No. 25A429

IN THE

Supreme Court of the United States

TILON LASHON CARTER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

**** CAPITAL CASE ****

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

UNOPPOSED APPLICATION FOR 30-DAY EXTENSION TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Tilon Lashon Carter, an indigent Texas death-row inmate, respectfully applies, pursuant to Supreme Court Rule 13.5, for a 30-day extension of time, to and including December 27, 2025, to file his petition for writ of certiorari to the Texas Court of Criminal Appeals.

Respondent, the State of Texas, is unopposed to this requested extension of time.

In support of his application, Mr. Carter states as follows:

1. Mr. Carter intends to file a petition for writ of certiorari challenging the Texas Court of Criminal Appeals' judgment denying his application for postconviction relief, which was entered on July 30, 2025. *Ex parte Tilon Lashon Carter*, -- S.W.3d --, 2025 WL 2161258 (Tex. Crim. App. July 30, 2025). *See* Appendix A.

2. Mr. Carter's petition is currently due to be filed in this Court by November 27, 2025.[1] He has previously requested one extension of

[1] November 27th is Thanksgiving Day, a federal public holiday. Thus, pursuant to Rule 30, the current deadline extends to November 28, 2025.

time; on October 16, 2025, this Court extended the time for filing by 30 days. In compliance with Rule 13.5, this application for additional time is being filed at least 10 days before that date.

3. This is a capital case in which preparing the petition for certiorari demands particularly extensive work. In the state postconviction proceedings below, Mr. Carter alleged that the State medical examiner presented false and misleading testimony as to the cause of death of the decedent—the central disputed issue at trial—and that new scientific evidence, unavailable at the time of trial, contradicts scientific evidence upon which the State relied at trial. The fact-finding court conducted a three-day evidentiary hearing in which Mr. Carter presented testimony from the State's medical examiner, two independent forensic pathologists, a professor of biomechanical engineering, and an expert in microscopic evidence analysis. Following the hearing, that court entered detailed findings of fact and conclusions of law recommending that the Texas Court of Criminal Appeals grant Mr. Carter a new trial on the ground that the State presented materially false and misleading testimony by the medical examiner on the critical issue of cause of death.

4. Nearly four years later, the Court of Criminal Appeals, by a closely divided 5–4 vote, rejected the trial court's findings and denied habeas relief. The majority opinion concluded that the trial court "admitted several pieces of evidence"—including testimony by the professor of biomechanical engineering, the testimony of the microscopy expert, and never-previously-disclosed handwritten notes by the State medical examiner produced in response to a subpoena—"that exceeded the scope of the claims that [Mr. Carter] raised" in his habeas application, and refused to consider it. Appendix A at 040. After refusing to consider this evidence, the majority concluded that "Applicant does not meet his burden on his false evidence claim or his new science claim." *Id*.

5. In a 70-page dissenting opinion, three judges discussed and conducted a detailed analysis of the evidence presented at trial as well as in the postconviction evidentiary proceeding, *see* Appendix B at 043–110, and concluded that had the jury been presented with the evidence developed at the evidentiary hearing "it is more likely than not that Carter would not have been found guilty" of capital murder. Appendix B at 110. Considering all the evidence, the four dissenters would also grant Mr. Carter a new trial.

6. In sum, five Texas judges—the judge who presided at the evidentiary hearing as well as the four dissenting judges on the Court of Criminal Appeals—concluded that the State presented false and misleading evidence as to the decedent's cause of death and that Mr. Carter would not have been convicted of capital murder without it.

7. Apart from the importance of the issues presented and the complexity of the evidentiary record, both of which make preparation of a petition for certiorari in this case particularly challenging, undersigned counsel have multiple competing professional obligations in other capital cases that make it exceedingly difficult for counsel to file the petition by the current November 27 deadline.

8. Undersigned counsel are scheduled to present oral argument in a capital direct appeal in the Eighth Court of Appeals in El Paso, Texas, on November 12, 2025. *Ronald Anthony Burgos-Aviles v. State of Texas*, 08-23-00240-CR. Counsel have devoted substantial time preparing for oral argument in *Burgos-Aviles* over the past several weeks and will be required to spend two days traveling between Austin and El Paso to present oral argument to the Court of Appeals next week.

9. In addition, undersigned counsel are clinical professors associated with the University of Texas School of Law, where fall term classes are well underway. Undersigned counsel are responsible for teaching several classroom courses four days a week; outside the classroom, they also supervise law students enrolled in the Capital Punishment Clinic, through which undersigned counsel represent capital defendants directly and assist other lawyers in doing so.

10. Finally, the current deadline falls on Thanksgiving Day and undersigned counsel each have pre-existing plans for cross-country air travel to spend the holiday with their respective families. Given the current government shutdown and recent reports that ground stops and delays at major airports are increasingly likely over the holiday, these unusual circumstances make it particularly difficult for counsel to prepare and file the petition by the current deadline.

11. Due to the demands of these competing obligations and deadlines, Mr. Carter respectfully requests a 30-day extension to file his petition for writ of certiorari.

Accordingly, for these reasons, Mr. Carter respectfully requests that the Court grant this application and extend the time to file a petition for certiorari for 30 days, to and including December 27, 2025.

Respectfully submitted,

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APPENDICES TO
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Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,722-03

EX PARTE TILON LASHON CARTER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. C-371-011057-0949973-B IN THE 371ST CRIMINAL DISTRICT COURT TARRANT COUNTY

FINLEY, J., delivered the opinion of the Court in which SCHENCK, P.J., and YEARY, KEEL, and PARKER, JJ., joined. WALKER, J., filed a dissenting opinion in which RICHARDSON and NEWELL, JJ., joined. MCCLURE, J., dissented.

O P I N I O N

Before the Court is Applicant Tilon Lashon Carter's first subsequent application for a post-conviction writ of habeas corpus. We filed and set this habeas application to determine whether the evidence admitted and considered at the evidentiary hearing on Applicant's false evidence and new science claims exceeded the scope of the claims Applicant raised. We conclude

that the habeas court considered several pieces of evidence that exceeded the scope of our remand order. After considering only the evidence that was properly within the scope of the Court's remand order, we deny Applicant post-conviction habeas relief.

I. Trial and Appeal Background

Applicant was charged with and convicted of capital murder for the April 2004 killing of 89-year-old James Tomlin during the course of a robbery. *See* TEX. PENAL CODE § 19.03(a)(2). In our opinion on direct appeal, we summarized the guilt phase evidence as follows:

> Appellant gave two statements to Detective Cheryl Johnson, who read them to the jury. In appellant's first statement, he told police that he and his girlfriend, Leketha Allen, had been talking about needing money when Leketha's mother suggested that they rob Tomlin, an elderly man who lived alone and kept large amounts of cash in his house. Leketha's mother drove them to Mims Street and pointed out Tomlin's house. The next day, appellant and Leketha drove back to Tomlin's house. Appellant waited in the car while Leketha, who was acquainted with Tomlin, knocked on the back door. After Tomlin opened the door, appellant walked up and told Leketha to get back in the car. Tomlin swung a hammer at appellant, but he dodged it and ordered Tomlin to lie down. Tomlin complied. Appellant started looking around the house. Leketha then walked into the house, and they both searched it. She told appellant that Tomlin was going to get up and move, so appellant bound Tomlin's hands with duct tape. He used a sock to hold the tape, and he tore the tape with his teeth. Leketha took two jars of coins from the kitchen, and appellant took an old, long gun from the bedroom. Leketha went back to the car. Appellant "came out last," and they drove back to Leketha's mother's house.
>
> In his second statement, appellant indicated that he had borrowed

a gun in preparation for the robbery and that he was holding it when he entered Tomlin's house. He stated that after Tomlin swung the hammer at him, he grabbed Tomlin's arm and made him sit down on the floor. When Leketha walked into the house, appellant gave her the gun to hold while he bound Tomlin's hands and feet with duct tape. After they finished searching the house and Leketha went back to the car, appellant watched Tomlin for a minute to make sure he was all right. Tomlin was sitting up with his legs straight out in front of him. Appellant told Tomlin they were leaving, and Tomlin said, "Okay."

Tomlin's daughter and responding law-enforcement officers testified that Tomlin's body was found lying face down on the floor just inside the back door, with his feet blocking the doorway. His hands were bound behind his back by duct tape that was wound around his wrists. Duct tape was also wound around his ankles. There was tape residue on his shirt and socks that was consistent with him having moved his arms and legs after they had been bound. His face was turned to the side. A piece of duct tape, partially folded over, was stuck to the side of his mouth area. There were two bloody injuries on the top and the left side of his head. Tomlin's glasses and a hammer with blood on the handle were found on the floor near his body.

A medical examiner testified that Tomlin's flesh at both his wrists and ankles had been compressed and his skin had been damaged by duct tape. The lacerations on Tomlin's face and head were the result of blunt-force trauma that might have caused a temporary loss of consciousness but no significant injury to the skull or brain. The inside of Tomlin's upper lip had been pressed hard against his teeth, resulting in a hemorrhaging injury. The nature of this injury indicated that it was the result of applying profound and sustained pressure against Tomlin's mouth for at least thirty seconds while he was still alive. The injury was typical of smothering, and it would not have resulted from the impact of a fall or from the weight of Tomlin's head as he lay on the floor.

The medical examiner further testified that, given the position of Tomlin's body when it was found and the evidence he had seen, Tomlin was bound while lying face down on the floor, and it would

> have been impossible for him to sit up and talk to anybody. The medical examiner acknowledged that most people probably would not understand the risk of death involved in binding someone in that position. However, he emphasized that he could not exclude smothering because the markings he had observed were "very consistent" with smothering. He ruled that the cause of death was "smothering with positional asphyxia."
>
> Appellant's ex-girlfriend testified that appellant told her that he and Leketha had killed an old white man during a robbery at a house on Mims Street. Appellant's former cell-mate testified that appellant had tried to intimidate him by boasting that he and his girlfriend had killed an old man during a robbery.

Carter v. State, No. AP-75,603, 2009 WL 81328, at *1–2 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication). This Court affirmed Applicant's conviction and death sentence. *Id.* at *6.

II. Habeas Background

a. Procedural History

We denied Applicant relief on his first post-conviction application for writ of habeas corpus. *Ex parte Carter*, No. WR-70,722-01, 2010 WL 5232998 (Tex. Crim. App. Dec. 15, 2010) (per curiam) (not designated for publication). Applicant filed this instant subsequent post-conviction application for a writ of habeas corpus on May 8, 2017.[1] Applicant raised three claims for relief. The

[1] Applicant's -02 writ was a writ of mandamus. After the filing of the instant writ, Applicant filed another subsequent application, which this Court dismissed as an abuse of the writ. *Ex parte Carter*, No. WR-70,722-04, 2021 WL 1014638 (Tex. Crim. App. Mar. 17, 2021) (per curiam) (not designated for publication).

Court remanded this application to the court of conviction to review the merits of Applicant's first and third claims:

> Claim 1 "[Applicant's] Due Process Rights Were Violated When the State Presented False or Misleading Testimony by the State Medical Examiner [Dr. Nizam Peerwani] that [the Victim] Had Been Intentionally Smothered"; and
>
> Claim 3 "New Scientific Evidence, Unavailable at the Time of [Applicant's] Trial, Contradicts Scientific Evidence the State Relied on at Trial and Establishes, by a Preponderance of the Evidence, That He Would Not Have Been Convicted Had [I]t Been Presented at Trial."

Ex parte Carter, No. WR-70,722-03, 2017 WL 4276860 (Tex. Crim. App. Sept. 27, 2017) (per curiam) (not designated for publication). The crux of these claims' rests upon Dr. Nizam Peerwani's trial testimony. Dr. Peerwani was the State's medical examiner and expert who testified about the victim's cause of death. Thus, his testimony was critical to the State's case and Applicant's conviction, specifically in proving Applicant's intent to kill. We begin by describing Dr. Peerwani's testimony in Section II.b and then Applicant's claims and attached declarations in Section II.c.

b. Dr. Peerwani's Trial Testimony

At trial, the State called Dr. Peerwani to describe his findings after having performed the autopsy on Mr. Tomlin. Dr. Peerwani first described the state of Mr. Tomlin: "[His face] showed tremendous amount[s] of congestion,

facial plethora, very dark[] with a lot of pooling of blood on his face. His eyes were swollen, the sockets of his eyes was hemorrhage in the right side [sic] of the eye. He had some – some facial swelling[] also present." Mr. Tomlin had "a big bump on his left side of the head where there were two small lacerations with swelling present on the left forehead – left side of the scalp." This injury required "a pretty strong blow." Dr. Peerwani also identified an injury on Mr. Tomlin's chin as a "contusion" and "a blunt force traumatic injury." The last external injuries Dr. Peerwani noted were "very precise patterned markings of [Mr. Tomlin's] inner [lip surface] produced by what we call compression of his upper lip . . . on his three teeth." Even though Dr. Peerwani found this inner lip injury, he did not find an injury corresponding to the external area of Mr. Tomlin's mouth. Absent a corresponding external injury, Dr. Peerwani opined that the inner lip injury suggested smothering: "This is a very classical and typical injury that you see in a setting where a person has been smothered . . . In this case you were not really seeing the exterior markings, but you are seeing the inner markings of the mucosa lacerations that are very much consistent with the smothering [sic] where there is [sic] compressive forces applied either directly to his face with a – with an open palm of he was pushed downwards onto a hard surface as he was lying down on an a floor."

When describing the inside of Mr. Tomlin's body, Dr. Peerwani testified

that Mr. Tomlin exhibited signs of an asphyxia death in the form of "very congested lungs . . . swelling of his lungs . . . congestion of the covering of the brain . . . blood over his brain had pooled in his blood vessels . . . [and] swelling of his brain." Based on these physical observations, Dr. Peerwani could rule out death by strangulation and death via a blow to the head. Dr. Peerwani also testified that there was evidence of a respiratory event in which Mr. Tomlin had been denied air or could not breathe. He concluded that Mr. Tomlin's death was "asphyxial or respiratory in nature." Dr. Peerwani testified that being restrained in a chest-down position like Mr. Tomlin would significantly compromise a person's ability to breathe and can cause a person, especially an elderly person, to experience respiratory difficulty and die of positional asphyxia. Mr. Tomlin's pre-existing heart and chronic lung problems would have made him more vulnerable to positional asphyxia.

Dr. Peerwani also testified, with the help of demonstrative evidence, that a person being restrained with duct tape and with their hands bound behind their back "obviously[,] greatly compromises [one's] ability to breathe." In fact, Dr. Peerwani testified that there were signs of positional asphyxia consistent with Mr. Tomlin. Based on this, Dr. Peerwani testified that he could not "be absolutely certain" as to "exactly how or precisely how pressure was applied to" Mr. Tomlin's face and to his mouth. Dr. Peerwani also testified that

smothering would require pressure to be applied for at least five to ten minutes to kill someone, and that it was "very unlikely" that Mr. Tomlin received the patterned injuries to his lips by trying to get the tape off of himself.

When asked whether he could say for sure "whether [Mr. Tomlin] died from smother[ing] or from positional asphyxiation," Dr. Peerwani said he could not be certain. All Dr. Peerwani could definitively say was that Mr. Tomlin "died an asphyxia death at the hands of another human being."

On cross-examination, Dr. Peerwani admitted that, ignoring the evidence of smothering, Mr. Tomlin "could . . . have died with [sic] positional asphyxiation within an hour." Defense counsel and Dr. Peerwani later shared the following exchange:

> Q: The bottom line of your testimony, Dr. Peerwani, is that it's your professional opinion that there's some evidence of smothering, but you really can't say that's what killed Mr. Tomlin. Would that be correct?
>
> A: What I can say, Counselor, is that he died of an asphyxia death. Either it is smothering, which by itself is fatal if it was carried on till he died, or it could have been attempted smothering which ended up in the death because of positional asphyxia.
>
> Q: But you don't know?
>
> A: I can't be certain, no, sir.
>
> Q: Could it have been positional asphyxia as the sole cause of death?
>
> A: It could have been positional asphyxia as a terminal event,

> but I cannot exclude smothering simply because there are markings that are very consistent with smothering.
>
> Q: I understand that, but you could have some attempted smothering that doesn't kill any person; however, the way that they're tied is what kills them, which is positional asphyxiation.
>
> A: If I am understanding you well, Counselor, what you're asking me is that was the terminal cause of death or terminal event, what terminated his life is positional asphyxia, is that possible, and the answer is yes, most definitely it's possible.

Dr. Peerwani agreed with defense counsel that positional asphyxia, not smothering, would more than likely be "the terminal event" if Mr. Tomlin's inner lip marks were caused by someone exerting profound and sustained pressure on Mr. Tomlin's head, while he was tied up, for thirty to sixty seconds.

Re-direct examination ended with Dr. Peerwani testifying that, based on "the smothering marks" he found, there were three scenarios concerning Mr. Tomlin's death: (1) someone intentionally tried to smother Mr. Tomlin, and he died of smothering; (2) someone tried to smother him and failed, but he later died of positional asphyxia; or (3) he was in a state of positional asphyxia and he was smothered at the end. Thereafter, on re-cross, Dr. Peerwani clarified that he could not be sure whether smothering by itself was Mr. Tomlin's cause of death, but in all three scenarios he described, positional asphyxia played a significant role in causing his death.

c. Applicant's Claims and Corresponding Declarations

In Applicant's first claim, he alleges a due process violation under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). As pleaded in the application, Applicant asserted that "Dr. Peerwani's testimony was presented as evidence that Mr. Tomlin had been killed by an intentional act because he testified that (1) smothering is an intentional act; (2) the abrasions on the inside of Mr. Tomlin's upper lip established that he had been smothered, leading to his death; and (3) these injuries could not have been caused by someone striking the victim because such action would have also caused markings on the exterior of Mr. Tomlin's lips or mouth." Applicant claimed that new evidence directly contradicts Dr. Peerwani's trial testimony and establishes that:

(1) The autopsy findings do not support a determination that an intentional act caused Mr. Tomlin's death;
(2) Mr. Tomlin's inner lip injuries do not clearly establish smothering, and a slap or a punch could have caused them; and
(3) The autopsy findings do not support a diagnosis of smothering; instead, the findings are more consistent with the cause of death being positional asphyxia or a sudden cardiac event resulting from Mr. Tomlin's pre-existing medical conditions.

In Applicant's third claim, he alleges new scientific evidence under Texas Code of Criminal Procedure Article 11.073. As pleaded, the factual basis of this claim was premised upon Dr. Peerwani's changed opinion that contradicted his trial testimony. To support his first claim, Applicant attached declarations from

Drs. Werner U. Spitz, Jack Daniel, and William R. Anderson, and another from Thea Posel, one of Applicant's then-habeas attorneys.[2]

Dr. Spitz stated that "an asphyxia death is determined based on circumstantial evidence. There is no unequivocal diagnosis that can be made of asphyxia based on autopsy findings." Dr. Spitz did not notice certain manifestations that are frequently found in asphyxia cases. He further noted that a slap or a punch could have caused Mr. Tomlin's inner lip injuries. Dr. Spitz found "no direct[] evidence of an asphyxial death or positional asphyxia." He further observed that Mr. Tomlin had a mildly enlarged heart and advanced coronary artery disease[,] and this may have presented a risk for causing arrhythmia or even death from excitement, agitation, stress, or fear. But Dr. Spitz found no evidence "to indicate an acute coronary occlusion or an acute myocardial infarct." Ultimately, what he found lacking in this case is the intent to cause death.

Dr. Daniel agreed with Dr. Spitz. He noted several findings "articulated by [Dr. Peerwani] in his report and substantiated by scene and autopsy photographs[,]" which include lack of apparent petechial hemorrhages, heart disease with significant narrowing of the arteries, and emphysema. Dr. Daniel stated that the mouth injuries "could possibly have been related to attempted

[2] Posel is no longer one of Applicant's habeas attorneys.

smothering, but they may also reasonably have been related to other assaultive behavior against" Mr. Tomlin. Dr. Daniel concluded that "the findings do not preclude asphyxia as [a] cause of or significant contributor to death," but "[t]he findings do not clearly establish that attempted smothering was in fact responsible for injuries to the inner aspect of the lips," and "[t]he manner of death was properly classified as homicide."

Dr. Anderson opined that "[t]he presence of significant pulmonary edema . . . suggest[s] a prolonged period of cardio-pulmonary compromise, as opposed to a rapid asphyxia (e.g., smothering)," with positional asphyxia being the most likely possibility. He noted that the death would still be classified as a homicide. However, Dr. Anderson asserted that the cause of death should be classified solely as "positional asphyxia" because he does not believe that the autopsy findings support a diagnosis of smothering.

Posel stated that she and co-writ counsel met with Dr. Peerwani shortly before filing the present habeas application. They explained who they were, that the key issue in this case was intent, and that the primary and critical evidence suggesting an intent to kill was the evidence of smothering in Dr. Peerwani's autopsy report and his trial testimony that smothering was a contributing cause of death. According to Posel, Dr. Peerwani said "that the actual cause of death was positional asphyxia itself. He stated that the victim

did not die of smothering." Dr. Peerwani told them that multiple autopsy findings supported a prolonged, rather than quick, death. He also stated that the presence of teeth marks on the oral mucosa did not indicate that Mr. Tomlin was smothered. Like Dr. Spitz, Posel averred that Dr. Peerwani agreed that the markings on the inside of Mr. Tomlin's mouth could have "been caused by something like a slap to the face." Posel said that she followed up with a phone call and letter to Dr. Peerwani, but Dr. Peerwani never gave Applicant's habeas attorneys a written statement verifying what he allegedly said during their meeting.

d. Remand & Order

On remand, the habeas court held three live evidentiary hearings and authorized a deposition of Dr. Peerwani. Drs. Spitz, Daniel, and Anderson did not testify. Applicant relied on the testimony of four other experts, Posel, and Dr. Peerwani. The habeas court entered its findings of fact and conclusions of law and recommended that this Court grant Applicant relief on both claims.

After this application returned to us, we filed and set the writ on two issues:

1. Did any of the evidence presented and admitted at the evidentiary hearing exceed the scope of the claims as Applicant phrased and argued them in his application?

2. If so, should we consider any such evidence?

Ex parte Carter, No. WR-70,722-03 (Tex. Crim. App. Oct. 6, 2021) (per curiam) (not designated for publication).

As discussed later in the opinion, much of the evidence presented, admitted, and considered by the habeas court exceeded the scope of the claims as Applicant phrased, pleaded, and argued in his application. This Court remanded this instant application for a merits' review to resolve the factual disputes and legal issues raised in the application itself. We did not remand this application for Applicant to re-litigate matters previously resolved or known, or advance new legal theories and factual issues not pleaded in his application. The habeas court should have limited its factual inquiry into only those things necessary to resolve the disputed factual and legal issues as outlined in Applicant's application. The application itself provides the guideposts for the habeas court to follow. As the ultimate habeas factfinder, this Court need not rely upon evidence and legal claims outside Applicant's application. After limiting our evidentiary review to the facts germane to the claims as pleaded in his application, we find that Applicant is not entitled to habeas relief.

III. The Habeas Evidence

a. Applicant's Witnesses

Applicant called six witnesses to testify at various live evidentiary

hearings on remand: (1) Dr. Peerwani;[3] (2) Dr. Amy Gruszecki (a forensic pathologist); (3) Dr. Michael Baden (a retired forensic pathologist); (4) Dr. Michael Sacks (a professor of biomedical engineering and computational engineer); (5) Dr. Christopher Palenik (a microscopist/trace evidence analyst); and (6) Posel. The habeas court relied upon Dr. Peerwani's deposition, the testimony elicited during the habeas hearings, and Posel's declaration attached to Applicant's writ application in recommending that this Court grant Applicant relief on both claims.

Dr. Amy Gruszecki, the Medical Director and Chief Forensic Pathologist of American Forensics, opined that Mr. Tomlin's death was due to: (1) his preexisting medical issues (hypertensive and atherosclerotic cardiovascular disease, and emphysema); (2) the stress of being robbed and receiving continuous contusions, which would have exacerbated his cardiac disease; and (3) positional asphyxia. Her opinions were not based on new science or new scientific theories. She did not find any signs "specific" to smothering. Dr. Gruszecki testified that "[p]atterned mucosal contusions of the lip are not specific for smothering." She opined that Mr. Tomlin's inner lip injuries could have been caused by something other than smothering, such as Mr. Tomlin's

[3] Because Dr. Peerwani's new testimony is directly germane to whether he changed his position since trial, it was properly considered by the habeas court and will be discussed in detail below.

head pressing his teeth into his lip as he was dying. Dr. Gruszecki ultimately "agree[d] with almost everything [Dr. Peerwani] said, with the exception of potential smothering."

Dr. Michael Baden, a retired physician and forensic pathologist, agreed with Dr. Peerwani that Mr. Tomlin's death was a homicide, as Mr. Tomlin "died because of what was being done to him." But he disagreed that Mr. Tomlin's death involved smothering or positional asphyxia. Rather, Dr. Baden opined that Mr. Tomlin "died of a cardiac arrythmia, which developed an acute congestive heart failure because of pre-existing, severe coronary artery disease, [and] a narrowing of his coronary arteries by arteriosclerotic plaque that was triggered by the home invasion – the emotional aspects of the home invasion." Dr. Baden criticized Dr. Peerwani's findings as evidence of smothering. To Dr. Baden, none of those findings "individually or together, indicate even a hint that the person may have been smothered." However, those findings were all consistent with Dr. Baden's opinion about Mr. Tomlin's cause of death. Dr. Baden took further issue with Dr. Peerwani's testimony about the patterned lip marks. Dr. Baden testified that such lip marks ordinarily occur when a person dies with their head down against a hard object like a carpeted floor and lies there for many hours. Dr. Baden ultimately opined that the imprints developed after Mr. Tomlin's death, and he did not believe

they were the result of prolonged and profound direct pressure before death.

Dr. Michael Sacks, a biomechanical engineer and professor, created a computational model to determine what scenario would most likely produce the permanent indentations in Mr. Tomlin's upper lip lining. Using this model and estimates of the necessary force, Dr. Sacks estimated the length of time necessary for Mr. Tomlin's upper lip indentations of this depth to form. Dr. Sacks explained that he used autopsy photographs to determine the indentations' depth. He also testified that scientific knowledge about how tissues react is still a young field, but over the last five to eight years the techniques for measuring the thickness of facial tissues has greatly improved, as have the available data and models. Scientists in his field can now make fairly accurate predictions, and these predictions have been validated by other techniques. Dr. Sacks opined that Mr. Tomlin's indentations likely resulted from the application of highly localized pressure, consistent with that of an adult human male head pressed to deceased tissue for a prolonged period of time, approximately two to three hours. Dr. Sacks ruled out other potential causes, such as a slap, and concluded that the marks happened while Mr. Tomlin was deceased.

Dr. Christopher Palenik, an expert in microscopy and forensic science, testified that the fibers from the fragment of folded duct tape found on Mr.

Tomlin's left cheek matched the carpeting on which Mr. Tomlin's head was resting when he was discovered. He and a colleague sought to reconstruct how the duct tape on Mr. Tomlin's left cheek became folded. The colleague laid on a carpet square with duct tape over his mouth, rubbed his face against the carpet, and tried to release the tape. This test proved successful, as the tape ended up in a similar area on his colleague's face, in a similar folded-back position as Mr. Tomlin, and with a similar fiber distribution pattern to the tape found on Mr. Tomlin's cheek.

Posel's habeas testimony largely concerned her pre-filing meeting with Dr. Peerwani. Posel said that Dr. Peerwani "was very clear with us, repeatedly and multiple times, that the cause of death in this case was positional asphyxia[,] and that Mr. Tomlin did not die of smothering." Posel's testimony boils down to her saying that Dr. Peerwani recanted his trial testimony: "He again repeated . . . 'This was not a death by smothering. None of the findings . . . support that conclusion. He died as a result of the stress of the event and the position in which he was bound.'" Over the State's objection, the habeas court admitted Posel's declaration that she attached to Applicant's habeas application. Dr. Peerwani testified that he did not make those statements to Posel, because he could not rule out smothering, and Posel took other statements out of context.

b. The Habeas Court's Findings of Fact and Conclusions of Law

Both Applicant and the State submitted their proposed findings of fact and conclusions of law to the habeas court. The habeas court adopted Applicant's, nearly verbatim. The habeas court's findings of fact and conclusions of law relied upon the facts previously mentioned and Mr. Tomlin's pacemaker, which is discussed below. Because the habeas court adopted Applicant's proposed findings of fact and conclusions of law, the habeas court recommended that this Court grant Applicant relief on both claims.

c. The State's Objections

The State filed objections to the habeas court's findings of fact and conclusions of law. The objections can be generalized into two categories of arguments.

First, the State argues that the habeas court considered evidence outside the scope of the factual basis of Applicant's claims. The factual basis of both Claim 1 and Claim 3 is that Dr. Peerwani changed his opinion about Mr. Tomlin's cause of death. The State argues that the habeas court exceeded the scope of that factual basis when it considered (1) Dr. Peerwani's failure to disclose that he found a pacemaker in Mr. Tomlin's body during the autopsy; (2) Dr. Peerwani's opinion about the pacemaker's significance; (3) Dr. Peerwani's misstatement at trial that Mr. Tomlin's chin and cheekbone

injuries were contusions instead of abrasions; (4) Dr. Peerwani's trial testimony about the cause of Mr. Tomlin's chin and cheekbone injuries; and (5) new scientific evidence demonstrating that the lip indentations on the inside of Mr. Tomlin's mouth occurred post-mortem.

Second, the State argues that the record does not support granting Applicant relief. Specifically, most of Dr. Peerwani's alleged changed opinion about Mr. Tomlin's cause of death comes from a version of events as articulated by Applicant's habeas counsel, and Dr. Peerwani's actual habeas testimony shows that he has not changed his opinion.

IV. Admissibility of Evidence

a. Applicable Law

We filed and set this habeas application to determine whether "any of the evidence presented and admitted at the evidentiary hearing exceed[ed] the scope of the claims as Applicant phrased and argued them in his application," and if so, whether we should "consider any such evidence." As explained below, the answer to the first issue is yes, and the answer to the second issue is no.

"[T]he fact issues that must be resolved are those contained within the writ application and the State's controverting answer." *Ex parte Medina*, 361 S.W.3d 633, 642 (Tex. Crim. App. 2011). We have continually required a writ application to "be complete on its face." *See id.* at 641. "It must allege specific

facts so that anyone reading the writ application would understand precisely the factual basis for the legal claim." *Id.* (citing *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977)). In the context of a subsequent Article 11.071 habeas application, we have explained that a trial court does not have habeas jurisdiction "unless and until this Court has made a determination that the application satisfies an exception under Article 11.071, § 5, to the bar against subsequent applications." *In re Tex. Dep't of Crim. Just.*, 710 S.W.3d 731, 738 (Tex. Crim. App. 2025). Consequently, a habeas court cannot review claims that were not raised in the application or the Court's remand order. *See id.*

Once claims in a subsequent capital writ application are remanded, "Article 11.071 makes the habeas judge 'the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.'" *See In re Harris*, 491 S.W.3d 332, 335–36 (Tex. Crim. App. 2016) (citing *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004)). The habeas judge has "a measure of discretion in managing the process of fact-finding in a capital writ proceeding." *Id.* at 336. The habeas court's duty as the "original factfinder" is to assist this Court in its role as the "ultimate factfinder." *See 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)). The habeas court does so by entering its findings of fact and conclusions of law and forwarding to us the habeas record. Those findings of fact and conclusions of law and accompanying records are then used by this Court in determining whether a habeas applicant is entitled to post-conviction relief. In most circumstances, we defer to the habeas judge's findings of fact and conclusions of law because the habeas judge is in the best position to assess the credibility of the witnesses. *Id.* We will defer to and accept a habeas judge's findings of fact and conclusions of law when they are supported by the record. *Id.* But if our independent review of the record reveals circumstances that contradict or undermine the habeas judge's findings and conclusions, we can exercise our authority to enter contrary findings and conclusions. *Id.*

The habeas system of review is frustrated when the habeas record contains evidence that is not pertinent to the claims for which this Court remanded. Our review becomes even more complex when the findings of fact and conclusions of law integrate facts and claims this Court previously considered and rejected. At that point, new claims and facts blend with old claims and facts, defeating the purpose of our remand order and the subsequent writ bar. Thus, the habeas court's evidentiary discretion over a

remanded subsequent writ application is limited by the claims upon which we remanded, and the facts pleaded in the application itself. This Court will undertake its own independent review of the record when the record created by the habeas court contains evidence that falls outside the scope of the application and our remand order. Here, we remanded two claims. The factual and legal bases pleaded in those claims restricted the habeas court's role as "the collector of the evidence, the organizer of materials, the decisionmaker as to what live testimony may be necessary [to resolve controverted factual issues], [and] the factfinder who resolves disputed factual issues." *Simpson*, 136 S.W.3d at 668.

Applicant's first claim alleged a false evidence due process claim. As this is a subsequent application, Applicant needed to clear the Section 5 writ bar under Article 11.071. An applicant may obtain a merits review of a subsequent application if "(1) the current claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previously application; [or] (2) by preponderance of the evidence but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1)–(2). Applicant alleged both. In the application, he relied upon the

alleged new evidence from Dr. Peerwani, along with Drs. Spitz, Daniel, and Anderson, to demonstrate that Dr. Peerwani's trial testimony, used by the State to prove that Applicant committed an intentional act, was inaccurate and misleading. That new evidence, as Applicant alleged, specifically established "that: (1) the autopsy findings do not support a determination that Mr. Tomlin's death was caused by an intentional act; (2) injuries on Mr. Tomlin's inner lip do not clearly establish smothering and those injuries could have in fact been caused by a slap or punch; and (3) the autopsy findings are more consistent with a cause of death of positional asphyxiation or a cardiac event resultant from Mr. Tomlin's pre-existing medical conditions, and do not support a diagnosis of smothering." To obtain a merits review to determine whether those three aspects of Dr. Peerwani's trial testimony were false or misleading, Applicant relied upon the new evidence from three experts and Dr. Peerwani's alleged change of opinion. Thus, the habeas court should have limited its factual and legal inquiry to whether that allegedly false or misleading testimony was false or misleading.

Applicant's third claim alleged new scientific evidence under Article 11.073 of the Texas Code of Criminal Procedure. Because this is a subsequent application, Applicant needed to show that the "claim or issue could not have been presented previously in an original application or in a previously

considered application" because it "is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application . . . was filed." TEX. CODE CRIM. PROC. art. 11.073(c). That determination is informed by "whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence has changed since" the date on which a previous application was filed. *Id.* art. 11.073(d). Applicant expressly relied upon Dr. Peerwani's changed opinion, as described in Posel's declaration, to satisfy the subsequent writ hurdle under Article 11.073. Thus, the habeas court's Article 11.073 merits analysis should have been limited to determining whether Dr. Peerwani did, in fact, recant his trial testimony.

b. Analysis

i. Claim 1: False Testimony

1. Dr. Peerwani's autopsy notes

Before his deposition prior to the habeas hearing, Dr. Peerwani turned over to Applicant the Provisional Autopsy Form (PAF) containing his handwritten notes for Mr. Tomlin's autopsy. These notes show that Dr. Peerwani found a pacemaker in Mr. Tomlin's body and observed a single pacemaker lead inserted into the heart. The final autopsy report provided to

defense at trial, which did not include the PAF, indicated that Mr. Tomlin had a pacemaker-type scar, but it did not mention that Dr. Peerwani actually found a device. At the deposition, Dr. Peerwani testified that he inadvertently omitted the pacemaker finding from his final autopsy report and did not mention the pacemaker during trial because no one asked him about it.

Evidence of the PAF and the State's failure to disclose it are not pertinent to resolving the merits of Applicant's instant false evidence claim. As pleaded, Applicant's false evidence claim revolved around the autopsy's findings and Mr. Tomlin's inner lip injuries not supporting Dr. Peerwani's trial testimony. Applicant alleged that other expert opinions demonstrated that Dr. Peerwani's trial testimony was false or misleading. The PAF falls outside the scope of the application's pleadings.

Instead, this evidence would support a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." 373 U.S. at 87. But Applicant already raised a *Brady* claim premised on the State's failure to disclose exculpatory evidence that Mr. Tomlin had a peacemaker at the time of death. *Ex parte Carter*, No. WR-70,722-04, 2021 WL 1014638 (Tex. Crim. App. Mar.

17, 2021) (per curiam) (not designated for publication). Applicant's *Brady* claim was dismissed by this Court as subsequent. Applicant cannot use evidence of a *Brady* violation to prove his *Napue* claim. Thus, the PAF, while in the record, is outside the scope of the claims on which we remanded.

2. The pacemaker

Related to the State's failure to disclose the PAF is Dr. Peerwani's failure to testify about the existence of the pacemaker, thereby potentially leaving a misleading impression of the evidence in the jury's mind. Applicant contends that Dr. Peerwani's testimony was "false" because he "omitted or glossed over pertinent facts," which created a false impression to the jury. *See, e.g.*, *Ex parte Robbins* (*Robbins I*), 360 S.W.3d 446, 462 (Tex. Crim. App. 2011). At trial, the State confirmed with Dr. Peerwani that Mr. Tomlin's death lacked evidence of a "cardio" event. Dr. Peerwani failed to mention the pacemaker, which arguably could be a relevant fact as to whether there was evidence of a cardiovascular or respiratory event.

However, the evidence of a pacemaker was known to Applicant at the time of trial. Mr. Tomlin's daughter testified that he had a pacemaker inserted into his chest in 2002.[4] During closing argument, defense counsel argued that

[4] On direct examination, Mr. Tomlin's daughter, Deborah Wilson, testified: "He had to have a pacemaker put in in 2002 because he was very weak and wobbly and would pass out."

Applicant was guilty of nothing more than felony murder or aggravated robbery and asserted that Mr. Tomlin had a pacemaker.[5] The State, Applicant, and even the jury knew of Mr. Tomlin's pacemaker. Everyone knew that Dr. Peerwani failed to testify about the pacemaker. Even the final autopsy report indicated that Mr. Tomlin had a pacemaker-type scar.

The pacemaker evidence was available at the time of Applicant's initial writ, and yet Applicant's initial writ application failed to claim that Dr. Peerwani provided false or misleading testimony. Even if this was not procedurally barred, the factual basis is outside the scope of the facts and legal claims pleaded in Applicant's subsequent writ.

3. Posel's declaration

The habeas court admitted and considered the sworn declaration by Posel for the truth of the matter therein. This evidence directly contradicts Dr. Peerwani's trial and habeas testimony and provides the strongest support for

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[5] In closing, Applicant's trial counsel argued the following:

1) "Now, did he [the complainant] die during a robbery? Sure, because robbery includes flight therefrom. After they left, did he die? Yeah. Is that in the course of a robbery? Yeah."

2) "Did anybody want him [the complainant] to die? I submit to you no. He was an older man. He had emphysema, chronic lung disease, high blood, a *pacemaker*. . . ." (Emphasis added).

3) "[The complainant's death] is punishable as either felony murder or aggravated robbery."

Applicant's false evidence claim.

The habeas court erred by admitting and relying upon what Dr. Peerwani allegedly said because Dr. Peerwani's statements are inadmissible as hearsay within hearsay. The first level is Posel's affidavit; the second level is Dr. Peerwani's out-of-court statement contained within Posel's version of Dr. Peerwani's statements. *See* TEX. R. EVID. 801. Posel's declaration is admissible because affidavits can be used in habeas hearings,[6] but the substance of the document itself violated the rule against hearsay. Therefore, the substance of Posel's declaration used to support Applicant's claim was erroneously admitted over hearsay objections and, as a result, should not have been considered.

4. Chin and cheek injuries

The autopsy report described two "abrasions" to Mr. Tomlin's chin and cheek. Yet at trial, Dr. Peerwani described these chin and cheek injuries as "contusions" or "bruises," not abrasions. As explained by Dr. Peerwani at the habeas hearing, an abrasion and contusion are specific and separate injuries. The habeas court should not have considered this evidence for two reasons. First, Dr. Peerwani's autopsy, provided to defense counsel before trial,

[6] The habeas court may resolve "controverted, previously unresolved factual issues material to the legality of the applicant's confinement" by requiring "affidavits, depositions, interrogatories, and evidentiary hearings" to assist with the process. *See* TEX. CODE CRIM. PROC. art. 11.071, § 9(a).

accurately described the injuries as "abrasions." Applicant, therefore, knew of this misleading testimony at the time he filed his initial writ, and yet he failed to make such a claim. This evidentiary basis is procedurally barred. Second, this testimony was not even mentioned in Applicant's habeas application, so it is outside this Court's remand order.

The habeas court also erred in considering Dr. Palenik's experiment in which his colleague laid on a carpet square, placed duct tape over his mouth, and rubbed his face on the floor to reproduce the crime-scene photo fold. That experiment, according to the habeas court, disproved Dr. Peerwani's answer to a hypothetical question posited by the State.[7] It is unclear whether an expert's

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[7] The hypothetical question posed by the State to Dr. Peerwani concerned the cause of the chin injury:

> [R]eferring to the contusion on his chin for a moment . . . could a contusion – I'm sorry-a bruise of this nature be caused if someone was struck on the head, fell, and hit the floor hard?" and "if a person was stretched out . . . with their chin in the proximity of the floor, that certainly might suggest that's what happened?"

Dr. Peerwani agreed with the prosecutor's hypothetical.

In finding of fact no. 129, the habeas court found, "This Court finds that the abrasions on Mr. Tomlin's chin and cheek are inconsistent with the hypothetical posed by the prosecutor, in which the injuries were erroneously described as contusions or bruises. This Court finds that this testimony was therefore both inaccurate and misleading." In finding of fact no. 130, the habeas court found, "This Court further finds that the abrasion on Mr. Tomlin's chin is consistent with Mr. Tomlin repeatedly rubbing his face against the carpet as he attempted to rub the strip of duct tape off his mouth."

opinion in response to a hypothetical could be proven false by a scientific experiment involving other facts not posed in the original hypothetical. Even assuming that it could, a contravening explanation as to how the duct tape on Mr. Tomlin became partially removed from his mouth is unrelated to the facts pleaded in this habeas application.

ii. Claim 3: Article 11.073

In his third claim, Applicant seeks relief under Texas Code of Criminal Procedure Article 11.073. Article 11.073 is the "new science" writ. Applicant claims that Dr. Peerwani's purported change in opinion regarding the cause of Mr. Tomlin's death is newly available scientific evidence. To the extent the habeas court relied on Posel's declaration, it erred. *See supra* Part II.b.i.3.

The habeas court also relied on Dr. Sacks's computational model and testimony, both of which were used to support the theory that Mr. Tomlin's patterned lip markings occurred post-mortem due to the weight of his head and pressure exerted on his upper teeth for several hours. The techniques employed by Dr. Sacks are recently developed from a young scientific field, and he could not have performed this analysis until 2018. This type of new scientific evidence is unrelated to whether Dr. Peerwani changed his expert opinion about Mr. Tomlin's cause of death. Because Dr. Sacks's scientific opinion is divorced from Dr. Peerwani's allegedly recanted opinion, the habeas court

erred by using Dr. Sacks's testimony in its recommendation that this Court grant Applicant relief under Article 11.073.

V. Merits of Applicant's Claims

a. Claim 1: False Testimony

This Court has said, "[W]hen the State uses materially false testimony to obtain a conviction, regardless of whether it does so knowingly," due process is violated. *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019) (citing *Chabot*, 300 S.W.3d at 770–71); *see also Napue*, 360 U.S. at 269. A due process claim based on false evidence requires the State to either "knowingly solicit[] false testimony or knowingly allow[] it 'to go uncorrected when it appears.'" *Glossip v. Oklahoma*, 604 U.S. —, 145 S. Ct. 612, 626 (2025) (quoting *Napue*, 360 U.S. at 269). The State must somehow assist the presentation of the false testimony before the jury. *See id*. The State may, for example, present false testimony or evidence to the jury, thereby sponsoring it for the jury to consider. Alternatively, the State may acquiesce when someone else creates a false impression before the jury. Under either scenario, the State is to blame because it knowingly participated in an unfair trial that resulted in the conviction of the accused. *See Napue*, 360 U.S. at 269–70.

This Court has expanded those principles and prohibits both the knowing and unknowing use of false or misleading evidence. *E.g.*, *Ex parte*

Ghahremani, 332 S.W.3d 470, 477–78 (Tex. Crim. App. 2011). This unknowing use due process claim removes the scienter requirement from the State's use but still requires the evidence to be false or misleading at the time of trial. *See, e.g.*, *Chabot*, 300 S.W.3d at 772 ("The DNA test results conclusively link [the State's witness] to [the victim's] sexual assault and therefore show that [the witness] perjured himself *at the applicant's trial*." (emphasis added)); *Ex parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014) (finding that mental health records demonstrated that witness gave false testimony at trial about whether he had ever experienced hallucinations). Opinion testimony that is scientifically accurate at the time of trial does not "create a misleading impression of the facts" at trial, *Ghahremani*, 332 S.W.3d at 479, because it leads the jury to a correct interpretation of the evidence according to the well-accepted understandings of the scientific community at that time. Thus, habeas claims that are based on that type of opinion testimony are not cognizable under the theory that the State unknowingly solicited false or misleading testimony.

i. Dr. Peerwani's testimony was not false or misleading

Both in his deposition and during the habeas hearing, Dr. Peerwani reaffirmed that there were two competing causes—smothering and positional asphyxia—for Mr. Tomlin's death. Dr. Peerwani also reaffirmed that he could

not conclusively determine how the smothering occurred, nor could he exclude smothering as part of the chain of events that led to the terminal cause of death because there were markings consistent with smothering, just as he had testified at trial. The only evidence that Dr. Peerwani contradicted himself came from Posel's declaration. But, as explained previously, that declaration was not admissible because it violated the rule against hearsay.

During the habeas hearing, Dr. Peerwani emphasized that the only evidence that supported the conclusion that Mr. Tomlin had been smothered were the partition marks or pattern contusions that Dr. Peerwani observed on Mr. Tomlin's inner and upper lip. Dr. Peerwani also reiterated that the inner lip injuries were consistent with smothering. Applicant's experts provided their competing conclusions. On direct examination, Dr. Gruszecki opined that Mr. Tomlin's death was due to: (1) his preexisting medical issues (hypertensive and atherosclerotic cardiovascular disease, and emphysema); (2) the stress of being robbed and receiving continuous contusions, which would have exacerbated his cardiac disease; and (3) positional asphyxia. Yet on cross-examination, Dr. Gruszecki testified that she could not rule out smothering. Dr. Baden testified that Mr. Tomlin "died of a cardiac arrythmia, which developed as an acute congestive heart failure because of pre-existing, severe coronary artery disease, a narrowing of his coronary arteries by arteriosclerotic

plaque[,] that was triggered by the home invasion – the emotional aspects of the home invasion." He also disagreed that the death involved smothering or positional asphyxia.

There are two takeaways from combining Applicant's experts' testimonies. First, even Dr. Gruszecki and Dr. Baden disagree about the cause of death. Second, only Dr. Baden unequivocally opined that the cause of death did not involve smothering or positional asphyxia. Unlike Dr. Baden, Dr. Gruszecki could not rule out smothering and even opined that positional asphyxia was part of Mr. Tomlin's cause of death. Because Applicant's own experts disagree about the cause of death, and only one confidently opined that Dr. Peerwani's testimony was incorrect, Applicant's false evidence claim amounts to no more than a difference of opinion among competing experts. Even the experts Applicant relied upon in filing this application disagree with the experts who testified on his behalf. Dr. Baden, for example, testified that the teeth imprints developed after death, while Dr. Sptiz's declaration stated that the injuries inside Mr. Tomlin's lip "could have been sustained by a slap or a punch."

A difference of opinion between experts is inadequate to render Dr. Peerwani's trial testimony false or misleading. Dr. Peerwani's opinion was not scientifically unsound at the time of trial and likewise seems scientifically

sound today. The battle of the experts that Applicant litigated before the habeas court goes to the weight of the evidence at trial, not whether Dr. Peerwani's trial testimony was false or misleading.

ii. Assuming the testimony was false or misleading, was it material?

Even if Dr. Peerwani's testimony was false or misleading, Applicant does not meet the materiality standard. Uncorrected false testimony warrants a new trial only if it "may have had an effect on the outcome of the trial—that is, if it 'in any reasonable likelihood [could] have affected the judgment of the jury.'" *Glossip*, 604 U.S. —, 145 S.Ct. at 626–27 (citation omitted). Stated another way, false evidence is material if there is a "reasonable likelihood" that it affected the jury's judgment. *Weinstein*, 421 S.W.3d at 665.

The State presented ample evidence to demonstrate Applicant's intent to kill. The murder was the tying up and smothering of an 89-year-old man and leaving him in a compromised position face down on the floor. The evidence at trial also showed that Applicant brought a gun with him to the robbery that he used to strike Mr. Tomlin in the head with enough force to render Mr. Tomlin temporarily unconscious. Neither Applicant nor his accomplice tried to hide their identities during the crime. The evidence at trial showed that neither Applicant nor his co-defendant wore masks during the robbery. The pair gained entry to the house because Mr. Tomlin knew Applicant's co-defendant

through her mother. Applicant told investigators that he covered his hands with socks during the offense. At trial, a witness testified that Applicant told her after the offense that he was not worried about the police finding fingerprints because he had worn gloves. The jury could have reasonably inferred from this evidence that Applicant knew he was going to kill Mr. Tomlin, so it was unnecessary to hide his face. Applicant just needed to avoid leaving fingerprints.

The manner of killing is equally important to this inquiry. As Dr. Peerwani testified at trial, there is a difference in killing someone with a firearm and killing someone by smothering: noise. Killing someone with a firearm—without a silencer—is an inherently loud cause of death. In contrast, killing someone by smothering is generally a quiet cause of death where the victim succumbs to the force of the attacker. As Dr. Peerwani testified, smothering is a preferable method of killing if the attacker aims to be quiet and avoid attention. The jury could reasonably infer that Applicant, who had entered Mr. Tomlin's home without a mask, would have killed the only witness to his crime quietly in order to avoid drawing the attention of a neighbor. Had the jury harbored a reasonable doubt as to whether Applicant's conscious objective or desire was to cause Mr. Tomlin's death, the jury charge instructed it to acquit Applicant of capital murder and then consider whether to convict

him of murder. But the jury did not harbor such doubt and found Applicant guilty of capital murder.

Moreover, even if Dr. Peerwani's testimony had been false, it would not have been material because the falsity pertained to only one of three alleged manner and means of killing. The indictment's allegations and the jury charge alleged three separate ways to convict Applicant. Dr. Peerwani's testimony, if false, only negated one of the three. On direct appeal, Applicant complained that the trial court erroneously authorized a guilty verdict if the jury found he had caused the complainant's death in one of three alternative ways—"restraining him *or* causing him to lie face down *or* by smothering him by exerting pressure on his head or face." *Carter*, 2009 WL 81328, at *2 (emphasis added). This Court held that there was no jury charge error; but even assuming there was, Applicant did not suffer egregious harm. *Id.* at *3. Even one of Applicant's instant habeas experts, Dr. Gruszecki, agreed that a likely cause of death was positional asphyxia (i.e., being restrained *or* forced to lie face down). There was ample evidence from which the jury could infer intent. Furthermore, the State's alternate theories allowed the jury to convict Applicant for intentionally killing Mr. Tomlin by either restraining him or causing him to lie face down. Dr. Peerwani's trial testimony did not touch on the State's evidence supporting the alternate theories.

Applicant fails to demonstrate that Dr. Peerwani's testimony was either false or misleading. Moreover, he also fails to show materiality. Applicant's false evidence claim fails.

b. Claim 3: Article 11.073

To receive relief under Article 11.073, an applicant must demonstrate by a preponderance of the evidence that he would not have been convicted if newly available scientific evidence had been presented at trial. *See* TEX. CODE CRIM. PROC. art. 11.073; *Ex parte Robbins* (*Robbins II*), 478 S.W.3d 678, 690 (Tex. Crim. App. 2014). Applicant failed to meet this burden.

As explained previously, the habeas court should not have considered Dr. Sacks's testimony because it fell outside the scope of Applicant's new science claim. Applicant's new science claim is based on Dr. Peerwani's allegedly "new," contradictory opinion of Mr. Tomlin's cause of death. As pleaded, this claim mirrors the claim made in *Robbins II*. *See generally* 478 S.W.3d 678. In *Robbins II*, the state's expert testified at trial that the manner of the victim's death was homicide. 478 S.W.3d at 682. Later, the expert re-evaluated her findings, could no longer stand by her testimony that the death was a homicide, and sent a letter to the district attorney in which she said, "I now feel that an opinion for a cause and manner of death of undetermined, undetermined is best for this case." *Id.* at 685. However, there is one significant difference

between Applicant and the applicant in *Robbins II*. There is no evidence that Dr. Peerwani has changed his opinion. Applicant's Article 11.073 claim rested upon Dr. Peerwani's alleged changed opinion about Mr. Tomlin's death. Because Applicant failed to demonstrate that change of opinion, Applicant's Article 11.073 claim fails.

VI. Conclusion

We filed and set this habeas application to determine whether the evidence admitted and considered at the evidentiary hearing on Applicant's false evidence and new science claims exceeded the scope of the claims Applicant raised in his application, and if so, whether we should consider that evidence. We conclude that the habeas court admitted several pieces of evidence that exceeded the scope of the claims that Applicant raised, and we will not consider it. Rejecting this evidence and properly limiting our analysis to only the evidence that should have been considered, Applicant does not meet his burden on his false evidence claim or his new science claim. Consequently, we deny Applicant post-conviction habeas relief.

Delivered: July 30, 2025
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Appendix B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,722-03

EX PARTE TILON LASHON CARTER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. C-371-011057-0949973-B IN THE 371ST DISTRICT COURT FROM TARRANT COUNTY

WALKER, J., filed a dissenting opinion, in which RICHARDSON and NEWELL, JJ., joined.

DISSENTING OPINION

We have before us an application for a writ of habeas corpus filed under article 11.071 of the Texas Code of Criminal Procedure. Applicant Tilon Lashon Carter claims the State relied on false and misleading testimony by the State medical examiner and that the State medical examiner has since changed his opinion on the cause of death in contradiction to the State's evidence at trial under article 11.073. Based on my independent review of the record, I conclude that Carter is right, and he is entitled to relief.

Instead of conducting its own independent *review* of the record sent to us by the trial court, the majority of this Court decides that it does not want to consider the evidence and throws it out,

because, in the majority's view, the evidence is not pertinent to the claims Carter raised in his application, and the majority chides the trial court for admitting the evidence. And without the evidence, the majority of course concludes that Carter fails to meet his burden to show he is entitled to relief.

The record evidence sent to us by the trial court is relevant and probative of Carter's claims, and the trial court was well within its role to admit it. Because the Court mistakenly decides that the evidence is outside the scope of Carter's claims, and therefore mistakenly concludes that Carter is not entitled to relief, I respectfully dissent.

I — Background and Trial

Tilon Lashon Carter was indicted for capital murder committed during a robbery. The indictment alleged that Carter "intentionally cause[d] the death of . . . James Tomlin by restraining him and causing him to lie facedown and by smothering him[.]"[1] At trial, there was no dispute that Carter and his girlfriend, Leketha Allen, robbed Tomlin; the dispute centered on whether Carter intentionally caused Tomlin's death or whether Tomlin died an unintended consequence of the home invasion. On November 1, 2006, the jury returned a guilty verdict, convicting Carter of capital murder. In accordance with the jury's findings in the punishment phase, the trial court sentenced Carter to death.

I(A) — Evidence Presented at Trial

On April 28, 2004, Deborah Wilson discovered her father, eighty-nine-year-old James Tomlin, deceased, lying on the floor of his living room. Tomlin's arms were duct-taped behind his back, and his ankles were duct-taped together. His feet were near the back door. The outer screen

[1] 1 CR 2.

to the back door was closed, but the interior door was open. His face was turned slightly to the left, and his right cheek rested on the carpet. Detective Cheryl Johnson of the Fort Worth Police Department testified that a piece of duct tape was stuck to Tomlin's left ear and cheek that had folded back on itself. She believed it covered Tomlin's mouth but at some point, someone had removed the tape or it "had been brushed with his head back and forth to make [the tape] peel back on itself."[2] Detective Johnson also observed glue from the duct tape on Tomlin's pant leg and sock that was consistent with a struggle to get out of the tape. No other evidence was presented at trial as to how the duct tape may have been removed from Tomlin's mouth.

I(A)(1) — Statements by Applicant

At trial, the State introduced several statements that Carter made to friends and police officers after the robbery. Carter told a former girlfriend that Allen shot Tomlin, but because Tomlin was still moving, Carter cut Tomlin's throat and secured him with duct tape. Carter told a longtime friend that he had robbed an old man with Allen, but they had only bound him with tape and did not kill him. After Carter's arrest, he told his cellmate that a man had died in the process of the robbery.

The State introduced two written statements that Carter gave to police after his arrest. In his first written statement, Carter said that Allen's mother suggested they rob Tomlin. Allen's mother knew that Tomlin lived alone and kept large amounts of cash in his house. Allen was also acquainted with Tomlin. When they arrived at Tomlin's house, Allen knocked on the back door first. When Carter reached the door, he saw that Tomlin had a claw hammer in his hand. Tomlin swung the claw hammer at Carter, but Carter dodged it and ordered Tomlin to lie down. Carter then used a sock to hold a roll of duct tape and tore a piece off with his teeth. He secured Tomlin's hands with the duct

[2] 40 RR 74–75.

tape while he and Allen searched the house. Allen took two jars of coins from the kitchen, and Carter took a gun from the bedroom. Allen left the house first and waited for Carter to join her. Once Carter came out of the house, they drove back to Allen's mother's house.

In his second written statement, Carter said he brought a gun with him to the robbery. When Tomlin swung at him with a claw hammer, he grabbed Tomlin's arm and sat him down on the floor. Allen then went into the house and took a jar of coins. Carter handed Allen the gun, and he went to the bedroom and grabbed Tomlin's gun. Carter told Allen to wait in the car while he wrapped Tomlin's hands and feet with duct tape. Carter watched Tomlin for a minute "to make sure he was ok."[3] When he left, Tomlin was still talking and sitting up with his legs out on the ground and his hands behind him.

I(A)(2) — Dr. Peerwani's Trial Testimony on the Cause of Death

Although Carter had told an ex-girlfriend that he cut Tomlin's throat after Allen shot Tomlin, neither were found by Dr. Nizam Peerwani, the Tarrant County Medical Examiner. Instead, Dr. Peerwani concluded that Tomlin died a respiratory death caused by "smothering with positional asphyxia."[4] In the autopsy report, Dr. Peerwani listed four findings that evidenced smothering: (1) patterned mucosal contusions of the upper lip (also referred to "patterned lip marks"); (2) orbital edema; (3) leptomeningeal congestion with cerebral edema; and (4) generalized visceral congestion. Dr. Peerwani discussed the external and internal autopsy findings that led him to his conclusion on the cause of death.

I(A)(2)(i) — External Injuries

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[3] State's Trial Ex. 97; 52 RR 141.

[4] 41 RR 195.

The external injuries noted by Dr. Peerwani were blunt force trauma to Tomlin's left forehead; contusions (or bruising) to the right area of his face, right cheekbone, chin, and focal abrasions; and another contusion to his right interior shoulder. Dr. Peerwani described the injury to Tomlin's forehead as "two small lacerations present where the scalp had been cut by a blunt trauma with [the] surrounding area of contusion or bruising and abrasions or a scraping."[5]

Dr. Peerwani testified that the lacerations to Tomlin's head were likely not caused by a claw hammer like the one found at the scene. The skull was not fractured, and the brain was not injured, so the amount of damage conflicted with a blow from a claw hammer. Dr. Peerwani agreed with the prosecutor's hypothetical that it was possible that the "contusion on his chin" could have occurred if someone was "struck on the head, fell, and hit the floor hard[.]"[6] He added that there was a "contusion or a bruise on the inner surface of the chin, and this is again a blunt force traumatic injury."[7] Dr. Peerwani described the other facial injuries as swelling and "tremendous darkening of the face."[8] Darkening of the face is a "sign that [Tomlin] went into respiratory failure of some sort."[9]

I(A)(2)(ii) — Internal Examination

In the internal examination, Dr. Peerwani found that the lungs and brain were swollen, and Tomlin's lungs, the covering of his brain, his liver and his kidneys were all very congested and

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[5] 41 RR 156. Dr. Peerwani described a "laceration" as an injury that causes damage to the skin where the skin is split up. Unlike a cut, a laceration is produced by a blunt force traumatic injury.

[6] 41 RR 160.

[7] 41 RR 160.

[8] 41 RR 159, 162.

[9] 41 RR 179.

swollen with blood.[10] To Dr. Peerwani, this meant that Tomlin was denied air or could not breathe, which is generally what causes congestion in the body. Therefore, he could say the death was "asphyxial or respiratory in nature," rather than a sudden cardiac event.[11] Dr. Peerwani also testified that Tomlin's heart was enlarged, his arteries were hardened, and he had moderate emphysema of his lungs. These conditions would have compromised Tomlin's lung capacity and he would therefore be more susceptible to positional asphyxia.[12] Dr. Peerwani added to the above findings that Tomlin was elderly and fragile, but other than those findings "no other pathology or abnormalities [were] present internally."[13]

I(A)(2)(iii) — Patterned Lip Marks

Dr. Peerwani testified at trial that Tomlin had an injury to the inside of his mouth, which he described as precise, patterned indentations along the inner surface of his right upper lip.[14] Dr. Peerwani said the marks to Tomlin's right upper lip showed that he was intentionally smothered sometime during the robbery while he was still alive.[15] He stated that these marks were significant because:

> This is a very classical and typical injury that you see in a setting where a person has been smothered. When the force is applied to the face and there are compressive forces pushing the lips and the cheek downwards onto a hard surface, in this

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[10] 41 RR 174.

[11] 41 RR 176.

[12] 41 RR 178.

[13] 41 RR 174.

[14] 41 RR 169–70.

[15] 41 RR 171.

> particular case, the underlying teeth then leave [these] indentation markings on the lips with superficial tearing of the lining of the mucosa.[16]

Dr. Peerwani could not determine how the pressure was applied to Tomlin's head or face, but he knew that the marks could not have resulted from a punch or slap to the mouth because in that case there would also be exterior injuries that were not present. Nor could the marks have been caused from Tomlin rubbing his face on the ground to remove the duct tape from his mouth because the pattern of the marks was caused by "direct perpendicular forces and compressive forces."[17] If Tomlin rubbed his face to get the duct tape off, there would be "much more injuries to the upper lips than you are seeing."[18] Dr. Peerwani also agreed with the prosecutor'' statement that the presence of internal indentation marks and the lack of external injuries "is classic for smothering by exerting pressure on a person's mouth."[19]

Dr. Peerwani also stated that producing the inner teeth marks would require steady, constant pressure, either directly to the front of Tomlin's face or the back of his head onto a hard surface while he was face down on the floor. Dr. Peerwani testified that smothering would take five to ten minutes of sustained and substantial pressure; "it's an intentional and very purposeful act requiring pressure to be continuously applied."[20]

I(A)(2)(iv) — Ultimate Conclusion on Cause of Death

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[16] 41 RR 172.

[17] 41 RR 186.

[18] 41 RR 202.

[19] 41 RR 173.

[20] 41 RR 183.

Dr. Peerwani recorded the cause of death on Tomlin's autopsy report as "smothering with positional asphyxia."[21] He could not determine whether Tomlin died from smothering or positional asphyxia, but he was positive that Tomlin died an asphyxial death at the hands of another human being. Dr. Peerwani said it was possible that Tomlin died from only positional asphyxia from the way he was bound with duct tape, but only if there were no patterned lip marks to suggest that Tomlin was smothered.[22] Dr. Peerwani emphasized that the cause of death comprised "two parts"—it was part positional asphyxiation and part smothering.[23] When defense counsel asked, "even though you say you found some evidence of smothering, that is not the cause of death by itself?"[24] Dr. Peerwani responded that he "can't be sure of that."[25]

Ultimately, Dr. Peerwani gave three scenarios for how Tomlin died: (1) an intentional smothering, which was fatal if it was carried on until he died; (2) an attempted smothering that left Tomlin in a compromised position which in turn caused him to die of positional asphyxia; and (3) Tomlin was in a state of positional asphyxia and then he was smothered at the very end until he died. The State concluded its presentation of Dr. Peerwani by confirming that "we're talking about an intentional act of smothering either way?"[26] Dr. Peerwani responded, "[t]hat's right."[27]

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[21] 41 RR 195.

[22] 41 RR 205.

[23] 41 RR 212.

[24] 41 RR 216–17.

[25] 41 RR 216–17.

[26] 41 RR 216.

[27] 41 RR 216.

I(B) — Closing Arguments

The State's closing argument centered on Dr. Peerwani's testimony that the patterned lip marks were evidence of intent to cause Tomlin's death. The State highlighted more than once that the marks on Tomlin's inner lips were "classical" of smothering:

> We have the smothering marks on the inside of his mouth. Dr. Peerwani talked to you about that stuff, and that's classical, classical for a case of intentional smothering. That's what those marks are. You don't just get those from falling. And we know it didn't happen that way be – from falling because he didn't have any injuries to the outside of his face . . . It was only the inside of the lips.[28]

The State also emphasized that the key points from Dr. Peerwani's testimony were: Tomlin died because Carter intentionally smothered him; Carter attempted to smother him, but did not succeed, and he died of positional asphyxia; or positional asphyxia had started and then Carter smothered him at the very end. "The bottom line is this, members of the jury. Someone intentionally tried to smother him, and he died of smothering."[29]

Besides presenting Dr. Peerwani as the State's primary evidence of intent to kill, the State argued that intent was clear, given that neither Carter nor Allen hid their faces or the car they used in the commission of the robbery, and Carter took care not to leave fingerprints at the scene. Carter brought a gun to the robbery, and although he did not shoot it, it could be inferred that it was the weapon used to cause the laceration to Tomlin's forehead and render him unconscious. Carter also made statements to others admitting participation in Tomlin's death.[30]

The defense's closing argument focused on persuading the jury that the State had not shown

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[28] 42 RR 41.

[29] 42 RR 45.

[30] Carter's trial counsel did not call any witnesses to testify.

the intent necessary for capital murder. Carter was only guilty of robbing and tying up Tomlin, who had then fallen and succumbed to positional asphyxiation.

After closing arguments, the jury found Carter guilty of capital murder. Subsequently, based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071, §§ 2(b) and 2(e), the trial judge sentenced Carter to death.

II — Post-Conviction Proceedings

On January 14, 2009, this Court affirmed Carter's conviction and sentence on direct appeal.[31] Carter filed a state application for writ of habeas corpus in 2008, alleging that trial counsel was ineffective for failing to timely contact, confer with, and present the testimony of a forensic pathologist to contradict Dr. Peerwani's trial testimony. The trial court conducted an evidentiary hearing on the application and recommended that relief be denied. We agreed and denied relief.[32]

III — Applicant's First Subsequent Application for Writ of Habeas Corpus

Carter filed his first subsequent application for a writ of habeas corpus on May 8, 2017.[33] In Claim One, Carter alleges that the State relied on false or misleading testimony in violation of due process under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Carter points to Dr. Peerwani's testimony that smothering is an intentional act, the patterned marks on the inside of Tomlin's upper lip established that he had been smothered, and

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[31] *Carter v. State*, No. AP-75,603, 2009 WL 81328, at *6 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication).

[32] *Ex parte Carter*, No. WR-70,722-01, 2010 WL 5232998 (Tex. Crim. App. Dec. 15, 2010) (not designated for publication).

[33] Carter's second writ, WR-70,722-02, was a writ of mandamus. Carter's -03 writ is his first subsequent writ under article 11.071.

these injuries could not have resulted from someone striking the victim because such action would have also caused markings on the exterior of Tomlin's lips or mouth. He argues that the State used Dr. Peerwani's testimony to show he killed Tomlin by an intentional act, which was necessary to convict Carter of capital murder.

Carter contends that new evidence shows Dr. Peerwani's trial testimony was false or misleading:

> (1) the autopsy findings do not support a determination that Tomlin's death was caused by an intentional act;
>
> (2) the injuries on Tomlin's inner lip do not clearly establish smothering, and those injuries could have resulted from a slap or punch; and
>
> (3) the autopsy findings are more consistent with a cause of death of positional asphyxiation or a cardiac event resulting from Tomlin's pre-existing medical conditions, and do not support a diagnosis of smothering.

In Claim Three, Carter alleges that new scientific evidence, presented by Dr. Peerwani's current opinion on the cause of death, contradicts the testimony the State relied on at trial. Carter alleges that Dr. Peerwani's current opinion is that the autopsy findings do not support an intentional act of smothering. Carter argues that had Dr. Peerwani's current opinion been presented at trial, the jury would not have convicted him of capital murder.

To support his writ application, Carter attached declarations from three experts. Carter's first expert, Dr. Werner U. Spitz, stated that "an asphyxial death is determined based on circumstantial evidence. There is no unequivocal diagnosis that can be made of asphyxia based on autopsy findings."[34] Ultimately, Dr. Spitz noted that "what I find is lacking in this case is the intent to cause

[34] First Subsequent Writ, Ex. 1.

death."[35] Next, Dr. Jack Daniel concluded that "[a]lthough the findings do not preclude asphyxia . . . " "[t]he findings do not clearly establish that attempted smothering was in fact responsible for injuries to the inner aspect of the lips[.]"[36] Carter's last expert, Dr. William R. Anderson, noted first that "[t]he presence of significant pulmonary edema . . . suggest[s] a prolonged period of cardio-pulmonary compromise, as opposed to a rapid asphyxia (e[.]g. smothering), with a positional asphyxia situation is the most likely possibility."[37] He concluded that "[t]he findings do not support an immediate death resulting from mechanical interference with breathing—a necessary finding needed to support a diagnosis of 'Smothering'."[38]

Carter also attached a sworn declaration and a letter from Thea Posel, who was serving as Carter's habeas counsel along with lead counsel, Raoul Schonemann.[39] According to Posel, she and Schonemann met with Dr. Peerwani on May 3, 2017, to discuss the autopsy of Tomlin. The next day, Posel sent an email to Dr. Peerwani's secretary, which contained a letter highlighting the significant points discussed in the meeting and requesting that he provide a written declaration. Dr. Peerwani did not respond to the email. On May 9, 2017, Schonemann and Posel sent Dr. Peerwani another email letting him know that they were required to file Carter's application the day before to meet the filing deadline before Carter's scheduled execution. A sworn declaration by Posel documenting their

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[35] *Id.*

[36] First Subsequent Writ, Ex. 3.

[37] First Subsequent Writ, Ex. 5.

[38] *Id.*

[39] Thea Posel is no longer serving as writ counsel for Carter. Raoul Schonemann continues to serve as writ counsel along with Mike Ware.

conversation with Dr. Peerwani was attached to the email. They requested that Dr. Peerwani correct them if there were any errors in the declaration; Dr. Peerwani never responded.

According to Posel, Dr. Peerwani said in their meeting that Tomlin's cause of death was positional asphyxia. He acknowledged that his autopsy report concluded the cause of death was "smothering with positional asphyxia," but he asserted that the actual cause of death was positional asphyxia. Posel wrote, "[h]e explicitly stated that the victim did not die of smothering." Posel's declaration also included that Dr. Peerwani said the patterned lip marks on the oral mucosa did not indicate that Tomlin was smothered; instead, he agreed that the marks could have resulted from something else. Dr. Peerwani said that "it was not possible to die of both smothering and positional asphyxia."

After we received Carter's first subsequent writ application, we stayed the execution and subsequently remanded to the habeas court Claims One and Three for resolution.[40] The habeas court conducted live evidentiary hearings in December 2019 and September 2020.

III(A) — Habeas Corpus Testimony

III(A)(1) — Dr. Peerwani

III(A)(1)(i) — Evidence of Smothering

Dr. Peerwani discussed each of the four findings listed in his autopsy report as evidence of smothering. He stated that none of the four findings are by themselves "specific to smothering."[41] He explained that asphyxia is a generic term for a respiratory death, and smothering is a type of

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[40] *Ex parte Carter*, WR-70,722-03, 2017 WL 4276860 (Tex. Crim. App. Sept. 27, 2017) (not designated for publication). Claim Two alleged ineffective assistance of counsel in violation of the Sixth Amendment.

[41] 6 WR 145.

asphyxial death.[42]

When Carter's counsel asked why the first finding, the patterned lip marks, evidenced smothering, Dr. Peerwani responded that "once you see markings on the undersurface of the lip, then you know there was a force applied, [a] shutting of the mouth."[43] Dr. Peerwani further explained that he could not rule out that the marks could have resulted from an impact on the front of his mouth, such as a punch.[44] If there were exterior injuries present in the area, then the marks would have certainly resulted from a slap or punch.[45] Dr. Peerwani acknowledged that if the patterned marks had resulted from some other mechanism, then there would be no evidence of smothering.

The habeas court questioned Dr. Peerwani directly on whether this was a "classical" case of smothering as he had testified at trial:

> [The Court] Q: And from the trial testimony . . . you, said, I believe, or somebody said, that this was a classical case of smothering. Is that – is it a classical case of smothering, or is just smothering a possibility?
>
> [Dr. Peerwani] A: Smothering is a possibility. It cannot be ruled out.
>
> [The Court]: Okay. Is it a classical case of smothering?
>
> [Dr. Peerwani]: If there was nothing else going on, it could be, yes. So you have to take that into context.
>
> [The Court]: So if you had someone who wasn't – didn't have this widespread edema that indicated a slower asphyxia and you had – they were just healthy . . . but they had

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[42] 6 WR 96.

[43] 6 WR 150.

[44] 6 WR 169.

[45] 6 WR 170–71. Dr. Peerwani did not think the patterned lip marks could have been caused by a slap because "[u]sually you don't slap people on the lips. You slap people on the cheeks." 6 WR 169.

died, and they had these teeth marks, you would say it's a classical case –

[Dr. Peerwani]: Correct.

[The Court]: – of smothering?

[Dr. Peerwani]: Correct

. . .

[The Court]: Okay. But in this case, would you call it a classical case of smothering, considering the whole context as far as –

[Dr. Peerwani]: You can take the whole context, and you have to consider everything. You have to consider his comorbidities, positional asphyxia, his lung problem, his heart problem, and then you can say that it's a very complex case.

Could [smothering] have happened at the very end? The answer is, yes, it could have happened at the very end. Could it have never happened? The answer is, yes, it could have never happened.

[The Court]: Okay. So it's not a classical case of smothering?

[Dr. Peerwani]: Not this particular case.

[The Court]: Because that makes it sound very straightforward, like, this man was definitely smothered.

[Dr. Peerwani]: Not in this particular case.[46]

The habeas court and Dr. Peerwani later returned to the discussion of whether smothering occurred:

The Court: Are you saying smothering did, in fact, occur?

. . .

[Dr. Peerwani]: No. I'm saying, if it was smothering –

The Court: So –

[Dr. Peerwani]: – or attempted smothering. And we have already discussed some

[46] 6 WR 113–15.

> ways that could have happened, if it was an injury, such as the impact on the face. So, you know, it's something that I cannot exclude. That's all, Judge.
>
> The Court: Okay. You can't exclude it, but you can't –
>
> [Dr. Peerwani]: I can't say that's what happened.[47]

Dr. Peerwani also admitted that he misspoke at trial and failed to correct the prosecutor in referring to the exterior injuries to Tomlin's chin and cheek as "contusions" instead of abrasions.[48] The injuries to Tomlin's chin and cheek were correctly listed as "abrasions" in Dr. Peerwani's autopsy report. Dr. Peerwani denied any plot with the prosecutor to refer to the injury as a contusion rather than an abrasion.[49]

Dr. Peerwani clarified that the second finding listed as evidence of smothering—orbital edema (swelling of the eyelids)—is not actually related to smothering, it is evidence of an "asphyxial event," and smothering is a type of asphyxial death.[50] Dr. Peerwani stated that generally, only a long-term asphyxial event would produce orbital edema.[51] This meant, it was unlikely the orbital edema found in Tomlin's case was caused only by smothering because it requires a prolonged process and smothering is typically a short-term event.[52] Dr. Peerwani stated that the third and fourth findings, leptomeningeal congestion with cerebral edema and generalized visceral congestion, are

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[47] 6 WR 165.

[48] 6 WR 130. Dr. Peerwani testified that an abrasion occurs when the epidermis is scraped, crushed, or rubbed away. 6 WR 65.

[49] 2 CR 714; Peerwani Dep. 27:19.

[50] 6 WR 140–43.

[51] 6 WR 140–43.

[52] 6 WR 141–43.

also not specific to smothering, but they can be found in asphyxial deaths.[53] Ultimately, the only indication that smothering could have possibly occurred in Tomlin's case was based on the upper lip indentations.[54] Each of Dr. Peerwani's findings could occur in a case of smothering, but they generally require a prolonged death rather than a short-term event.

III(A)(1)(ii) — Tomlin's Preexisting Medical Conditions

When discussing the internal examination of the autopsy, Dr. Peerwani testified consistently with his trial statements that the brain, covering of the brain, lungs, and kidneys were swollen and congested. Dr. Peerwani also revealed that Tomlin likely suffered from several preexisting medical conditions such as hypertension, heart failure, cardiac arrhythmia, and lung disease.[55]

Dr. Peerwani testified that Tomlin suffered from hypertension based on the thin outer layer and granular surface of his kidneys.[56] As for the state of Tomlin's cardiovascular system, Dr. Peerwani stated that Tomlin's heart was enlarged and there was narrowing of his coronary arteries to 70%–80%.[57] Dr. Peerwani characterized 70%–80% narrowing as moderate to severe.[58] He explained that "if the coronary arteries are narrowed, there's not sufficient blood going into the heart.

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[53] 6 WR 202.

[54] 6 WR 120.

[55] According to Dr. Peerwani, heart failure is a slow disease where the heart is not pumping blood as well as it should, which can cause insufficient blood flow, swelling of the legs, and congestion and swelling in the lungs. 6 WR 136–37. A cardiac arrhythmia is an abnormal heart rhythm, and it is considered a sudden cardiac event. 6 WR 87 & 137. Dr. Peerwani stated that an abnormal heart rhythm is fatal unless it is corrected. 6 WR 137.

[56] 6 WR 69.

[57] 6 WR 70.

[58] 6 WR 70.

And, obviously, under stress, the heart may throw a rhythm abnormality, or it might cause a[n] infarction and die – and the person would die because of that."[59]

Although the terminal event could have been a cardiac arrhythmia, Dr. Peerwani said it is "not the proximate cause of death."[60] Dr. Peerwani explained that Tomlin "is an old person. He's compromised. He has cardiovascular disease. He has lung disease. He's been tied up. And could he have a fatal arrhythmia or cardiac event at the end? Absolutely. Yes. Why not?"[61] When defense counsel asked Dr. Peerwani why he did not discuss cardiac arrhythmia at trial, he said "I wasn't asked."[62]

Dr. Peerwani did not find evidence that Tomlin's death was due to heart failure because Tomlin "did not have any edema or swelling of his feet. He had no fluid collection in the chest cavity."[63] He said that in heart failure you might find congestion in the lungs, generalized visceral congestion, marked leptomeningeal congestion with cerebral edema, and orbital edema—all of which he found in Tomlin.[64] But he could not be sure whether those signs were caused by an asphyxial death or heart failure before he died.[65]

Another point of discussion during the evidentiary hearing was the discovery of an implanted

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[59] 6 WR 70.

[60] 6 WR 88.

[61] 6 WR 164.

[62] 6 WR 120.

[63] 6 WR 137.

[64] 6 WR 137, 201–02.

[65] 6 WR 137.

pacemaker in Tomlin's chest. The day before Dr. Peerwani's deposition, he produced his own handwritten notes from the autopsy. These notes were never given to the State, Carter's trial counsel, or post-conviction counsel. When asked why the notes were never given to defense counsel, Dr. Peerwani reasoned that "[s]omebody may have omitted to send them out when they were asked."[66] The notes indicate that Dr. Peerwani observed an implanted pacemaker with one lead in Tomlin's chest during the autopsy. Dr. Peerwani acknowledged that he discovered a pacemaker in Tomlin's chest, that he did not include the discovery of the pacemaker in his final autopsy report, and that he did not mention the pacemaker during his trial testimony.

Dr. Peerwani also testified that he did not include the pacemaker in his final autopsy report because he "didn't think it was important as to the cause of death."[67] He could not recall the type of the pacemaker Tomlin had other than his belief that it was a one-lead model; if there had been a second lead, he would have included it in his autopsy notes.[68] Dr. Peerwani agreed with defense counsel that if the pacemaker had not been connected properly, it "could be significant."[69] Dr. Peerwani suspected that Tomlin likely had a regular pacemaker rather than a defibrillator due to the technology being fairly new in 2004.[70] Dr. Peerwani said this meant that it could only help pace Tomlin's heart, unlike a defibrillator. If his heart threw a bad rhythm, the pacemaker would be

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[66] 2 CR 766–67; Peerwani Dep. 79:25–80:01.

[67] 2 CR 760; Peerwani Dep. 73:04.

[68] 6 WR 71–72.

[69] 6 WR 81.

[70] 6 WR 71–72.

unable to correct it, and it would not keep him alive.[71]

Overall, Dr. Peerwani believed that the cause of death was respiratory rather than cardiovascular, but he emphasized that "it's a very complex case":[72]

> Dr. Peerwani: But, Your Honor, in addition to his heart, he also had emphysema. So he had problems with his lungs also. So you're looking at a person that has – that has a lot of other comorbidities that could have played a role at the very end.
>
> And he was compromised, lying on his – on his prone position with his hands tied behind, and he had respiratory distress because of that. So it's a very complex case from that perspective.
>
> But we do know for a fact that he had a bad heart, he had bad coronaries, he had bad lungs, and that he was in a prone position that would have impeded his proper respiratory motions.
>
> He was stressed. He had a laceration of the scalp that would have put a stress on his heart, because when you injure somebody or you are – you threaten somebody, you have a pouring out of adrenalin[e], which makes the heart beat faster, which is not good for an elderly person because you already have very compromised coronary arteries.
>
> So there's so many things happening together, and I can't pinpoint one and say this is what killed him and this what – I can say they happened all together.[73]

Dr. Peerwani said that his trial testimony made it clear that the death was an asphyxial death.[74] Dr. Peerwani characterized his trial testimony about the cause of death as "there was an attempt at smothering in the very beginning and then he died of positional asphyxia, or he may have

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[71] 6 WR 72–73.

[72] 6 WR 91.

[73] 6 WR 91–92.

[74] 6 WR 103.

had positional asphyxia and he was smothered at the end. I really don't know."[75] He emphasized that none of these signs are by themselves diagnostic of an asphyxial death, but together with the way that he was discovered at the scene, they reflect an asphyxial death. Dr. Peerwani maintained that he has not changed his opinion about Tomlin's cause or mechanism of death, and he believes that his habeas testimony reflects his trial testimony.

III(A)(1)(iii) — Dr. Peerwani's Meeting with Applicant's Writ Counsel

During Dr. Peerwani's deposition and hearing testimony, Carter's counsel questioned him about Posel's letter and her declaration. Both were admitted into evidence over the State's hearsay objections. Posel's letter alleged that Dr. Peerwani made six statements to them during their meeting. The letter first asserted that Dr. Peerwani said: (1) positional asphyxia was the actual cause of Tomlin's death, not smothering; and (2) various aspects of the autopsy findings supported a prolonged death. At the deposition, Dr. Peerwani agreed that the autopsy findings supported a prolonged death.[76] At the hearing, Dr. Peerwani denied saying the first half of the statement because he has never stated that smothering was not a possibility.[77]

Second, the letter asserted that Dr. Peerwani said, "the markings noted on the oral mucosa could indeed have been caused by something other than pressure intentionally applied to the mouth and with intent to kill the victim, such as a slap."[78] In the deposition, Dr. Peerwani said that this was inaccurate; he would not have said that because he has always maintained that a slap to the cheek

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[75] 6 WR 104.

[76] 2 CR 723.

[77] 6 WR 103.

[78] Ex. 8 of writ application.

would not produce the teeth marks.[79] In the hearing, Dr. Peerwani stated that this statement was misinterpreted or taken out of context, and he added that an impact to the interior area of the front of his mouth or his head being compressed on the ground could have produced the marks.[80]

In the letter's third statement, Dr. Peerwani said that his trial testimony—that it was impossible for someone in the same prone and restricted position as Tomlin to right himself into a seated position—stemmed from the way in which the particular question was asked. In the deposition and hearing, he testified that this part was true—it would have been very hard for a person to do that.[81] The third statement also included that Dr. Peerwani said it was possible that Tomlin could have toppled himself from a seated position to the prone position in which he was found, and that it was not impossible for Tomlin to be speaking when Carter and Allen left the house. In the deposition, Dr. Peerwani testified that it was entirely possible for Tomlin to topple himself, but he was not asked directly about the possibility of Tomlin speaking as Carter and Allen left the house.[82]

In the fourth statement, Posel asserted that Dr. Peerwani said, "any person with over 70% arterial narrowing is considered to be at high risk for a sudden cardiac event" and that Tomlin's overall health and advanced age "made him more susceptible to fatally succumbing to the position in which he was found."[83] In the hearing, Dr. Peerwani affirmed that this was "absolutely correct."[84]

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[79] 2 CR 724; Peerwani Dep. 37:15–24.

[80] 6 WR 105.

[81] 2 CR 725; 6 WR 105.

[82] 2 CR 725.

[83] Ex. 8 of writ application.

[84] 6 WR 106.

Fifth, Posel alleged that Dr. Peerwani said Tomlin's death "was ultimately caused by combination of the taping of his limbs/restriction of movement, the stress of the situation, and the position in which he was found."[85] In response, Dr. Peerwani stated at his deposition that this would be consistent with what he would have said assuming "that statement means that [Tomlin] died of asphyxial death."[86] But he would have also added smothering as a possibility.

In the sixth statement, although Dr. Peerwani still thought this case was clearly a homicide, he "agree[d] that both the general circumstances and the specific findings of the autopsy do not support the idea that an intentional act caused" Tomlin's death.[87] At the deposition, Dr. Peerwani responded that he did not recall making that statement and he has always maintained that an autopsy cannot demonstrate intent. Dr. Peerwani reaffirmed that position at the hearing.

Posel was the last witness to testify at the evidentiary hearing.[88] Although the State had

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[85] Ex. 8 of writ application.

[86] 2 CR 726–27; Peerwani Dep. 39:19–40:12.

[87] Ex. 8 of writ application.

[88] While it is common for prior counsel to testify at a writ hearing, such testimony usually comes in the context of a claim of ineffective assistance of counsel, relating to final, disposed-of litigation. At that point, prior counsel's work is done, and responding to such a claim generally puts prior counsel in a position adverse to the former client, the applicant. Here, however, we note the uncommon nature of Posel testifying at the writ hearing, because the matter in which Posel had previously assisted Carter as counsel is the same instant application for writ of habeas corpus for which the hearing was held. Furthermore, Posel's testimony was not in opposition to Carter's claim; rather, it tended to support his claim for relief.

As our sister court has explained, when one person acts as both advocate and witness, "[a]mong the concerns of this dual role are that 'the attorney may be more impeachable for interest and, therefore, a less effective witness,' the dual role may place the attorney 'in the unseemly and ineffective position of arguing his own credibility,' and 'the roles of advocate and witness are inconsistent, because the function of an advocate is to advance his client's cause and that of a witness is to state facts objectively.'" *In re Keenan*, 501 S.W.3d 74, 77 (Tex. 2016) (quoting *Warrilow v. Norrell*, 791

previously objected to the admission of Posel's letter and her declaration, the State did not object to Posel testifying, nor object to her testimony which largely mirrored her letter and declaration.[89] Additionally, the State cross-examined Posel about the meeting with Dr. Peerwani, the letter, and the declaration. She described Dr. Peerwani as friendly, and he took the time to go over the entire autopsy with them. Schonemann took notes during the meeting while Posel listened. That day she drafted a letter to Dr. Peerwani memorializing Dr. Peerwani's statements and requesting a declaration from him. Posel testified that they tried to highlight the significance of their conversation

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S.W.2d 515, 521 n.6 (Tex. App.—Corpus Christi–Edinburg 1989, writ denied)). But above those concerns is the "belief that the finder of fact may become confused when one person acts as both advocate and witness." *Id.* (quoting *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 422 (Tex. 1996)).

But instead of prohibiting any testimony from a lawyer who may have relevant evidence to present as a witness, the remedy is to have the lawyer withdraw as counsel. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08(a) ("A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client."). As noted above, *supra* n.39, Posel does not serve as Carter's counsel.

[89] The State objected, once, during Posel's hearing testimony to a question posed by writ counsel Mike Ware, which the State alleged asked for speculation about Dr. Peerwani's understanding:

> [Mr. Ware]: And he understood, in y'all's minds, what the significance of that was, correct?
>
> Mr. Whelchel: Objection, speculation.
>
> Q. (By Mr. Ware) Did y'all explain to him why that was important to y'all's case?
>
> A. We did. . . .

8 WR 163-64.

with Dr. Peerwani so that he would understand why a declaration from him would be helpful. Dr. Peerwani never responded to the letter. Posel and Schonemann followed up several times in the days before filing Carter's application on May 8, 2017. Five days after the meeting, and after several attempts to get a declaration from Dr. Peerwani, Posel submitted her own declaration with the subsequent writ application. She also sent the declaration to Dr. Peerwani and again asked that he still provide his own declaration, particularly if any aspect of her declaration was inaccurate. He never responded.

Posel testified that she believed everything in her letter and declaration was correct and nothing significant was omitted. She noted that Schonemann reviewed the letter and the declaration to ensure there were no errors, but she could not recall him making any changes. The letter and declaration contained similar statements by Dr. Peerwani—Posel stated that the letter was only meant to highlight Dr. Peerwani's main points in their meeting. The declaration contained more detail on Dr. Peerwani's statements about the autopsy, the circumstances of the meeting with Dr. Peerwani, and their attempts to get a declaration from him.

In Posel's habeas testimony, she said that the meeting started with Dr. Peerwani explaining that Tomlin's manner of death was a homicide because it was caused by another person, and the cause of death was positional asphyxia. When they pointed out that the cause of death on the autopsy report was "smothering with positional asphyxia," Dr. Peerwani responded with, "No. This was a death by positional asphyxia."[90]

Posel stated Dr. Peerwani "was very clear with us, repeatedly and multiple times, that the

[90] 8 WR 171.

cause of death in this case was positional asphyxia and that Mr. Tomlin did not die of smothering."[91] "He said, 'If you die of smothering, you're already dead. You can't die of positional asphyxia and vice versa.'"[92] Dr. Peerwani also discussed findings in the autopsy that he said supported a prolonged death rather than a shorter cause of death caused by smothering. According to Posel's declaration, Dr. Peerwani said the following showed that Tomlin died of a prolonged death:

- [T]he lungs were . . . full of blood—if the death was quicker, he told us, there would be less blood.
- He pointed out in the autopsy photos that the face was very dark with blood, which would not have happened in a quicker smothering scenario.
- [T]he plethora—or pooling of blood—of both the face and the internal organs in the body occurred over time, supporting a finding of prolonged death by positional asphyxia.
- Hemorrhaging and swelling of the eye suggested a slow death[.]
- [T]he mere presence of teeth marks on the oral mucosa do not indicate that someone was smothered. He agreed that it was certainly possible that the markings on the inside of the mouth, initially cited as evidence of intentional smothering, could have instead been caused by something like a slap to the face. He also agreed that pressure could be applied to someone's mouth sufficient to cause such marks but without an intent to kill: he provided the example of pressing a hand over someone's mouth to keep them quiet, and then removing the hand.
- [T]he victim in this case was very old, and had bad lungs and a bad heart. He said that the autopsy revealed arterial narrowing of 70–80% . . . . Dr. Peerwani stated that the victim was likely at a higher risk of death because of his overall poor health. Dr. Peerwani said if a younger, healthier person were restrained in such a fashion and left in a prone position, that person may not have died.

At the end of the meeting, "he again repeated . . . 'This was not a death by smothering. None of the

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[91] 8 WR 162–63.

[92] 8 WR 163.

findings . . . support that conclusion. He died as a result of the stress of the event and the position in which he was bound.'"[93] Posel emphasized that they were very clear to Dr. Peerwani on the significance of what he was stating regarding the cause of death being positional asphyxia. "Some of the times, we asked him to repeat because I was personally surprised."[94]

III(A)(2) — Dr. Amy Gruszecki

Carter called several other experts to testify. Dr. Amy Gruszecki, the Medical Director and Chief Forensic Pathologist of American Forensics, conducted her own investigation on the cause of death and reviewed the autopsy findings. She concluded that the cause of death was "due to hypertensive and atherosclerotic cardiovascular disease and emphysema, the stress of being robbed and receiving continuous contusions, and that would have exacerbated his cardiac disease as well."[95] Positional asphyxia from the way he was lying with his arms and feet taped would have also contributed to his death.[96] Dr. Gruszecki concluded that the findings of orbital edema, leptomeningeal congestion with cerebral edema, and generalized visceral congestion could have resulted from heart disease, but it was impossible to determine whether the cause of death was respiratory or cardiac.[97] She testified that none of Dr. Peerwani's findings were specific to a

[93] 8 WR 171–72.

[94] 8 WR 169.

[95] 6 WR 199.

[96] 6 WR 199.

[97] 6 WR 206–07. Dr. Gruszecki stated that orbital edema can be caused by many things—heart failure, an asphyxial death, or from a person dying while lying face down. Leptomeningeal congestion can be found in a heart-related death, an emphysema-related death, or in someone dying of sepsis. Cerebral edema is "very nonspecific," and means that there has been a lack of oxygen in the brain. It can be caused from smothering, choking, or from the lungs or heart

respiratory death; however, Tomlin's enlarged heart and severe narrowing of his coronary arteries were specific signs of a cardiac event.[98]

Dr. Gruszecki also took issue with Dr. Peerwani's inclusion of smothering because "there is nothing about the autopsy report or the findings at autopsy that shows that there was any . . . definitive, intentional act of smothering."[99] Dr. Gruszecki did not find any signs specific to smothering. She stated that "[p]atterned mucosal contusions of the lip are not specific for smothering."[100] In fact, many things could account for the patterned lip marks, whether they were caused intentionally or accidental. For example, Dr. Gruszecki opined that the marks could have resulted from the weight of Tomlin's head pressing his teeth into his lip as he lay there dying.[101] She stated that she "agree[d] with almost everything [Dr. Peerwani] said [in his hearing testimony], with the exception of the potential smothering."[102]

III(A)(3) — Dr. Michael Baden

Dr. Michael Baden, a retired physician and forensic pathologist, agreed with Dr. Peerwani that Tomlin's death was a homicide because it was "triggered by what happened to him at the

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failing. 6 WR 201–02.

[98] 6 WR 206 & 207–08.

[99] 6 WR 216.

[100] 6 WR 201.

[101] 6 WR 217.

[102] 6 WR 215.

time."[103] He disagreed that the death involved smothering or positional asphyxia.[104] Dr. Baden concluded that "[Tomlin] died of a cardiac arrythmia, which developed an acute congestive heart failure because of pre-existing, severe coronary artery disease, [and] a narrowing of his coronary arteries by arteriosclerotic plaque that was triggered by the home invasion – the emotional aspects of the home invasion."[105]

Dr. Baden based his conclusion on the autopsy report and Tomlin's medical records, which showed that he had severe heart disease.[106] He explained that severe coronary artery disease had damaged his heart muscle and heart nerves, weakening the heart's ability to pump, leaving it unable to regulate its rhythm.[107] A weakened heart muscle can lead to congestive heart failure (a gradual death), and an unstable heart rhythm can lead to sudden death.[108] These preexisting conditions would make Tomlin more vulnerable to stressful situations because physical activity or emotional upset increases the demand on the heart.[109] Dr. Baden testified that none of the findings Dr. Peerwani cited as evidence of smothering, "individually or together, indicate even a hint that the person may have been smothered."[110]

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[103] 7 WR 10.

[104] 7 WR 10.

[105] 7 WR 10.

[106] 7 WR 10–11.

[107] 7 WR 10–11.

[108] 7 WR 13.

[109] 7 WR 14.

[110] 7 WR 31.

As to the patterned lip marks, Dr. Baden testified that indentations such as these can occur in cases of smothering with hand pressure placed against the lip, however, they more typically occur when a person dies with the head down against a hard object such as a carpeted floor and lies there for many hours.[111] In this case, Dr. Baden thought it was likely that the marks occurred postmortem because the head itself is about eleven pounds, and if Tomlin was still alive when the marks were inflicted, he would expect some bleeding or disruption of the capillaries and blood vessels in that area, which did not occur.[112]

Dr. Baden also criticized Dr. Peerwani's failure to include the pacemaker in his report or trial testimony.[113] He pointed out that Dr. Peerwani's notes reflect that he observed only one lead of a pacemaker, but Tomlin's medical records revealed that the pacemaker had two leads.[114] Dr. Baden stated, "[i]t's a testament to the hospital and their care that he lived that long with this severe heart disease. But once the pacemaker was not functioning, it was back to the critical state that he had been in previously."[115] He also noted that Tomlin's medical records show that four weeks before he died, his pacemaker had been tested and it appeared to be functioning properly.[116] The pacemaker was not critical to his opinion on Tomlin's cause of death, but it reflected the severity of Tomlin's heart disease, and if it was not working, then Tomlin was more susceptible to dying from emotional or

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[111] 7 WR 24.

[112] 7 WR 24–25.

[113] 7 WR 35–36.

[114] 7 WR 17.

[115] 7 WR 23.

[116] 7 WR 33.

physical problems.[117] Dr. Baden also took issue with Dr. Peerwani's hearing testimony that pacemakers were new in 2004, because Dr. Baden said that pacemakers have been in widespread use since 1960, and there were various types of pacemakers by 2002.[118] Finally, Dr. Baden testified that he found Dr. Peerwani's testimony—that there were no other pathology or abnormalities present in the internal examination—inaccurate.[119]

III(A)(4) — Dr. Michael Sacks

Dr. Michael Sacks, a biomechanical engineer and professor, created a computational model to determine how the soft tissues of Tomlin's upper lip would respond to force and pressure.[120] Based on the autopsy report, autopsy photographs, and crime scene photographs, Dr. Sacks created a model of what he believed caused the indentations and the time required for the indentations to form.[121] Dr. Sacks observed two permanent depressions of one or more millimeters deep, matched by the imprint of the accompanying teeth on the upper jaw of the right side of the mouth.[122] The impressions appeared to be smooth and fairly deep into the tissue.[123]

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[117] 7 WR 45.

[118] 7 WR 32–33.

[119] 7 WR 54.

[120] 8 WR 9 & 18. Dr. Sacks explained that the field of biomechanical engineering is still young, but it has greatly improved in the last five to eight years in its experimental techniques with measuring facial tissues. 8 WR 19. Dr. Sacks testified that within the last five years the available data and models have improved enough that it is possible to make "pretty accurate predictions that have also been validated through a variety of other techniques." *Id.*

[121] 8 WR 14–15 & 18–19.

[122] 8 WR 16.

[123] 8 WR 17.

According to Dr. Sacks, the indentations were formed postmortem because in normal living tissue, such force could produce a bruise, but any indentation would be only momentary and would recover within a matter of ten or fifteen minutes.[124] But in this case no recovery took place, indicating that they occurred in deceased tissue.[125] Dr. Sacks concluded to a reasonable degree of scientific certainty, that the observed indentations most likely resulted from a high degree of pressure in a local area, rather than over a broad area.[126] His calculations demonstrated that the weight of the human head projected onto a small area of the two to three front, right teeth would be a sufficient focal force (a force applied to a small area) to cause the indentations.[127] He estimated that the minimal length of time for the indentations to form was likely about two to three hours.[128]

Dr. Sacks also analyzed two other scenarios to explain the indentations: an instantaneous impact of force, such as a slap to the face, and a clamped hand over the mouth.[129] He ruled out the first scenario because the time the force was applied was "far too short," and "it would have been applied to still-living tissue . . . which would have the ability to restore itself."[130] Dr. Sacks ruled out the second scenario because, although the force may be large enough, the distributed force spread over the entire hand would not produce sufficient focal pressure to create indentations to one or two

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[124] 8 WR 22.

[125] 8 WR 22.

[126] 8 WR 20–21.

[127] 8 WR 29.

[128] 8 WR 21.

[129] 8 WR 24 & 26.

[130] 8 WR 24.

teeth.[131] Dr. Sacks also noted that the amount of pressure applied in the second scenario likely would have been short, "[p]robably no more than about 10 minutes."[132] Ultimately, Dr. Sacks concluded that to create the patterned lip marks it would require: (1) "a prolonged application of focal force of sufficient magnitude;" (2) "that force has to . . . occur for a sufficient length of time;" and, (3) "[the application of force] has to occur during a period where . . . most of the period, the tissue is dead."[133] Therefore, Dr. Sacks concluded that the patterned lip marks were consistent with the weight of Tomlin's head resting against the floor bearing down on two or three front teeth on his upper lip as he was dying and deceased.[134]

III(A)(5) — Dr. Chris Palenik

Dr. Chris Palenik is an expert in microscopy and forensic science.[135] He sought to determine whether there were any constraints on how the duct tape found on Tomlin's cheek ended up in that position in the crime scene photographs.[136] Dr. Palenik examined two fragments of duct tape from the crime scene, photographs from the crime scene and autopsy, and carpet samples from Tomlin's house.[137] By comparing the molecular structure and type of polymers found in the carpet samples and fibers found on the duct tape, Dr. Palenik concluded that seven out of the ten fibers found on the

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[131] 8 WR 26.

[132] 8 WR 26.

[133] 8 WR 29.

[134] 8 WR 27.

[135] 8 WR 110.

[136] 8 WR 114.

[137] 8 WR 114–20.

adhesive side of the samples of duct tape matched the carpet under Tomlin's head.[138]

To determine how the tape could have gotten to its folded position on Tomlin's cheek, a colleague of Dr. Palenik laid on a carpet square and placed a piece of duct tape over his mouth.[139] His colleague then rubbed his face on the floor to reproduce the same "general positioning" of the fold observed in the crime scene photographs.[140] His colleague released the tape while lying face down by rubbing his face against the carpet, and then by rolling his face onto his left side, one side of the tape was pushed up and stuck to his face.[141] Dr. Palenik reasoned that this demonstration provided a "reasonable explanation as to why there are carpet fibers on the duct tape."[142] Dr. Palenik stated that this reenactment was significant because it showed that "it's actually possible to reproduce what I would term to be a relatively complex fold . . . fairly naturally through face-to-floor contact . . . And when you couple that with the fact that there are fibers on the tape, that all – it all points to a picture."[143] Dr. Palenik did not test whether there were fibers on the adhesive side of the duct tape after the colleague's reenactment;[144] the purpose of the reenactment was to show that it is possible to get the tape into a similar position.[145]

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[138] 8 WR 127.

[139] 8 WR 130–31 & 132.

[140] 8 WR 132 & 141.

[141] 8 WR 132.

[142] 8 WR 133.

[143] 8 WR 143–44.

[144] 8 WR 137.

[145] 8 WR 141.

III(B) — Habeas Findings and Conclusions

At the close of the evidentiary hearing, the habeas judge requested that the parties submit proposed findings of fact and conclusions of law. The habeas court adopted Carter's proposed findings of fact and conclusions of law and recommended that we grant relief on both claims.[146]

Under Claim One, the habeas court found that Dr. Peerwani's testimony was false and misleading because it implied that the autopsy evidence definitively established that Tomlin had been intentionally smothered. While it did not find Dr. Peerwani uncredible, the habeas court concluded that Dr. Peerwani's testimony was false, inaccurate, and misleading as to at least ten crucial elements of the State's capital murder case:

(1) that smothering was a "part of the cause of death";

(2) that Mr. Tomlin's death could have been caused by an intentional act of smothering "carried on till he died";

(3) whether there is any evidence that Mr. Tomlin died of smothering;

(4) whether there is evidence that smothering occurred at all;

(5) that the observed lip markings in Mr. Tomlin's upper lip were "classical" evidence of smothering;

(6) whether the markings could feasibly be caused by another mechanism;

(7) that the patterned lip markings were caused before Mr. Tomlin's death;

(8) that the autopsy findings indicated that the cause of death was respiratory, and not cardiac, in nature;

(9) that the autopsy findings in this case are not consistent with a cardiac death; and

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[146] The habeas court's recommendation includes fifty-one pages of its conclusions and detailed findings of fact. Most are summarized here.

(10) the nature of the injuries to Mr. Tomlin's right cheekbone and chin.[147]

The habeas court also found "that Dr. Peerwani's testimony was inaccurate and misleading when he failed to disclose or discuss the fact [that] Mr. Tomlin had a pacemaker at the time of the autopsy."[148]

In finding the State's evidence as false and misleading, the habeas court relied in part on statements attributed to Dr. Peerwani from the Posel and Schonemann meeting:

- In that May 2017 meeting, Dr. Peerwani also told Ms. Posel and Mr. Schonemann that the autopsy findings supported a prolonged death, such as positional asphyxia, not a rapid one, such as smothering. . . . At the writ hearing, Dr. Peerwani acknowledged these statements, pointing to findings at autopsy that demonstrated the death was a "slow process."[149]

- Also in that meeting, Dr. Peerwani told Ms. Posel and Mr. Schonemann that smothering and positional asphyxia are "competing" causes of death. . . . At the writ hearing, Dr. Peerwani acknowledged that this was "absolutely correct."[150]

As to materiality, the habeas court concluded that there was at least a reasonable likelihood that the false testimony affected the judgement of the jury:

- Dr. Peerwani was the State's primary—and only—witness on the issue of intent. His testimony was critical to the State's case against Mr. Carter; Dr. Peerwani provided the only testimony that Mr. Tomlin was smothered at all, and the State predicated its trial theory on his testimony.[151]

The habeas court also found that the false and misleading evidence was material because the State emphasized Dr. Peerwani's testimony throughout its closing argument at the guilt phase, arguing that

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[147] 3 CR 1118 (formatted for readability).

[148] 3 CR 1118.

[149] 3 CR 1108.

[150] 3 CR 1108.

[151] 3 CR 1120.

the "bottom line" to be drawn from Dr. Peerwani's testimony was that an intentional act of smothering was part of the cause of death.[152]

For the new science claim, the habeas court found that Carter met his burden under article 11.073 based on two theories: Dr. Peerwani's change of opinion on the cause of death and new scientific evidence shows that the patterned lip marks on the inside of Tomlin's lip were caused by the weight of his head against the floor and not by smothering.[153]

The habeas court found that Dr. Peerwani's habeas testimony, his statements to Carter's counsel, the credible corroborating testimony of Posel, and other documentary evidence all contradict Dr. Peerwani's trial testimony and show his change of opinion on the cause of death.[154] It found the following instances of Dr. Peerwani's testimony contradictory to his trial testimony:

- Dr. Peerwani's deposition testimony that "an autopsy cannot demonstrate intent" and his hearing testimony that he "will not discuss intent of a person based on injury patterns" are inconsistent with his trial testimony that smothering is "an intentional and very purposeful act" and the cause of death included "an intentional act of smothering either way."[155]

- Dr. Peerwani's present testimony that smothering and positional asphyxia are "competing causes of death" contradicts his trial testimony that the cause of death had "two parts."[156]

- Dr. Peerwani's present testimony that it is possible that the terminal event was a cardiac event contradicts his trial testimony that the cause of death was

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[152] 3 CR 1119–20.

[153] 3 CR 1121, 1126, & 1133.

[154] 3 CR 1120–26.

[155] 3 CR 1124–25.

[156] 3 CR 1125.

respiratory, not cardiac, in nature.[157]

- Dr. Peerwani's present testimony that each of the signs he pointed to at trial to show a respiratory death could have been caused by other mechanisms, including a cardiac death.[158]

- Dr. Peerwani's acknowledgment that the patterned lip marks on Tomlin's lip could have been caused by something other than smothering contradicts his trial testimony that the markings were "classical or typical" evidence of smothering.[159]

In sum, Dr. Peerwani's habeas testimony and statements to Carter's counsel undermine the State's only evidence of intent.

The habeas court also found that new scientific research, unavailable at the time of Carter's trial, establishes that markings on the inside of Tomlin's lip were caused by the weight of his head against the floor and not by smothering.[160] It found that Dr. Sacks's scientific evidence—that the marks could not have resulted from a smothering—contradicts and undermines the State's only evidence of intent.[161] Therefore, the habeas court concluded that it was more likely than not that, had all of this evidence been presented at trial, Carter would not have been convicted of capital murder.[162]

The State objected to the habeas court's findings and conclusions arguing that they exceeded

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[157] 3 CR 1125.

[158] 3 CR 1126.

[159] 3 CR 1126.

[160] 3 CR 1126.

[161] 3 CR 1134.

[162] 3 CR 1134.

the scope of Carter's First Subsequent Writ and this Court's remand order. The State also objected to the findings and conclusions that relied on the statements attributed to Dr. Peerwani from the Posel letter and declaration because the statements were inadmissible hearsay under Texas Rule of Evidence 801(e)(2)(D).

After the habeas court's findings of fact and conclusions of law and the State's objections were filed, we ordered, in additional to any general briefing of the claims, briefing from both parties on two issues:

> 1. Did any of the evidence presented and admitted at the evidentiary hearing exceed the scope of the claims as Applicant phrased and argued them in his application?
>
> 2. If so, should we consider any such evidence?[163]

IV — Analysis

IV(A) — Standard of Review

In a post-conviction review of a habeas corpus application, "the convicting court is the 'original factfinder,' and this Court is the ultimate factfinder." *Ex parte Chavez*, 371 S.W.3d 200, 207 (Tex. Crim. App. 2012) (quoting *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)). Because the habeas court is "[u]niquely situated to observe the demeanor of witnesses . . . . in most circumstances, we will defer to and accept a [habeas] judge's findings of fact and conclusions of law when they are supported by the record." *Reed*, 271 S.W.3d at 727.

> [T]his standard of review accounts for the unparalleled position of the habeas judge to directly assess a witness's demeanor. When listening to testimony, the habeas judge is tuned in to how something is being said as much as to what is being said. The judge is acutely aware of a witness's tone of voice or inflection, facial

[163] *Ex parte Carter*, No. WR-70,722-03, 2021 WL 4571414, at *1 (Tex. Crim. App. Oct. 6, 2021) (not designated for publication).

expressions, mannerisms, and body language.

Id. at 728.

We apply the same deference to a habeas court's ruling on mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014). "When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions." *Reed*, 271 S.W.3d at 727. If we determine that the habeas court's findings and conclusions that are supported by the record require clarification or supplementation, we may exercise our discretion and make additional findings and conclusions, supported by the record, that are necessary to our ultimate disposition. *Id.* at 727–28. But where a given finding or conclusion is irrelevant to our ultimate disposition, we may decline to enter an alternative or contrary finding or conclusion. *Id.* at 728.

IV(B) — The Scope of Applicant's First Subsequent Application

The Great Writ "is a shield against injustice." *Ex parte Carr*, 511 S.W.2d 523, 525 (Tex. Crim. App. 1974). Proper respect for the writ therefore requires that applications be filed in earnest along with all meritorious claims. *Id.* In a post-conviction writ of habeas corpus, applicants must plead specific facts which, if proven to be true, might entitle him to relief. *Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011). Death-sentenced defendants need not plead evidence in an application, "just as there is no requirement that the State allege evidence in an indictment." *Id.* at 639. Nonetheless, an application "must allege specific facts so that anyone reading the writ application would understand precisely the factual basis for the legal claim." *Id.* at 637–38. "[T]he fact issues that must be resolved are those contained within the writ application and the State's

controverting answer." *Id.* at 642.

When considering a post-conviction application for writ of habeas corpus, this Court has no jurisdiction to review claims that were not raised in the application. *Ex parte Carty*, 543 S.W.3d 149, 151 (Tex. Crim. App. 2018). In *Carty*, we remanded to the trial court three out of the six claims included in Carty's subsequent application for writ of habeas corpus. *Carty*, 543 S.W.3d at 150. The remanded claims alleged due process violations for the State's knowing and unknowing use of false and misleading testimony at trial (Claims A and B) and the State's failure to disclose impeachment and exculpatory evidence (Claim C). *Id.* All three claims stemmed from the testimony of four specific witnesses. *Id.* at 150. After an evidentiary hearing was held in the habeas court, Carty filed a "Motion for Remand And, Alternatively, Motion to Stay." *Id.* at 177 (Richardson, J., concurring). Carty's motion asked this Court to remand the case for consideration of specific due process violations "uncovered shortly before and during the evidentiary hearing." *Id.* The motion alleged that the State failed to disclose to defense counsel that it had a deal with a fifth witness in exchange for his trial testimony. *Id.* at 151 (per curiam). The habeas court did not consider the claim because it had not been raised in the writ application and it was not the subject of this Court's remand order. *Id.* at 177 (Richardson, J., concurring). We agreed and held that because Carty's new claim was not included in her writ application, we did not have jurisdiction to review it. *Id.* at 151 (per curiam); *see also id.* at 178 (Richardson, J., concurring) ("In order for this Court to have jurisdiction to consider this claim, Carty would have to raise it by filing a third writ application in the trial court.").

Here, Carter's first claim centers on whether the State relied on false and misleading testimony by Dr. Peerwani because he created the impression that the autopsy established an intentional smothering. The specific factual basis for Claim One concerns Dr. Peerwani's trial

testimony that smothering is an intentional act, the patterned lip marks established Tomlin was definitively smothered, and the marks could not have resulted from someone striking the victim because such action would have also caused marks on the exterior of Tomlin's lip or mouth. Therefore, to support Claim One, Carter was entitled to present new evidence relevant to showing Dr. Peerwani was false and misleading when he concluded that Tomlin died of an intentional act of smothering.

Claim Three concerns whether new science, presented as Dr. Peerwani's current opinion that the autopsy findings do not support an act of smothering, contradicts his testimony at trial, and if his current opinion had been presented at trial, whether the jury would not have convicted Carter of capital murder. Carter was thus entitled to present new evidence to the habeas court that was relevant to showing Dr. Peerwani's current opinion on the cause of death is contradictory to his trial testimony.

Carty is distinguishable from Carter's case. The new evidence developed on remand in *Carty* involved a new factual basis (a fifth witness not mentioned in the application) which gave rise to a new claim specific to the witness. The evidence that the State failed to disclose a deal with a fifth witness in exchange for his trial testimony was not relevant to Carty's claims about the testimony elicited from the other witnesses listed in her application. In the present case, the new evidence developed on remand concerns the same witness alleged in Carter's application. Accordingly, any new evidence developed on remand must be relevant to showing Dr. Peerwani's testimony was false and misleading or that he has since changed his opinion on the cause of death.

Accordingly, Carter was entitled to present more evidence on remand in the habeas court if it is relevant to and supports his authorized claims. *See Ex parte Garza*, 620 S.W.3d 801, 816 (Tex.

Crim. App. 2021). Were we to require an applicant to allege every fact or piece of evidence relevant to his claim, there would be no need for the habeas court to serve as "the collector of evidence" and "the organizer of materials." *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004).

That role of the habeas court cannot be overemphasized. The statutory framework necessarily contemplates that the habeas court is the one that puts together the habeas record, not this Court. This Court's role is one of *review*. *See* TEX. CODE CRIM. PROC. Ann. art. 11.071, § 11 ("The court of criminal appeals shall expeditiously *review* all applications for a writ of habeas corpus submitted under this article. . . . After *reviewing the record*, the court shall enter its judgment[.]").

Article 11.071 presents two pathways for "the record" to come to this Court. When the habeas court determines that there are no controverted, previously unresolved factual issue that are material to the applicant's claim, then "the record" sent to this Court includes: (A) the application; (B) the State's answer; (C) any orders entered by the habeas court; (D) the parties' proposed findings of fact and conclusions of law; and (E) the habeas court's own findings and conclusions. *Id.* § 8(d)(1).

But when the habeas court determines that there are controverted, previously unresolved factual issues that are material to the applicant's claim, then "the record" sent to this Court includes: (A) the application; (B) the State's answer and any motions filed; (C) the reporter's transcript, if there was a hearing; (D) the documentary exhibits introduced into evidence, if there was a hearing; (E) the parties' proposed findings of fact and conclusions of law; (F) the habeas court's own findings of fact and conclusions of law; (G) sealed materials; and (H) any other matters used by the habeas court in resolving the issues of fact. *Id.* § 9(f)(1). While "any other matters" can be read broadly, the statute permits the habeas court to rely on affidavits, depositions, interrogatories, evidentiary

hearings, and even its own personal recollection. *Id.* § 9(a).

Because the statutory framework places the duty on the habeas court to determine what the factual issues are, and which items are to be used to resolve the factual issues, including the possibility of holding a hearing to hear testimony and receive documentary evidence, the habeas court is necessarily accorded a measure of discretion. *See Simpson*, 136 S.W.3d at 668. And because it is the habeas court's job to handle the evidentiary matters, we have often referred to the habeas court as the "original factfinder." *See, e.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007); *Reed*, 271 S.W.3d at 727; *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017) ("This Court has long held that . . . the trial judge is the 'original factfinder.'"). Indeed:

> The legislative framework of article 11.071 contemplates that the habeas judge is "Johnny-on-the-Spot." He is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief. This Court then has the statutory duty to *review* the trial court's factual findings and legal conclusions to ensure that they are supported by the record and are in accordance with the law. We are not the convicting trial court, and we are not the original factfinders.

Simpson, 136 S.W.3d at 668–69 (emphasis in original).

If the habeas court, in exercising its duty as the "original factfinder" to collect and organize the evidence has before it items that may be objectionable, handling those objections is part and parcel of the habeas court's duty to designate the issues of fact to be resolved and the manner in which the issues shall be resolved. TEX. CODE CRIM. PROC. Ann. art. 11.071, § 9(a). If the habeas court holds a hearing, then the State has the full opportunity under the Texas Rules of Evidence to challenge the admissibility of that evidence, including its relevance and probative value, as well as challenge the credibility of that evidence through impeachment and cross-examination. *See id.* § 10.

If the habeas court introduces documentary evidence into the record, those documents will not simply be submitted to this Court nakedly. That evidence will have been subjected to adversarial testing.

The same is true if the habeas court, in executing its duty as the "original factfinder" to collect and organize the evidence, determines that certain evidence which may be "old," for the purposes of the new factual basis exception to the subsequent writ bar, would help it in resolving the disputed issues of fact. That "old" evidence will also be subject to the Rules of Evidence and to adversarial testing. Then that "old" evidence becomes part of the record sent to this Court pursuant to article 11.071. It is then up to this Court, in executing its duty as the "ultimate factfinder," to decide what weight, if any, to give that "old" evidence.

Speaking of *this Court's role* as "ultimate factfinder," our often-repeated standard does not include a duty of this Court to edit the record sent to us by the habeas court. Instead, our "statutory role under Article 11.071 is one of review." 43B GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 58:57 (3d ed. 2011). Keeping in mind any credibility determinations made by the habeas court below because the habeas court is "[u]niquely situated to observe the demeanor of witnesses first-hand [and] is in the best position to assess the credibility of witnesses[,]" "we will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record." *Reed*, 271 S.W.3d at 727. "When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions." *Id.*

Indeed, in exercising that authority to make contrary or alternative findings and conclusions,

we are constrained, except in "compelling and extraordinary circumstances," to "the record" that the habeas court sends to us. *See Simpson*, 136 S.W.3d at 669 (suggesting that this Court "might have the implicit authority to consider evidentiary materials filed directly with this Court" if the applicant "offer[s] proof of any compelling and extraordinary circumstances"). This is so even if some members of this Court would have put together a different record, omitting certain items or including something else, had they been the habeas court judge. Rather, "[i]n the ordinary case," this Court considers the very same evidentiary materials that were submitted to and considered by the habeas court; otherwise, "the statutory purpose in having the convicting court gather the pertinent evidence and make the appropriate written findings of fact would be entirely frustrated." *Id.* at 668.

In sum, "the record" before the Court includes the application, the State's answer, the reporter's record of the writ hearing (including the testimonies of Drs. Peerwani, Gruszecki, Baden, Sacks, and Palenik, and the testimony of Thea Posel), the exhibits introduced into evidence, "any other matters used by the convicting court in resolving issues of fact," and the findings of fact and conclusions of law.

IV(B)(1) — The State's Objection that Applicant's Factual Claims Exceed the Scope of Applicant's First Subsequent Writ Application

The State contends that Carter's First Subsequent Writ did not raise the following factual claims and thus the trial court erred in considering them in its recommendation:

- Dr. Peerwani's failure to disclose that he discovered a pacemaker in Tomlin's body during the autopsy;
- Dr. Peerwani's opinion about the pacemaker in Tomlin;
- New scientific evidence establishes that lip indentations on the inside of Tomlin's mouth occurred postmortem.

- Dr. Peerwani's misstatement at trial that the injuries on Tomlin's chin and cheek were contusions, instead of abrasions; and
- Dr. Peerwani's opinion about the cause of the injuries on Tomlin's chin and cheek.

The State argues that because Carter first presented the above factual claims in the trial court, they were beyond the scope of this Court's remand order. The proper scope of Carter's application, the State contends, concerned only whether Dr. Peerwani changed his opinion on the cause of death since trial.

Carter argues that each instance of false or misleading testimony by Dr. Peerwani revealed after the filing of the present application is relevant to whether Dr. Peerwani testified falsely and misleadingly that the cause of death had two parts, and that regardless of the sequence, the cause of death included an intentional act of smothering.

IV(B)(1)(i) — The Autopsy Notes and the Pacemaker

The State's argument that the pacemaker could not be considered by the trial court, simply because Carter's application did not specifically mention the pacemaker, ignores that an applicant need not list all his evidence or state every word pertaining to his evidence in his application. To require an applicant to list every ounce of evidence would create a standard too onerous to meet. *See Medina*, 361 S.W.3d at 639 (death-sentenced defendants need not plead evidence in an application, just as the State need not allege evidence in an indictment).

The State also misconstrues the pacemaker evidence as Carter bringing a new habeas claim, as does the majority, which points to the fact that the existence of the pacemaker was known at the time of trial when Tomlin's daughter testified that he had a pacemaker implanted in 2002. Because it was known, the majority implies that Carter should have raised a claim in his initial writ

application that Dr. Peerwani's testimony was false or misleading by omission because Dr. Peerwani failed to testify about the pacemaker. If that was Carter's claim raised in the application before us, I would agree and this Court would have dismissed the application as procedurally barred.

But the majority fails to see that this is *not* Carter's claim. Carter is not making a specific claim about the pacemaker; Carter is using evidence of the pacemaker to *support* his claim that Dr. Peerwani testified falsely and misleadingly that Tomlin was definitively killed by an intentional act.[164] The failure to mention the pacemaker, and the significance of the pacemaker, is both relevant and probative to that question. Although the majority declares that the pacemaker evidence—both the autopsy notes reflecting that Dr. Peerwani found and noted the existence of the pacemaker and Dr. Peerwani's failure to testify about the pacemaker at trial—are "not pertinent to resolves the merits of [the] false evidence claim,"[165] and "outside the scope of the facts and legal claims,"[166] respectively, the majority itself acknowledges that Dr. Peerwani's failure to mention the pacemaker

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[164] Carter's use of the pacemaker as supporting evidence is also apparent when looking at his Second Subsequent Application for Writ of Habeas Corpus which included claims specific to the pacemaker not included in the present application. *See Ex parte Carter*, No. WR-70,722-04, 2021 WL 1014638 (Tex. Crim. App. Mar. 17, 2021) (not designated for publication). That application raised four claims connected to the pacemaker: (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence that Tomlin had a pacemaker at the time of death; (2) the State's failure to preserve the pacemaker violated his federal constitutional right to due process and a fair trial; (3) the State's failure to preserve potentially exculpatory evidence violated his right to due course of law under the Texas Constitution; and (4) the State violated his Fourteenth Amendment right to due process when it presented Dr. Peerwani's testimony that was known to be false or misleading. *Id.* These claims are all distinct from Carter's current Claim One, the State's unknowing use of false and misleading evidence that Tomlin was killed by the intentional act of smothering.

[165] Majority opinion at 28.

[166] Majority opinion at 30.

is "a relevant fact as to whether there was evidence of a cardiovascular or respiratory event."[167]

How is it relevant? The existence of the pacemaker is relevant to showing that Tomlin died from a combination of the consequences from the stress of the robbery and a preexisting condition, rather than from an intentional smothering. This stands in stark opposition to Dr. Peerwani's testimony at trial which Carter alleges was false and misleading. *See* Carter's First Subsequent Application at 28 ("the autopsy findings are more consistent with a cause of death of positional asphyxiation or a cardiac event resultant from Mr. Tomlin's pre-existing medical conditions"). Thus, the trial court could consider evidence of Dr. Peerwani's failure to disclose that he found the pacemaker and his opinion on the significance of pacemaker.

IV(B)(1)(ii) — New Scientific Evidence Concerning the Patterned Lip Marks

Carter argues evidence that the patterned lip marks occurred postmortem, supplied by Drs. Gruszecki, Baden, and Sacks, should be considered under Claim One because it undermines Dr. Peerwani's assertion that the marks were conclusive and classical of intentional smothering. I agree. Whether the patterned lip marks occurred post-mortem from the weight of Tomlin's head tends to show that smothering may have not occurred. The new evidence concerning the patterned lip marks also directly contradicts Dr. Peerwani's testimony that the marks were inflicted while Tomlin was alive. The trial court could thus consider new scientific evidence about the cause of the patterned lip marks in considering whether Dr. Peerwani's testimony was false and misleading under Claim One.

Specifically with regard to Dr. Sacks's evidence, we must also resolve whether the trial court could rely on Dr. Sacks's new biomechanical science in its recommendation to grant relief on Claim Three. In his application, Carter claimed that new scientific evidence, presented as Dr. Peerwani's

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[167] Majority opinion at 29.

current opinion on the cause of death, contradicts Dr. Peerwani's testimony at trial. Carter was thus entitled to present only new evidence to the trial court that was relevant to showing Dr. Peerwani's current opinion on the cause of death is contradictory to his trial testimony. Evidence of a new field of science, not available at the time of trial, supports a different theory of relief under article 11.073 that Carter did not present in his current application. Therefore, the trial court's conclusions under Claim Three that rely on the new scientific evidence from Dr. Sacks exceed the scope of Carter's application. On this single point, I agree with the majority. However, the majority wholly neglects to consider Dr. Sacks's new science testimony under Claim One.

IV(B)(1)(iii) — Chin and Cheek Injuries

Finally, the State argues that Dr. Peerwani's trial testimony that the chin and cheek injuries were contusions instead of abrasions exceeds the scope of Carter's application. As discussed above, at trial Dr. Peerwani agreed with the prosecutor's theory that it was possible that the "contusion on [Tomlin's] chin" could have occurred if he was "struck on the head, fell, and hit the floor hard,"[168] consistent with a blunt force traumatic injury. In contrast, Dr. Baden testified that the abrasions to Tomlin's chin were the kind of injuries that result from rubbing the chin on a carpet such as the one that Tomlin was found lying face down on.[169] And Dr. Palenik determined that the tape likely got into its folded position through face-to-floor contact based on his reenactment and through connecting fibers found on the tape to the carpet underneath Tomlin. Therefore, the abrasions found on Tomlin's chin and cheek are not consistent with a blunt force traumatic injury.

Carter argues that Dr. Peerwani's misstatement is relevant because it undermines the State's

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[168] 41 RR 160.

[169] 7 WR 40.

evidence of intent that Carter hit Tomlin over the head hard enough for him to fall to the floor. Carter contends that the misstatement also supports that Tomlin was still alive when Carter left the house because Tomlin could have caused the abrasions himself by rubbing his face across the carpet to fold back the tape and later died of a cardiac event or positional asphyxia. I agree. Evidence that Tomlin's injuries were abrasions instead of contusions tends to show that Tomlin was not killed by an intentional act if the injuries were self-inflicted, and also that he was alive when Carter left the home. The habeas court could consider evidence of Dr. Peerwani's false identification of Tomlin's chin injury as a contusion rather than an abrasion and that Tomlin may have inflicted the abrasions himself.

The majority concludes that Dr. Peerwani's testimony that the injury was a contusion, rather than an abrasion as noted in his autopsy report, should have been the basis for a claim in Carter's initial application for writ of habeas corpus. And because the matter before us is a subsequent writ application, the contusion-versus-abrasion issue is now procedurally barred. That is all well and good, and I would agree, had Carter alleged in the current writ that Dr. Peerwani provided false or misleading testimony because he said "contusion." But that is not Carter's claim. His claim is that Dr. Peerwani provided false or misleading testimony about Tomlin's cause of death as an intentional smothering. The proper characterization of the injury, as a contusion or an abrasion, goes directly to how Tomlin's death proceeded, whether he was smothered to death or whether he was alive when Carter left, fell to the floor, and tried to scrape the duct tape off of his face.

The majority also declares that the contusion-versus-abrasion issue "was not even mentioned in [Carter's] habeas application, so it is outside this Court's remand order."[170] While it was not

[170] Majority opinion at 32.

specifically mentioned, it is not necessary for a habeas applicant to plead every specific piece of evidence supporting his claims for relief. *Medina*, 361 S.W.3d at 639. Rather, the applicant need only plead sufficient specific facts that, if true, would entitle him to relief. *Id.* at 637.

The contusions-versus-abrasions issue also shows why the evidence provided by Dr. Palenik, wherein he described the experiment he conducted which provided an explanation contradicting Dr. Peerwani's theory of how the duct tape on Tomlin's face came to be in the position it was when Tomlin was found, is relevant. The majority rejects that evidence because the majority finds it unrelated to the facts pleaded in Carter's application. But what happened to the duct tape is a piece of the puzzle showing whether or not Dr. Peerwani's testimony—that Tomlin was killed by intentional smothering—was false or misleading. If Tomlin was alive when Carter left, and Tomlin rubbed his face on the floor to try and remove the duct tape, then Tomlin was not killed by intentional smothering.

IV(B)(2) — The State's Objection that the Habeas Court Relied on Inadmissible Hearsay

To support Claim Three, Carter offered the letter sent to Dr. Peerwani from Posel and Schonemann and Posel's declaration. The letter and declaration were admitted at the evidentiary hearing. The habeas court relied in part on the statements attributed to Dr. Peerwani in the letter, declaration, and Posel's live testimony in its recommendation to grant relief on Claims One and Three. The State argues that the habeas court improperly relied on the statements attributed to Dr. Peerwani because the statements are inadmissible hearsay.

At the evidentiary hearing, the State objected to the admission of the letter as hearsay while Dr. Peerwani was testifying.[171] Carter's counsel responded that "if [her statements] were not true,

[171] 6 WR 107.

he would have responded to [them]."[172] The State's objection was overruled.[173] Carter's counsel later offered Posel's declaration as an adoptive admission under Texas Rule of Evidence 801(e)(2)(D) because "the State is a party," and "Dr. Peerwani is both an agent and a contractual employee of the State."[174] The State objected, arguing that Dr. Peerwani had no obligation to reply and he was out of town when the declaration was sent.[175] The habeas court overruled the State's objection and admitted the declaration.[176] The State later objected again to the declaration arguing that Dr. Peerwani is not a party to the lawsuit and statements cannot be attributed to him, but the habeas court again overruled the objection.[177]

The State now argues that the habeas court erred in admitting the statements under Rule 801(e)(2)(D) because that is not the adoptive admission provision, that provision applies to the statements of a party's agents or employees. The State also argues that even when the statements are examined under the proper provision for adopted admissions, Rule 801(e)(2)(B), Dr. Peerwani's statements are still inadmissible because he is not a party to the action. The State concedes that Dr. Peerwani is an agent of the State; however, it asserts that the hearsay exception for adoptive admissions does not extend to a party's agents or employees. Carter argues that Peerwani's statements in Posel's letter and declaration are admissible because they are statements in which the

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[172] 6 WR 107.

[173] 6 WR 107.

[174] 6 WR 173–74.

[175] 6 WR 174.

[176] 6 WR 175.

[177] 6 WR 226.

State has adopted because Dr. Peerwani, an agent of the State, understood the statements and remained silent or acquiesced to those statements.

Here, the State timely objected to the admissibility of Posel's letter and declaration during Dr. Peerwani's testimony, and the majority holds that the habeas court erred by admitting those documents into evidence. But even if the majority and the State are correct that the habeas court erred in admitting Posel's letter to Dr. Peerwani and her declaration over the State's objection, and we were to set aside and not consider those particular documents in evaluating the merits of Carter's claim, the State did not reassert the same objection to Posel's testimony, in which she testified to Dr. Peerwani's statements from their meeting—all statements that mirrored the contents of her letter and declaration.[178] Posel testified that Dr. Peerwani said: "This was a death by positional asphyxia";[179] "This was not a death by smothering";[180] and "[Tomlin] died as a result of the stress of the event and the position in which he was bound." The State did not make any hearsay objections during this testimony.[181] Furthermore, while cross-examining Posel, the State asked questions which again elicited statements made by Dr. Peerwani:

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[178] In other contexts, namely, direct appeal, "[t]he erroneous admission of evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. This rule applies whether the other evidence was introduced by the defendant or the State." *Cook v. State*, 665 S.W.3d 595, 600 (Tex. Crim. App. 2023). This rule was "well settled" over 100 years ago. *See Wagner v. State*, 109 S.W. 169, 169 (Tex. Crim. App. 1908) ("It is well settled in this state that the erroneous admission of testimony is not cause for reversal, if the same fact is proven by other testimony not objected to.").

[179] 8 WR 171.

[180] 8 WR 172.

[181] As noted above, *supra* n.89, the only objection made by the State during Posel's testimony was to a question asked by writ counsel Ware, which the State objected to as asking for speculation.

> [The State]: And it's your belief that Dr. Peerwani told you that there's no way the victim could have died of smothering and that these weren't competing causes of death?
>
> [Posel]: He didn't say there was no way. He said the cause of death was positional asphyxia and that smothering and positional asphyxia were competing causes of death; you couldn't die from both.[182]
>
> . . .
>
> [The State]: Did he explain it to you that [it] could have begun the process of positional asphyxia, had all the signs and symptoms, and then be smothered --
>
> [Posel]: He --
>
> [The State]: -- and then the cause of death is smothering?
>
> [Posel]: He didn't make those statements, and he stated repeatedly that the cause of death here was positional asphyxia.[183]
>
> . . .
>
> [The State]: And you're of the opinion that Dr. Peerwani told you this was not an intentional act?
>
> [Posel]: He differentiated smothering as an intentional act from positional asphyxia, and he said the findings and the scene do not support the idea that an intentional act caused [Tomlin's] death. He said, "This is a death of positional asphyxia. He did not die of smothering." He explicitly said that.[184]

To the extent that the habeas court erred in admitting Posel's letter and declaration, the same substance of those documents was admitted without objection. Posel's testimony echoed the same statements found in her letter and declaration, the State failed to object to any of her testimony, and the State's own questions called for testimony that it had objected to. Similarly, when Dr. Peerwani

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[182] 8 WR 186.

[183] 8 WR 186–87.

[184] 8 WR 187–88.

testified at the writ hearing, the State asked him in cross-examination about the statements attributed to him in the letter and declaration. The habeas court properly heard and considered the testimony they provided at the hearing. In hearing and considering the testimony, the habeas court is at liberty to decide how much weight to give to the testimony of each individual witness, and in doing so, take into consideration the posture of each witness. It is likely that the habeas court kept in mind the fact that Posel was one of the lawyers representing Carter on this writ application when weighing her testimony. As the ultimate factfinder, this Court is at liberty to do the same, and I have.

Accordingly, the record that we *should* be reviewing includes not just Dr. Peerwani's testimony, but also the testimonies of Drs. Gruszecki, Baden, and Sacks. It was not error for the habeas court to admit their testimony—all of these pieces of evidence are relevant and probative of Carter's Claim One, even if the majority does not see how the pieces fit. And while the habeas court may have erred in admitting Posel's letter and declaration, she testified to the very same information in the habeas hearing and her testimony is properly part of the record, relevant, and probative of Carter's Claim Three.

IV(C) — Claim One: Whether Dr. Peerwani's Testimony Gave the Jury a False Impression that Tomlin was Intentionally Smothered

The United States Supreme Court has held that a State's knowing use of false testimony to obtain a conviction violates a defendant's due process rights. *Napue*, 360 U.S. at 269. In *Ex parte Chabot*, this Court held that the State's unknowing use of false evidence also violates a defendant's due process rights. *Chabot*, 300 S.W.3d at 772. To obtain post-conviction habeas relief based on the State's use of false evidence, an applicant must show by a preponderance of evidence that: "(1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict of

guilt." *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015). The applicant need not show that testimony was perjured, "although whether the testimony is perjury or was knowingly used may impact the applicable standard of materiality." *Ex parte Robbins*, 360 S.W.3d 446, 460 (Tex. Crim. App. 2011) (hereinafter referred to as "*Robbins I*" because the successive case, "*Robbins II*," is discussed below) (citing *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). Falsity is a factual inquiry and reviewed under a deferential standard. *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018). Materiality is a legal question and therefore reviewed *de novo*. *Id.* at 264.

IV(C)(1) — Was Dr. Peerwani's Testimony False?

The proper question to determine falsity is "whether the particular testimony, taken as a whole, 'gives the jury a false impression.'" *Weinstein*, 421 S.W.3d at 666 (quoting *Chavez*, 371 S.W.3d at 208); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). "[T]he record must contain some credible evidence that clearly undermines the evidence adduced at trial." *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020) (parenthetical citation omitted).

We have held that testimony may create a false impression where the witness "omitted or glossed over pertinent facts." *Robbins I*, 360 S.W.3d at 462; *see also Alcorta*, 355 U.S. at 30 (witness gave jury a false impression by testifying that he did not "love" the victim and had not been on any dates with the victim but omitted that he had a sexual relationship with the victim). In contrast, we have rejected an allegation of false testimony where at trial, the expert testified "openly about the autopsy findings," "did not omit pertinent details," and the testimony was not "entirely refuted by any expert." *Robbins I*, 360 S.W.3d at 462.

At trial, the State relied on Dr. Peerwani's conclusion that Tomlin's cause of death was

"smothering with positional asphyxia" to show the intent necessary for a capital murder conviction. Dr. Peerwani's conclusion stemmed from the patterned lip marks on Tomlin's upper inner lip—had there been no marks that could suggest Tomlin was smothered, the cause of death would have been from positional asphyxia. Dr. Peerwani testified at trial that the patterned teeth marks were "a very classical and typical injury that you see in a setting where a person has been smothered,"[185] caused from "direct perpendicular forces and compressive forces,"[186] that required "an intentional and very purposeful act requiring pressure to be continuously applied"[187] while Tomlin was alive. Ultimately, Dr. Peerwani gave three scenarios for how Tomlin died: (1) an intentional smothering, which was fatal if carried on until he died; (2) an attempted fatal smothering that left Tomlin in a compromised position which in turn caused him to die of positional asphyxia; and (3) Tomlin was in a state of positional asphyxia and then was smothered until he died.

In contrast, at the writ hearing, Dr. Peerwani admitted that Tomlin's case is not in fact a classical case of smothering. It would only be a classical case of smothering if there were no other complicating factors such as Tomlin's comorbidities, his lung and heart problems, and positional asphyxia. He cannot exclude smothering, but he cannot say that it definitively occurred, either, as he stated in his trial testimony. If the patterned lip marks had resulted from some other cause, then there would be no evidence of smothering. Dr. Peerwani also admitted that his testimony referring to Tomlin's chin and cheek injuries as contusions that resulted from blunt force trauma, instead of abrasions was false.

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[185] 41 RR 172.

[186] 41 RR 186.

[187] 41 RR 183.

Dr. Peerwani's post-conviction statements along with new evidence and expert testimony establish that the autopsy findings are more consistent with a cause of death from positional asphyxia or a cardiac event, rather than smothering. The patterned lip marks do not conclusively show that Tomlin was smothered. Although Dr. Peerwani still maintains that there may have been an attempted smothering, due to the complicated nature of the case, he admittedly does not know. He testified that none of the findings listed as evidence of smothering in the autopsy report (orbital edema, leptomeningeal congestion with cerebral edema, and generalized visceral congestion [excluding the patterned lip marks]) are specific to smothering—each finding could be found in an asphyxial death or a cardiac death, and each finding is more consistent with a prolonged death, rather than smothering which causes a quick death. Finally, Dr. Peerwani's statements from his meeting with Carter's counsel reflect that he believes the cause of death was from positional asphyxia, not smothering.

In *Robbins I*, the medical examiner who performed the autopsy of the infant victim testified at trial that the victim died of asphyxiation from compression of the chest and abdomen. *Id.* at 450. On cross-examination, the medical examiner asserted that she was not excluding other reasonable hypotheses by which the victim died, but she believed beyond a reasonable doubt that the victim was asphyxiated. *Id.* at 451. Post-conviction, the medical examiner revised her opinion to "undetermined," but she still believed the death was suspicious. *Id.* at 454. Her change of opinion was due to more experience in her field and her review of additional information since trial. *Id.* This Court held that the medical examiner's trial testimony was not false because it did not give a false impression of the facts. *Id.* at 462. In so holding, we noted that the medical examiner testified openly about the autopsy findings and explained her reasoning for her conclusion, she did not omit pertinent

details, and neither her conclusion nor the autopsy evidence which she had relied on had been entirely refuted by any expert. *Id.* None of the expert testimony developed post-conviction showed that the victim could not have been intentionally asphyxiated. *Id.* at 461.

Robbins I is distinguishable from the present case. *Robbins I* involved a medical examiner's equivocal trial testimony that she believed asphyxiation caused the victim's death, but she was not ruling out other explanations. When she later revised her conclusion to "undetermined," there was no new scientific evidence or expert opinion to refute her trial testimony. Simply changing her opinion to "undetermined" did not necessarily make her trial testimony false. In Carter's case, unlike the equivocal testimony in *Robbins I*, Dr. Peerwani gave unequivocal trial testimony that Tomlin was definitely smothered at some point when he died. Now, Dr. Peerwani has backtracked from that testimony and instead given cautious, equivocal testimony that the cause of death was from positional asphyxia, but he cannot say if smothering was involved. *See Ex parte Hightower*, 622 S.W.3d 371, 375 (Tex. Crim. App. 2021) (Hervey, J., concurring) ("the definitiveness of the scientific testimony is of paramount importance.").

Robbins I is also distinguishable because the medical examiner in that case was clear at trial that she was not excluding other explanations for how the victim could have died, but it was her belief that the victim died of asphyxiation. Whereas here, Dr. Peerwani was clear at trial that there could be no other explanation for Tomlin's death except for either a combination of smothering and positional asphyxia or he died from only smothering. The *Robbins I* medical examiner testified openly and did not omit any pertinent details from her trial testimony, unlike Dr. Peerwani who did not discuss the implanted pacemaker, that Tomlin could have died from a cardiac event, or that many of the autopsy findings are more consistent with a prolonged death. These omitted details weigh

against Dr. Peerwani's conclusion.

Dr. Peerwani's smothering conclusion has also been entirely refuted by new scientific evidence and expert opinion. Two forensic pathologists concluded that Tomlin's death was due in part to the stress that the robbery would have had on his heart and his preexisting medical conditions. Dr. Gruszecki determined that Tomlin died from a combination of hypertension, coronary artery disease, lung disease, and positional asphyxia. The stress of being robbed and receiving a contusion to the head also would have exacerbated his heart disease. Dr. Baden concluded that Tomlin died because the home invasion triggered a cardiac arrhythmia, in conjunction with severe heart failure from preexisting coronary artery disease. While Dr. Gruszecki did not rule out positional asphyxia as a contributor, she and Dr. Baden agreed that nothing in the autopsy report or findings show that there was an intentional act of smothering. Drs. Gruszecki and Baden also agreed that the patterned lip marks here likely resulted from the weight of Tomlin's head pressing his teeth into his lip as he lay there dying, a common occurrence when someone dies laying facedown.

Next, Dr. Sacks refuted Dr. Peerwani's testimony that the patterned lip marks resulted from Tomlin being smothered while he was still alive. Dr. Sacks's computational biomechanical model showed that the patterned lip marks were caused by the weight of Tomlin's head resting against the floor as he was dying. He testified that if the marks had been inflicted in living tissue, any indentation would be temporary. And a clamped hand over the mouth would distribute too broad a force to inflict indentations over just three teeth. The weight of the human head projected onto a small area of two to three front, right teeth would be a sufficient focal force to inflict the indentations only after two to three hours.

The State argues that Dr. Peerwani testified at trial that he was uncertain if Tomlin died of

positional asphyxia or smothering, and therefore his current testimony is not false. But the State is mistaken. Dr. Peerwani was only uncertain on the sequence of positional asphyxia and smothering; he was certain that both had occurred at some point and that both contributed to his death, demonstrated by his "smothering with positional asphyxia" conclusion. Dr. Peerwani emphasized at trial that Tomlin's cause of death comprised "two parts"—part smothering and part positional asphyxia. His uncertainty as to the sequence of events is different from uncertainty as to what caused his death.

There can be no doubt that Dr. Peerwani's trial testimony gave the false impression that Tomlin was definitively smothered based on his testimony that the patterned lip marks were "classical" of smothering. Dr. Peerwani's three scenarios for the sequence of events in Tomlin's death left no question that he was smothered at some point by Carter. Now, Dr. Peerwani has backtracked from his confident, unambiguous testimony and has instead replaced it with careful testimony full of evasive language. His trial testimony describing the death as a classic case of smothering stands in stark contrast to his post-conviction testimony that this was a complicated case where he cannot be sure that smothering occurred at all.

Dr. Peerwani did not testify openly about the autopsy findings. He omitted Tomlin's pacemaker, he overstated his confidence that this was a respiratory death in general, he was untruthful in labeling Tomlin's case as classical of smothering, and his conclusion that Tomlin's death was "smothering with positional asphyxia" has been entirely refuted by experts. While positional asphyxia has not been excluded as a contributor to Tomlin's death, Dr. Peerwani's conclusion that smothering occurred—the State's primary evidence of intent—is false.

In sum, the evidence before us presents two very different depictions of Tomlin's cause of

death. The depiction presented at trial is one of a classic, simple case of a smothering, while the depiction presented post-conviction is filled with many complicated variables. The habeas court's findings are supported by the record. Dr. Peerwani's testimony was false because it created the false impression that Tomlin was killed by the intentional act of smothering.

IV(C)(2) — Was Dr. Peerwani's False Testimony Material?

False evidence is material when there is a "reasonable likelihood" that it affected the judgment of the jury. *Weinstein*, 421 S.W.3d at 665 ("an applicant who proves, by a preponderance of the evidence, a due-process violation stemming from a use of *material* false testimony necessarily proves harm") (emphasis in original).

As stated previously, the pivotal question at trial was whether Tomlin's death was caused by an intentional act. The indictment alleged that Carter "intentionally cause[d] the death of . . . James Tomlin by restraining him and causing him to lie face down and by smothering him."

The State's primary evidence of intent was Dr. Peerwani's testimony that Tomlin's death was caused entirely or in part from Carter smothering him because this was a classical case of smothering based on the patterned lip marks. Each cause of death provided by Dr. Peerwani included "an intentional act of smothering either way."[188] Throughout the State's closing argument, it emphasized Dr. Peerwani's testimony that the patterned lip marks were classical for a case of intentional smothering and that smothering showed that Carter "intended to kill [Tomlin]."[189] The trial testimony left the jury with no choice but to find that Carter intentionally smothered Tomlin.

The State's other claimed evidence of intent at trial was that Carter and Allen did not attempt

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[188] 41 RR 216.

[189] 42 RR 42, 43, & 45–46.

to hide their faces during the robbery, the robbery was committed in broad daylight, and Carter brought a gun to Tomlin's house. While these facts could be inferred as evidence of intent, their link to intent is overshadowed by the strength of the link between classical smothering marks and intent to kill.

It is obvious that the State's main focus at trial was that Tomlin was smothered—the patterned lip marks were "classical for a case of intentional smothering" and "bottom line is this . . . [s]omeone intentionally tried to smother him, and he died of smothering." Therefore, I would find based on the allegations in the indictment and the State's reliance on Dr. Peerwani's testimony to show intent, that there was a reasonable likelihood that the false evidence affected the judgment of the jury. The evidence before us tends to show that smothering may not have occurred at all, the marks could have been caused by the weight of Tomlin's head, and that this case was nowhere near a classic case of an intentional smothering; Tomlin could have died a respiratory death or from cardiac complications. I agree with the habeas court's findings that the false testimony was material to Carter's conviction.

IV(D) — Claim Three: Whether Dr. Peerwani's New Characterization of the Evidence Contradicts his Trial Testimony Under Article 11.073

Under article 11.073 of the Texas Code of Criminal Procedure, an applicant can obtain post-conviction relief based on a change in science relied on by the State at trial. TEX. CODE CRIM. PROC. art. 11.073. Article 11.073 permits a court to grant post-conviction writ relief when:

> (1) Relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;
>
> (2) The scientific evidence would be admissible under the Texas Rules of

Evidence at a trial held on the date of the application; and

(3) The court must make findings of the foregoing and also find that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Chaney, 563 S.W.3d at 255 (citing. art. 11.073(b)(1) & (2)).

IV(D)(1) — Availability of Scientific Evidence

In assessing whether relevant scientific evidence was available, we consider "whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based" has changed since the applicant's trial or the date of applicant's previously considered application. TEX. CODE CRIM. PROC. art. 11.073(d)(1) & (2). "Scientific knowledge includes a change in the body of science (e.g., the field has been discredited or evolved) and when an expert's opinion changes due to a change in their scientific knowledge (e.g., an expert who, upon further study and acquisition of additional scientific knowledge, would have given a different opinion at trial)." *Chaney*, 563 S.W.3d at 255 (citing art. 11.073(d); *Ex parte Robbins*, 478 S.W.3d 678, 691 (Tex. Crim. App. 2014) (hereinafter "*Robbins II*") (internal quotations removed).

In the successive case to *Robbins I*, this Court held that a medical examiner's revised opinion can be considered a change in scientific knowledge. *Robbins II*, 478 S.W.3d at 692. Following *Robbins I*, the applicant filed a subsequent application for a writ of habeas corpus after the enactment of article 11.073. *Id.* at 680. The applicant argued that the medical examiner's change of opinion on the cause of death from "asphyxiation" to "undetermined" contradicted the State's scientific evidence relied on at trial, and had it been presented at trial he would not have been convicted. *Id.* Because the scientific process and method used by the medical examiner had not changed or

advanced since trial, the question for this Court was whether a change in an individual's scientific knowledge could be considered new science. *Id.* at 691.

We found that the medical examiner's new opinion was relevant scientific knowledge because it was based on inferences derived from supported scientific methods. *Id.* at 692. The autopsy she performed was not flawed, but her original conclusion was not supported by the autopsy. *Id.* Had the medical examiner's new opinion on the cause of death been presented at trial, it would have been admissible under the Texas Rules of Evidence, and the applicant would not have been convicted because the medical examiner's original trial testimony was the only evidence that showed a homicide had occurred. *Id.*

In Carter's case, Dr. Peerwani has not employed a new scientific method or expanded his scientific knowledge post-conviction. Dr. Peerwani has also not admitted that he has changed his opinion on the cause of death like the medical examiner in *Robbins II*. Article 11.073 and *Robbins II* do not require a testifying scientific expert's formal statement of a changed opinion, but it must be decided whether a testifying expert's post-conviction statements objectively imply a change in opinion.

IV(D)(2) — Admissibility of Dr. Peerwani's Post-Conviction Opinion

First, I address whether the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application. Here, the relevant scientific evidence is Dr. Peerwani's opinion on the cause of death, which includes Posel's letter and declaration, Dr. Peerwani's deposition and habeas hearing testimony, and Posel's habeas hearing testimony. Because Posel's letter and declaration and Dr. Peerwani's statements within the letter and declaration are both out-of-court statements, each part must fall within an exception to the rule against hearsay. TEX. R.

EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

Carter argues that Posel's statements—the letter and declaration—are admissible as non-hearsay because they are adoptive admissions by Dr. Peerwani, and Dr. Peerwani's statements contained within those documents are admissible as non-hearsay because they are statements made by an agent of a party to the action, the State. The State concedes that as the medical examiner, Dr. Peerwani was an agent of the State, however, Dr. Peerwani's failure to respond to Posel's letter and declaration is not an adoptive admission because he is not a party to the action.

Under Rule 801(e)(2)(B), a "statement offered against an opposing party" is not hearsay if it "is one the party manifested that it adopted or believed to be true." TEX. R. EVID. 801(e)(2)(B). As Dr. Peerwani is neither the prosecutor nor the applicant in this case, he cannot be considered a party to the action. Therefore, the letter and declaration are not adoptive admissions by Dr. Peerwani, and the question of whether Dr. Peerwani is an agent of the State need not be considered. However, as discussed above, although the State objected to the letter and declaration attributing statements to Dr. Peerwani, the State did not object to the same evidence from Posel's testimony. Moreover, Posel's letter and declaration were only submitted to support Carter's application. The habeas court chose to credit the *hearing testimony* of Posel over Dr. Peerwani, and I agree with that choice. Therefore, it is not necessary to look at the declaration and letter for his new opinion. We can—and I will—look instead to Dr. Peerwani's statements at the habeas hearing and Posel's unobjected-to testimony regarding Dr. Peerwani's statements made during their meeting.

IV(D)(3) — Whether Dr. Peerwani's Post-Conviction Statements Show an Objective Change of Opinion on the Cause of Death

Under Carter's new science claim, Dr. Peerwani's trial statements must be compared to his post-conviction statements to determine whether he is contradicting his previous testimony. It does not matter that Dr. Peerwani has not admitted to changing his opinion. An applicant may establish a change in science in the form of a revised scientific opinion if, from an objective perspective, one would find that the scientific expert's post-conviction statements demonstrate a changed opinion.

At trial, Dr. Peerwani characterized the cause of death—smothering with positional asphyxia—as a clear case potentially comprising two parts. He could conclusively say that one part of the cause of death was smothering, and positional asphyxia may have also contributed, but the cause of death included "an intentional act of smothering either way." Dr. Peerwani stated that the patterned lip marks from Tomlin's teeth were a "classical and typical injury" of someone who had been smothered.

Post-conviction, however, Dr. Peerwani has said that the determination of Tomlin's cause of death is much more complicated. He cannot be sure whether smothering occurred at all. The patterned lip marks are not necessarily indicative of smothering, they are not classical of smothering in this case, they do not demonstrate intent to kill, and without the patterned lip marks, none of the findings listed as evidence of smothering are in fact specific to smothering. Dr. Peerwani's post-conviction statements demonstrate that he has changed his opinion on the cause of death. His trial opinion was essentially that Tomlin died from a classic case of smothering that potentially involved positional asphyxia, and his post-conviction opinion is that Tomlin died from positional asphyxia, with a possibility of smothering. These are two inconsistent causes of death. Therefore, Dr. Peerwani has objectively changed his opinion on the cause of death and contradicted his trial testimony.

IV(D)(4) — Whether Applicant Would Not Have Been Convicted if Dr. Peerwani's New Opinion Had Been Presented at Trial

I conclude that it is more likely than not that, had Dr. Peerwani's current opinion on the cause of death been presented at trial, Carter would not have been convicted of capital murder. The State's chief evidence of intent was Dr. Peerwani's trial testimony that Tomlin's death was caused entirely or in part from Carter smothering him. The State emphasized in its closing argument that the jury could conclude from Dr. Peerwani's testimony that this was a classical case of a smothering, and this showed that Carter intentionally killed Tomlin. Now that Dr. Peerwani has backtracked from his unequivocal opinion that smothering definitely occurred, has said that this was not a classic case of smothering, and has instead said that Tomlin's death could have been caused by positional asphyxia, I find that it is more likely than not that Carter would not have been found guilty for the intentional murder of Tomlin.

The facts of this case are tragic, and I do not condone Carter's actions, nor would the jury who likely would have found Carter guilty of some lesser-included offense that is not dependent upon a showing that Carter intentionally caused Tomlin's death by smothering. But as a charge of capital murder, caused by an intentional act of smothering, I cannot say that Carter would have been convicted of capital murder when the State's primary evidence of intent has been discredited.

V — Conclusion

Based on the evidence in the habeas record, we should grant Carter's request for relief, set aside his conviction in cause number C-371-011057-0949973-B, and order that he be remanded to the Sheriff of Tarrant County to answer the charges against him. Because the Court chooses to disregard significant portions of the record that are relevant and probative of whether Dr. Peerwani

provided false or misleading testimony and relevant and probative of whether Dr. Peerwani's current opinion has changed from his trial testimony, I respectfully dissent.

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