No. 20–7687

IN THE
Supreme Court of the United States

RONALD JAMES HAMILTON, JR.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Ronald James Hamilton, Jr., shot and killed Ismail Yousef Matalkah while robbing a convenience store. He pleaded guilty to that murder. During punishment, two eyewitnesses testified that Hamilton committed a *second* murder during another convenience store robbery. In addition to the eyewitnesses, a jailhouse informant linked Hamilton to this second murder. However, the police candidly admitted that no fingerprints or physical evidence from the second murder "tie[d] back" to Hamilton. Hamilton now alleges that the State failed to disclose fingerprint comparison results relevant to the second murder, the State offered false and misleading evidence about the killing, and new fingerprint evidence proves that someone else was the murderer. Accordingly, Hamilton contends that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), and his sentence is constitutionally unreliable per the Court's holding in *Johnson v. Mississippi*, 486 U.S. 578 (1988). The Texas Court of Criminal Appeals (CCA) denied relief on subsequent state habeas review, observing that Hamilton's jury had heard the essence of the habeas evidence and that Hamilton failed to show his new evidence was material to the killer's identity. Hamilton's petition now presents the following question for this Court's consideration:

> Did the CCA err in finding the lack of false testimony and materiality precludes relief on Hamilton's claims?

LIST OF ALL PROCEEDINGS

The State of Texas v. Ronald James Hamilton, Jr., No. 901049 (180th Dist. Ct., Harris Cty., Tex., Nov. 12, 2002)

Ex parte Hamilton, No. 901049–A (180th Dist. Ct., Harris Cty., Tex., Nov. 25, 2014) (entered findings of fact and conclusions of law)

Ex parte Hamilton, No. 901049–B (180th Dist. Ct., Harris Cty., Tex., Oct. 30, 2019) (entered findings of fact and conclusions of law)

Hamilton v. State, No. 74,523 (Tex. Crim. App. Oct. 13, 2004)

Ex parte Hamilton, No. 78,114–01 (Tex. Crim. App. Jun. 24, 2015)

Ex parte Hamilton, No. 78,114–02 (Tex. Crim. App. Nov. 11, 2020)

Hamilton v. Lumpkin, No. 4:15–cv–01996 (S.D. Tex.)

Hamilton v. Texas, No. 04–9658 (U.S. Jun. 20, 2005)

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INTRODUCTION

Hamilton shot and killed a convenience store clerk during a robbery. He made his getaway in a car driven by his friend, Shawon Smith. After Hamilton pleaded guilty, the State introduced many extraneous offenses and bad acts to convince the jury to impose the death penalty. Hamilton had prior convictions. He made his living as a drug dealer. He possessed weapons. He was an incorrigible inmate who engaged in racist bullying and violence. He had an ugly history of domestic abuse.

And there was ample evidence that Hamilton had committed another murder. Two witnesses identified Hamilton as the man who killed Son Vinh Huynh while robbing Huynh's convenience store. Further, a jailhouse informant had heard Hamilton discussing the robbery while awaiting trial. But the police acknowledged at trial that no physical evidence tied Hamilton or Smith to Huynh's murder. And the police specifically conceded that prints found on a bottle recovered from outside Huynh's convenience store—a bottle that Hamilton now alleges that the killer touched shortly before the murder—did not tie back to Hamilton or Smith.

Based on his guilty plea and the punishment evidence, the jury convicted Hamilton of capital murder and sentenced him to die. Following unsuccessful direct appeal and state writ proceedings, Hamilton filed a federal habeas petition. After the district court stayed federal proceedings to allow Hamilton to exhaust his state remedies, Hamilton raised a claim to the state court asserting that "recently tested fingerprint evidence establishes [his] innocence of [the] extraneous capital murder

introduced at punishment." *Ex parte Hamilton*, WR–78,114–02, 2018 WL 4344324, at *1 (Tex. Crim. App. Sept. 12, 2018).

The CCA remanded the claim to the trial court for consideration. *Id*. Following a hearing, the trial court adopted Hamilton's proposed findings of fact and conclusions of law recommending that relief be granted. *Ex parte Hamilton*, WR–78,114–02, 2020 WL 6588560, at *1 (Tex. Crim. App. Nov. 11, 2020); App. A[1] at 4; App. B. But the CCA conducted an independent review and rejected the trial court's findings and conclusions as not supported by the record or law.[2] *Ex parte Hamilton*, 2020 WL 6588560, at *1, *3; App. A at 4, 7.

Independently evaluating Hamilton's claim that he had been sentenced based on false evidence and was innocent of the extraneous killing, the CCA noted that "fingerprint testing in 2017 identified another person as having handled the bottle." *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 5. But the CCA found that "the State's trial evidence about the fingerprints was consistent with the fingerprint evidence developed at the habeas stage" because the jury heard the essence of Hamilton's claim—that the fingerprints did not tie to Hamilton or Smith—through police testimony. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 5–6. The

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[1] When citing the Petitioner's Appendices, the Respondent uses the Petitioner's page numbers rather than the internal document pagination.

[2] In disagreeing with the trial court, the CCA simply served its function as the "ultimate factfinder" in Texas state habeas proceedings. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008); *see also Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017) ("[W]hen our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, we have exercised our authority to enter contrary findings and conclusions."). Hamilton complains that rejecting the trial court's recommendation of relief in capital cases is a trend with the CCA, Pet.24 n.30, but obviously he must show that error occurred in his own case to obtain relief.

CCA further found that Hamilton failed to show that the prints were "material to the identity of the [killer]" because Hamilton failed to show that the killer actually handled the bottle. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6–7. The CCA then denied relief. *Ex parte Hamilton*, 2020 WL 6588560, at *3; App. A at 7.

Hamilton now seeks certiorari review of the CCA's decision. In his petition, Hamilton proceeds under several distinct, but intertwined, legal theories to argue that his constitutional rights were violated. Namely, he complains that the prosecution violated *Brady* and *Napue* and that his death sentence is unreliable under *Johnson*. But, as shown below, Hamilton's claims merit no relief.

In order to establish a *Brady* violation based on withheld evidence, a defendant must prove: (1) "[t]he evidence in question was favorable to him;" (2) the "evidence [was] suppressed by the State;" and (3) the evidence was material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 280–82 (1999). Under *Napue*, a conviction must be set aside where the defendant has demonstrated that: (1) a witness gave false testimony; (2) the falsity was material; and (3) the prosecution knew the testimony was false. *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007). In *Johnson*, this Court reversed a death sentence predicated on a materially inaccurate aggravating factor—a prior violent felony conviction that was vacated after the petitioner's trial. 486 U.S. at 580–82, 590.

Hamilton's three theories thus all share a materiality component, and therefore, the CCA's adverse materiality determination is fatal to all three. As the CCA recognized, without demonstrating that the killer touched the bottle, the

fingerprints on it are worthless. The bottle was found outside a convenience store where people would drink and loiter and may have been sitting there when the killer arrived. It was imperative for Hamilton to conclusively show that the killer handled the bottle, and he failed to do so. In any event, the jury was aware that fingerprints on the bottle did not tie back to Hamilton and Smith. 18 RR 40–41.[3] Additional evidence on this point would have been cumulative.

And for the same reason that the evidence was cumulative, no false testimony was actually presented—the police truthfully told the jury that the fingerprints did not tie back to Hamilton or Smith. Hamilton does not contend anyone knew at the time of trial who the prints matched. Pet.34.[4] In fact, Hamilton does not appear to identify a statement made at trial that was actually false; rather, Hamilton seems to simply believe that he has proved he did not kill Huynh and thus any testimony that suggests that he did must necessarily be incorrect and misleading. *Id.* at 14 ("These claims were based upon the idea that all of the evidence suggesting Mr. Hamilton committed the [ ] murder was false and misleading[.]").

In sum, Hamilton's petition does not demonstrate any special or important reason for this Court to review the CCA's decision. Hamilton identifies no compelling

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[3] The Respondent employs the following citation conventions: "CR" refers to the clerk's record of pleadings and documents filed during Hamilton's capital-murder trial. "RR" refers to the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's and defense's trial exhibits. "SHCR–01, –02" refer to the clerk's record of pleadings and documents filed during Hamilton's initial and subsequent state habeas proceedings. "SHRR–02" refers to the reporter's record of transcribed subsequent state habeas proceedings. "ECF No." refers to the entries on the federal district court's electronic docket sheet. All references are preceded by volume number and followed by page number.

[4] Hamilton's petition is muddled on this point. Pet.2 ("the trial prosecutors suppressed material fingerprint evidence showing someone else committed the extraneous murder").

misstatement of the law. And, as shown below, the state court's factbound denial of his claims was entirely correct and proper. But even if Hamilton's claims had some purchase, this Court typically does not engage in mere error correction. Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"); *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Nor should the Court second-guess the decision of the jury, which heard all of the testimony about Hamilton's other bad acts and offenses, heard the testimony of the eyewitnesses and the inmate informant, knew that no fingerprints or physical evidence tied Hamilton to the extraneous murder, and still opted to answer the special issues in favor of the death penalty. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

Ahmad Naimi was the manager of a Sun Mart gas station located on Yellowstone Street in Houston, Texas. 16 RR 252–53. On November 7, 2001, around 6:45 p.m., Naimi saw Hamilton enter the store, ask the cashier, Matalkah, about an item, and then leave. *Id*. at 253–55. Two to three minutes later Naimi heard someone talking to Matalkah. *Id*. at 255, 260. Investigating, he saw that Hamilton had returned and was pointing a gun at Matalkah's face. *Id*. When Hamilton saw Naimi, he shot Matalkah. *Id*. at 255, 262. Hamilton then chased and shot at Naimi, who fell

to the ground and was still. *Id.* at 262–65. Hamilton left, taking with him a cash register containing about two hundred dollars. *Id.* at 263, 276.

Josephine Miller saw Hamilton leaving the Sun Mart. Hamilton had the cash register and entered the passenger side of an older grey Cutlass or Regal. 16 RR 57, 65. The car was driven by Hamilton's friend Smith (also known as "Big Shawn"). 16 RR 88–89, 242; SX 38-A at 4. Miller provided police a partial license plate number, noted the car's driver was heavyset, and described Hamilton's clothing. 16 RR 63–65. Miller later identified Smith's car as the getaway vehicle. *Id.* at 242.

After Hamilton left, Naimi called the police and tended to Matalkah. *Id.* at 264–66. Matalkah eventually succumbed to a gunshot wound to the head. 18 RR 67, 86–87. The store's security camera captured the robbery, and Naimi identified Hamilton as Matalkah's shooter. 16 RR 243–46, 277–84; SX 41.

Billy Norris was Hamilton and Smith's friend. At the time of Matalkah's murder, Norris was staying with Smith about two blocks from the Sun Mart. 16 RR 72–73. Norris testified that Smith drove a late 1980s two-door smoke grey Regal. *Id.* Shortly after Matalkah's murder, Norris heard Hamilton and Smith arguing and hitting something with a hammer. *Id.* at 74–76. Hamilton and Smith were attempting to open a cash register. *Id.* at 76. Smith said that he drove Hamilton to a store because Hamilton was hungry. *Id.* at 77. While Smith waited in the car, he heard a gunshot and then saw Hamilton leave the store with the cash register. *Id.* Smith told Norris that Hamilton was using fry when he murdered Matalkah. *Id.* at 101–02. Fry is marijuana laced with PCP. 17 RR 46. Hamilton himself was evasive about what

happened with Norris, but he did say that he had made a mistake and was sorry. 16 RR 78–79. Hamilton started attending church with Norris about a week after Matalkah's murder and expressed remorse. *Id.* at 80. After a month or two, though, Hamilton stopped attending church. *Id.* at 80–81. In December 2001, Norris witnessed Hamilton and Smith fighting. *Id.* at 81–84. Hamilton threatened Smith not to tell anyone about the murder. *Id.* at 84–85.

On January 21, 2002, police responded to a family disturbance involving Hamilton and Brooke Rogers at a Stop-N-Go store. 16 RR 124–25. Rogers had met Hamilton in 1995, was romantically involved with him for three years, and was the mother of his three-year-old son. *Id.* at 138–39. Hamilton and Rogers had been at Rogers's house arguing about her relationship with another man and her refusal to have sex with Hamilton. *Id.* at 148. They continued to fight as Rogers drove Hamilton home. *Id.* at 148–49. Rogers eventually grew frightened that Hamilton might hit her and stopped her car. *Id.* at 150. Hamilton got out, and Rogers called the police. *Id.* at 150–51. When Rogers locked herself in the car, Hamilton slashed her tires with a knife. *Id.* at 120, 129, 150–51. After the police arrived, Hamilton told them that Rogers was wanted for writing hot checks. *Id.* at 152. In turn, Rogers told police that Hamilton had confessed to shooting a man at a gas station. *Id.* at 152–53. Rogers had recognized Hamilton's picture from the news. *Id.* at 153–54. Hamilton told Rogers that he robbed the convenience store because he was broke. *Id.* at 155. But he also claimed that he had shot Matalkah because Matalkah was reaching for a gun in "a drug deal gone bad." *Id.* at 154, 157. Hamilton told Rogers that he threw the murder

weapon and the cash register into the ship channel and threatened Rogers to keep quiet. *Id*. at 158–59, 181. Police arrested Hamilton for criminal mischief[5] and placed a homicide hold on him. *Id*. at 130–31. Rogers gave police a statement. 16 RR 229.

Hamilton himself also gave a videotaped statement. Hamilton confessed that he had accompanied Smith and a man named "Black" to the Sun Mart in Smith's car, but he did not admit to committing the murder or robbery—instead, he blamed "Black" and Smith. 16 RR 229–38, SX 38, 38-A, 39. Hamilton acknowledged recently having a cast on his right hand. 16 RR 243. The robber in the Sun Mart surveillance tape also had a cast, albeit on the left hand. *Id*.

II. Evidence Relating to Punishment

A. The State's evidence

In addition to Matalkah's murder, the State presented evidence concerning Hamilton's other bad acts and convictions. Rogers testified that Hamilton was nice to her before their son was born, but Hamilton later contributed little time or money to their son's upbringing. 16 RR 140–43. Hamilton and Rogers fought often, and Hamilton would physically hurt Rogers. *Id*. at 159–60. Once, Hamilton shot a gun at Rogers from across a field. *Id*. at 182–84. Another time, Hamilton grew angry about a comment made by a friend of a man that Rogers knew, and Hamilton pushed or tripped Rogers. *Id*. at 160–61. Hamilton took their son from Rogers, and when she went for help, he followed Rogers down the street, cursing, hitting, kicking, and

[5] Hamilton was convicted of criminal mischief and sentenced to fifty days in the county jail. 23 RR 53; SX 51.

pushing her while she wept. *Id*. at 161–64. In another incident, the police came to Rogers's apartment after Hamilton had beaten her. 17 RR 62. Hamilton had grown upset when their baby was crying while Hamilton was on the phone. *Id*. at 64. Hamilton threw the phone at Rogers, and Rogers sprayed air freshener at Hamilton. *Id*. at 64–65. Hamilton then punched Rogers three times. *Id*. at 66. Rogers testified that Hamilton sold drugs for a living. 16 RR 198–99.

The State also elicited testimony about Hamilton's poor behavior in jail. Hamilton had assaulted one inmate, calling him a "fucking Mexican" and beating him until the guards arrived. 17 RR 80–85. Hamilton hit another inmate hard enough that he injured his own hand and left the inmate with a permanent scar on his forehead. *Id*. at 143–46, 165. Hamilton put hair remover in another inmate's shampoo bottle and stole an inmate's food tray. *Id*. at 113–17, 127–31.

Inmate Joseph Montoyer testified that Hamilton was a bully who picked on Caucasians and Hispanics. 17 RR 185. Montoyer heard Hamilton tell friends that he shot a man on Yellowstone Street and took a cash drawer. *Id*. at 186. Hamilton also told Montoyer that Hamilton's sister and aunt would testify that Hamilton was in Dallas during a killing, and Montoyer overheard Hamilton discuss his alibi during a phone call. *Id*. at 189–90, 193.

The State introduced evidence that Hamilton was previously convicted of: (1) possession of a controlled substance in 1994; (2) possession of marijuana in 1997; and (3) possession of cocaine in 1998. SX 48–50. As noted, Hamilton was also convicted of criminal mischief in 2002. SX 51. Hamilton's 1997 conviction stemmed from police

executing a narcotics search warrant at a Houston residence after receiving complaints that drugs were being sold there. 17 RR 31–34. The police arrested Hamilton and Smith and found numerous plastic baggies and envelopes filled with marijuana. *Id*. at 39, 41. Hamilton's 1998 conviction arose when police stopped Hamilton for driving a vehicle listed as stolen. *Id*. at 93–103, 106. Inside the car, police found crack cocaine, a pistol under the driver's seat, and two soda bottles filled with codeine and another liquid. *Id*. at 106–07.

Relevant to the instant petition, the State also presented evidence that Hamilton committed another murder at a convenience store on Holman Street on December 9, 2001.[6] Charles Douglas and Wanda Johnson arrived at the store around 7:00 p.m. 17 RR 276. Inside, Hamilton was talking with owner Son Vinh Huynh (also known as "Tulson"). 17 RR 216, 239–42, 262–63; 18 RR 98. Hamilton and Huynh began fighting. 17 RR 242–43. Hamilton then drew a gun and shot Huynh. *Id*. at 244–45, 264, 284–85. After shooting Huynh, Hamilton tried unsuccessfully to open the store cash register and used a shirt to wipe his fingerprints off it. *Id*. at 247. He eventually left, getting into the passenger seat of an older car driven by a heavyset African-American man. *Id*. at 246, 276, 279.

When police arrived at the scene, Huynh was dead and lying face down in a pool of blood. 17 RR 205. The cause of Huynh's death was similar to Matalkah's—a gunshot to the head. 18 RR 86–87. The type of wound suggested the gun had been

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[6] Hamilton asserts that the State committed misconduct by purportedly reneging on a plea deal with Smith. Pet.10–11, 21–22. This claim has been largely rejected by the state courts. 4 SHCR–01 784–87, 801; *Ex parte Hamilton*, 2020 WL 6588560, at *3; App. A at 7.

pressed against Huynh's skin when fired. *Id.* at 80–81. Huynh also had injuries consistent with a struggle. *Id.* at 82, 84–86. Douglas and Johnson later identified Hamilton from a photospread and in court. 17 RR 241, 266, 268; 18 RR 22–24. Inmate Montoyer also overheard Hamilton discussing a robbery on Holman Street involving an Asian victim. 17 RR 187–88.

Hamilton's mother had seen him with a gun on several occasions. 18 RR 232–34. Hamilton had an Uzi and possibly a .38 caliber handgun. Hamilton was proud of his weapons. *Id.* at 233–36.

Muhamed Alli, Matalkah's brother-in-law, testified that Matalkah came to the United States from Jordan, leaving behind his wife and four children, because he was unable to find employment in his home country. 19 RR 158–59. Alli sent money to Matalkah's family in Jordan because there was no one else to care for Matalkah's family except neighbors and relatives after Matalkah's death. *Id.* at 160–61.

B. The defense's evidence

Hamilton presented evidence that the getaway vehicle used in Matalkah's murder was wrecked on December 2, 2001 (i.e., a week before Huynh's murder).[7] 18 RR 109–12. Hamilton was arrested in connection with the car accident, but he was released prior to Huynh's murder. *Id.* at 111, 116.

The defense also offered Hamilton's family and personal history through testimonies from Hamilton's mother and father (18 RR 119–244), his cousin Darious

[7] Hamilton claims that the police somehow thwarted his plan to show that Smith's car was unavailable on the day of Huynh's murder, Pet.10, but Smith's testimony was not necessary to make this point.

Graves (19 RR 8–49), and his friend Billy Norris (16 RR 89–115). Hamilton's parents, who were previously married but subsequently divorced, 18 RR 121, 128–29, had a tumultuous relationship, *id*. at 130–31, had criminal histories, *id*. at 140–41, 190, 204, 240, abused drugs and alcohol, *id*. at 123–25, 127–28, 135–36, 190, 204, 240, and neglected Hamilton due to their own issues. *Id*. at 135, 145, 203. Hamilton was partially raised by his grandmother in poor conditions, *id*. at 130, 132–33, 143, and began selling drugs at a young age. *Id*. at 148. There was also testimony about fry and its deleterious effects on Hamilton. 18 RR 136, 204; 19 RR 18–19, 25–27. Educational diagnostician Deedee Halpin testified about Hamilton's academic and intellectual issues. 19 RR 50–94. While Hamilton had an IQ of 92, he likely also had a learning disability and his academic performance was poor. *Id*. at 53–57, 60–62.

III. Subsequent State Habeas Proceedings

A. The incident report

Hamilton's instant contentions originate in the Houston Police Department's (HPD) incident report[8] detailing Huynh's murder. 8 SHRR–02 337–64. Police officers Larry Hoffmaster and Connie Park investigated the killing.[9] *Id*. at 337. According to

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[8] Hamilton asserts that the parties agreed that the trial court could consider this report, Pet.3 n.1, but the State qualified that the court must find the contents admissible first. 2 SHRR–02 16. The admissibility of the contents, particularly pages 2.011 and 2.025, was the subject of some debate at the evidentiary hearing. 5 SHRR–02 29–39. Hamilton attempted to introduce the pages under the rule of optional completeness with witness Johnson's police statement, but the State successfully argued that admission under the rule was improper and the contents were hearsay. *Id*. However, the whole report was later admitted over the State's renewed hearsay objections, although likely with the qualification that it was not offered to prove the truth of the matters asserted within. 6 SHRR–02 10–21.

[9] Hoffmaster was retired and testified in the subsequent state proceedings via deposition. 4 SHRR–02 891. Hoffmaster's memory was compromised by the passage of time and the number of cases that he had worked on. *Id*. at 896–98, 901, 908, 920–21, 934–36. He mostly related the information contained in the incident report. Park did not testify at the hearing. 5 SHRR–02 949.

the report, latent print examiner Debbie Benningfield was called to the crime scene to aid in the collection and processing of potential evidence. *Id.* at 347, 351–52, 358–59. Benningfield developed a single usable palm print from the inside of the store's glass front door. 4 SHRR–02 45. Benningfield also collected various items for processing, including four alcohol containers outside of the store. 4 SHRR–02 45–46; 8 SHRR–02 351–52. She developed three usable fingerprints. 3 SHRR–02 91; 4 SHRR–02 47–48, 53; 8 SHRR–02 358–59. These fingerprints came from a Schlitz can found on top of a cooler and a Schlitz bottle found on top of a railing. *Id.* Benningfield requested that the container mouths be swabbed for DNA. 8 SHRR–02 347, 352. Police also requested fingernail scrapings from Huynh. 8 SHRR–02 346. While the report shows that items were available for testing, it does not appear to show any results.[10] 3 SHRR–02 93–94, 101; 4 SHRR–02 97–98; 8 SHRR–02 337–64.

B. The fingerprint evidence

The trial court conducted an evidentiary hearing in late May and early June of 2019. 1 SHRR–02. At the hearing, the parties presented evidence concerning the fingerprints taken from the scene. Benningfield, since retired, testified. 3 SHRR–02 57–150; 4 SHRR–02 31–117. She acknowledged that her supplements to the incident report do not reflect that she compared the fingerprints to anyone. 3 SHRR–02 93–94, 101; 4 SHRR–02 97–98. However, when she reviewed photographs of the evidence, she recognized that she had made certain comparisons and Automatic Fingerprint

[10] It does not seem that samples were obtained from Hamilton for DNA testing. 7 SHRR–02 118.

Identification System (AFIS)[11] searches based on her own markings and notations. 3 SHRR–02 94–95; 4 SHRR–02 40–41, 49–53, 57–94. At the time, if a comparison did not yield an identification, no supplement was made.[12] 3 SHRR–02 90, 101; 4 SHRR–02 61–62, 65–68. Benningfield did not make a positive identification on any palm or fingerprint developed from the crime scene. 4 SHRR–02 65, 87–90, 93–94. Hamilton's prints were compared and eliminated, but pursuant to policy no supplement was made. *Id*. at 52, 58, 65–68, 93. Benningfield did not recall the specific person to whom she reported Hamilton's elimination. 3 SHRR–02 101–02; 4 SHRR–02 62. Benningfield explained that in 2001 or 2002, the defense could learn comparison results by contacting HPD's legal department. 4 SHRR–02 62–64, 68, 96.

George Barringer, a retired investigator for Harris County District Attorney's Office, also testified at the evidentiary hearing. 5 SHRR–02 40–53. Barringer reviewed a memorandum that he had prepared for the prosecution. 5 SHRR–02 41–42; 8 SHRR–02 365; App. K. In this document, Barringer noted that he "[c]heck[ed] for print results 169781801[13] prints found were compared to defendants and eliminated." 5 SHRR–02 48; 8 SHRR–02 365; App. K. Based on the chronology of his

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11 AFIS refers to any database of fingerprint records. 2 SHRR–02 35, 41, 101; 3 SHRR–02 70; 4 SHRR–02 69.

12 During the subsequent state writ proceedings, lawyers for the Harris County District Attorney's Office eventually became aware that, despite the lack of reports or supplements documenting the results of pretrial forensic testing, pretrial comparisons had occurred and contrary representations in the State's answer had been incorrect. Hearing (May 21, 2019) at 4–11. This was due to the aforementioned policy not to record eliminations. *Id*. The State disclosed this information to habeas counsel, as well as a memorandum discussed below noting that Hamilton was eliminated. *Id*. at 7. The State also provided its file for an in-camera review. *Id*. at 9–10. It does not seem that the trial court found any additional disclosable items. 5 SHRR–02 1139.

13 This is the incident number associated with Huynh's murder. 8 SHRR–02 338.

notetaking, Barringer believes he would have made this entry before April 15, 2002—i.e., before main trial proceedings in November 2002. 5 SHRR–02 52–53; 16 RR 8.

Rebecca Green, latent print technical lead at the Houston Forensic Science Center (HFSC)[14], testified at the evidentiary hearing. 2 SHRR–02 30–143. Pursuant an order of the court, Green had examined the fingerprint evidence from the Huynh murder investigation. *Id*. at 85–86. Green testified that AFIS algorithms are periodically upgraded to newer, better versions. *Id*. at 103–04. Green agreed that the 2019 algorithms were "exponentially better" than those used when she started work in 2006. *Id*. at 104. After excluding Hamilton as the source of the three fingerprints from the crime scene, Green ran AFIS searches. *Id*. at 100. One fingerprint was linked to witness Charles Douglas. 2 SHRR–02 71, 117–18; 8 SHRR–02 77. The other two linked to a man named Marshall Knight. 2 SHRR–02 67–68, 72, 121; 8 SHRR–02 77. Knight's counsel stated at the hearing that Knight would not answer questions pursuant to the Fifth Amendment. 6 SHRR–02 4–5, 7–10.

Loretta Muldrow, Hamilton's lead trial counsel, testified at the evidentiary hearing. 6 SHRR–02 21–143. She only reviewed portions of the record before the hearing (*id*. at 60, 122–23), no longer had the defense file (*id*. at 58, 60, 142), and her memory of the case details and her interactions with the State had been somewhat compromised by the passage of years and her participation in other cases. *Id*. at 58–60. Muldrow acknowledged that before trial she was aware from the incident report of the Schlitz bottle and that usable latent prints had been collected from the Huynh

[14] HFSC became an accredited lab separate from HPD in 2014. 2 SHRR–02 83–84.

murder scene. *Id*. at 42, 47–48, 114–15, 119–20. But Muldrow claimed was not given notice that Hamilton had been excluded as the source of any prints. 6 SHRR–02 42–43, 49–50, 114. Muldrow did not file pretrial motions seeking comparison of the fingerprint evidence to Hamilton or DNA testing. *Id*. at 128. Hamilton did not call the prosecutors or Hamilton's trial co-counsel to validate any of Muldrow's assertions regarding the State's disclosures.

Wanda Johnson testified at the evidentiary hearing, having previously testified at trial as an eyewitness to Huynh's murder. 5 SHRR–02 5–39. At the hearing, Johnson confirmed that she had testified truthfully at trial and told police the truth after Huynh's murder. *Id*. at 19, 26. Johnson mostly testified that she saw Huynh's killer set down a bottle, 5 SHRR–02 9, 11–12, 17, 27–29, although there was confused testimony that she knew the shooter did not touch the bottle. *Id*. at 13. Johnson also first stated that she had told police about the shooter setting down the bottle, *id*. at 11–13, 16–19, 27–28, but then qualified, "Well I don't know if I told the police, but I think when they brung me to court to testify. . . I told the Court." *Id*. at 28. Johnson was not happy to testify; she perplexingly stated that her memory was better eighteen years after the crime[15]; she incorrectly asserted that it was a long time after the shooting before she spoke to police when it had only been a day; she claimed she did not read her sworn police statement[16] before signing it and the police

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[15] *But see* 5 SHRR–02 26 ("[H]ow you expect me to remember what I told somebody 17 years ago and I'm 54? I was younger then, but now I'm older.").

[16] Witnesses who gave sworn statements at the HPD police station were given an opportunity to read their typed statements and make any changes before signing them; officers typed statements using a witness's own words. 4 SHCR–02 929–30.

made omissions; and she had recently told an investigator that her memory was not what it used to be, had trouble remembering what had happened, and conveyed inconsistent information about the timing of events. *Id.* at 11, 14–18, 20–23.

C. The DNA evidence

The parties also presented testimony about DNA evidence from the Huynh murder. Jessica Powers, HFSC DNA analyst, testified. 7 SHRR–02 69–140. Powers could not reliably make any comparisons using the DNA profile developed from the Schlitz bottle. 7 SHRR–02 88–89, 112; 8 SHRR–02 21. Along the same lines, Powers believed "there very well could be more than one contributor" to the Schlitz bottle's DNA profile, "but the data is just so low and unreliable to make an interpretation on that." 7 SHRR–02 91, 106, 108, 111–12; 8 SHRR–02 21. DNA profiles suggesting a mixture of at least two contributors, at least one male, were developed from Huynh's left and right hand fingernail scrapings. Powers found both major and minor contributors to the DNA mixture derived from the scrapings. 7 SHRR–02 106–09; 8 SHRR–02 21. Powers excluded Hamilton as a possible contributor to the major component of the scraping profiles, but the minor component was "not suitable for comparison due to insufficient data." 7 SHRR–02 109; 8 SHRR–02 21. Four people at HFSC checked Powers's work. 7 SHRR–02 99–100, 139.

Dr. Robert Collins, Hamilton's DNA expert, testified at the evidentiary hearing. 5 SHRR–02 55–100; 7 SHRR–02 14–67. Collins had not worked in a forensic DNA laboratory. 5 SHRR–02 61, 65. Collins also did not perform his own DNA testing, even though the DNA evidence had not been fully consumed. 5 SHRR–02 71;

7 SHRR–02 27, 44, 76. Nevertheless, Collins disagreed that the partial male profile developed from the bottle had insufficient data for comparison purposes, believed the evidence did not indicate an additional contributor, and Hamilton was excluded. 5 SHRR–02 91–95; 7 SHRR–02 58–61. Collins disagreed that the minor contributor profile from the fingernail scrapings had insufficient data for comparison purposes and believed that Hamilton was excluded. 5 SHCR–02 96–99; 7 SHRR–02 61–62.

D. The expert testimony on eyewitness identifications

Over the State's scope objections, Hamilton called Trent Terrell, a psychology professor at the University of Mary Hardin-Baylor, to testify as an expert on eyewitness identifications. 3 SHRR–02 151–66; 4 SHRR–02 122–213. Terrell never spoke with Douglas or Johnson about their identifications. 4 SHRR–02 172. He did not offer an opinion on their credibility, assert that they misidentified Hamilton as Huynh's killer, or claim that they made false identifications. *Id* at 174–75. Rather, Terrell identified several factors that he believed may have affected the reliability of their identifications. *Id*. at 175–76. Of the factors, Terrell believed previous exposure to a police sketch was most detrimental. *Id*. at 162.[17]

IV. Conviction and Postconviction Proceedings

Indicted for capital murder, Hamilton pleaded guilty to killing Matalkah while committing a robbery. 1–2 CR 2, 328, 334–35; 16 RR 10; 22 RR 4. Pursuant to the jury's answers to the punishment special issues, the trial court sentenced Hamilton

[17] Alvin Nunnery, Smith's trial attorney, and Darrell Stein, HFSC Director of Information Strategy and former HPD firearms examiner, also testified at the hearing. 4 SHRR–2 13–31; 5 SHRR 107–41.

to death. 2 CR 329–31; 22 RR 4–7; Tex. Code Crim. Proc. art. 37.071, § 2(b), (e). The CCA upheld Hamilton's conviction and death sentence on automatic direct appeal. *Hamilton v. State*, No. 74,523 slip op., 2004 WL 3094382 (Tex. Crim. App. Oct. 13, 2004) (per curiam) (not designated for publication), *cert. denied* 545 U.S. 1130 (2005); Tex. Code Crim. Proc. art. 37.071, § 2(h).

Hamilton also filed a state application for a writ of habeas corpus. 1 SHCR 2. After briefing, the trial court issued findings of fact and conclusions of law and recommended that the CCA deny relief. 4 SHCR 776–809. Following its own review, the CCA adopted the trial court's findings of fact and conclusions of law and denied Hamilton's application. *Ex parte Hamilton*, No. 78,114–01, 2015 WL 3899185 (Tex. Crim. App. Jun. 24, 2015) (per curiam) (not designated for publication).

Hamilton filed a federal petition for a writ of habeas corpus. ECF No. 19. After initial briefing, the district court stayed the case so Hamilton could present unexhausted claims to the state court. ECF No. 37. The CCA found that one allegation satisfied the requirements for consideration of a subsequent application under Texas Code of Criminal Procedure Article 11.071, § 5—namely, that recently tested fingerprint evidence established Hamilton's innocence of an extraneous capital murder introduced at punishment. *Ex parte Hamilton*, 2018 WL 4344324, at *1. Following a hearing, the trial court adopted Hamilton's proposed findings of fact and conclusions of law recommending that relief be granted. *Ex parte Hamilton*, 2020 WL 6588560, at *1; App. A at 4. But the CCA independently reviewed the case and rejected the trial court's findings and conclusions as not supported by the record or

law. *Ex parte Hamilton*, 2020 WL 6588560, at *1; App. A at 4, 7. The CCA then denied relief on Hamilton fingerprint claims and dismissed the remainder of Hamilton's claims as procedurally barred. *Ex parte Hamilton*, 2020 WL 6588560, at *3; App. A at 7. The instant petition followed.

REASONS FOR DENYING THE WRIT

The questions that Hamilton presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

Additionally, as Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

See also Lawrence v. Florida, 549 U.S. 327, 335 (2007). As demonstrated below, Hamilton's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and certiorari should be denied.

I. The State Did Not Violate *Brady*.

Hamilton believes that Huynh's killer set down a bottle outside the store on Holman Street and then urinated on or over it. Hamilton alleges that the State then withheld fingerprint evidence derived from the bottle that excluded him from

touching it. Pet.1, 24–30. However, the CCA correctly determined that Hamilton is not entitled to relief on this claim, explaining:

> [Hamilton] argues that because recent fingerprint testing in 2017 identified another person as having handled the bottle[ ], the State presented false evidence, and, therefore, he is innocent of the Holman murder. But the State's trial evidence about the fingerprints was consistent with the fingerprint evidence developed at the habeas stage.
>
> Investigating Houston Police Detective Connie Park testified at trial that the Holman fingerprint evidence—including that found on the 40-ounce bottle—did not "tie back" to [Hamilton] or his co-defendant in the Yellowstone murder, [Smith]. The habeas evidence merely confirmed Park's testimony by specifying whose prints they were—not [Hamilton]'s or Smith's. Since the jury heard the "essence" of the habeas evidence—that the prints on the bottle were not [Hamilton]'s or Smith's—[Hamilton] has not established the falsity of the State's trial evidence. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866–67 (Tex. Crim. App. 2015) (because jury heard the first medical examiner's opinion, which conflicted with the eyewitness's testimony, and resolved the conflict against applicant, post-conviction evidence of an additional gunshot wound, viewed in light of the totality of the record, failed to demonstrate by a preponderance of the evidence the eyewitness's testimony gave the jury a false impression, and this Court denied habeas relief).
>
> Further, [Hamilton] fails to show that this bottle or the print recovered from it is material to the identity of the Holman shooter. *See U.S. v. Bagley*, 473 U.S. 667, 682 (1985) (evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different); *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980) (when determining materiality, any omission must be evaluated in the context of the entire record). No one identified the bottle in question as having been handled by the shooter. And the witness who testified in the habeas hearing that the shooter handled a bottle just before the shooting equivocated about that assertion.

Ex parte Hamilton, 2020 WL 6588560, at *2; App. A at 5–7.

As previously noted, to establish a *Brady* violation Hamilton must prove: (1) the evidence in question was favorable; (2) the evidence was suppressed by the State; and (3) the evidence was material. *Banks*, 540 U.S. at 691; *Strickler*, 527 U.S. at 281–82. Concerning materiality, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1978); *Dickson v. Quarterman*, 462 F.3d 470, 478 (5th Cir. 2006) ("alleging a speculative outcome is insufficient"); *Hampton v. State*, 86 S.W.3d 603, 612–13 (Tex. Crim. App. 2002). Rather, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.[18]

Brady materiality does not require a defendant demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted in acquittal nor is it identical to a sufficiency-of-the-evidence test. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Wearry v. Cain*, 577 U.S. 385, 392 (2016). However, the State's evidence is relevant. *See*, *e.g.*, *Hampton*, 86 S.W.3d at 613; *Kopycinski v. Scott*, 64 F.3d 223, 226–27 (5th Cir. 1995). To determine materiality, the proper inquiry is "whether 'the favorable evidence could reasonably be taken to put *the whole case* in

[18] Hamilton states that the CCA did not identify the appropriate materiality standard, Pet.29, but the CCA correctly cited *Bagley*. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6.

such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435) (emphasis added).

Here, the CCA held that the jury heard the essence of the habeas evidence. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6. Indeed, the record clearly shows that the defense brought out at trial that the bottle had fingerprints and those prints did not tie to Hamilton or Smith:

> [Defense Counsel:] Did you collect that bottle?
>
> [Connie Park:] Yes, we did. Our latent lab examiner did.
>
> [Defense Counsel:] And any prints on the bottle?
>
> [Connie Park:] Yes.
>
> [Defense Counsel:] Okay. Did it tie back to my client?
>
> [Connie Park:] No.
>
> [Defense Counsel] Did it tie up to Mr. Smith, Shawn Smith?
>
> [Connie Park:] No.
>
> [Defense Counsel] Okay. Any physical evidence that came back to my client or to Shawn Smith?
>
> [Connie Park:] No, not in this investigation.

18 RR 40–41. Counsel's closing argument reiterated the absence of fingerprints or DNA linking Hamilton to Huynh's murder. 21 RR 45.

Evidence is not suppressed when the State presents it at trial. *See*, *e.g.*, *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002); *see also Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008) ("The Supreme Court has never expressly held that evidence that is turned over to the defense during trial has been 'suppressed' within

the meaning of *Brady*."). Here, the fact that the fingerprints did not tie to Hamilton or Smith was known to the jury and therefore was not suppressed. Hamilton may be making a tortured distinction between the fact that the prints did not tie to him (which was disclosed at trial) and specific knowledge of Benningfield's eliminations. Or he may perhaps be arguing that when Park said that he did not tie to the bottle, she merely meant that the prints were not usable or were not compared to him and therefore he was not aware he was affirmatively eliminated. But these distinctions slice *Brady* very fine. Even assuming Hamilton did not know Benningfield had compared Hamilton and Smith to the prints on the bottle prior to trial, the fact that Hamilton and Smith were not *included* as donors of fingerprints is the important thing, not the specifics of any *exclusion*. *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2003) (defense counsel cross-examined witness with similar facts as she would had with the undisclosed evidence, so the evidence is not material). And when Park said that Hamilton and Smith did not tie to the bottle, the clear import was that they were not a match to the prints—Park did not say that no comparisons were done or that the prints were unusable. Certainly, this is the commonsense interpretation of Park's testimony that the CCA adopted. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6 ("the jury heard the 'essence' of the habeas evidence—that the prints on the bottle were not [Hamilton]'s or Smith's"). Hamilton therefore fails both the first and the third prongs of *Brady*.

Trying to show materiality, Hamilton asserts that if he had known of his pretrial elimination, his "entire approach to defending against the extraneous murder

allegation would have changed." Pet.2. Granted, Muldrow asserted that she would have hired her own fingerprint expert and altered her cross-examination of Park if she had known Hamilton had been eliminated, 6 SHRR–02 44, 51, but it remains unknown what different testimony an expert would have provided or what was left unasked of Park. Muldrow elicited the relevant information from Park, and an expert would have just confirmed what Park willingly admitted. The idea that an expert repeating the information would have yielded a reasonable probability of different result is speculative at best.

Moreover, Muldrow's assertions are suspect since the trial was not over when Park finished testifying. If Hamilton had wanted to call a fingerprint expert, nothing stopped him from doing so after Park revealed the purportedly suppressed fact that he was not tied to the bottle. He also could have re-examined Park when his surprise wore off; in fact, Park was recalled three days later. 19 RR 6. And if Hamilton needed more time to adjust his strategy or prepare, he could have raised an objection and requested a continuance.[19] But he made no objection. 6 SHRR–02 120.

Hamilton argues that his facts are analogous to those in the federal habeas case *Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018), where the Fifth Circuit granted

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[19] Under state law, "when previously withheld evidence is disclosed at trial, the defendant's failure to request a continuance waives any *Brady* violation." *Gutierrez v. State*, 85 S.W.3d 446, 452 (Tex. App.—Austin 2002, pet. ref'd) (citations omitted); *see also Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999); *Valdez v. State*, AP–77,042, 2018 WL 3046403, at *11 (Tex. Crim. App. Jun. 20, 2018) (not designated for publication) ("A defendant's failure to request a continuance when *Brady* evidence is disclosed at trial arguably waives his complaint that the State has violated *Brady* and suggests that the tardy disclosure of the evidence was not prejudicial to him."). The CCA did not explicitly find waiver here, but Hamilton's failure to object to the purported *Brady* violation shows that he likely was not surprised and/or that the allegedly withheld information was not important.

habeas relief on a *Brady* claim. Pet.26–27. But *Floyd* is easily distinguishable. To begin, it is important to note that the Fifth Circuit majority found Floyd *demonstrated his actual innocence* such that he was permitted to present time-barred claims. *Id*. at 159–60. Floyd had confessed to two similar murders, was tried for both, but was convicted of only one. *Id*. at 149–52. The Fifth Circuit majority found that Floyd's own statements (a confession and a threat made to another person) were the only evidence supporting his conviction. And the Fifth Circuit majority entertained the possibility that the confession had been improperly obtained or even beaten out of Floyd, who had an IQ of 59. *Id*. at 157–59. In fact, the case against Floyd was so weak that the State refused to expressly oppose Floyd's innocence claim in the Fifth Circuit and tried to plea bargain the case away during federal habeas review. *Id*. at 154. Floyd's *Brady* claim involved the nondisclosure of fingerprint comparison results from the scene of the murders and a statement from a friend of the victim. Evidence disclosed to the defense prior to trial had indicated that the fingerprints taken from both scenes had not been tested, when, in fact, they had been tested and excluded the victims and Floyd. *Id*. at 162. The Fifth Circuit majority emphasized that Floyd had not been convicted of the other murder despite his confession, and the majority believed that the instant evidence might have led to the same result. *Id*. at 167. The majority also noted that a detective had presented incorrect testimony at trial that reinforced the validity of Floyd's confession, when the correct testimony would have undermined it. *Id*. at 164–66.

Thus, the only real similarity between *Floyd* and Hamilton's case is that they both involve fingerprints. Hamilton has not been found actually innocent, and the State rejects any such conclusion. Floyd's *Brady* claim involved two compelling nondisclosures, whereas Hamilton's only involves only one purported nondisclosure. Floyd's *Brady* claim involved the crime of conviction, whereas Hamilton's case centers on an extraneous offense presented in the punishment phase of a capital case with robust additional evidence in support of the death penalty. But most importantly, in the instant case *the police admitted that Hamilton was not tied to the prints on the bottle*. In *Floyd*, "[a]lthough the fingerprint-comparison results existed at the time of the joint bench trial, the results were not presented." *Id*. at 156. This distinction undermines Hamilton's whole comparison.

Hamilton concedes that the trial prosecutors were likely not aware of the fact that the prints on the bottle matched Knight. Pet.34. In any event, because the jury already knew that the prints did not tie back to Hamilton or Smith, the CCA reasonably held that the jury's evaluation would not have been swayed by additional testimony showing who the prints actually belonged to. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6. This Court has previously held that "the cumulative effect of [ ] withheld evidence" may be "insufficient to undermine confidence in the jury's verdict." *Turner v. United States*, 137 S. Ct. 1885, 1894–95 (2017) (citing *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) & *Kyles*, 514 U.S. at 434) (internal quotation omitted); *see also Agurs*, 427 U.S. at 109 n.16 & 114 (declining to find a *Brady* claim in part because lower court found evidence cumulative); *Murphy v. Davis*, 901 F.3d

578, 598 (5th Cir. 2018) (immaterial evidence "was of marginal value to the defense and was cumulative with already presented [ ] evidence."); *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010) ("Undisclosed evidence that is merely cumulative of other evidence is not material.").

Further, the CCA observed that "[n]o one identified the bottle in question as having been handled by the shooter. And the witness who testified in the habeas hearing that the shooter handled a bottle just before the shooting equivocated about that assertion." *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6–7. Huynh's convenience store was a high traffic location where people would loiter and drink. 17 RR 202–03; 8 SHCR–02 352 (alcohol containers found), 513 (no loitering sign). There is no way of telling when Knight's prints were left on the bottle or how long the bottle had been outside the store. Thus, the CCA correctly recognized it was critically important for Hamilton to show that the bottle was touched by Huynh's killer if he wanted to demonstrate materiality. Without that connection, the bottle is just unremarkable trash and it does not matter whose prints are on it.

Hamilton argues that Johnson clearly stated that the killer handled the bottle, Pet.4, 16–17, 28–29, but the totality of the record shows Johnson is confused and inconsistent on this point. Hamilton's instant contentions stemmed originally from a portion of the incident report noting that Johnson said that she saw the killer handle the bottle. 4 SHCR–02 917; 8 SHRR–02 348 (pg. 2.011: "[i]t was not mentioned in the statement but [Johnson] also saw the same man sit down an empty 40 once [sic] beer bottle on the rail"). Yet, this is a hearsay statement by the reporting officer. *Id*. In her

sworn statement Johnson does not mention the killer handling the bottle. 6 SHRR–02 17; 8 SHRR–02 244–45. She also seems to deny it in another hearsay statement. 4 SHCR–02 918; 8 SHRR–02 362 (pg. 2.025: "Johnson stated the suspect did not pick up the glass bottle but stood over it when he urinated").

Johnson's trial testimony does not specify that the killer touched a 40-oz Schlitz beer bottle. 17 RR 275–99. Rather, Johnson merely referred to "a bottle" and said that the killer urinated over it.[20] *Id*. at 277 ("He had a bottle sitting on the side of the store on the bench. He was urinating over the bottle onto the wall"). At the evidentiary hearing, Hamilton failed to show Johnson the recovered bottle and ask Johnson to confirm that it was the same bottle that she saw the shooter touch, although she did state that she saw the killer drinking a "40-ounce." 5 SHRR–02 5–29. Again, at the hearing, Johnson mostly testified that she saw Huynh's killer set down a beer bottle, 5 SHRR–02 9, 11–12, 17, 27–29, although there was also confused testimony that she knew the shooter did not touch the bottle. *Id*. at 13. Johnson also first stated that she had told police about the shooter setting down the bottle, *id*. at 11–13, 16–19, 27–28, but then qualified, "Well I don't know if I told the police, but I think when they brung me to court to testify. . . I told the Court." *Id*. at 28. This does not appear to be reflected in the relevant trial testimony. 17 RR 277.

Johnson's hearing testimony is, simply put, a mess. *See* Statement of the Case, Section III(B), *supra*. Hoffmaster could not independently remember how Johnson

[20] If the bottle is as material and important as Hamilton says, then it is surprising that the Hamilton's trial attorneys did not confirm with Johnson that the killer touched it. 17 RR 290–99.

described the alcohol container and multiple containers were recovered. 4 SHCR–02 931–33. Thus, the CCA was entirely correct when it noted that no one identified the bottle in question, and Johnson equivocated about the shooter handling a bottle.[21]

Here, two eyewitnesses identified Hamilton as Huynh's murderer. 17 RR 227–28, 251, 282, 288; 18 RR 21–24. Jailhouse informant testimony linked Hamilton to Huynh's murder. 17 RR 187–90, 195–97. Huynh's murder was similar to Matalkah's. 21 RR 21–23 (prosecutor's closing summary). Moreover, the State presented evidence that Hamilton had prior convictions, dealt drugs, possessed weapons, was racist and violent in prison, and engaged in domestic abuse. *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (evidence not material partly in light of overwhelming other evidence); *see also Smith*, 565 U.S. at 76 (evidence "may not be material if the State's other evidence is strong enough to sustain confidence in the verdict"). This is not a situation where the State had a weak case, either with respect to guilt-innocence,[22] the extraneous offense, or the State's other punishment evidence.[23] Thus, in light of the dubious value of the allegedly withheld information and the State's robust case against Hamilton, there is no reasonable probability that had additional evidence been

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[21] Hamilton complains that the prosecution's closing misled the jury by observing that prints were not found at either scene. Pet.12, 31–32. However, the prosecution is emphasizing the fact that Hamilton used a shirt to wipe his fingerprints off the cash register. 17 RR 247; 21 RR 22.

[22] Under Texas law, the facts of the crime alone can be enough to make the future dangerousness finding necessary for the death penalty. *Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003).

[23] *Cf. Wearry*, 577 U.S. at 392 ("[t]he State's trial evidence resembles a house of cards"); *Smith*, 565 U.S. at 76 ("testimony was the only evidence linking [the petitioner] to the crime," and, therefore, the undisclosed statements contradicting this testimony were "plainly material"); *Agurs*, 427 U.S. at 113 ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

disclosed to the defense, the result of the proceeding would have been different, i.e., Hamilton would have received a life sentence in lieu of the death penalty.

Finally, although the CCA did not explicitly rule on the suppression prong[24], it is worth noting that if Hamilton was actually surprised by Park's testimony, 6 SHRR–02 48, 50, 114, the defense's reaction is puzzling. It is extremely odd that they did not request a continuance or mistrial or otherwise put that surprise on the record. Muldrow acknowledged that after Park testified to the lack of fingerprints and physical evidence linking Hamilton to the murder, she did not object that the State had violated any of the trial court's orders or rulings.[25] 6 SHRR–02 120; *see also* Pet.6, 31–32 (arguing that the State misled the trial court and the defense). Along the same lines, Muldrow acknowledged that she cannot recall all the details of her conversations related to the case and that some aspects of her memory had faded due to the passage of time and the number of cases she has handled. 6 SHRR–02 59–60, 75. Despite having the burden of proof, Hamilton failed to call co-counsel or the prosecution[26] to confirm Muldrow's assertion that she was unaware of the

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[24] Hamilton asserts that "the CCA accepted that prongs one and two of the *Brady* claim were proven." Pet.25–26. This is not reflected in the opinion. Indeed, given the rejection of *all* the trial court's findings and conclusions, it appears the contrary is more likely true—the CCA found that the first and second prongs were *not* proven.

[25] Hamilton does not appear to make a claim that the disclosure that he was not tied to the fingerprints was merely late or tardy. However, even if he did, the question is whether "the evidence is received in time for its effective use at trial." *Powell*, 536 F.3d at 335–36; *Little v. State*, 991 S.W.2d 864, 867–68 (Tex. Crim. App. 1999). Given that the jury was aware that the fingerprint evidence did not tie to Hamilton and Smith, it is clear that the evidence was, in fact, used effectively.

[26] Hamilton asserts that the State should have called the prosecution, Pet.22, but he had the burden of proof. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 5. This Court should be reticent to impugn the ethical reputations of attorneys who have not had the opportunity to defend themselves.

eliminations prior to trial despite the State's open file. 2 RR 7. Muldrow also did not know where the defense file was and therefore her testimony lacked contemporary defense documentation. 6 SHRR–02 58, 60, 142.

In sum, Hamilton has not shown that, in the light of all the evidence, it is reasonably probable that the punishment outcome would have been different had the purportedly suppressed evidence been disclosed.[27] The CCA did not err in its decision, and certiorari review should be denied.

II. The State Did Not Violate *Napue*.

The rule under *Napue* and *Giglio*[28] is that "'a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict.'" *Bagley*, 473 U.S. at 679–80 & n.9 (quoting *Agurs*, 427 U.S. at 103). Here, the record fully supports the CCA's decision that no false testimony was presented because the jury heard the essence of the habeas evidence. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 6. Indeed, the habeas evidence merely shows the additional fact that, based on comparisons made long after trial, the prints match another individual—not that

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[27] The incident report put the defense on notice that DNA swabs were collected from the evidence. 8 SHRR–02 347. Prior to trial, the defense could have requested that DNA testing but did not. 6 SHRR–02 128. Hamilton, without pinpoint citation, states that "Park falsely testified that no DNA samples were obtained." Pet.10. He makes a similar statement about the prosecution's closing argument. *Id*. at 12. To the extent that Hamilton refers to the exchange on 18 RR 55–56, the defense's question and Park's answer appear to refer to the collection of DNA samples from the killer's urine and not to DNA on the bottle or in fingernail scrapings. *See also* 18 RR 95 (defense asking different witness about DNA in urine). The same goes for the prosecution's closing argument. 21 RR 45 (defense closing mentioning urine), 85–86 (prosecution closing mentioning DNA in urine).

[28] *Giglio v. United States*, 405 U.S. 150 (1972).

Park's testimony was false, perjured, or misleading. *Id*. Park truthfully and accurately testified that the prints did not tie to Hamilton or Smith. 18 RR 40–41. Therefore, "the State's trial evidence about the fingerprints was consistent with the fingerprint evidence developed at the habeas stage." *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 5. This lack of false testimony dooms Hamilton's claim.

Under the *Napue/Giglio* standard, Hamilton is also required to prove that the prosecution knew that false testimony was presented. Because Hamilton has not demonstrated any testimony is false, he necessarily also cannot show that the prosecution knew any testimony was false.[29] And if he believes that he has conclusively proved his innocence of Huynh's murder and therefore any evidence to the contrary must be false or misleading, Hamilton's premise is flawed. The CCA disagreed that it was shown that the killer actually handled the bottle, so Knight's prints on it are meaningless. Hamilton thinks that it is telling that Knight took the Fifth[30] rather than answer questions, App. M, but Hamilton has no other compelling evidence that Knight committed the murder. Pet.30–31. Hamilton observes that Knight had a criminal history, Pet.2, 13, 30–31 & App. H, but so does Hamilton, including killing Matalkah during a similar robbery. Hamilton subjectively suggests

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[29] To the extent that Hamilton argues that the testimony was incomplete because it did not show that the prints matched Knight, his claim fails because he does not contend that the prosecutors knew that the prints matched Knight. Pet.34. Also, Knight's 2017 AFIS identification does not mean that a 2001 AFIS search would have yielded the same result. 2 SHRR–02 112–13; 4 SHRR–02 81, 92–93.

[30] Knight could have had any number of wholly unrelated reasons for asserting the Fifth Amendment. For instance, Hamilton says that Knight was twenty when the murder occurred. Pet.8 n.10. If so, that suggests that he was drinking underage and possibly in violation of the terms of his community supervision. App. H at 159; 8 SHRR–02 380.

that Knight better fits the shooter's description, Pet.3, 8–9 n.10, but he largely ignores that the eyewitnesses identified Hamilton. Hamilton's petition does not show that the witnesses have retracted those identifications. Indeed, Hamilton does not seem to argue anyone identified Knight as the shooter, testified that Knight was the shooter, or provided any forensic evidence linking Knight to the crime outside the bottle.[31] Knight's prints do not undermine the State's evidence in support of his commission of the Huynh murder, specifically the two identifications, Montoyer's testimony, and the similarities in the murders.

For his false testimony claim, Hamilton faced a less demanding standard in state court and did not need to show that the prosecution knew about any purported falsity. *Ex parte Hamilton*, 2020 WL 6588560, at *2; App. A at 5; *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (recognizing a due process deprivation through the State's *unknowing* presentation of false evidence). However, Hamilton must prove knowledge here in federal court. "There is a long line of unbroken precedent from . . . the U.S. Supreme Court holding that false trial testimony does not implicate a defendant's due process rights if the State was unaware of the falsity at the time the testimony was given." *Pierre v. Vannoy*, 891 F.3d 224, 230 (5th Cir. 2018) (Ho, J., concurring), *as revised* (June 7, 2018), *cert. denied*, 139 S. Ct. 379 (2018). This Court has "never held" that the unknowing use of false testimony violates the Due Process Clause and it is "unlikely ever to do so." *Cash v. Maxwell*, 565 U.S. 1138

[31] Hamilton asserts that his DNA was not found on the bottle, but the HFSC analyst found insufficient data for that conclusion. *See* Statement of the Case, Section III(C), *supra*.

(2012) (Scalia, J., dissenting from denial of certiorari). "All we have held is that 'a conviction obtained through use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment.'" *Id*. (quoting *Napue*, 360 U.S. at 269) (emphasis in original).

Lastly, Hamilton's evidence was not material under *Napue*/*Giglio* for the same reasons that it was not material under *Brady*. As shown above, the CCA found that the jury heard the essence of the habeas evidence and that Hamilton failed to demonstrate that the shooter had actually handled the bottle in the first place. Hamilton's guilt of Huynh's murder was supported by two eyewitness identifications, Montoyer's testimony, and similarities in the crimes. And the State presented ample evidence of Hamilton's noncompliant and racist behavior in prison, his drug-dealing, his weapons possession, and his abuse of his child's mother. Consequently, even if Hamilton could demonstrate falsity and knowledge, his claim would still fail because of a lack of materiality. There simply is no reasonable likelihood that the purported falsity could have affected the jury's verdict. *Agurs*, 427 U.S. at 103.

III. The State Did Not Violate *Johnson*.

In his last question presented, Hamilton argues that he is entitled to a new sentencing trial because, while he concedes that the prosecution likely did not know about Knight, his conviction is based on materially inaccurate testimony suggesting that he killed Huynh. Pet.34–37. In *Johnson*, the Court addressed whether Johnson's death sentence could stand despite being predicated on the existence a prior assault conviction that was vacated after his trial. 486 U.S. at 585–86. During Johnson's

sentencing, the jury found three aggravating factors, including that Johnson had been previously convicted of a violent felony, an assault in New York. *Id.* at 581 n.1. The only evidence presented to prove the assault was a copy of Johnson's prison commitment. *Id.* at 581. No witnesses were presented to testify regarding the underlying facts of the assault. *Id.* at 585. In closing, the prosecutor "repeatedly urged the jury to give [the prior conviction] weight." *Id.* at 586. But after the trial a New York court reversed the assault conviction. *Id.* at 582.

The Court held that Johnson's death sentence could not stand because it was predicated on an aggravating circumstance that was "materially inaccurate." *Id.* at 589. In so holding, the Court stated that, "petitioner's death sentence is now predicated, in part, on a New York judgment that is not valid now, and was not valid when it was entered in 1963." *Id.* at 585 n.6. However, the Court indicated that it may have reached a different conclusion if additional evidence (e.g., witness testimony) had been admitted. *Id.* at 585–86, 590 n.9.

Johnson simply does not apply here. Hamilton does not contend that an invalid conviction was entered against him. *Hernandez v. Johnson*, 213 F.3d 243, 252 (5th Cir. 2000) ("[t]he present case does not parallel the situation addressed in *Johnson* nor the vast majority of cases that have relied upon *Johnson* [. . .] Instead of a materially inaccurate criminal conviction, we confront purportedly materially inaccurate testimony."). Hamilton's discussion of this claim, Pet.34–37, offers no cases where this Court has granted *Johnson* relief in situations like his. In fact, Hamilton's discussion cites no other cases at all save for one from 1884 for the

proposition that state courts have an "obligation to guard, enforce, and protect every right granted or secured by the constitution." Pet.36 (citing *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). But even expanding *Johnson* beyond its initial confines, Hamilton cannot show that any materially inaccurate testimony was used against him. As the *Johnson* Court clearly stated, Johnson's prior conviction was invalid when it was entered and was invalid at the time of trial. *Johnson*, 486 U.S. at 585 n.6. Here, the police correctly testified that the fingerprints on the bottle did not tie to Hamilton or Smith. Nothing that happened after trial has rendered that testimony false. The testimony was accurate then, and it is accurate now. Hamilton himself concedes that there was no inaccurate testimony about Knight at his trial. Pet.34.

Moreover, the Court in *Johnson* indicated that the result may have been different if additional evidence had supported the facts of the prior assault. Here, as shown above, two eyewitnesses identified Hamilton as Huynh's killer, an informant linked Hamilton to the crime, and there were prominent similarities between the murders. *Hughes v. Quarterman*, 530 F.3d 336, 346 (5th Cir. 2008) (rejecting *Johnson* claim in part because other evidence connected petitioner to offense).

As with his prior claims, the main thrust of Hamilton's argument seems not to be that any trial testimony was actually inaccurate, but that he is actually innocent of killing Huynh and, if he had presented additional evidence at trial, then the jury would not have sentenced him to death. However, this is plainly not an argument under *Johnson*. And, in any event, Hamilton does not come close to demonstrating that his actual innocence. The CCA found the bottle was not material to the identity

of Huynh's killer, but even if it was, then Hamilton is merely offering evidence that conflicts with the State's other evidence that he killed Huynh. *Kelly v. Cockrell*, 72 F. App'x 67, 76 (5th Cir. 2003) (denying *Johnson* claim in part because evidence conflicted).

The unimportance of Hamilton's new evidence is reflected in the CCA's materiality decision, which likewise defeats his claim. The relevant fact that Hamilton was not tied to the bottle was before the jury, which thus heard the essence of Hamilton's theory. Likewise, Hamilton failed to show that the shooter handled the bottle. Without locking in that critical evidentiary step, Hamilton's claims fall apart. Unless the killer touched the bottle, it is just trash next to a convenience store.

Hamilton contends that the CCA's decision is flawed because it failed to consider any evidence adduced posttrial. Pet.23, 36. However, the CCA was not required to address every jot of evidence or argument that Hamilton raised. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions."); *Ex parte Graves*, 70 S.W.3d 103, 120 n.3 (Tex. Crim. App. 2002) (Price, J., dissenting) ("we are not required to write an opinion explaining the reason or reasons we deny relief on applications of habeas corpus"). Indeed, "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion." *Johnson v. Williams*, 568 U.S. 289, 299–300 (2013). Nevertheless, the CCA clearly considered postconviction developments in its opinion, specifically noting the new fingerprint evidence that matched another individual and Johnson's testimony. The fact that the state court did not specifically respond to every

jot of Hamilton's evidence is not surprising or undermine its decision. State courts are tasked with reviewing scores of habeas applications and their "[o]pinion-writing practices" are influenced by considerations other than avoiding scrutiny in federal court. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). And while Hamilton argues that the state court did not consider the totality of the evidence, Pet.32, the CCA's opinion offers parentheticals referring both to the "totality of the record" and the "entire record." *Ex parte Hamilton*, 2020 WL 6588560, at *2–*3; App. A at 6.

But even if Hamilton showed some trial testimony was false, any resulting error was harmless. *Velez v. State*, AP–76,051, 2012 WL 2130890, at *32 (Tex. Crim. App. Jun. 13, 2012) (not designated for publication) (for *Johnson* claims, "a reviewing court 'must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.'"); *see also Clemons v. Mississippi*, 494 U.S. 738, 754 (1990) (harmless error analysis permissible for capital sentencing); *Hogue v. Johnson*, 131 F.3d 466, 498 n.60, 502 (5th Cir. 1997) ("[*Johnson*] does not preclude harmless error analysis"). A crucial problem in *Johnson* was that the lower court "refused to reweigh the remaining, untainted aggravating circumstances against the mitigating circumstances." *Romano v. Oklahoma*, 512 U.S. 1, 11 (1994). Here, the CCA did not explicitly conduct a harm analysis. However, unlike *Johnson*, it is not obvious the CCA refused. And the result of the analysis is clear—Hamilton shows no harm.

This lack of harm is reflected by Hamilton's reference to the prosecution's closing statement that "Even, ladies and gentlemen, without that second capital, he

is a future danger; but, with it, he is an absolute menace."[32] Pet.35 n.4 (citing App. B at 7). Hamilton believes this statement shows the State's reliance on Huynh's murder, but it more accurately shows the opposite. The State is clearly saying that it does not matter Hamilton killed Huynh because the evidence supports a death sentence regardless. This closing argument is borne out by the evidence—namely, the facts of Matalkah's murder, Hamilton's prior convictions, his drug-dealing, his weapons possession, his violence and noncompliance in prison, and his vicious domestic abuse.

Given that Hamilton fails to show any false or otherwise inaccurate testimony was actually presented at trial or that any purportedly inaccurate testimony was material, the Court should reject Hamilton's invitation to use his case to define the contours of *Johnson*. No matter how *Johnson* is stretched, Hamilton is not entitled to relief, and thus this case is a poor vehicle for further exploration.

CONCLUSION

As demonstrated above, the CCA correctly denied Hamilton's subsequent state habeas petition. Hamilton's petition for a writ of certiorari should be denied.

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[32] If Hamilton is claiming that the prosecutor falsely claimed he committed the murder, closing arguments are not evidence and the prosecutor may make reasonable deductions or inferences from the evidence. *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008); *Clark v. Johnson*, 227 F.3d 273, 279 (5th Cir. 2000); *Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App. 1992).

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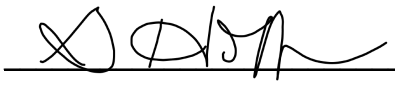

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