lineup).

The defendant must show that the testimony was false or misleading and was material. However, he need not show that the prosecutor knew that the testimony was false or misleading to obtain relief. Ex parte Chabot,

300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (habeas relief granted because accomplice witness testified falsely, without prosecutor's knowledge, that he did not sexually assault or harm

[Page 10]

victim, that he acted under duress, and that he was in another room when she was sexually assaulted and murdered); Estrada v. State, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010) (death sentence reversed because prosecution expert testified falsely that inmates sentenced to life without parole for capital murder could obtain less restrictive prison classification after ten years, which conflicted with testimony of defense expert).

A showing of materiality does not require the defendant to prove that impeachment of the false testimony would have resulted in an acquittal or a conviction for a lesser offense. A conviction must be reversed if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Napue v. Illinois, 360 U.S. 264, 271-72 (1959); United States v. Agurs, 427 U.S. 97, 103 (1976). That

materiality standard is equivalent to the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967). Thus, reversal is required unless the State proves beyond a reasonable doubt that the false testimony did not “contribute” to the conviction. See United States v. Bagley, 473 U.S. 667, 679-80 & n.9 (1985).¹⁰

The same principles apply when the prosecutor made material false statements during her closing argument. Miller v. Pate, 386 U.S. 1, 6 (1967) (conviction

¹⁰ Accord Ex parte Reed, 670 S.W.3d 689, 767 (Tex. Crim. App. 2023); Ex parte Ghahremani, 332 S.W.3d 470, 478 & n.21 (Tex. Crim. App. 2011).

[Page 11]

reversed because prosecutor falsely argued that stains on shorts were blood, knowing that they were paint); Brown v. Borg, 951 F.2d 1011, 1014-17 (9th Cir. 1991) (habeas relief granted because prosecutor falsely argued that murder occurred during robbery when he knew that hospital personnel had given missing property to deceased's next of kin); United States v. Kalfayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (conviction reversed because

prosecutor falsely argued that Government could not call witness who had invoked his privilege against self-incrimination when Government had cooperation agreement with witness but decided not to call him to testify); Walker v. State, 624 P.2d 687, 691 (Utah 1981) (conviction reversed because prosecutor discovered during trial that officers' testimony on material issue was incorrect but relied on that testimony during his closing argument).

...

[Page 14]

...

C. The Prosecutor Presented False Testimony That Applicant Intentionally Fired The Fatal Shot.

Taormina testified that he was in the passenger seat of Finkelman's car when applicant and Payne got in the car and closed the doors (6 R.R. 70, 73-74). All the doors were closed at the time Finkelman was shot (6 R.R. 82). Taormina and Payne both testified that the gun discharged the first time when Finkelman grabbed applicant's arm, but Finkelman was not shot (6 R.R. 77,

79-80, 104, 150-51).

[Page 15]

Taormina testified that applicant then intentionally fired two shots, one of which killed Finkelman (6 R.R. 77-81, 104). Payne testified that he exited the car after the first shot, heard two or three more shots, and realized that Finkelman had been shot (6 R.R. 151-52). Prall testified that he heard one shot fired in the car and three or four shots fired outside the car (6 R.R. 14, 19).

Applicant testified that Finkelman grabbed the gun, they struggled over it, it discharged one time, and that was the only shot fired in the car (7 R.R. 131, 136, 167). Applicant testified that he did not intend to kill Finkelman (7 R.R. 132).

Officer T.R. Cunningham's 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). Thus, if applicant fired three shots in the car—the first accidentally, followed by two intentionally—and the second or third shot killed Finkelman, as Taormina testified and Payne suggested, there would have been

two bullets or bullet strikes found in the car in addition to the bullet found in Finkelman's head during the autopsy. Officer E.P. Aguilera, who processed the car at the scene, testified that he did not observe any bullet strikes in the car (5 R.R. 84).

The trial court instructed the jury in the charge on capital murder and felony murder (C.R. 190-91). Magness argued that the only question was whether applicant intended to kill Finkelman (8 R.R. 31); that Taormina and Payne testified that more

[Page 16]

than one shot was fired in the car (8 R.R. 25-26); that the first shot was fired when Finkelman grabbed for the gun and struggled with applicant (8 R.R. 40); that applicant then "pistol-whipped" Finkelman, put the gun to his head, and shot him (8 R.R. 42); and that the second or third shot killed Finkelman (8 R.R. 40). Brown asked rhetorically during his closing argument where the other two bullets were if applicant fired three shots in the car (8 R.R. 17). The jury convicted applicant of capital murder.

Resp't App. 8b

After applicant went to prison, an anonymous person (hereafter referred to as the Confidential Source or CS) deposited funds in his inmate trust account for many years (AX 13). Applicant did not know who was doing this or why.

The CS sent applicant a letter in 2022 in which he gave his name and asked to be placed on applicant's visitation or telephone list so he could send more money (AX 13, 14). They eventually spoke. The CS told applicant that he had attended the trial and knew that applicant had been convicted of capital murder based on false testimony. The CS explained that one of the boys who had been in the car at the time of the shooting had told him before anyone was arrested that Finkelman went for the gun, it discharged, and Finkelman was killed. The CS attended part of the trial and heard a prosecutor argue that the boys had testified that the gun discharged accidentally, Finkelman was not shot, but applicant then intentionally fired two more shots, one of which killed Finkelman. The CS explained that he had sent money to

applicant's inmate trust account for years because he was "eaten up with guilt" that applicant had been convicted of capital murder and sentenced to life without parole based on false testimony and that he had not spoken up at the time.

Applicant's habeas counsel spoke to the CS. The CS identified himself as a relative of Finkelman who wanted to remain anonymous so his family would not learn of his cooperation. The CS has provided an affidavit¹⁵ that he sent money to applicant in prison for several years because he knew that applicant did not intend to kill Finkelman and believed that applicant did not deserve to spend the rest of his life in prison (AX 15). A couple of years ago, TDCJ returned some checks and informed him that he had to be on applicant's visitation or telephone list to send money. He wrote a letter to applicant in October 2022, gave his name, said that applicant had not been forgotten, and asked to be placed on a list so he could send more money. The CS confirmed that Taormina had told him at the memorial service, a

few days after the shooting, that Finkelman went for the gun, it discharged, and Finkelman was killed¹⁶

¹⁵ Habeas counsel agreed to file the CS's affidavit under seal so it would be available to the court and the parties but not to the public. The CS fears retribution if his name is revealed publicly.

¹⁶ Taormina's extensive criminal history demonstrates his continued dishonesty and disrespect for the law since he lied at applicant's trial (AX 18). He was charged with criminal mischief and resisting arrest in November 2007 after he damaged a female's vehicle and struck a police officer who was attempting to arrest him; was placed on deferred adjudication probation on the mischief charge in January 2008; violated the conditions of probation and served six days in jail; and the resisting arrest charge was dismissed. He was charged with DWI in April 2012; placed [. . .]

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The HPD Incident Report confirms what Taormina told the CS—that only one shot was fired in the car. Officer Cunningham's report states that he examined the interior of the car at the scene and observed that, all the windows were rolled up and there were no broken windows or bullet strikes (AX 12).¹⁷ Officer Aguilera's report states that he processed the car at the scene and

Resp't App. 11b

did not observe any bullet strikes (AX 16).¹⁸ Officer F.E. Martinez's report states that he processed the car at the police facility; describes the physical evidence he observed; and does not mention any bullets, bullet strikes, or broken windows (AX 17).¹⁹

Taormina and Payne testified that the gun discharged accidentally when Finkelman grabbed it. The physical evidence supports that applicant fired one shot inside the car, and it killed Finkelman. No physical evidence supports that applicant intentionally fired two more shots at Finkelman, and that the second or third shot killed him. This case is similar to Chabot, in which the prosecutor did not know that [. . .]

on probation in June 2014; and his probation was revoked and he was sentenced to 100 days in jail in January 2015. He was charged with misdemeanor theft in September 2014 and sentenced to two days in jail in February 2015. He was charged with possession of heroin in October 2014 and again in November 2014; he pled guilty to one charge and was sentenced to 180 days in a state jail, and the other charge was dismissed in May 2016. He was charged with misdemeanor theft in July 2015 and sentenced to 60 days in jail in December 2015. He was charged with giving a false name and date of birth to a police officer in March 2016 and sentenced to 10 days in jail

Resp't App. 12b

in May 2016. He is, by any measure, a petty career criminal.

¹⁷ Officer Cunningham did not testify at trial.

¹⁸ Officer Aguilera testified at trial that he did not observe any bullet strikes in the car (5 R.R. 84).

¹⁹ Officer Martinez, did not testify at the trial.

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Pabst, the accomplice witness, had testified falsely that he was not involved in the capital murder, but DNA testing established years later that Pabst had sexually assaulted the deceased. Chabot obtained habeas corpus relief based on the State's unknowing use of false testimony. Ex parte Chabot, 300 S.W.3d 768 (Tex. Crim. App. 2009). Pabst was then arrested, charged, and convicted of capital murder. Pabst, v. State, No 05-08-01347-CR, 2010 WL 965742 (Tex. App.—Dallas Mar. 18, 2010, pet ref'd) (not designated for publication). Additionally, the pathologist's testimony that Finkelman had gunshot residue on his left hand — and, possibly, on his right hand—indicates that his hands were on or near the gun when it discharged and is consistent with him struggling over the gun (7 R.R. 91-93).

There is no direct evidence that Magness and Allen knew that Taormina and Payne had lied about the number of shots fired in the car—although, as experienced prosecutors, they easily could have figured that out. Nonetheless, the CS's credible affidavit that Taormina told him at the memorial service, a few days after the shooting, that Finkelman went for the gun, it discharged, and Finkelman was killed establishes that the prosecution presented false testimony that caused applicant to be convicted of capital murder instead of felony murder.

D. The Prosecutor Made False Statements About The Evidence During Her Closing Argument.

Magness had Officer Cunningham's report that he examined the interior of the car at the scene and observed that all the windows were rolled up and there were

[Page 21]

no broken windows or bullet strikes (AX 12); Officer Aguilera's report that he had processed the car at the scene and did not observe any damage to the interior (AX 16); and Officer Martinez's report that he had processed

the car at the police facility and did not mention any bullets, bullet strikes, or broken windows (AX 17). Neither Cunningham nor Martinez testified at trial. Aguilera testified that he did not observe any bullet strikes in the car (5 R.R. 84). Prall testified that he heard one shot fired in the car and three or four more shots fired outside the car (6 R.R. 16, 19).

The State had to overcome the fact that the physical evidence supported that one shot was fired in the car, and it killed Finkelman—one bullet was found in his head, but no bullets, bullet strikes, or broken windows were found in the car. Magness' solution was to lie to the jury during her closing argument.

Magness argued as follows (8 R.R. 24-26):

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.

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You'll recall from the evidence that Officer Frank Martinez had a stroke. He is still recovering, and *he is the only person who has that information* (emphasis added).

MR. BROWN: Judge, I think that's crucial. I must object, because the State of Texas has this information. There is more than one officer involved. If they wanted to bring it, they could bring it, Just because one officer becomes unavailable—in fact, the law is specific, if he becomes unavailable they can bring it without him.

THE COURT: That's no legal objection I'm hearing.

What's your basis?

MR. BROWN: It's improper jury argument of the things that did not happen on the witness stand, and it is not part of the record.

THE COURT: Sustained as to the last statement by the prosecutor, the last sentence.

MRS. MAGNESS: 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.

Thereafter, Magness made the false statement that Prall had testified that multiple shots were fired in the car (8 R.R. 33).

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

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jury would never know whether there were "additional bullet strikes in the car," because only Martinez had that information and he could not testify, was knowingly false. Cunningham and Aguilera could have testified that there were none; and, if Martinez had been available, he could not have testified truthfully to the contrary. Magness's false statements, made with the intent to deceive the jury, denied applicant due process of law and a fair trial. See Miller v. Pate, 386 U.S. 1, 6 (1967) (conviction reversed because prosecutor falsely

argued that stains on shorts were blood, knowing that they were paint); cf. Dakin v. State, 632 S.W.2d 864, 866-67 (Tex. App.—Dallas 1982, pet. refd) (conviction reversed because prosecutor attempted to present harmful facts, unsupported by evidence, in form of questions).

E. The False Testimony And False Argument Were Material.

As Magness accurately observed during her closing argument, the “only question” was whether applicant specifically intended to kill Finkelman. The jury’s determination of applicant’s intent depended on whether Finkelman was killed when the gun discharged accidentally during the struggle or whether that shot missed him, and applicant then intentionally fired more two shots, one of which killed him. If the jury had known that Taormina told the CS a few days after the shooting that Finkelman went for the gun, it discharged, and Finkelman was killed; that all the car windows were rolled up at the time of the shooting; and that no bullets, bullet strikes, or broken windows were found in the car, there is a reasonable probability that the

jury would have convicted applicant of felony murder instead of capital murder or at least deadlocked. The State cannot prove beyond a reasonable doubt that applicant would have been convicted of capital murder instead of felony murder if the jury had known the truth about these matters. Thus, the false testimony and false argument require a new trial.

*[Remainder of memorandum
and signature pages omitted]*

Respondent's Appendix C
(Excerpts from the Reporter's
Record for Petitioner's State
Habeas Evidentiary Hearing)

Resp't App. 1c
REPORTER'S RECORD
VOLUME 2 OF 4 VOLUMES
TRIAL COURT CAUSE NO. 1061081-B

RECEIVED
COURT OF CRIMINAL APPEALS
5/12/2025
DEANA WILLIAMSON, CLERK

EX PARTE * IN THE DISTRICT COURT

DONTAE TERRELL MOORE, HARRIS COUNTY, TEXAS

Applicant * 177th JUDICIAL DISTRICT

WRIT EVIDENTIARY HEARING

On the 8th day of April, 2025, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable Lydia Clay-Jackson, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by oral stenography.

Resp't App. 2c
CHRONOLOGICAL INDEX

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STATE'S WITNESS						
MARK TAORMINA	275	--	--	--	--	--

...

[Page 17 Line 1]

[MR. SCHAFFER]. How were you related?

[JEFF JOACHIM]. Uncle.

Q. And --

A. He's my nephew.

Q. Is his sister -- I mean is his mother your sister?

A. Yes.

Q. Were you aware of the fact that Dontae Moore was arrested for shooting and killing Jonathan in 2005?

Resp't App. 3c

A. Yes.

Q. And did you attend a memorial service for your nephew?

A. Yes.

Q. Did you see someone there whom you knew had been present at the time of the shooting?

A. I approached --

THE COURT: Just a moment. I'm sorry, sir. Would you repeat your question again because the court reporter didn't hear it.

(BY MR. SCHAFFER)

Q. Did you see someone at the memorial service whom you believed had been present at the time of the shooting?

A. I had no idea he was present when I approached him. I just approached him and asked him if he knew what happened.

Q. And who is the person you approached?

A. I didn't know who he was at the time. [. . .]

...

[Page 19, Line 6]

Q. When you asked him what happened, what explanation did he give you?

Resp't App. 4c

A. It was a very short conversation, 30-45 seconds. He said the black guy got in behind Johnathan, into the car, and put a gun to Johnathan's head. He said Jonathan looked over at me, and I knew something was going to happen, and Jonathan went for the gun and he was killed in the struggle or the gun went off. I -- I don't know how the conversation specifically ended. My interest was the fact that Jonathan went for the gun, and that was the end of the conversation.

Q. You did give an affidavit in this matter; did you not?

A. I did.

Q. And did you swear to the affidavit before a notary public?

A. Yes.

Q. And was the affidavit true when you gave it?

A. Yes.

Q. And would it refresh your memory to review the affidavit?

[Page 20, Line 1]

A. I'm familiar with the affidavit.

Q. So, is it your understanding that according to Taormina, the black male put a gun to Jonathan's head and demanded drugs or money?

Resp't App. 5c

A. Yes.

Q. That Jonathan went for the gun?

A. Yes.

Q. And that the gun discharged and Jonathan was killed?

A. Yes.

Q. Did Mark Taormina say anything about the first shot missed Jonathan and two more shots were fired in the car?

A. No.

Q. All right. Now, did you attend the closing arguments during Dontae Moore's trial?

A. I attended the end of the sentencing. I was there for the sentencing.

Q. And did you hear argument being made about three shots being fired in the car, the last two deliberately?

A. If -- If I did, it didn't register with me.

Q. All right. Did you communicate to either the prosecutor or Dontae Moore's lawyer what Mark Taormina had told you at the memorial service?

A. No.

...

[MS. MAGNESS:] Well, by "physical evidence," maybe we have a different idea of what that means. When you say no physical evidence, I say yes. There was additional physical evidence that more than one shot was fired in the car, and that evidence would have included the blood spatter evidence, it would've included the testimony related to Jonathan's injuries --

[MR. SCHAFFER]. Just a minute. Testimony is not physical evidence.

A. Well, but the -- the injuries themselves were. That is physical evidence. It was documented and it was presented at trial.

Q. Are you saying Jonathan was shot more than once?

A. No. I'm saying that he sustained injuries that were independent of the fatal shot.

Q. And how does that prove more than one shot was fired?

A. My recollection is combining all of the pieces of information together established more than one shot was fired in the vehicle.

Q. Ms. Magness, If Jonathan sustained physical injuries during that altercation, how does that prove more than one shot was fired in the car?

Resp't App. 7c

MS. THOMPSON: Objection as to relevance. The claim here is that she made a misstatement during closing argument about bullet strikes inside the car.

THE COURT: I don't need speaking objections. Just give me the legal --

[Page 86, Line 1]

MS. THOMPSON: It's not relevant to the claims.

THE COURT: Overruled.

(BY MR. SCHAFFER:)

A. I am sorry. I thought I answered your question.

Q. I don't think you did. If Jonathan sustained physical injuries during the altercation, how does that prove more than one shot was fired in the car?

A. Because if the first shot that was fired in the car was the shot that killed him, there would not have been an opportunity for him to continue to struggle to sustain injuries independent from the gunshot.

Q. Could he have sustained those injuries during the struggle before the gunshot?

MS. THOMPSON: Objection, outside the scope of this proceeding.

THE COURT: Overruled.

Resp't App. 8c
(BY MR. SCHAFFER:)

Q. In other words --

A. My recollection of the medical examiner's testimony was no.

Q. Well, I don't know where you're getting your recollection ma'am.

A. I'm doing the best I can.

Q. All right. So, are you telling us the car was destroyed while the case was pending?

[Page 87, Line 1]

A. I can't remember exactly what happened to the car. I -- I know it was unavailable. I just don't remember if it was --

Q. Well, no, you -- you know, it was --

A. -- if it was --

Q. I'm sorry.

A. -- if it was destroyed or if it was sold at auction or -- I just remember that it was unavailable.

Q. Well, ma'am you put in your affidavit that the car was destroyed; correct?

A. Correct. But I created my affidavit with the record right in front of me and the offense report in front of me. So, I would have been referencing specific

Resp't App. 9c

information that I was using to refresh my recollection. But you're asking me today specifically what I recall, and without it right in front of me for me to be able to read it, I -- I don't want to say something that's not accurate.

...

[Page 93, line 1]

A. I can't speculate as to what my questioning would've been without knowing what Officer Martinez had to say. You're -- you're asking me to speculate the questions I would've asked, and my answer is I don't know. The questions I would've asked would have depended on what information he gave me.

Q. Well, if he told you he did thorough search of the car and he didn't find any bullets, bullet holes, casings, or bullet strikes, would you have elicited that?

A. Well, of course.

Q. But then you couldn't have made the argument to the jury that you made here; could you?

A. I disagree.

Q. You could have made it anyway?

A. I -- I think you're mischaracterizing my argument because you've read portions of it from the transcript, but you're not really focusing on the point that I was making to the jury. And the point that I was making to the jury in that portion of my argument is that they had to base their verdict on the evidence they had

Resp't App. 10c

before them. They couldn't speculate, they couldn't guess, they couldn't make up information. They had to render a verdict based on the information they had and the testimony that they had and nothing else.

Q. Well, weren't you asking them to speculate that there were other bullets, bullet holes, or bullet strikes found in the car that they would never hear about because Martinez was

[Page 94, Line 1]

unavailable?

A. No, sir.

Q. So you didn't want to create the impression with the jury that you had additional evidence that you couldn't offer because the witness was unavailable?

A. Absolutely not.

Q. And why mention Martinez at all?

A. Because I felt like the jury would want to know why a crucial witness wasn't present to testify.

Q. Well, there had already been testimony that he had a stroke; correct?

A. I believe that was in the record.

Q. So, you had no reason to even reference it unless you wanted the jury to speculate he could have given them information that they didn't have?

Resp't App. 11c

A. No, sir. You're attributing to me a motive that I did not have. What I wanted the jury to do is not get lost in -- in making up information. Rather, what I was trying to do is to get them to focus on making a decision based entirely on what they had. As someone who's tried a lot of cases, I know that sometimes jurors go back and they talk about crazy things back in their deliberations and they -- they speculate about if a witness was called, they would've said this or they would've said this or -- and I didn't want them to do that. I wanted them to make their decision based entirely on the information

[Page 95, Line 1]

that they had received and nothing else.

Q. So, tell me, Ms. Magness, if three shots were fired in the car, as Mark Taormina and Warren Payne testified, one bullet is found in Jonathan's head during the autopsy, where did the other two bullets go?

A. I don't know.

Q. They had to go somewhere.

MS. THOMPSON: Objection, sidebar.

THE COURT: Sustained.

(BY MR. SCHAFFER:)

Q. Well, if, as the State theorized, Jonathan and Dontae are struggling over the gun and the gun

Resp't App. 12c
discharges and Jonathan is not hit, do you agree that
bullet had to go somewhere?

A. I mean, logic tells me yes --

Q. Okay.

A. -- it had to go somewhere. I don't know where.

Q. Well, in terms of trying this case, you have a car
and there's no bullet, bullet hole, bullet strike, or spent
casing found in the car. So, what's your explanation as
you sit here today for what happened to those other two
bullets that the witnesses claim were fired in the car?

MS. THOMPSON: Objection, calls for
speculation.

THE COURT: Sustained.

...

[Page 98, Line 2]

(BY MR. SCHAFFER:)

Q. As you sit here today, you can't explain where
this so-called first bullet went if it didn't go in his head;
can you?

MS. THOMPSON: Objection, asked and
answered.

THE COURT: Sustained.

(BY MR. SCHAFFER:)

Resp't App. 13c

Q. You wanted the jury to believe that Officer Martinez could have testified to two other bullet strikes, but you couldn't call him, so the jury would never know?

A. No.

Q. You did not want the jury to have that impression?

A. I wanted the jury to make their decision based on the evidence presented in the courtroom and not to speculate as to what any witness who was not called would say, and that's --

THE COURT: I think, Ms. Magness, what Mr. Schaffer is trying to ask is why bring up Officer Martinez at all to the jury in closing?

THE WITNESS: If the question was --

THE COURT: My question.

THE WITNESS: Okay. If the question is to why --

THE COURT: That's my question.

THE WITNESS: -- bring it up at all, jurors are

[Page 99, Line 1]

going to wonder about witnesses that aren't called, and, so, part of our job as prosecutors when we make our closing argument is try to address questions that they might have about this --

Resp't App. 14c

THE COURT: The jury already knew that he had a heart attack and was unavailable.

THE WITNESS: He didn't have a heart attack. He had a stroke.

THE COURT: Stroke. Sorry. Why bring him up at all if the jury already has that information, to put Officer Martinez in this parameter? Why bring him up at all?

THE WITNESS: I --

THE COURT: Do you recall why you brought him up?

THE WITNESS: I -- I do, and it's -- it's -- it's in my affidavit, is that I wanted to focus the jury on making their decision based on the testimony that they had in court and not anything else.

THE COURT: Well, why bring up -- Ms. Magness, why bring up a witness who was unavailable? Why highlight the fact that he was not -- that he had no testimony for them to consider?

THE WITNESS: Because, Your Honor, I was arguing the charge at that point and --

THE COURT: I understand what you were arguing.

[Page 100, Line 1]

Resp't App. 15c

THE WITNESS: Right. And I was going through the charge and explaining the various admonitions in the charge and I was relating it to the facts presented at trial.

(BY MR. SCHAFFER:)

Q. Then why tell the jury that Martinez was the only person who had information about the condition of the car?

A. I don't think that's what I said. I think what I said was that he was the only person who could testify about his specific processing of the car.

Q. You preface it by saying, "We don't know whether there are additional bullet strikes in the car and you're not ever going to know that because Martinez can't testify." That's exactly the way you framed it; isn't it? "We're never going to know about additional bullet strikes in the car because I can't call Martinez;" correct?

A. I -- I don't agree with the way you're characterizing my statements. No, sir.

Q. Ma'am --

THE COURT: Mr. Schaffer, do you have the transcript with that in it?

MR. SCHAFFER: Of course.

Resp't App. 16c

THE COURT: Okay. Would you please show Ms. Magness. At this point it's becoming redundant.

...

[Page 103, Line 3]

(BY MR. SCHAFFER:)

Q. Ms. Magness, in arguing to the jury, "How can we be sure how many shots were fired in the car? We don't know whether there are additional bullet strikes in the car, and you're not ever going to know that because Officer Martinez is unavailable to testify;" weren't you trying to create the impression with the jury there were additional bullet strikes in that car they would never get to hear about?

A. No.

Q. Then tell me what that argument meant.

A. I already have.

Q. You stand by that answer?

A. I do.

Q. What evidence did the State have there were any additional bullet strikes fired in the car?

MS. THOMPSON: Objection, asked and answered.

THE COURT: Sustained.

...

[Page 107, Line 1]

A. I don't specifically recall that, but if it's in the record, I agree.

Q. Do you recall that Prall testified he heard three or four shots fired outside the car?

A. I thought he said outside but he wasn't sure.

Q. He said outside, and when asked if there were more shots fired inside the car, he said he wasn't sure; correct?

A. That sounds correct.

Q. All right. And one of the shots fired outside the car hit Payne; correct?

A. Yes.

Q. When you argued to the jury, you argue that Prall testified he heard multiple shots fired in the car; correct?

A. Yes.

Q. Now, Prall was not involved in the crime like Taormina and Payne were; was he?

A. No.

Q. He wasn't in the car doing the dope deal; right?

Resp't App. 18c

A. Correct.

Q. He was in the bleachers watching what he expected to be a fight or robbery or something; correct?

A. Yes.

Q. Theoretically, he would have more credibility than people who were involved in the crime, correct?

A. No.

[Page 108, Line 1]

Q. You think he had less credibility?

A. I think a credibility determination would have been up to the jury, and I've heard plenty of people who have been involved in a crime testify truthfully. So, the credibility decision --

Q. You were aware that Taormina was like -- if not Jonathon's best friend, one of his closest friends; correct?

A. I don't really remember the nature of their relationship.

Q. And you recall that Payne was a codefendant who had pled guilty on the morning of trial to aggravated robbery without an agreed recommendation on punishment and was cooperating with the State; correct?

A. Yes, he was a codefendant. Yes, he cooperated. I don't remember when he entered his plea.

Resp't App. 19c

Q. All right. Your argument to the jury that Prall testified that he heard multiple shots fired in the car was false; wasn't it?

A. My recollection of his testimony was not correct.

Q. Okay. So, you tried to explain this in your first affidavit; did you not -- you addressed the subject in your first affidavit?

A. Yes.

Q. And in doing that, you went back and read Prall's testimony; correct?

[Page 109, Line 1]

A. Yes.

Q. Because you cite it in your affidavit; correct?

A. Yes.

Q. You also read your argument; did you not?

A. Yes.

Q. And you acknowledge in your affidavit that your argument was wrong?

A. Yes.

Q. And your explanation was that you used your trial notes to draft your argument and you didn't have a transcript of the testimony and you must have made a mistake in your trial notes?

Resp't App. 20c

A. That's not exactly accurate. My speculation was that I had used trial notes to draft my closing argument. I don't think I said I did use my trial notes. I think I said that this is my common practice.

Q. Why would you then speculate? Did you review your trial notes before you made the affidavit?

A. No.

Q. Well, what did you review to prepare that affidavit?

A. The offense report, the record, and the exhibits.

Q. You swore to the affidavit; did you not?

A. Yes.

Q. And was your affidavit true or did you have false statements in it?

[Page 110, Line 1]

A. The information in the my [sic] affidavit was true.

Q. Okay. So, did you review your trial notes before you prepared the affidavit?

A. No.

Q. Did you review the offense report, the trial record; how did you get that information?

Resp't App. 21c

A. I believe the State sent me the offense report. I don't remember if it was the State that sent me the trial record or if I accessed that through the records of the court.

Q. Well, your trial notes would be in the State's file; correct?

A. Yes.

Q. So, if you're going to give an affidavit to explain this argument and you're going to put the blame on your trial notes being inaccurate, why didn't you ask to review your trial notes in the State's file?

A. It didn't occur to me to do that.

Q. What do you mean it didn't occur to you? You're talking in here about it's your practice to take notes in trial as each witness testifies; "I use those notes to draft my closing argument. It appears I made a mistake when I made notes regarding Matthew Prall's testimony during trial."

[Page 111, Line 1]

You're saying you made a mistake in your notes; correct?

A. I'm saying I made a mistake in my argument and I -- I assumed that I must have written something down incorrectly in my notes.

Resp't App. 22c

Q. Well, you say here, "It appears I made a mistake when I made notes regarding Matthew Prall's testimony during trial;" correct, the mistake being in your notes?

A. My explanation was it is my common practice to make --

Q. No, ma'am. Please answer my question. When you say in your affidavit, "It appears I made a mistake when I made notes regarding Matthew Prall's testimony during trial," you're referring to a mistake in your notes; are you not?

A. No. I -- if what you're asking me is was I saying I wrote -- what I wrote down in my notes was a mistake, no, that's not what I was saying because I never saw my trial notes prior to executing that affidavit.

Q. And that's why you reference it by saying, "It appears I made a mistake when I made notes"?

A. That doesn't --

Q. What does this mean other than what it says in English?

A. I -- I thought I was explaining myself. My common practice is I take notes during trial. When I go to do my closing argument I look at those notes. I make my closing

[Page 112, Line 1]

argument based off of information in the notes that I take down, and then I get my closing

Resp't App. 23c

argument. When I went back and looked at the trial testimony of Matthew Prall, clearly, I had made a mistake. When I argued that he said there were multiple shots in the car, that did not comport with the record. That was not his testimony. So, I was clearly -- I was wrong. I was inaccurate. My assumption was that I had written it down wrong in my notes.

Q. Okay. That's all I wanted to hear you say. So, you assumed you made an incorrect statement in your notes about the number of shots he heard fired; correct?

A. Yes.

Q. So, my question to you is since you're going to swear to this affidavit under oath instead of speculating, why didn't you ask to look at the trial notes you made?

A. I didn't think to do that. I thought the point of -- of what was being argued in the writ is that I intentionally made a false statement, and, so, I was addressing that accusation. And that accusation was that I knowingly made a false statement about Matthew Prall's testimony.

...

[Page 119, Line 3]

Q. Now, that was not filed pursuant to a court order, was it, to your knowledge?

A. No, I don't think there was a court order.

Resp't App. 24c

Q. How did you happen to file a supplemental affidavit?

A. At some point I was made aware that the State had looked at my notes in the file and that there were no notes about Matthew Prall's testimony. And, so, then I felt that it was important to provide a supplemental affidavit to clarify that it wasn't that I had taken down his testimony incorrectly. It's that I just did not remember his testimony accurately.

Q. Well, let me back up a step. Who asked you to file a supplemental affidavit?

A. I don't remember if I was asked to file a supplemental affidavit or if I did it on my own.

Q. Why would you do it on your own?

A. Because the information in my first affidavit where I assumed where I had gotten the statement that I made in closing would've been from my trial notes. And then once I was made aware that there were no trial notes where I had taken down his testimony incorrectly, it seemed important to correct that so that it was -- that -- either way, it's -- it's my fault. What I said in my closing was not an accurate reflection of Matthew Prall's testimony, but initially I assumed that it was because

[Page 120, Line 1]

I had taken it down incorrectly in my notes. And then when I became aware that there were no notes that I had

Resp't App. 25c

taken with respect to Matthew Prall's testimony, then it seemed important to me to correct that it was just my faulty memory of his testimony.

Q. So, let me make sure I got this right. You made a false statement to the jury during your closing argument about the number of shots Matthew Prall heard, correct, fired in the car?

A. Not intentionally.

Q. Understood. And you made a false statement in your first affidavit and the basis for that argument; correct?

A. No.

Q. Well, you made a false statement that you were relying on incorrect notes of his testimony, but you made a mistake in your notes?

A. I gave an explanation that I assumed I had written it down incorrectly in my notes.

Q. And that turned out to be false, didn't it?

A. That turned out not to be accurate, but at the time that I made the statement, I did not know it was false.

Q. So, you come here having made a false argument to the jury -- a false statement during your argument to the jury, a false statement in your first affidavit, and

Resp't App. 26c

you're now trying to explain it all in a supplemental affidavit; correct?

...

[Page 128, Line 1]

A. Again, I don't know the exact timing, but it -- I would not think that Ms. Thompson would misrepresent to me that if she told me there's no notes pertaining to Matthew Prall, there was no reason that I wouldn't believe that that were true. I -- I -- I wouldn't question that. I wouldn't think that she would tell me that and it not be accurate.

Q. So, you say in your supplemental affidavit, "I've since been informed that there were no notes in the State's file related to Prall's testimony;" correct?

A. Yes.

Q. And again, you're basing that on what Ms. Thompson told you as opposed to actually reviewing the notes; correct?

A. Again, I -- I don't remember the timing of when I reviewed the notes, but I do know that -- that Ms. Thompson told me that there were notes -- no notes pertaining to Matthew Prall.

Q. And, so, you say in the second affidavit that, "Any mention in my closing argument about Prall's testimony was based on my faulty recollection and not on my trial notes;" correct?

Resp't App. 27c

A. It's what my affidavit says.

Q. So, you're saying before you made the supplemental affidavit, you never looked at the State's file yourself to see if you had made any notes of Prall's testimony?

A. I did not.

...

[Page 151, Line 1]

A. You -- you asked why I wouldn't take notes of Matthew Prall, and -- and my answer is I thought when I asked him the questions and he answered them, that it really kind of just spoke for itself and there wasn't anything else that needed to be documented.

Q. So, that's your -- so, you're saying you did not take notes as opposed to you took notes and you don't know what happened to them?

A. I have -- sitting here now, some 18 years later, I have no specific recollection of taking notes of any of these witnesses. I'm only going off of what you're showing me. So, my specific recollection today is I don't know whether I took notes or not, but based on the exhibit that you showed me, I think it's reasonable to conclude that I did not take notes because I would have started them immediately after the witness that proceeded him.

Resp't App. 28c

Q. Let me pose this to you: When you came down here in the Fall of 2024 to look at documents to refresh your memory, to prepare your first affidavit, and the State's file was made available to you, did you find the notes of Matthew Prall's testimony reflecting that he testified he heard one shot in the car and three or four outside the car and remove those notes from the State's file?

A. I removed nothing from the State's file nor did I review any trial notes made during the trial.

...

[Page 243, Line 8]

[MS. THOMPSON]. In regards to their claim, the statement you made, "You're never going to know if there were bullet strikes in the car," whenever you made that argument were you trying to deceive the jury?

[MS. MAGNESS]. No. And I also think it would have been impossible to deceive the jury because they had heard from other --

MR. SCHAFFER: Pardon me. Excuse me.
Nonresponsive.

THE COURT: Sustained.

(BY MS. THOMPSON:)

Q. And why not?

Resp't App. 29c

A. Because they had heard from other witnesses the testimony about the lack of bullet strikes. They also had the benefit of photographs of the car. So, I couldn't mislead them. The testimony was in the record and the pictures were there before them. They saw them.

Q. So, when you talk about not knowing about bullet strikes in your closing argument, were you trying to convey

[Page 244, Line 1]

that there were bullet strikes in the car and they just aren't going to know about it?

A. No.

Q. Were you lying when you said to the jury, "You'll never know about additional bullet strikes"?

A. No.

...

[Page 246, Line 3]

Q. Are you aware that in this case Charles Brown actually said in his closing argument, "We don't know how many shots are in the car. We don't know of any other bullets inside the car." Do you recall that? Or if I tell you that it's in the record, would you believe it?

A. I believe it's in the record and it would make sense that he was inviting a response.

Resp't App. 30c

Q. I know you don't recall 18 years ago, which is understandable, but is it possible that you were -- when you talked about "We'll never know how many bullet strikes," it was a response to Charles Brown's closing argument?

A. Yes.

Q. I want to talk a little bit about Matthew Prall's testimony. You've already admitted you misstated what was said?

A. Yes, I did.

Q. Did the jury hear Matthew Prall's testimony

A. Yes.

Q. Did the jury get to hear from the officers that testified about the bullet strikes?

A. Yes.

Q. Did they also get to hear from two witnesses who said there were multiple shots inside the car?

[Page 247, Line 1]

A. Yes.

Q. Do you recall where Matthew Prall was located during the shooting inside the car?

A. (No response.)

Q. How about was he in the car?

Resp't App. 31c

A. No. And my recollection is he wasn't near the car either.

Q. Do you recall how far away he was from the car?

A. I don't recall a specific distance, but it seems to me there was something about being in or around the bleachers kind of across a park, so not in close proximity.

Q. And do you recall that the defendant testified at trial?

A. Yes.

Q. And, so, the jury got to hear the defendant say there was one shot inside the car?

A. Yes.

Q. And they got to hear Matthew Prall say there was one shot inside the car?

A. Yes.

...

Resp't App. 32c
REPORTER'S RECORD
VOLUME 3 OF 4 VOLUMES
TRIAL COURT CAUSE NO. 1061081-B

RECEIVED
COURT OF CRIMINAL APPEALS
5/12/2025
DEANA WILLIAMSON, CLERK

EX PARTE * IN THE DISTRICT COURT

DONTAE TERRELL MOORE, HARRIS COUNTY, TEXAS

Applicant * 177th JUDICIAL DISTRICT

WRIT EVIDENTIARY HEARING

On the 9th day of April, 2025, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable Lydia Clay-Jackson, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by oral stenography.

[MARK TAORMINA]. It was 20 years ago. I mean, I may have spoke with a couple of people, but not that any conversation that I can recall, but I'm sure I did.

[MS. THOMPSON]. And at the time of the funeral, did you know who Jeff Joachim was?

A. Did I know who he was? Yes. I don't know -- but again, I -- yes, I knew who he was. Yes.

Q. You knew of him?

A. I knew of him.

Q. And you now know that he has done an affidavit in this case?

A. Yes, ma'am.

Q. And you read his affidavit?

A. Yes, ma'am.

Q. And it discusses a conversation he had with you at the funeral; right?

A. Yes, ma'am.

Q. Do you recall having a conversation with Jeff Joachim at the funeral?

A. No, ma'am.

Resp't App. 34c

Q. If an adult male that you recognized approached you at the funeral and asked you a question, would you have answered it?

A. Yes, ma'am.

Q. After reading the affidavit, did it make you question

[Page 20, Line 1]

the testimony that you gave at trial?

A. No, ma'am

Q. And why not?

A. I've relieved that night in my head thousands – hundreds of thousands and millions of times and still remember it the same.

Q. And at the trial you testified there were three shots inside the car?

A. Yes, ma'am.

Q. And the night right after you watch your friend get killed, did you tell police there were three shots in the car?

A. I did.

Q. And after that first night, did you talk to the police more?

Resp't App. 35c

A. Yes ma'am. I believe they came to my school and spoke with me then.

Q. And when you met with them then, was it still your memory of the crime that there were three shots in the car?

A. Yes, ma'am.

Q. I know you said you don't recall any specific conversations from the funeral. Do you recall at the funeral going into detail about what happened during the shooting?

A. I'm not -- I don't -- I don't recall, but -- no, I don't think at the funeral. At the funeral I was a mess and I -- I -- I think I pretty much stayed with some close friends.

...

[Page 35, Line 12]

Q. You're telling us you saw the shot that killed Jonathan; correct?

MS. THOMPSON: Objection, misstating the testimony.

THE COURT: Well, he's asking him was that Mr. Taormina's statement. So ... And Mr. Taormina knows what his statement is.

(BY MR. SCHAFFER:)

Resp't App. 36c

A. I saw the shots. I -- after the first shot, there was still a struggle. After the next two that happened in -- pretty rapidly after that -- boom, boom -- I don't know exactly which one hit him.

Q. All right. I want you to show the Court, demonstrate to the Court, the manner in which Mr. Moore was holding the gun[. . .]

. . .

[Page 46, Line 1]

(BY MS. THOMPSON:)

Q. Jeff Joachim's affidavit stated that, "Mark Taormina told me a black male put a gun to Jonathan's head, demanded drugs or money or both. Jonathan went for the gun, it discharged, and Jonathan was killed." You have no idea if that's what you said; right?

A. Correct. I don't remember that conversation.

Q. So, do you know if what Jeff is saying in his affidavit is true, that you told him these things?

THE COURT: He's answered the question.

(BY MS. THOMPSON:)

A. No.

THE COURT: He's answered the question, Ms. Thompson.

Resp't App. 37c
(BY MS. THOMPSON:)

Q. So, it's possible you had the conversation?

THE COURT: He's answered the question, Ms. Thompson. Move to your next line of questioning, unless you want to make a bill.

MS. THOMPSON: Yes, Your Honor. I would like to make a bill of exception briefly.

(BY MS. THOMPSON:)

Q. Do you know if what Jeff put in his affidavit is true in the sense that -- do you know if that exact conversation was had between the two of you?

[Page 47, Line 1]

A. No, ma'am.

MS. THOMPSON: That ends the bill.

THE COURT: Thank you. Is that the end of your redirect?

MS. THOMPSON: No, Your Honor.

THE COURT: Okay. Very well.

(BY MS. THOMPSON:)

Q. At the funeral, there were a lot of people around?

A. Yes, ma'am.

MR. SCHAFFER: This is repetitious.

Resp't App. 38c
(BY MS. THOMPSON:)

Q. Do you think that you --

MR. SCHAFFER: Excuse me. It's repetitious.
We went all through this before.

THE COURT: Overruled.

(BY MS. THOMPSON:)

Q. Do you think that you would have gone into great detail about what happened the night Jonathan was killed if you were asked about it?

A. At the funeral I was in no condition to -- I -- I was literally a mess. I don't even think I -- I -- I could have put a sentence together that day.

Q. Earlier on cross-examination, you were asked a lot of questions about what happened that night. Is the best recollection for you what happened that night going to be in

[Page 48, Line 1]

the offense report and how you testified at trial?

A. Yes, ma'am. The -- I would say the most accurate would be that night, and then the trial was -- I don't remember exactly how much after that, but that would be the most accurate.

Q. And, I mean, you know, compared to any recollection you're giving today about what happened

Resp't App. 39c

that night, would you say that your trial testimony and what you said to police is a more accurate recollection than your recollection today?

A. Yes, ma'am. It had just happened.

MS. THOMPSON: I pass the witness, Your Honor.

THE COURT: You were asked the question, sir, about any drug usage that you might have had during that period of time when you were 16 - 17 years of age and you said that the only drugs that you had taken were marijuana; is that correct?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Do you know what type of pills were being sold that night?

THE WITNESS: Yes, ma'am.

THE COURT: What type?

THE WITNESS: Painkillers.

THE COURT: Okay. Thank you for your time. Any more questions?

MS. THOMPSON: Nothing from the State, Your Honor [. . .]

Respondent's Appendix D

**(Excerpts from Petitioner's Proposed
Findings of Fact and Conclusions of Law
in the State Habeas Proceedings)**

Resp't App. 1d

5/15/2025 9:04 AM
Marilyn Burgess – District Clerk Harris County
Envelope No. 88776788
By: Bryan Hudson
Filed: 6/13/2024 2:22 PM

**IN THE 177TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS**

**EX PARTE §
 § CAUSE NO. 10610810-B
DONTAE TERRELL MOORE §**

**APPLICANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

The Court, having considered the application for a writ of habeas corpus, the brief the exhibits, and the official court records and testimony from the trial and the habeas corpus proceeding, enters the following findings of fact and conclusions of law:

...

[Page 8]

24. The defendant must show that the testimony was false or misleading and was material. However, he need not show that the prosecutor

knew that the testimony was false or misleading to obtain relief. Ex parte Chabot, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (habeas relief granted because the accomplice witness testified falsely, without the prosecutor's knowledge, that he did not sexually assault or harm the victim, that he acted under duress, and that he was in another room when she was sexually assaulted and murdered); Estrada v. State, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010) (death sentence reversed because a prosecution expert testified falsely that inmates sentenced to life without parole for capital murder could obtain a less restrictive prison classification after ten years, which conflicted with the testimony of the defense expert).

25. A showing of materiality does not require the defendant to prove that impeachment of the false testimony would have resulted in an acquittal or a conviction for a lesser offense. A conviction must be reversed if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Napue v. Illinois, 360 U.S. 264,

271-72 (1959); United States v. Agurs, 427 U.S. 97, 103 (1976). That “materiality” standard is equivalent to the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967). Reversal is required unless the State proves beyond a reasonable doubt that the false testimony did not “contribute” to the conviction. Glossip v. Oklahoma, 604 U.S. ___, 145 S.Ct.

[Page 9]

612, 627 (2025); Ex parte Reed, 670 S.W.3d 689, 767 (Tex. Crim. App. 2023); Ex parte Ghahremani, 332 S.W3d 470, 478 & n.21 (Tex. Crim. App. 2011).

26. The same principles apply when the prosecutor made material false statements during her closing argument. 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); Brown v. Borg, 951 F.2d 1011, 1014-17 (9th Cir. 1991) (habeas relief granted because the prosecutor falsely argued that the murder occurred during a robbery when he knew that hospital personnel had given the missing

property to the deceased's next of kin); United States v. Kalfayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (conviction reversed because the prosecutor falsely argued that the Government could not call a witness who had invoked his privilege against self-incrimination when the Government had a cooperation agreement with the witness but decided not to call him to testify); Walker v. State, 624 P.2d 687, 691 (Utah 1981) (conviction reversed because the prosecutor discovered during trial that the officers' testimony on a material issue was incorrect but relied on that testimony during his closing argument).

...

*[Remainder of Applicant's Proposed Findings of
Fact and Conclusions of Law omitted]*

Respondent's Appendix E

**(Excerpts from the State's Objections
to the Associate Court's Findings of Fact,
Conclusions of Law, and
Order Recommending Relief in
Petitioner's State Habeas Proceedings)**

Resp't App. 1e

WR-89,615-03
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/12/2025 12:58 PM
Accepted 9/12/2025 2:23 PM
DEANA WILLIAMSON

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9/12/2025
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
WR-89,615-03
EX PARTE DONTAE TERRELL MOORE
IN THE COURT OF CRIMINAL APPEALS

CAUSE NO. 1061081-B
IN THE 177TH DISTRICT COURT
HARRIS COUNTY, TEXAS

STATE'S OBJECTIONS TO THE
ASSOCIATE COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
RECOMMENDING RELIEF¹

¹ On August 14, 2025, Associate Judge Lydia Clay-Jackson filed the "Trial Court's Finding of Facts, Conclusions of Law and Order to the Clerk."

The State of Texas, through the undersigned Assistant District Attorney, respectfully objects to the Associate Court's² August 14, 2025 findings of fact, conclusions of law, and order recommending relief. The District Clerk's Office served the parties with a copy of the Associate Court's findings on August 20, 2025. The State respectfully requests that the Court of Criminal Appeals ("CCA") conduct an independent review and make contrary conclusions since the record and law do not support the Associate Court's findings and conclusions. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014).

Although, the convicting court is the "original factfinder", the CCA is the "ultimate factfinder." *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017), *citing Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). While the CCA generally defers to the trial court's findings of fact and conclusions of law because the trial court is in the

² Throughout this document, "Associate Court" refers to Associate Judge Lydia Clay-Jackson.

Resp't App. 3e

best position to assess the credibility of the witnesses, if an independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, the CCA can exercise its authority to enter contrary findings and conclusions. *Id.* Because the Associate Court's findings are contrary to the record and law, the CCA should not defer to them.

**LACK OF EVIDENTIARY SUPPORT FOR ASSOCIATE
COURT'S CREDIBILITY DETERMINATION
REGARDING MIA MAGNESS**

The Associate Court found that the State's trial prosecutor, Mia Magness ("Magness"), did not exhibit the professionalism, preparedness, or candidness expected of a prosecutor with her experience. *See* Trial Court's FFCL³ #32. The Associate Court also found that Magness' testimony at the writ evidentiary hearing was not credible. *Id.* at #45 and #48.

³ Throughout this document, "Trial Court's FFCL" refers to Associate Judge Lydia Clay-Jackson's Findings of Fact and Conclusions of Law that were filed on August 14, 2025.

The record, however, does not support these findings as they are based on speculative inferences rather than objective evidence. The Associate Court questioned Magness's credibility from day one, before reviewing the trial record. At the Associate Court's first setting for the instant writ, the Associate Court did not have a copy of the reporter's record for the primary case, and had not read the reporter's record for the primary case (1 S.W.H.R.⁴ at 1, 26, 33–34, 56). Nevertheless, the Associate Court questioned the veracity of Magness' affidavits, despite having no knowledge of what occurred at trial in the primary case (1 S.W.H.R. at 18–21, 56). The Associate Court's apparent distrust of Magness carried forward into the writ evidentiary hearing.

Magness testified in 2025 about events that occurred in 2006 and 2007. Magness was asked to recall specific details about the primary case, and what her thought processes were in 2006 and 2007.

⁴ 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.

Over the State's objections, the applicant questioned Magness about matters that were not alleged in the writ application. Magness had not reviewed materials related to the unalleged matters (2 W.H.R.⁵ at 224–25, 228, 240).

. . . Despite allowing the applicant to question Magness on issues the applicant had not raised in the writ, the Associate Court found that Magness lacked preparedness (2 W.H.R. at 85–86, 91, 134–39, 224–25, 228, 240).

⁵ Throughout this document, “W.H.R.” refers to the reporter’s record of the writ hearing in the instant case, cause no. 1061081-B.

The Associate Court found Magness lacked candidness at the writ hearing. The Associate Court, however, denied Magness the opportunity to be candid (2 W.H.R. at 126, 251–53).

Question by the applicant’s habeas counsel (“Schaffer”):

17	Q. And you’re telling the Court it	
18	never occurred to you	
	to also look at your trial notes?	

19 MS. THOMPSON: Objection,
asked and answered.

20 THE COURT: Moving on.

21 THE WITNESS: May I say
something?

22 THE COURT: No.

23 MR. SCHAFFER: No.

(2 W.H.R. at 126).

Question by the State ("Thompson"):

3 Q. Earlier on direct exam there was
something you
4 had wanted to share or add, if you can
recall. Would you like
5 to share or add what you wanted to say
earlier about any of
6 these allegations?

7 MR. SCHAFFER: Not a proper
question.

8 THE COURT: Sustained.

9 (BY MS. THOMPSON:)

10 Q. You have been accused of
prosecutorial misconduct and
11 you have essentially been cross-
examined on that. Is there
12 anything you would like to add today in
regard to the
13 allegations against you?

14 MR. SCHAFFER: Well, excuse
me. There needs to
15 be specific questions for specific
answers and not the
16 opportunity to make a speech.
17 THE COURT: Sustained.
18 Counsel, you know better.

(2 W.H.R. at 252).

2 (BY MS. THOMPSON:)
3 Q. Would you like to elaborate on
you not being found to
4 have committed prosecutorial
misconduct?
5 MR. SCHAFFER: She answered
the question
6 There's nothing more to elaborate
whether she was aware of it
7 Or not. She said she's not aware of it.
8 THE COURT: That's correct.
9 MS. THOMPSON: So, she cannot
elaborate?
10 THE COURT: She can explain
her answer as to why
11 she doesn't know that those allegations
are there? That
12 doesn't make sense.
13 MS. THOMPSON: She's being --

14	(BY MS. THOMPSON:)	
15	Q: So, to your knowledge, that has	
	not happened?	
16	MR. SCHAFFER: Repetitious.	
17	THE COURT: It has been asked	
	and answered.	
18	She's answered the question.	

(2 W.H.R. at 253).

The record shows that Magness tried her best to answer questions about events from 2006-2007, and at times, because of the passage of time, she could not answer the applicant's questions. The record also shows that during the course of Magness' testimony, habeas counsel engaged in conduct that was discourteous and inconsistent with the standards of professional courtroom decorum, including an aggressive tone and dismissive manner. Moreover, the Associate Court's interactions with Magness included critical commentary delivered in a condescending manner with despising facial expressions. At one point during the writ hearing, the Associate Court acknowledged she was making facial expressions by stating, "I don't play poker well. So, the expressions

you definitely see on my face sort of mirror what I'm thinking. In fact, I don't play poker at all." (2 W.H.R. at 215). The cold record does not provide a complete picture of the environment Magness was in. This atmosphere undermined the professionalism expected in judicial proceedings and may have had a chilling effect on Magness' ability to testify fully and without intimidation (2 W.H.R. at 101-02, 105, 227, 232-35, 264, 266).

Question by Schaffer:

16	Q. So, would you agree with me that
17	the context of your
18	argument is that the jury was never going
19	to know whether there
20	are additional bullet strikes in the car
21	because Officer
22	Martinez can't testify; yes or no?

23	A. I'm sorry, Mr. Schaffer. I don't
24	know how to answer
25	your question.

26	Q. Well, truthfully would be a good
27	way, but I suspect
28	you already have a problem with that.

(2 W.H.R. at 101).

Question by Schaffer:

7	Q. That's not what you argued. You argued --
8	A. I disagree.
9	Q. -- the jury would -- ma'am, you argued the jury would
10	never know how many additional bullet strikes were found in the
11	car when you knew the answer was none; correct?
12	A. I don't know why you're yelling at me. I answered
13	your question. I have answered your question as best I can.
14	Q. Are you beginning to see why the DA's office let you
15	go for a lack of credibility --
16	THE COURT: Objection --
17	MS. THOMPSON: Objection under 611. He's now
18	harassing the witness.

(2 W.H.R. at 105).

...

[Page 11]

**NO EVIDENCE FOR ASSOCIATE COURT'S FINDING
THAT MAGNESS PRESENTED FALSE TESTIMONY**

...

There is no credible evidence that Taormina's testimony was false, much less any evidence that Magness intentionally presented false testimony from Taormina. Taormina's testimony during the writ evidentiary hearing is consistent with his trial testimony, that the applicant fired three shots inside the vehicle (3 W.H.R. at 32-34; 6 R.R. at 80-81). Taormina does not question his trial testimony (3 W.H.R. at 19-20). Additionally, the HPD incident report indicates that multiple eye-witnesses told police that more than one shot was fired inside the vehicle, specifically Jeffrey Lopez, Joseph Brandon Powell, and Steven Lopez. *State's Writ Exhibit 4, Houston Police Department Offense Report #195111805* at 40-41, 43, 47-48, 50. The Associate Court declined to consider this evidence. *See* Applicant's Objections to the State's Proposed FFCL at 1; *See* Order, granting the Applicant's Objections to the State's Proposed FFCL.

At trial, Warren Payne ("Payne"), who was inside the vehicle with Taormina, the applicant, and the complainant ("Finkelman") when the shooting

occurred, testified that the applicant fired the gun three or four times while inside the vehicle (6 R.R. at 151-52). Matthew Prall ("Prall"), positioned approximately thirty yards from the vehicle at the time of the shooting, testified at trial that he heard one shot that sounded like it was inside the vehicle, and then heard three or four more shots (5 R.R. at 198; 6 R.R. at 12, 15-16). The applicant testified at trial that the gun went off one time during the struggle inside the vehicle and that he did not intend to kill Finkelman (7 R.R. at 131-32). Officer Aguilera testified at trial that he did not see any shell casings, spent bullets, or bullet strikes inside the car (5 R.R. at 83-84).

[Page 13]

The jury heard conflicting testimony regarding the number of shots fired inside the vehicle. The Associate Court cannot speculate as to the minds of the jurors, or replace the jury's reconciliation of the facts and the evidence with its own. *See Ex parte De La Cruz*, 466 S.W.3d 855, 871 (Tex. Crim. App. 2015)

(court must consider the jury's reconciliation of conflicting evidence at trial, and may not substitute

its own judgment for that of the jury). The jury heard all of the strengths and weaknesses of the State's case against the applicant, and reconciled the conflicting evidence against the applicant. The habeas court cannot override the jury's assessment with its own. *Id.*

**NO EVIDENCE FOR ASSOCIATE COURT'S FINDING
THAT MAGNESS INTENTIONALLY PRESENTED
FALSE ARGUMENT**

Next, there is no credible evidence that Magness' misstatements during closing argument were intentional or materially prejudicial. The Associate Court found that Magness' trial notes and her testimony about what she reviewed before preparing her affidavits proves she deliberately misled the evidence during her closing argument. *See* Trial Court's FFCL #35, 45. Magness, however, testified at the writ hearing that she made a mistake regarding Prall's testimony, and denied attempting to intentionally mislead the jury during her closing argument (2 W.H.R. at 93-105, 108-09, 112). The record lacks any support for the Associate Court's finding that Magness intentionally misled the jury.

Also, Magness' testimony at the writ hearing about what she reviewed before preparing her affidavits is consistent with the State's recollection during a pretrial conference (2 W.H.R.

[Page 14]

at 110, 121-26; 2 S.W.H.R at 16-17). Further, none of Magness' statements during her closing argument were extreme or manifestly improper.

Magness acknowledged she made a misstatement in her closing argument when she stated that Prall testified that multiple gunshots occurred inside the vehicle (2 W.H.R. at 108-09, 112; 8 R.R. at 33). The misstatement was an accident and unintentional (2 W.H.R. at 267). During her closing argument, Magness did not have the trial transcript or notes about Prall's previous statements in front of her (2 W.H.R. at 265-67). Further, the jury heard Prall's testimony (6 R.R. at 16-19). The jury did not have to rely on Magness' statements in closing argument to determine what the evidence was.

When Magness argued that the jury would never know whether there were additional bullet strikes found in the car because the person who processed

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the car was unavailable after having a stroke, she was trying to get the jury to render a verdict based on information they had and nothing else (2 W.H.R. at 93-105). Also, she could have been responding to defense counsel's argument that, we don't know of any other bullets in the car (2 W.H.R. at 246). The record shows that Magness did not make a false statement when she said the jury would never know whether there were "additional bullet strikes" found in the car (2 W.H.R. at 93-105).

The record fails to show the applicant was harmed by Magness' mistake during closing argument.

*[Remainder of Objections and
Signature Page omitted]*