

No. 25-884

IN THE
Supreme Court of the United States

DONTAE TERRELL MOORE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITIONER'S REPLY BRIEF

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ARGUMENT**I. PETITIONER'S PERJURED TESTIMONY
CLAIM IS PROPERLY BEFORE THE COURT.**

Petitioner testified at trial that the deceased, Jonathan Finkelman, tried to take his gun during a robbery inside Finkelman's car. The gun discharged once during the struggle, and Finkelman was unintentionally killed. A bullet was found in Finkelman's head. The lead prosecutor, Mia Magness, called Finkelman's friend, Mark Taormina, an occupant of the car, to testify that the first shot was fired unintentionally during the struggle, but petitioner then intentionally fired two shots, one of which killed Finkelman. The car doors were closed and the windows were up at the time of the shooting. The police found no bullets or bullet strikes in the car. Petitioner was convicted of capital murder (with a mandatory punishment of life without parole) instead of felony murder (with a punishment range of five to 99 years or life and the possibility of parole) based on Taormina's testimony. Petition at 3-10.

Petitioner filed a habeas corpus application alleging that he was denied due process of law and a fair trial because (1) the prosecution presented false testimony that he intentionally fired the fatal shot and (2) the lead prosecutor, Mia Magness, made false statements about the evidence during her closing argument. Petitioner also alleged that his trial counsel was ineffective.

The state habeas trial court conducted an evidentiary hearing at which Magness testified extensively. The court made the following relevant findings of fact:

32. The Court finds that Magness did not exhibit the professionalism, preparedness, or candidness expected of a prosecutor with the experience she claimed to have had, when she presented herself as a witness at the Writ Hearing. (App. 8a).
35. The Court finds that Ms. Magness's closing argument . . . was a deliberate act of misleading of the evidence [sic]. (App. 9a).
43. Magness made false statements during her closing argument even though she knew that Officer Cunningham's and Officer Aguilera's reports stated that there were no bullet strikes or broken windows in the car; that Officer Martinez's report did not mention finding any bullets, bullet strikes, or broken windows; and that [Matthew] Prall said before trial and testified that he heard one shot fired in the car (App.12a).¹
44. Magness made a false statement during her closing argument that Prall testified that multiple shots were fired in the car (8 R.R. 33) (App. 12a).²

1. Magness stated during her closing argument that the jury would never know whether there were additional bullet strikes in the car because Officer Martinez, who processed the car, had a stroke, could not testify, and the car had been destroyed (8 R.R. 24-26).

2. Prall testified that, as he sat in the bleachers at a park to watch what he assumed would be a robbery, he heard one shot fired inside the car and then heard three or four shots fired after petitioner exited the car. Magness testified at the habeas evidentiary hearing that she misspoke during her closing argument (2 H.R.R. 108-10).

45. Magness's testimony at the evidentiary hearing that she made an honest mistake regarding Prall's testimony was not credible (App. 12a).
46. Magness offered Mark Toarmina as a trial witness knowing that his testimony directly contradicted the physical evidence and officers' investigations and reported findings, and with her admitted trial experience she knew or should have known that such a contradiction would be misleading (App. 14a).
47. No other interpretation can be made, given Magness description of her trial expertise, that her closing argument was an intentional misleading of the evidence [sic] (App. 14a).
48. Mia Magness was not a credible witness (App. 14a).

The state habeas trial court concluded that Magness's failure to correct testimony that she knew or should have known was false denied petitioner due process of law (App. 15a; Conclusion of Law 52). The court also concluded that Magness's false statements during her closing argument were "made with the intent to deceive the jury," were "material," and, "The State did not prove beyond a reasonable doubt that these statements did not contribute to the conviction. . . ." (App. 15a; Conclusion of Law 54).³

3. The state habeas trial court also found that petitioner had been denied the effective assistance of counsel (App. 16a-23a; Findings of Fact 58-63; Conclusions of Law 71-82).

The Texas Court of Criminal Appeals (TCCA) summarily denied relief in a brief unpublished order stating that it disagreed with the trial court's findings and conclusions and that petitioner's claims were "without merit" (App. 1a-2a).

Respondent asserts that petitioner's perjured testimony claim is not properly before the court because he did not allege and prove that the prosecution *knowingly* solicited or failed to correct perjured testimony, and this Court has never dispensed with the "knowledge" requirement. Brief in Opposition (BIO) at 12. Respondent further asserts that petitioner "expressly disclaimed any requirement that he must show 'that the prosecutor knew that the testimony was false or misleading to obtain relief,'" under *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2000). Respondent is wrong.

Petitioner noted in his state court brief that the TCCA held in *Chabot* that a petitioner need not prove that the prosecution knew that the testimony was false in order to obtain relief. However, petitioner maintained that the prosecution knew or should have known that Taormina testified falsely regarding the number of shots fired in the car, and Magness *deliberately* lied during her closing argument that (1) Prall testified that multiple shots were fired in the car and (2) Officer Martinez was the only person who could testify regarding the number of bullet strikes in the car, and he was forever unavailable because he had a stroke. Petitioner argued that the perjured testimony and false statements, considered together, were "material" under *Napue v. Illinois*, 360 U.S. 264 (1959).

The state habeas trial court repeatedly and explicitly found that Magness engaged in this misconduct with the

intent to deceive the jury and concluded that it denied petitioner due process of law and a fair trial. Petitioner's certiorari petition concerns the "materiality" of the perjured testimony and false statements during closing argument rather than whether the testimony and closing argument were deliberately false. Respondent's argument that the state court did not determine the falsity of the testimony and closing argument is a red herring.

A Texas criminal defense lawyer would commit malpractice if he argued in a state habeas proceeding that the petitioner has to prove that the prosecutor knowingly elicited or failed to correct perjured testimony, as *Chabot* held that the petitioner need not show that the prosecutor knew that the testimony was false or misleading. *Chabot*, 300 S.W.3d at 771 (habeas relief granted because an 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).

Respondent asserts that the TCCA denied relief in petitioner's case without having "an opportunity to pass upon *Napue's* requirement that the prosecution *knows* a given witness's testimony was false." BIO at 14. Respondent ignores that the TCCA will never pass upon whether a prosecutor *knew* that, as knowledge is no longer an element of a perjured testimony claim in Texas. Respondent's argument, carried to its logical conclusion, would insulate all Texas perjured testimony claims from federal review by this Court on direct appeal following the denial of state habeas corpus relief and by the lower courts in a federal habeas corpus proceeding.

Furthermore, the state habeas trial court found that Magness elicited and failed to correct Taormina’s testimony that three shots were fired in the car, that she knew or should have known that the testimony was false based on the physical evidence, and that she intended to deceive the jury by *deliberately* making false statements during her closing argument about the number of shots fired. Because the TCCA did not reject *any* of those factual findings, they survive its denial of relief. *Cf. Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (“We hold that the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.”). The TCCA has routinely rejected fact findings made by habeas trial courts with which it disagreed.⁴ That the

4. See e.g. *Ex parte Gutierrez*, No. WR-94,908-01, 2024 WL 959606 (Tex. Crim. App. Mar. 6, 2024) (not designated for publication) (“With the exception of Finding of Fact No. 30, this Court adopts the trial court’s findings and conclusions” and denies relief); *Ex parte Hall*, No. WR-86,568-01, 2024 WL 467871 (Tex. Crim. App. Feb. 7, 2024) (not designated for publication) (“We adopt the trial court’s Findings Of Fact and Conclusions Of Law except for Finding Of Fact 16 and Conclusions Of Law 5 and 6” and deny relief); *Ex parte Leassear*, No. WR-93,357-01, 2022 WL 791665 (Tex. Crim. App. Mar. 16, 2022) (not designated for publication) (“The court adopts the trial court’s findings of fact and conclusions of law, with the exception of findings of fact numbers 20, 21, 24, 41-42, 53, 77-81, and conclusion of law numbers 5, 6, and 7. Based on the trial court’s other findings and conclusions and this Court’s independent review of the entire record, relief is denied”); *Ex parte Lake*, No. WR-80,209-01, 2013 WL 6124249 (Tex. Crim. App. Nov. 20, 2013) (“The court does not adopt the trial court’s findings of fact numbers 8, 11, and 12 . . .” and denies relief); *Ex Parte Teeter*, No. WR-76,667-01, 2012 WL 1142461 (Tex.

TCCA did not reject any of the trial court’s fact findings in petitioner’s case demonstrates that it denied relief based on the lack of “materiality.” Accordingly, the perjured testimony claim is properly before this Court.

Additionally, because the state habeas trial court’s fact findings were based on credibility determinations, the TCCA almost certainly accepted them. *See Ex parte De La Cruz*, 466 S.W.3d 855, 865-66 (Tex. Crim. App. 2015) (“This Court ordinarily defers to the habeas court’s fact findings, particularly those related to credibility and demeanor, when those findings are supported by the record. . . . In the specific context of a false-evidence analysis, “[w]e review factual findings concerning whether a witness’s testimony is perjurious or false under a deferential standard, but we review the ultimate legal conclusion of whether such testimony was ‘material’ *de novo*.”). That is strong evidence that the TCCA denied relief based on the purported lack of “materiality.” Accordingly, the *Napue* claim is properly before this Court.

II. THE “MATERIALITY” STANDARD OF REVIEW IS RIPE FOR RESOLUTION.

Respondent asserts that the Court should deny certiorari for a variety of procedural reasons. First, respondent suggests that this claim is best resolved in a federal habeas corpus proceeding. BIO at 16-17. Respondent relies primarily on Justice Stevens’s observation that federal constitutional claims should be

Crim. App. Apr. 4, 2012) (“We decline to adopt the trial court’s October 24 and December 28 findings and conclusions” and deny relief based on lack of prejudice).

resolved in a federal habeas proceeding rather than on certiorari from a state court denial of relief. *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J. concurring).

Respondent's position is untenable for two reasons. First, Justice Stevens' statement was made before the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted in 1996 to limit a federal habeas court's ability to grant relief from a state conviction. For this reason, the Court has shown a greater willingness to grant review to decide federal constitutional issues raised in state post-conviction proceedings post-AEDPA. *See* Z. Payvand Ahdouta, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163-64 (2021) ("Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed course and exhibited the exact opposite preference: a propensity for granting cases from state collateral review as against federal habeas review.") (discussing several of this Court's cases). Furthermore, respondent knows that petitioner is entitled to *de novo* review in this proceeding, but a federal habeas court must defer to the state court decision under 28 U.S.C. § 2254(d).

Respondent next asserts that the issue is not ripe for review because the TCCA entered a brief, unpublished opinion that failed to set forth its reasoning and, therefore, lacks precedential value. BIO at 17-18. The TCCA frequently denies relief in that manner in an effort to shield its unreasoned decisions from federal review, whether by certiorari or habeas corpus. As long as this Court turns a blind eye, the TCCA will continue to do so *ad infinitum*.

Finally, respondent asserts that, to reach the “materiality” issue, the Court must assume that the TCCA concluded that the prosecutor elicited or failed to correct perjured testimony and knowingly made false statements during her closing argument. BIO at 18-19. Respondent posits that the Court cannot know why the TCCA disagreed with the state habeas trial court’s recommendation to grant relief, as the TCCA did not provide an explanation. BIO at 19-20. And, indeed, that is exactly why the Court should grant certiorari, vacate the TCCA’s judgment, and remand with instructions to consider petitioner’s due process claim under the correct “materiality” standard and “show its work.” *See Andrus v. Texas*, 590 U.S. 806, 820 (2020) (per curiam). Otherwise, the TCCA will continue to sidestep meritorious perjured testimony and false argument claims.

III. THE TCCA FAILED TO APPLY THE “MATERIALITY” STANDARD REQUIRED BY *GLOSSIP V. OKLAHOMA*.

Petitioner explained in the petition why the TCCA’s “materiality” standard “does not comport with the materiality standard adopted by the Court in *Napue* and reiterated in *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025).” Petition at 16-21. Respondent counters that the difference between this Court’s and the TCCA’s standards is inconsequential. BIO at 21-22. However, TCCA Judge Finley recently noted that the conflict in standards is significant. *See Ex parte Warner*, 721 S.W.3d 436, 447-48 (Tex. Crim. App. 2025) (Finley, J., concurring). Whether the TCCA correctly applies the *Glossip* “materiality” standard can be sorted out on remand. The proof, of course, will be in the pudding.

IV. A FALSE STATEMENT DURING CLOSING ARGUMENT CLAIM HAS THE SAME STANDARD OF REVIEW AS A PERJURED TESTIMONY CLAIM.

Respondent maintains that the Court has not decided whether a *Napue* due process violation occurs when the prosecutor makes false statements during the closing argument. BIO at 23. If correct, that is all the more reason to grant certiorari, as respondent will contend in a federal habeas corpus proceeding that relief must be denied under the AEDPA because the state court decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

However, there is controlling authority on this issue. Almost 60 years ago, the Court held that a prosecutor's false statements during closing argument denied the defendant due process of law and a fair trial. *Miller v. Pate*, 386 U.S. 1, 4-6 (1967) (prosecutor violated due process by arguing falsely that there was blood on the defendant's shorts when the prosecutor knew that the red substance was paint) (citing *Napue, supra*).

Respondent attempts to distinguish *Miller* to no avail. Respondent observes that the prosecution in *Miller* admitted that the prosecutor knew that the statements during closing argument were false but, in petitioner's case, " . . . 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." BIO at 23-24. Respondent ignores that the state habeas trial court found that

Magness’s testimony about her intent “was not credible” and that she intended to deceive the jury regarding the number of shots fired inside the car (App. 9a, 12a-14a; Findings of Fact 35, 43-45, 47-48). Respondent dismisses these findings—which the TCCA did not reject—with the flippant observation, “*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.*”(emphasis added) BIO at 24. To the contrary, petitioner’s case presents an ideal vehicle to confirm that a prosecutor cannot deliberately lie about material matters during her closing argument.

CONCLUSION

The Court should grant certiorari, vacate the TCCA’s judgment, and remand with instructions to consider petitioner’s due process claim under the *Napue/Glossip* “materiality” standard.

Respectfully submitted,

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