No. _____

In the Supreme Court of the United States

ELIJAH DWAYNE JOUBERT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

An investigation commissioned by the District Attorney in Harris County, Texas, concluded that Elijah Joubert's prosecutor—Daniel Rizzo—wrongfully convicted an innocent man—Joubert's co-defendant, Alfred Brown of capital murder. The special prosecutor found Rizzo: (1) abused the grand jury process; (2) coerced false testimony; (3) intimidated Brown's alibi witness; (4) intentionally suppressed telephone records corroborating Brown's alibi; (5) knowingly allowed co-defendant Dashan Glaspie to falsely accuse Brown and falsely blame Joubert for the shooting of Alfredia Jones; and (6) knowingly allowed Glaspie to falsely testify that his plea agreement required him to be 100 % truthful with the juries.

Based on Rizzo's presentation of Glaspie's false testimony, one jury convicted Brown and sentenced him to death, and another convicted Joubert, and sentenced him to death. Rizzo urged jurors to sentence Joubert to death because, among other things, he was the "cold-blooded killer" of Jones, and not the remorseful getaway driver he claimed to be.

The District Attorney declared Brown innocent and he has been released. In Joubert's state post-conviction proceedings, the District Attorney conceded that Glaspie lied about Brown and his need to testify truthfully to keep his 30-year sentence. The State did not dispute that Rizzo knew Glaspie was lying.

The trial court found Rizzo's knowing use of false testimony about Brown and Joubert was material and denied Joubert a fair trial under this Court's decision in *Napue v. Illinois*, 360 U.S. 264 (1959). As to the sentence, the court found that discrediting Glaspie's account could have led the jury to give Joubert a life sentence.

The Texas Court of Criminal Appeals disagreed. It held Joubert was not entitled to relief under *Napue* because Joubert did not "show by a preponderance of the evidence" that there was a "reasonable likelihood" Glaspie's false testimony about Brown *alone* affected the jury's decision. That gives rise to the following question:

> Does the Due Process Clause of the Fourteenth Amendment permit a prosecutor's knowing use of false testimony unless the defendant proves by a preponderance of the evidence that there was a reasonable likelihood that one aspect of the false testimony actually affected the judgment of the jury?

RELATED PROCEEDINGS

351st Judicial District Court, Harris County, Texas:

State of Texas v. Elijah Dwayne Joubert, No. 944756 (Oct. 21, 2004) (judgment of conviction and sentence of death)

Court of Criminal Appeals of Texas:

Elijah Dwayne Joubert v. State of Texas, No. AP-75, 050 (Oct. 3, 2007) (direct appeal affirming the judgment of the trial court)

Ex parte Elijah Dwayne Joubert, No. WR-78, 119-01 (Sept. 25, 2013) (order denying relief on initial application for habeas corpus)

Ex parte Elijah Dwayne Joubert, No. WR-78, 119-02 (Jun. 23, 2021) (order denying relief on subsequent application for a writ of habeas corpus)

Unites States District Court (S.D. Tex.):

Elijah Dwayne Joubert v. Stephens, No. 13-3002 (Oct. 15, 2015) (order staying Petitioner's federal habeas proceedings)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Elijah Dwayne Joubert respectfully petitions for a writ of certiorari to review the order of the Court of Criminal Appeals of Texas ("TCCA") in this case.

OPINIONS BELOW

The decision of the TCCA (App. 1a-6a) is not published in the S.W. Reporter but is available at 2021 WL 2540170. The finding of facts and conclusions of law and recommendation of the 351st District Court of Harris County (App. 7a-73a) are unreported.

JURISDICTION

The order of the TCCA was entered on June 23, 2021. Pursuant to this Court's orders issued March 19, 2020, and July 19, 2021, this petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the U.S. Constitution provides, in relevant part:

> No State shall *** deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

"The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *Cone v. Bell*, 556 U.S. 449, 451 (2009) (cleaned up). For example,

state prosecutors may neither "solicit[] false evidence, [nor] allow[] it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). That principle, "implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness" who testified falsely. *Ibid*. Except in Texas.

On habeas review, the trial court in Elijah Joubert's capital murder case found at least ten examples of false testimony presented by the prosecutor, Daniel Rizzo. App. 50a-52a. Those included six witnesses who falsely placed Alfred Brown with Joubert and Dashan Glaspie at the time of the robbery, App. 50a-51a, and lead detective Brock McDaniel's misleading testimony that telephone records linked Brown to the robbery. App. 51a. Rizzo also presented false testimony and argument that Glaspie's deal for a 30-year sentence required him to testify truthfully. App. 51a-52a. Quoting the District Attorney, the court found that "'well before Brown's trial," McDaniel showed Rizzo telephone records corroborating Brown's alibi, "'yet [Rizzo] failed to disclose them to the defense counsel or the jury.'" App. 53a-54a. Finally, the judge found that at the time of Petitioner's trial, Rizzo knew "(a) the evidence linking Brown to the robbery and homicides was false, and (b) that Glaspie's testimony about his plea deal requiring complete consistency with the evidence was false." App. 52a.

It was a close case for capital liability under *Tison v. Arizona*, 481 U.S. 137 (1987). Under interrogation, both Joubert and Glaspie claimed they were the getaway driver and that the other had entered the store and shot the clerk, Alfredia Jones. Rizzo conceded to the jury that if Petitioner "would have let Ms. Jones live," that

"might have been sufficient" for the jury to spare him. Although Petitioner told police he knew Jones was "'gonna die'" if the police came, App. 5a, he also tearfully told them he participated in the robbery believing that would not happen and no one would get shot.

On appeal, the State argued "'that the most powerful evidence in the State's case was Dashan Glaspie's testimony. Glaspie described how Appellant was involved in the planning of the robberies, willingly participated in them, and personally shot Alfredia Jones in the head.'" App. 58a (quoting State's Brief).

The trial judge found Rizzo's knowingly false representations about Glaspie's credibility were material. Joubert had told police he was remorseful and that Glaspie had coerced him. App. 59a-60a. The court found "[e]ither or both of these claims, if credited could have influenced the jury's verdict" regarding Joubert's liability as a party under *Tison*, or its assessment of mitigation at sentencing. *Ibid.*

Neither the State nor the TCCA disputed the trial judge's factual findings. Rather, the court disagreed with his legal conclusions, based on an erroneous interpretation of this Court's cases. Specifically, the court did not consider Glaspie's and Rizzo's lies about Glaspie's need to testify truthfully, the testimony of the other witnesses Rizzo presented to falsely corroborate Glaspie's testimony about Brown, or the impact on Glaspie's credibility—and in particular his assertion that Petitioner shot Jones—if Rizzo had complied with this Court's cases and told the court and jury about the telephone records exculpating Brown. Instead of asking whether "there is any reasonably likelihood that the false testimony *could have* affected the judgment,"

Agurs v. United States, 427 U.S. 97, 103 (1976) (emphasis added), or that it "*may have* had an effect on the outcome of the trial," *Napue*, 320 U.S. at 272 (emphasis added), the court required Petitioner to prove by a preponderance of the evidence that "Glaspie's false testimony about Brown's participation in the offense" alone "affected the judgment of the jury in [Petitioner's] trial." App. 5a.

That decision conflicts with the decisions of a majority of the federal Circuits and state courts of last resort that. Like Members of this Court, those courts equate the *Napue* standard with the harmless-error standard of *Chapman v. California*, 386 U.S. 18 (1967). This Court should accept review of Petitioner's case and clarify that *Napue* requires reversal unless the State demonstrates that its knowing use of false testimony, considered collectively, did not contribute to the verdict.

STATEMENT OF THE CASE

Petitioner, Glaspie, and Brown, were charged with capital murder for shooting to death Alfredia Jones and Houston Police Officer Charles Clark during the robbery of an ACE Cash Express store on April 3, 2003.

The State alleged that Brown and Petitioner entered the store to rob it. Jones, the store's clerk, pressed a silent alarm button. When Officer Clark responded and confronted the robbers, Brown killed him in an exchange of gunfire. Petitioner then shot Jones. The robbers fled in a car.

Shortly after the incident, each man was arrested separately. Glaspie initially denied involvement, but when investigators gave him the names of Brown and Petitioner, and repeatedly told him that three people were involved, Glaspie began to implicate Brown and Petitioner.

For over two hours, Petitioner denied involvement in the robbery and murders. When the detectives played him a portion of Glaspie's statement implicating him and Brown, Petitioner told the police he had been pressured by Glaspie into participating in the robbery. Petitioner explained that Glaspie had lent him money to post bond on a pending drug case and Glaspie was using that loan as leverage. Petitioner denied having a gun during the robbery and denied shooting anyone. He told the police that Brown shot Clark and Glaspie shot Jones.

Brown maintained his innocence. He had an alibi. He was at his girlfriend's apartment at the time of the robbery.

Before Petitioner's trial, Glaspie and the State entered into a plea agreement. Glaspie pled guilty and would not be sentenced until after he testified at Petitioner's trial, then Brown's. If Glaspie complied fully with the terms of the agreement, he would be sentenced to a term of 30 years' incarceration.

Harris County assistant district attorney Daniel Rizzo led the prosecution. He represented Texas before the grand jury, during pretrial investigations by the Houston police, in Glaspie's plea negotiations, and in the trials of Petitioner and Brown.

I. Petitioner's trial

In his opening statement, Rizzo told jurors they would "hear that after a lot of work we believed [Glaspie] to be the non-shooter." 26 RR 28. Glaspie would testify that he "got a 30-year deal for aggravated robbery" and "part of that deal is that he has to testify truthfully." 26 RR 28. Rizzo said Glaspie had "a big hammer over his head to testify truthfully." 26 RR 29. If Glaspie "lies about anything . . . about one

little minor thing," or if his testimony "doesn't match the evidence and the truth in any way, the deal is that he can be prosecuted for capital murder." 26 RR 29.

Rizzo said the evidence would show that Brown, also known as "Doby," shot and killed Officer Clark. 26 RR 20-21.

Glaspie would describe a dramatic scene in which Petitioner told him, "'Shon, this bitch played us.'" Then, Petitioner "raised up his hand, his arm, like a gangster, and shot [Jones] once in the head and that she dropped and died in the middle of the lobby. That's what this Defendant did." 26 RR 22. Rizzo assured jurors, "[a]ll of the evidence is going to be matching up for you," and that the evidence would corroborate Glaspie's testimony. 26 RR 24.

Specifically, Rizzo described cell phone location data: "what I would like you to do, also, is to compare that evidence with Mr. Glaspie's statements to see if it corroborates it. Because those are things that cannot lie." 26 RR 30.

Regarding Petitioner's videotaped statement, Rizzo told jurors that Petitioner "makes himself guilty as a party to the capital murder." 26 RR 26. Thus, "there won't be any doubt, based on his statement alone, that he's guilty of capital murder as a party, as a non-shooter. *But that's not the truth. That's not what happened. He is the killer, based on the evidence, of Mrs. Jones*." 26 RR 26-27 (emphasis added).

Detective Brett McDaniel testified for the State regarding phone records that he had obtained and analyzed. Using location data, he mapped cell phone calls from Glaspie's and Petitioner's phones beginning at 8:26 a.m. and resuming at 10:14 a.m., the time of before and shortly after the robbery. He showed the maps to the jury in a

slideshow. St. Exs. 222, 223. McDaniel testified that he spent two days with Glaspie, going through the phone logs and reviewing each call. Det. McDaniel explained that not every call was in the slideshow, that they "pulled out some that were more pertinent." 29 RR 203-204. The exhibits depicted several calls that Glaspie said had been made to or from Brown using Glaspie's phone. 29 RR 231.

Relying on Glaspie's account of which calls had been made by Brown, McDaniel told the jury that "pings" of Glaspie's phone showed Brown en route to the store before the robbery, and nearby afterwards. 29 RR 219-230.

As the State would later tell the TCCA, Glaspie was the star witness against Petitioner. Glaspie admitted that he had accepted a plea offer of 30 years on a reduced charge of aggravated robbery to testify against Petitioner, contingent upon him testifying "truthfully," "about [his] role or any other role that's in this case and what happened." He explained that if he lied "about anything," even "one tiny thing," even "a small thing," he would be prosecuted for capital murder and eligible for the death penalty. 29 RR 9, 11-12.

Glaspie told the jury that he recruited Petitioner and Brown to rob a check cashing store, and admitted that the .45 caliber pistol used in the ACE robbery was his gun. 29 RR 13-16, 19-22, 112, 128. But he said, Petitioner grabbed the gun and took it into the store. 29 RR 40-41. Glaspie was to act only as the getaway driver, and had not planned to enter the store. 29 RR 43. After waiting outside, Glapsie entered the store and claimed to see Petitioner holding Glaspie's gun to the store clerk's head as she knelt at the store's safe. 29 RR 55. Glaspie's said he saw Brown move to the

lobby of the store and heard "a few shots." 29 RR 60-61, 62. Then, Petitioner grabbed Jones, moved into the lobby area, told Glaspie, "this bitch played us, man," and shot her. 29 RR 63-65. Glaspie and prosecutor Rizzo conducted a demonstration to show the jury how Jones was grabbed and shot. 29 RR 60-61. Glaspie testified that he and Petitioner exited the store and got in the waiting car where Brown was in the driver's seat and the three drove off. 29 RR 68. Glaspie denied that he had admitted to someone that he shot the woman at the store. 29 RR 74, 165-66.

Petitioner presented a single witness, Lamarcus Collar. Collar testified that he returned home early from school on April 3, between 10:00 and 10:30 a.m. 30 RR 39. Minutes later, Glaspie, Brown and Petitioner arrived at the apartment, staying only 10–15 minutes. 30 RR 39-41. Collar said he overheard Glaspie on the telephone admitting that he had shot someone and saying, "Shit, bitch got out of line. She was taking too long, so I had to do what I had to do." 30 RR 46-47.

In its closing argument, the State addressed the physical evidence, arguing to the jury that the dress worn by Jones was particularly important because in Petitioner's "version of events" is inconsistent with Jones having no "soot or stippling on her." But Glaspie's account was consistent with the way Jones's "dress is ripped right here (indicating) underneath the right arm." 31 RR 10.

The State explained that jurors were not required to agree on whether it was a robbery/murder or a double murder. 31 RR 26. He argued that the defense failed to meet its burden as to duress because "[t]here was no one standing there forcing him at gunpoint to commit this offense." 31 RR 36.

Defense counsel argued that it was Glaspie who shot Jones, adding, "the State of Texas does not want you all to focus on the real killer here. They have to justify the decision they made for that 30-year sentence." 31 RR 39. Counsel argued that the State used Glapsie because he would put the murder of Jones on Petitioner, describing it as a deal with the devil: "the Devil is a deceiver," "the Devil is a liar and the father of lies and is a murderer." 31 RR 83. Counsel concluded by asking the jury to convict Petitioner of aggravated robbery, the offense Glaspie pled guilty to. 31 RR 94.

In his closing, Rizzo again vouched for Glaspie's credibility and repeatedly assured the jury that, consistent with the terms of the plea deal, Glaspie testified truthfully. See 31 RR 106 ("Glaspie told the truth when he testified. And he had good reason to."); 31 RR 116 ("Glaspie was telling the truth."). Rizzo argued that "Glaspie was telling the truth" because his testimony, "matches each and every small piece of evidence." 31 RR 116.

Rizzo emphasized the harsh terms of the Glaspie's deal:

> Glaspie is eligible for the death penalty in Texas. Glaspie testified that he knows that if he testifies falsely about one thing and it doesn't match the evidence and it doesn't match anything, if he testifies falsely about one thing, that all deals are off. . . . Also, he testified that there's no substantial compliance. In other words, he can testify about 99 percent of - and comply with 99 percent of everything, but if one thing he doesn't comply with, he testifies falsely, then he can be prosecuted, again, for capital murder. That's a heavy hammer. That's a bigger hammer than most witnesses have over their head.

31 RR 118.

The court presented the jury with three charges: capital murder, felony murder, and aggravated robbery. As to capital murder, the jury could find Petitioner guilty as a principal or party. 2 CR 293-96. During deliberations, the jury requested

the transcript of Rizzo's direct examination of Glaspie regarding "[h]ow Ms. Jones was being held (demonstration w/ Rizzo)." 2 CR 309.

The jury returned a general verdict of guilty of capital murder. 2 CR 307.

In the penalty phase, the State presented evidence regarding Petitioner's prior contacts with law enforcement as a juvenile and adult. *See* RR vols. 33, 34.

Petitioner presented family members, including his grandmother who testified how Petitioner's mother had her first child when she was 14 and was 18 when she gave birth to Petitioner. 35 RR 117. She described how Petitioner's mother began using drugs in 1974, and continued to battle addiction. 35 RR 122-23. A social worker testified about the formative phases of Petitioner's life, and described his childhood as "very neglectful," marked by an absent parent and the absence of feelings of parental love due to Petitioner's mother's drug addiction. 35 RR 153-54, 169. Petitioner's mother also described her long history of drug use, and how she used marijuana while pregnant with Petitioner. 36 RR 12. She said the apartment complex where Petitioner grew up as "not a good place to live, not to raise kids." 36 RR 17. She had not been present for her children and left them unsupervised. Petitioner's sister also described the conditions in which she and her brother grew up. 36 RR 32-70. She confirmed that the housing project was "not a nice place to live," and described how the two of them saw drug dealing and on one occasion, she observed a murder. She and her brother had seen the bodies of murder victims around the complex. 36 RR 37-39. She also described physical abuse by her mother. 36 RR 55-58.

In his closing argument of the penalty phase, Rizzo asked the jury "to look at this case," 39 RR 203, and described Petitioner as a "violent," "cold-blooded killer," referring to Glaspie's testimony that Petitioner killed Jones. 39 RR 204. Rizzo told the jury there was no "question that [Petitioner] is the shooter of Ms. Jones." 39 RR 215. "[A]ll of the evidence is consistent with [Petitioner] being the shooter." *Ibid*. He told the jury that "the best mitigation for [Petitioner] not to receive the death penalty is if he would have let Ms. Jones live," and stated that this mitigation "might have been sufficient" to require a non-death sentence. 39 RR 227. However, according to Rizzo, "that [mitigation] did not exist because [Petitioner] killed [Jones] and he killed her because he was mad." *Ibid*.

The jury answered the special issues submitted under Tex. Code Crim. Proc. art. 37.071, returning affirmative answers to issues one and two and a negative answer to the mitigation special issue. 2 CR 235, 236. The trial court accordingly sentenced Petitioner to death on October 21, 2004.

II. Alfred Brown's case

Alfred Brown was tried separately, after Petitioner. Glaspie testified against Brown in a manner consistent with his testimony at Petitioner's trial. *Ex parte Alfred Dewayne Brown*, No. 1035159-A, Agreed Proposed Findings of Fact and Conclusions of Law at 4 (May 22, 2013).

Brown maintained that he was not at the ACE store. He had an alibi. Brown was in the apartment of his girlfriend, Erika Dockery; that two of Ms. Dockery's nephews were also home with him; that Ms. Dockery was at work and that he called her

around 10:00 a.m. from her apartment, which made it physically impossible for him to participate in the ACE robbery and murders. *Ibid*.

On April 4, 2003, the day after the robbery, Dockery told police that Brown was home asleep when she escorted her children to catch the bus at 6:50 a.m., and when she left for work at 8:30 a.m. She later called home and was told that Brown was sick and upstairs sleeping. Brown called her at work at approximately 10:00 a.m. and she talked to him for approximately fifteen minutes. *Id*. at 2.

At Brown's trial, however, Dockery was called by the prosecution and testified that Brown was not in her apartment when she returned at 7:25 a.m. *Id*. at 4-5. She testified that Brown called her around 10:00 a.m. at the home of her employer and told her that he was at "Shono's" home in the Villa Americana Apartments. *Id*. at 5. On cross examination, Dockery testified that her employer, Alma Berry, told her the caller ID indicated the call was from Ms. Dockery's house. *Ibid*.

The jury found Brown guilty of capital murder in the death of Officer Clark on October 18, 2005, and sentenced him to die on October 25, 2005.

On November 3, 2005, Glaspie was sentenced to 30 years' imprisonment.

III. Initial post-conviction proceedings on *Brady*

During Brown's post-conviction proceedings, the State disclosed grand jury testimony and phone records that tended to refute Glaspie's testimony.

The grand jury transcripts showed Rizzo called Dockery to testify on April 21, 2003. Dockery testified that Brown was asleep on her couch when she left home to go to work at 8:30 a.m. on April 3, 2003. At approximately 10:00 a.m., she was at the home of Alma Berry, an elderly woman for whom Dockery was a paid caregiver, when

the phone rang. Berry looked at the Caller ID on her phone and said, "Ericka, it's your house." Dockery answered and spoke to Brown for about 15 minutes. Dockery left work at 1:00 p.m., and returned home where she saw Brown who told her that he did not feel well.

The District Attorney's later investigation showed that Rizzo knew, but did not disclose, that the grand jury foreman, James Koteras, was an active-duty Houston police officer. The transcript reflects that the grand jurors, including Koteras, along with Rizzo, accused Dockery of lying and threatened that if she was perjuring herself, her children would be taken away. But Dockery stuck to her story. Grand Jury Testimony of Erika Dockery, pp. 1-119 (April 21, 2003).

After leaving the grand jury room, Rizzo spoke with Dockery in the hallway. Then Dockery returned to the grand jury to "correct" her statement, saying she had not returned to the apartment after leaving at 6:50 a.m. *Id*. at 120-22.

Tonika Hutchins, Glaspie's girlfriend, testified before the grand jury on April 28, 2003. Hutchins testified that Glaspie had told her that George "Ju Ju" Powell, rather than "Doby" (Alfred Brown) had been a participant in the ACE robbery. Glaspie told her was there, but never entered the store, only Petitioner and "Ju Ju." Hutchins testified that she overheard Glaspie call Brown around 6:00 a.m. and told someone to wake Brown up, but he was rebuffed by the other party. Grand jurors aggressively questioned Hutchins, telling her they knew she was lying, that she took drugs, and that her family was ashamed of her for "hanging out with a hoodlum who probably killed someone."

During post-conviction proceedings in Brown's case, the State asked the police officer who conducted the original phone investigation to search for any documents relating to the case. He found a box of related materials at his home.

Those materials included phone records for the landline in Dockery's apartment on April 3, 2003, along with an application Rizzo filed to obtain the landline records from the telephone company, which was signed by the trial court on April 24, 2003.[1]

The records showed a call from Dockery's apartment to Alma Berry's house at 10:08 a.m. on the day of the robbery. That corroborated Dockery's statement to the police and her initial testimony to the grand jury that Brown called her around 10:00 a.m. and that Berry recognized Dockery's number on Caller ID.

In both Brown's post-conviction case and Petitioner's, the State conceded the phone records were favorable to the defense, in that they supported Brown's alibi and contradicted Glaspie's testimony. The State also conceded that the records were not produced to Petitioner's or Brown's counsel or used by the State at either trial.

In Brown's case, the State agreed, and the trial court found that the State had "inadvertently" failed to disclose phone records that supported Brown's alibi, and Brown's habeas application be granted pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *Ex parte Alfred Dewayne Brown*, No. 1035159-A (May 28, 2013).

[1] It was later revealed that prosecutor Dan Rizzo was made aware of this information long before the trials of Petitioner and Brown.

The TCCA agreed and vacated Brown's conviction. *Ex parte Alfred Dewayne Brown*, No. WR-68,876-01 (Tex. Crim. App. Nov. 5, 2014). Brown's case was remanded for a new trial. *Ibid*. On June 8, 2015, the trial court granted the State's motion to dismiss the capital murder charges against Brown on grounds of insufficient evidence. *State v. Brown*, No. 1035159, Order (Jun. 8, 2015).

IV. Procedural history of Petitioner's *Napue* claim

Petitioner's conviction and sentence were affirmed by the TCCA. *Joubert v. State*, 235 S.W.3d 729 (Tex. Crim. App. 2007) (App. 76a-82a).

In December 2006, Petitioner filed his initial state application for a writ of habeas corpus. The trial court held a hearing on Petitioner's claim that his trial counsel were ineffective for failure to investigate and present available evidence to impeach Glaspie's credibility at trial. Petitioner presented seven witnesses who testified to Glaspie's poor reputation for truthfulness. *Ex parte Elijah Joubert*, No. 944756-A, 2 RR 59-110.

In December 2006, Petitioner filed his initial state application for a writ of habeas corpus alleging his trial counsel were ineffective for failing to investigate and present available evidence impeaching Glaspie. At a hearing, Petitioner presented seven witnesses who testified to Glaspie's poor reputation for truthfulness. *Ex parte Elijah Joubert*, No. 944756-A, 2 RR 59-110.

Trial counsel testified that "the credibility of Mr. [Glaspie] was critical to Petitioner's case during the guilt/innocence and punishment." *Id*. at 2 RR 25. The trial

court recommended that relief be denied, and the TCCA adopted the trial court's findings and conclusions, denying relief. *Ex parte Joubert*, WR 78,119 01 (Tex. Crim. App. Sept. 25, 2013).

On September 24, 2014, Petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of Texas.

In light of the developments in Brown's case, and at Petitioner's request, the federal habeas court stayed and held in abeyance Petitioner's federal habeas case to permit Petitioner to present unexhausted *Brady* and *Napue* claims in the state courts. *Joubert v. Stephens*, 4:13-CV-03002 Order (S.D. Tex. Oct. 15, 2015).

On June 9, 2016, Petitioner filed his subsequent application for writ of habeas corpus in state court. The TCCA authorized Petitioner to proceed on Claims One and Two, in which he alleged that the State violated *Napue v. Illinois*, 360 U.S. 264 (1959), by knowingly presenting false testimony from Glaspie and other witnesses, and violated *Brady* by suppressing evidence that would have undercut Glaspie's credibility and testimony. The court remanded the case for the trial court to consider the two claims.[2] App. 75a. *Ex parte Joubert*, WR-78,119-02, 2016 WL 5820502 (Tex. Crim. App. October 5, 2016).

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[2] Petitioner's relevant claims alleged:

Claim One: "The prosecution presented a false and misleading impression of its' key witness Dashan Glaspie's truthfulness by withholding evidence and failing to correct testimony which undermined the bolstering effect of the State's zero-tolerance plea agreement."

The trial court reviewed the documentary evidence then available, which included the trial and post-conviction records of Brown (the grand jury transcripts and telephone records), as well as Petitioner's subsequent application with attached exhibits, and the parties submitted proposed findings of fact and conclusions of law.

Petitioner's counsel argued that Rizzo knew of the evidence that supported Brown's alibi and still presented false testimony at Petitioner's trial. Writ Hr'g. Tr. at 8 (Jul. 24, 2017). The State argued the evidence had been withheld *unintentionally* and that Brown's case was dismissed not because Brown was "actually innocent," but because there was "now insufficient evidence to support [Mr.] Glaspie's testimony because the other witnesses who put Mr. Brown in and around the scene of the capital murder, their testimony has gone south on the State." *Id*. at 16.

Based upon the facts then available, the trial court signed the State's proposed findings and conclusions. The court found "the State *unintentionally* failed to disclose certain phone records that would have supported Brown's alibi. *Ex parte Elijah Dwayne Joubert*, No. 944756-B, Findings of Fact and Conclusions of Law at 15 (Aug. 4, 2017) (emphasis added).

The State did not contest the suppression and favorability prongs of *Brady*. *Id*. As materiality, the court found that Petitioner had failed to satisfy that prong and, recommended that relief be denied on the *Brady* claim. *Id*.

Claim Two: "The prosecution withheld material evidence which impeached its key witness, Dashan Glaspie's testimony and which would have undermined the bolstering force of the State's Zero tolerance plea agreement."

The State's proposed findings and conclusions did not address the merits of Petitioner's *Napue* claim. *Id*.

Before the case was set for submission in the TCCA, the State asked the court to return the case to the trial court "so that it may consider whether additional and/or different findings of fact and conclusions of law are necessary in the wake of recent developments in the case of the applicant's co-defendant Alfred Dewayne Brown." *Ex parte Joubert*, WR-78,119-02, Mot. Remand (Tex. Crim. App. Aug. 29, 2018).

The "recent developments" were that the District Attorney had discovered new evidence "suggesting that former Harris County District Attorney Dan Rizzo was informed about the existence of the phone records well before trial, yet failed to disclose or provide them to defense counsel or the jury." That discovery prompted the District Attorney to notify the State Bar of Texas "so that it may investigate the former prosecutor's professional conduct while handling the Brown case." The District Attorney also appointed Special Prosecutor John Raley to review Brown's claim of actual innocence. *Id*. at 2-3. Brown had sued the District Attorney and Rizzo for federal civil rights violations. The defendants in Brown's civil suit had filed a motion to dismiss premised on an expert's opinion that the withheld phone records could be interpreted as inculpatory of Brown. *Ibid*.

The State offered three exhibits in support of its motion:

1) A news release dated March 2, 2018, titled "Statement from Harris County District Attorney Kim Ogg Regarding Newly Discovered Evidence in Alfred Brown Case."

2) A press release dated May 2, 2018, tilted "DA Ogg announces review of Alfred Brown case."

3) "Defendant Harris County's Rule 12(b)(6) Motion to Dismiss Claims Related to Alleged Brady Violations," dated March 1, 2019.

On March 1, 2019, Special Prosecutor Raley issued a 179-page report on Brown's case. Raley found that Rizzo had abused Dockery and Hutchins before the grand jury, and threatened and intimidated them into corroborating Glaspie's account of Brown's participation. Raley also found that after McDaniel informed Rizzo that phone records corroborated Dockery, Rizzo gathered more evidence, and suppressed it. Raley found that Rizzo knew Glaspie and other witnesses testified falsely about Brown in both Petitioner's trial and Brown's, and that Glaspie had lied about Petitioner shooting Jones. Raley concluded that Brown was actually innocent of the robbery/murders.

On the day the Raley report was issued, the State filed an Amended Motion to Dismiss Alfred Brown's case. The State averred that "no credible evidence exists that inculpates Alfred Brown in the April 3, 2003 murder of Charles Clark as alleged in Cause No. 1035159," and that Brown is "actually innocent." *State v. Brown*, No. 1035159, St. Am. Mot. Dismiss at 4 (Mar. 1, 2019). The State submitted the Raley Report as an exhibit in support of its Amended Motion. *Id*. at Ex. A.

That same week, the State renewed its request for Petitioner's case to be returned the trial court, adding the Raley Report to the list of exhibits. *Ex parte Joubert*, WR,78-119-02, State's Renewed Mot. Remand (March 8, 2019).

On May 3, 2019, the trial court withdrew its June 2015 Order of Dismissal and, "[f]or the reasons stated in the State's Amended Motion to Dismiss," ordered that

Brown's case be dismissed "due to Alfred Dewayne Brown's actual innocence." *State v. Brown*, No. 1035159, Order (May 3, 2019).

In June 2019, the TCCA remanded Petitioner's case to the trial court. Referring to the State's exhibits, it ordered the trial judge to make findings of fact and conclusions of law "regarding whether the filed evidence should be considered and if it had any effect on Claims One and Two in [Petitioner]'s case." *Ex parte Joubert*, WR-78,119-02 (Tex. Crim. App. Jun. 12, 2019) (not designated for publication).

On November 2, 2020, the court indicated it had reviewed the evidence and directed the parties to submit new proposed findings of fact and conclusions of law reflecting their views on the new evidence.

In December 2020, the trial court withdrew its previous Findings of Fact and Conclusions of Law, and entered new ones, recommending that relief be granted on Petitioner's Claims One and Two. App. 73a.

The TCCA disagreed. As to Petitioner's *Brady* claim, the court acknowledged that the State conceded that it suppressed favorable evidence, but concluded that "the suppressed evidence, considered collectively and balanced against the evidence supporting [Petitioner]'s conviction, is not material." App. 4a.

The court found that "the true identity of the third participant does not ultimately matter in light of [Petitioner]'s own statement to the police." App. 4a. Because Petitioner had "admitted that he actively participated in the offense and he knew

Jones was 'gonna die' if the police came to the scene," the court held that "the suppressed evidence supporting Brown's alibi does not undermine our confidence in the outcome of [Petitioner]'s trial." App. 5a.

As to his *Napue* claim, the TCCA said Petitioner had to "show by a preponderance of the evidence that (1) false testimony was presented at trial and (2) the false testimony was material to the jury's verdict." App. 5a (citing *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015); *Ex parte Weinstein*, 421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014)).

The court acknowledged that the State "conceded that Glaspie falsely testified at [Petitioner]'s trial *about Brown's participation in the instant offense*." App. 5a (emphasis added). Without explanation, the court then concluded that "it is not reasonably likely that Glaspie's false testimony *about Brown's participation in the offense* affected the judgment of the jury in [Petitioner]'s trial." App. 5a (citing *Weinstein*, 421 S.W.3d at 665) (emphasis added). The court thus denied Claims One and Two. App. 5a.

REASONS FOR GRANTING THE PETITION

I. The TCCA decided Petitioner's false-testimony claim in a way that conflicts with the relevant decisions of this Court

Under the Texas precedent applied in this case, a state-habeas petitioner raising a claim under *Napue* "must show by a preponderance of the evidence that (1) false testimony was presented at his trial and (2) the false testimony was mate-rial to the jury's verdict." App. 5a. Although the TCCA acknowledged that the State had "concede[d] that Glaspie falsely testified at [Joubert's] trial about Brown's participation

in the instant office," it omitted other examples of false testimony. *Ibid*. The trial court found Rizzo knowingly presented false testimony from five other witnesses who implicated Brown, the lead detective regarding phone records, and that Rizzo prompted Glaspie to give false testimony about his incentive to be truthful. App. 52a-55a. The TCCA "disagree[d]" with the trial court's conclusions, but neither rejected nor otherwise took account of its findings regarding falsity and knowledge. App. 5a.

As to materiality, the TCCA relied upon its own cases for the proposition that "false testimony is 'material' only if there is a 'reasonably likelihood' that it affected the judgment of jury." *Ibid*. (citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014)). The court concluded "it is not reasonably likely that Glaspie's false testimony about Brown's participation in the offense affected the judgment of the jury in [Joubert]'s trial." *Ibid*.

The TCCA's review of Joubert's false-testimony claim failed to follow this Court's precedent in several ways. First, this Court's cases require that the prosecutor *knew* that testimony presented by the State was false. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue*, 360 U.S. at 269. Under state precedent, "[t]he Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly." *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011) (footnotes omitted); *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015) (cited in App. 5a).

Second, this Court's cases require that courts assess the impact on a witness's credibility of having his falsehoods exposed, *Napue*, 360 U.S. at 272, and that the "materiality … of suppressed evidence collectively, not item by item."[3] *Kyles v. Whitley*, 514 U.S. 419, 436 (1996); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1334 (11th Cir. 2009) (Carnes, J.). Although the State conceded, and the trial court found, the State presented false testimony from five witnesses other than Glaspie, and that Glaspie's testimony about his plea was false, the TCCA considered only Glaspie's testimony about Brown.

Third, this Court's cases hold that when the prosecution knowingly relies on false testimony, "[a] new trial is required if 'the false testimony could … in any reasonably likelihood have affected the judgment of the jury.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271); *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonably likelihood that the false testimony could have affected the judgment"); *Wearry v. Cain*, 577 U.S. 385, 393 (2016). That "strict standard of materiality" applies because the knowing use of false testimony "involve[s] a corruption of the truth-seeking function of the trial process," but "is not necessarily applicable" when a case involves the suppression of evidence and no knowing use of false testimony. *Agurs*, 427 U.S. at 104.

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3 Although *Kyles* is a *Brady* case that did not involve the use of false testimony, this Court said in *Agurs*, "[t]he rule of *Brady* … arguably applies … [i]n the … situation[] typified by *Mooney*." 427 U.S. at 103. *See Smith*, *supra*, 572 F.3d at 1332-33. *See also Pyle v. Kansas*, 317 U.S. 213, 216 (1941).

In ordinary suppression cases that don't involve the knowing use of false evidence, courts must apply the reasonable-probability standard from *Strickland v. Washington*, 466 U.S. 668 (1984). *Kyles*, 514 U.S. at 434. Under that standard, a post-conviction petitioner "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry*, 577 U.S. at 392 (quoting *Kyles*, 415 U.S. at 434). The petitioner "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough to convict." *Kyles*, 514 U.S. at 434-35. Under *Brady* a petitioner "can prevail even if … the undisclosed information *may not have affected* the jury's verdict." *Wearry*, 577 U.S. at 392 n.6 (emphasis added).

The TCCA has excised the probabilistic terms "any" and "could have" from the *Napue* standard so that a state-habeas petitioner like Joubert "must show by a preponderance of the evidence" that "there *is* a 'reasonably likelihood' that [the false testimony] *affected* the judgment of the jury." App. 5a (emphasis added). Cases from the TCCA make clear that the "could have" inquiry has been excised with the words, creating a *higher* burden for petitioners like Joubert than the reasonable-probability standard applied in *Kyles*.

For example, when describing the test for false-testimony cases in *Robbins*, *supra*, the TCCA said, "We have also used … 'more likely than not' in lieu of 'reasonable likelihood.'" 360 S.W.3d at 459 n.13 (citing *Ex parte Chabot*, 300 S.W.3d 768, 772

(Tex. Crim. App. 2009)).[4] In *De La Cruz*, which the TCCA cited in Petitioner's case, App. 5a, the court applied the sufficiency-of-the-evidence test that this Court disapproved in *Kyles*. The TCCA found the false testimony was not material because, "the

[4] For many years, the TCCA only recognized a claim for the knowing use of false testimony, and followed this Court's decision in *Napue* in holding "[t]he standard applied in such cases [i]s … whether the testimony '*may* have had an effect on the outcome of the trial.'" *Means v. State*, 429 S.W.2d 490, 494 (Tex. Crim. App. 1968) (citing *Napue*) (emphasis added). *See also*, *e.g.*, *Ex parte Cherry*, 456 S.W.2d 949 (Tex. Crim. App. 1970); *Crutcher v. State*, 481 S.W.2d 113, 117 (Tex. Crim. App. 1972); *Ex parte Adams*, 768 S.W.2d 281, 289 (Tex. Crim. App. 1989) (en banc).

The TCCA recognized that the *Napue* standard was equivalent to the harmless-error standard adopted in *Chapman v. California*, 386 U.S. 18 (1967). *Adams*, 768 S.W.3d at 292 (quoting *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (op. of Blackmun, J.). *See also id*. at 293. Occasionally, it still does, while also applying a different standard for unknowing-use cases. *See Ex parte McGregor*, No. WR-85,833-01, 2019 WL 2439453, at *2 (Tex. Crim. App. June 12, 2019).

When the TCCA first recognized that the *unknowing* use of false testimony could deny a defendant due process of law, the court saw "no reason for subjecting the two types of errors [knowing and unknowing use] to different standards of harm." *Chabot*, *supra*, 300 S.W.3d at 771. However, even then, the court misstated this Court's standard under *Napue* as requiring that the petitioner satisfy "'the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment.'" *Ibid*. (quoting *Ex parte Fierro*, 934 S.W.2d 370, 374 (Tex. Crim. App. 1996). The court explained that is "the normal standard on habeas review," as distinct from the *Chapman* standard applied on direct appeal. *Napper*, *supra*, 322 S.W.3d at 242.

But later, the TCCA held that whether the evidence showed knowing or unknowing use was "crucial to determining the standard of materiality or harm to be applied." *Ex parte Napper*, 322 S.W.3d 202, 241 (Tex. Crim. App. 2010). Unknowing use cases required a higher showing from the petitioner. *See id*. at 242 ("It remains unsettled whether a more favorable standard might be available to a defendant in the 'knowing use' context.").

Although *Fierro* "left open the possibility that [a habeas petitioner] *might* 'avail himself of the *Chapman* harmless error standard,'" if he had no opportunity to raise his false-testimony claim at trial or on appeal, *Napper*, 322 S.W.3d at 242 (quoting *Fierro*, 934 S.W.2d at 374 n.10) (emphasis added), the court believed "the *Chapman* standard need not apply" to false-testimony claims raised in habeas proceedings because "*Napue* and *Bagley* both involved direct rather than collateral attacks." *Fierro*, 934 S.W.2d at 372. Of course, that is wrong. Both *Napue* and *Bagley* involved collateral attacks. *Napue*, 360 U.S. at 267; *Bagley*, 473 U.S. at 671-72.

jury could have convicted applicant of … murder even if" the allegedly false testimony had not been admitted. 466 S.W.3d at 871. The court illustrated that it required an actual, outcome-determinative effect—as opposed to a showing that it was reasonably likely the false testimony could have had an effect—when it upheld De La Cruz's conviction because it

> could not conclude that any such false evidence *tipped the scales* in favor of persuading the jury to believe [prosecution] testimony or to convict applicant. Thus, even were we to accept that this limited aspect of [the witness]'s testimony has been proven false, we could not now conclude that it would have been materially false." *Ibid.* (emphasis added).

Agurs rejected for ordinary *Brady* suppression cases the *Napue* standard for setting aside a judgment based on the prosecution's knowing use of false testimony. *Agurs*, 427 U.S. at 103. It did so because those cases "involve[] no misconduct, and … no reason to question the veracity of any of the prosecution witnesses." *Id.* at 103-04. *Agurs* thus left no doubt that a criminal judgment falls more easily when it rests on the knowing use of false evidence, than when evidence favorable to the defense was

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Nevertheless, the TCCA held that its version of the harmless-error standard applied in habeas proceedings where the petitioner could not have raised his false-testimony claim on direct appeal. *In re Ghahremani*, 332 S.W.3d 470, 483 (Tex. Crim. App. 2011).

At the same time, though, the court *raised* the standard of materiality for *knowing* false-testimony claims so that they require the same showing from the petitioner/defendant as *unknowing* false-testimony claims. A few months after its decision in *Ghahremani*, the court explained that the "reasonable likelihood" standard from *Napue* is used interchangeably with the "more likely than not" standard from *Chabot*. *Robbins*, *supra*, 360 S.W.3d at 449 n.13. *See also Weinstein*, *supra*, 421 S.W.3d at 669-674 (Keller, J., concurring).

Thus, the TCCA abandoned its previously observed distinction between materiality and harm. In *Weinstein*, one of the two cases cited in Joubert's case, App. 5a, the court explained that on habeas review, "The issue in false-testimony claims is 'materiality' not 'harm.'" *Weinstein*, 421 S.W.3d at 664.

suppressed. The question remains where the *Napue* standard—"any reasonable likelihood that the false testimony could have affected the judgment of the jury," *id.* at 103—sits in relation to other standards for reversal.[5]

At least four Justices of this Court have equated the *Napue* standard with the "harmless beyond a reasonable doubt" standard adopted in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Bagley*, 473 U.S. at 679 n.9 (1985) (opinion of Blackmun, J.); *Strickler v. Greene*, 527 U.S. 263, 298-99 (1999) (Souter, J., dissenting).

Those Justices relied on *Chapman*'s assertion that

> [t]here is little, if any, difference between … [asking] "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Chapman, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1964)). Indeed, there is little, if any, difference between asking whether there is "*any* reasonable likelihood that the false testimony *could have* affected the judgment," *Agurs*, 427 U.S. at 103 (emphasis added), and asking whether there is a reasonable *possibility* that the evidence complained of *might have contributed* to the conviction. "Could" connotes "possibility." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/could (stating that "can"—the present tense of "could"—is used to indicate possibility). "Affected," the word used by the TCCA means "act[ed] on and cause[d] a change in (someone or something)." *Merriam-*

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[5] As noted above the Court of Criminal Appeals has variously equated and distinguished the issues of materiality and harm or harmlessness when evaluating false-testimony claims.

Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/affect.

The TCCA's shift to an outcome-determinative test fails to protect fundamental fairness and the trial's truth-seeking function, the central concerns of this Court's cases. *Mooney* held that "the requirement of due process … cannot be deemed to be satisfied … if a state has contrived a conviction … through a deliberate deception of testimony known to be perjury." 294 U.S. at 112. "Such a contrivance by a state," is not a real trial, but "the pretense of a trial." *Ibid.*

Alcorta v. Texas, 355 U.S. 28 (1957), another state-habeas case, closed two loopholes left by *Mooney* and *Pyle v. Kansas*, 317 U.S. 213, 216 (1941). One concerned testimony that, although true on its face, left a false impression. The other concerned whether due process was violated by the use of false testimony that bore on the *degree* of the offense alone. This Court held that "[u]nder the general principles laid down" in *Mooney* and *Pyle*, Alcorta "was not accorded due process of law" because a prosecution witness's testimony, "taken as a whole, gave the jury the false impression that his relationship with [the] petitioner's wife was nothing more than that of casual friendship." 355 U.S. at 31. If that relationship "had been truthfully portrayed to the jury, it would have, apart from impeaching [the witness's] credibility, tended to corroborate" Alcorta's heat-of-passion defense that, if accepted, would have reduced his crime "to 'murder without malice' precluding the death penalty." *Id.* at 31-32. *See also Giles v. Maryland*, 386 U.S. 66, 79 n.11 (1967) (stating test for whether a state court must inquire into the suppression of police reports from a rape investigation "cannot

be … that a remand would be justified only if the evidence presented necessarily excludes the conclusion" that the defendant penetrated the alleged victim) (internal quotation marks omitted).

Napue added that a conviction "must fall under the Fourteenth Amendment … when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," 360 U.S. at 269; *Brady*, 363 U.S. at 87, "even though the testimony may be relevant only to the credibility of a witness." *Giles*, 386 U.S. at 74. In *Napue*, the prosecutor allowed a key witness to lie about whether the witness "had been promised consideration" for his testimony. *Napue*, 360 U.S. at 268. After finding that a jury "apprised of the true facts … might well have concluded that [the witness] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case," *id.* at 270, the Court concluded the "false testimony … *may have* had an effect on the outcome of the trial. Accordingly, the judgment below must be reversed." *Id.* at 272 (emphasis added).

The TCCA's decision in Joubert's case, by focusing solely on Glaspie's false testimony "about Brown's participation in the instant offense," and ignoring how the falsity would have impacted his credibility on other issues such as whether he or Joubert shot Jones, failed to follow *Napue*.

II. The TCCA's Decision in Joubert's Case Conflicts with the Decisions of Courts of Last Resort in Other States, and with Decisions of Federal Circuits

Lower court decisions conflict with the TCCA's decision in Joubert's case, and with each other. The split appears in each area discussed above: (1) whether *Napue* error requires reversal at a lower threshold than *Bagley*'s reasonable-probability

standard; (2) if so, whether (a) *Napue* is equivalent to *Chapman*, and, if so, (b) whether the defendant/petitioner or the State has the burden to demonstrate materiality or harmlessness, respectively, and; (3) whether false-testimony claims, like ordinary *Brady* claims, require a cumulative assessment of materiality or harm.

A. Most courts agree *Napue* claims pose a lower hurdle for defendants than *Brady* claims that do not involve the use of false evidence.

The materiality standard for ordinary *Brady* claims "'impose[s] a higher burden on the defendant,'" than the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Kyles*, 514 U.S. at 436 (quoting *Agurs*, 427 U.S. at 112). Thus, a finding of materiality under *Brady* "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Kyles*, 514 U.S. at 435 (quoting *Brecht*, 507 U.S. at 623) (internal quotation marks and citation omitted). *Brecht* adopted for purposes of federal habeas cases the standard applied to non-constitutional errors in direct appeals, *Kotteakos v. United States*, 328 U.S. 750 (1947), which is less favorable to defendants than *Chapman*. *Kyles*, 514 U.S. at 437 (discussing *Brecht*, 507 U.S. at 522-23). That raises the question whether a habeas petitioner who has satisfied *Napue*'s "any reasonable likelihood" standard must also satisfy *Brecht*.

All federal Circuits that have addressed the issue have held that the *Napue* standard for setting aside a judgment is easier for the defendant/petitioner to meet than *Bagley* and *Brecht*. *See Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 150–51 (3d Cir. 2017) (discussing cases from other Circuits); *Rosencrantz v. Lafler*, 568 F.3d 577, 587 (6th Cir. 2009) (agreeing with *Gilday v. Callahan*, 59 F.3d 257, 268

(1st Cir. 1995), and *Ventura v. Attorney General, Fla.*, 419 F.3d 1269, 1283-84 (11th Cir. 2005)). Thus, most of those Circuits require habeas petitioners whose claims satisfy *Napue* to satisfy *Brecht*, as well. *Gilday*, 59 F.3d at 268; *Barrientes v. Johnson*, 221 F.3d 741, 756–57 (5th Cir. 2000); *Rosencrantz*, 568 F.3d at 584; *United States v. Clay*, 720 F.3d 1021, 1026-27 (8th Cir. 2013); *Douglas v. Workman*, 560 F.3d 1156, 1173 n.12 (10th Cir. 2009); *Trepal v. Sec'y, Florida Dep't of Corr.*, 684 F.3d 1088, 1111–13 (11th Cir. 2012). The Third Circuit and the Ninth do not. *See Haskell*, 866 F.3d at 145-46; *Hayes v. Brown,* 399 F.3d 972, 984-85 (9th Cir. 2005) (en banc). The Circuits' application of a lower threshold for reversal than *Kyles* shows the TCCA applied a conflicting standard in Petitioner's case.

A large number of state and federal courts place the burden on the defendant or petitioner to show *Napue* materiality in order to obtain relief.[6] In doing so, and consistent with this Court's decisions, those courts have set such a low bar that materiality is "readily shown," *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003), such that "reversal is virtually automatic," *Hayes v. Brown*, 399 F.3d 972, 978 (9th

[6] *See Harris v. State*, 847 S.E.2d 563, 571 (Ga. 2020); *State v. Lankford*, 399 P.3d 804, 830 (Idaho 2017); *State v. Kimble*, 833 S.E.2d 814, 816 (N.C. 2019); *Com. v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999); *Tiner v. Premo*, 391 P.3d 816, 827 (Or. 2017); *State v. Blank*, 192 So.3d 93, 101 (La. 2016); *State v. Mildenhall*, 747 P.2d 422, 425 (Utah 1987); *State v. Dockery*, 2018 WL 4603139 (Wash. Ct. App. Sept. 25, 2018); *State v. Robinson*, 2005 WL 20088186 (Tenn. Crim. App. Aug. 17, 2005) (citing *State v. Cureton*, 38 S.W.3d 64, 74-75 (Tenn. Crim. App. 2000)); *State v. Johnson*, 45 N.E.3d 208, 531-32 (Ohio 2015); *State v. Yates*, 629 A.2d 807, 809 (N.H. 1993); *Gratzer v. State*, 71 P.3d 1221, 1225 (Mont. 2003); *State v. Kolbet*, 638 N.W.2d 653, 659 (Iowa 2001); *Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991).

Cir. 2005), unless the prosecution's case is "so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." *Shih Wei Su*, 335 F.3d at 129.

These courts follow *Agurs* in reasoning that the knowing use of false evidence must "invoke[] the highest level of appellate scrutiny." *Azania v. State*, 730 N.E.2d 646, 652 (Ind. 2000). For these courts, a "strict standard of materiality espous[es] the view that the use of perjured testimony is fundamentally unfair and a corruption of the truth-seeking function of the trial process." *State v. Eugene*, 340 N.W.2d 18, 25 (N.D. 1983) (citing *Agurs*, *supra*).

Whether courts require the State to prove harmlessness of the false testimony beyond a reasonable doubt, or have the defendant show "any reasonable likelihood" that the false testimony "could have affected the judgment of the jury," the net result is the same: the materiality standard needed to obtain relief is significantly more favorable to the defendant.[7]

Many lower courts correctly follow Justice Blackmun's separate opinion in *Bagley*, and Justice Souter's dissenting opinion in *Strickler*, and hold *Napue* requires reversal as readily as *Chapman*. *Chapman* established a rule "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. Accordingly, the

[7] Courts also apply the "reasonable likelihood" standard without explicitly placing the burden on the defendant but imply it is a showing the defendant must make. *See, e.g., State v. Towns,* 432 A,2d 688, 691 (R.I. 1981); *State v. Brunette*, 501 A.2d 419, 423 (Me. 1985); *Gates v. State*, 754 P.2d 882, 886 (Okla. Crim. App. 1988); *Manning v. State*, 884 So.2d 717, 726 (Miss. 2004).

State, as beneficiary of the error, would have the burden to prove beyond a reasonable doubt that the knowing use of false testimony by the prosecution did not contribute to Petitioner's guilty verdict or death sentence.

In *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009), the Eleventh Circuit held that a new trial is required "unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." The court distinguished "two categories of *Brady* violations, each with its own standard for determining whether undisclosed evidence is material and merits a new trial." *Ibid.* The first category (what it called *Giglio* claims) involves undisclosed evidence that "reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false." *Ibid*. Under this category of constitutional violation a new trial is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid*. (quoting *Agurs*, 427 U.S. at 103). This "could have" standard requires a new trial unless the prosecution persuades the court that the false testimony was "harmless beyond a reasonable doubt." *Ibid*. The caselaw adopting this more stringent standard "is shaped by the realization that 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" *Id*. at 1333-34 (quoting *Giglio*, 405 U.S. at 153).

The Supreme Court of Florida has also held that once the petitioner shows falsity and knowledge, the State "must prove that the presentation of the false testimony was harmless beyond a reasonable doubt," and to meet that standard, "the

State must establish that 'there is no reasonable possibility that the error contributed to the conviction.'" *Guzman v. State*, 941 So.2d 1045, 1050, 1138 (Fla. 2006) (quoting *State v. DiGuillio*, 491 So.2d 1129, 1138 (Fla. 1986)).

The District of Columbia Court of Appeals, citing Justice Blackmun's statement in *Bagley*, explained that "[b]ecause a prosecutor's failure to correct known false or misleading testimony of a government witness violates due process, such failure requires reversal of a conviction unless there is no reasonable possibility that the falsehood affected the jury's verdict." *Woodall v. United States*, 842 A.2d 690, 696 (D.C. 2004) (citing *Bagley*, 473 U.S. at 678-79 n.9). *See also Mitchell v. United States*, 101 A.3d 1004, 1008 (D.C. 2014) ("Once the appellant has made sufficient demonstration of uncorrected false testimony then the burden shifts to the government to 'show, beyond a reasonable doubt, that the false testimony was harmless in the context of appellant's trial.'") (quoting *Longus v. United States*, 52 A.3d 836, 845 (D.C. 2012)).[8]

In *Adams v. Commissioner of Correction*, the Supreme Court of Connecticut explained that the standard for reversal in a false testimony case ("any reasonable likelihood that the false testimony could have affected the judgment of the jury") "is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." 71 A.3d 512,

[8] *But see, Jones v. United States*, 202 A.3d 1154, 1168 (D.C. 2019); *United States v. Nelson*, 217 A.3d 717, 723 (D.C. 2019); *Powell v. United States*, 880 A.2d 248, 257 (D.C. 2005) ("burden is on the appellant to demonstrate that he is entitled to relief").

520 (Conn. 2013). The court reasoned that this "'strict standard of materiality' is appropriate in such cases 'not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.'" *Id*. at 521 (quoting *Agurs*, 427 U.S. at 104).

Prior to *Chapman*, the Illinois state courts "placed the burden on the defendant to show by clear and convincing proof that the testimony was perjured and that it was so material to the issue as to have probably controlled the result." *People v. Bracey*, 283 N.E.2d 685, 689 (Ill. 1972). However, post-*Chapman*, the Illinois high court explained that, while a defendant should have the burden to prove

> that perjured testimony was used in a manner proscribed by *Napue* . . . we do not believe that in line with *Chapman* the defendant can be required to sustain the further burden of proving that the perjured testimony was so material to the issue as to have probably controlled the result . . . or that there was a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id*. at 690.

The court explained, "Once the condumned [sic] use of perjured testimony has been established, *Chapman* dictated that the burden then be placed on the State to establish beyond a reasonable doubt that the perjured testimony did not contribute to the conviction." *Ibid*.

B. The courts of last resort in Florida and Illinois, and the Ninth and Eleventh Circuits, hold *Napue* claims require a cumulative materiality/harm analysis, like *Brady* claims.

The TCCA in Petitioner's case considered only Glaspie's false testimony about Brown's participation in the robbery and not the other false testimony about Brown or Glaspie's false testimony about his incentive to be honest. Thus the TCCA failed

to consider the impact on Glaspie's credibility in general, or his claim that Petitioner shot Jones, in particular.

Like this Court in *Napue*, 360 U.S. at 269, lower courts recognize that exposing a false testimony on one topic undermines the credibility of the witness on others. For example, in *Hayes*, *supra*, the Ninth Circuit considered how the revelation of a secret deal with a prosecution witness would have impacted his credibility including how the State "had falsely buttressed his credibility before the jury" by allowing him to deny the deal it made with him. 399 F.3d at 987-88. Also unlike the court in Petitioner's case, the Ninth Circuit considered how "the State's independent duty under *Alcorta* and *Pyle* … would have … forced [the prosecutor] to disclose to the jury" that it allowed its witness to lie. *Id*. at 988.

The Illinois Supreme Court employed a similar approach in *People v. Olinger*, 176 Ill. 2d 326 (1997), holding that a post-conviction petitioner would demonstrate an entitlement to relief if he proved the prosecution allowed an informant to lie about the favorable treatment he would receive for his testimony. The court found the jury could have found the informant "was unworthy of belief because he had an overwhelming incentive to fabricate testimony." *Id*. at 349.

Recognizing that all *Napue* claims are also *Brady* claims, the Eleventh Circuit follows *Kyles* and evaluates both "'the tendency and force of the undisclosed evidence [of falsity] item by item,'" and, separately, "'its cumulative effect for purposes of materiality.'" *Smith*, 572 F.3d at 1333 (quoting *Kyles*, 514 U.S. at 436-37 n.10).

Similarly, in *Johnson v. State*, 44 So. 3d 51 (Fla. 2010), *as revised on denial of reh'g* (Sept. 2, 2010), the Florida Supreme Court's materiality analysis considered each instance of a jailhouse informant's false testimony, and the prosecutors allowance of it during a suppression hearing, and reliance upon it at trial, and in closing argument. 44 So. 3d at 66-70. The false testimony was material to the sentencing verdict. The informant's false testimony tended to reinforce the prosecution's claim that the crime was deliberate, *id*. at 71-72, and to undermine Johnson's claim that he was mentally ill. *Id*. at 72.

III. This case presents an excellent vehicle for resolving the lower courts' conflicting applications of *Napue*

Like *Napue* itself, Joubert's case reaches this Court after merits review in state court. Texas conceded that the evidence of Glaspie's false testimony had been suppressed, and therefore was not previously available to Joubert. *See* App. 4a; App. 64a. The TCCA found the State's suppression of evidence meant Joubert could not have raised his claim earlier, and accordingly held that under state law, Joubert was entitled to review on the merits. App. 75a. This Court can resolve the split between the lower courts without the adjudicative restrictions applicable to federal habeas review. *E.g.* 28 U.S.C. § 2254(d).

This case also arrives with detailed, undisturbed findings of fact from a trial court. There are no findings of fact adverse to Petitioner. On the contrary, the trial court adopted Petitioner's proposed findings of fact and conclusions of law. App. 4a. Although the TCCA disagreed with the trial court's legal conclusions, it did not reject the trial judge's factual findings. App. 5a.

The TCCA correctly found that Texas conceded that Glaspie had falsely accused Brown. However, the court failed to acknowledge that Texas also conceded that "that the State elicited false testimony from Glaspie *that his testimony was entirely truthful*." State's Amend. FFCL ¶ 57 (emphasis added). The trial court found 11 examples of false testimony in Petitioner's trial. App. 50a-51a. Texas made no objection to those findings. Thus, there can be no dispute before this Court regarding whether the state court failed to consider all of the false testimony that Texas elicited in Petitioner's trial.

Since the District Attorney revealed evidence that Rizzo had confirmed Brown's alibi through telephone records, Texas has not disputed that Rizzo knew Glaspie's testimony was false. On the contrary, as the trial court found, the District Attorney admitted Rizzo was aware of the telephone records corroborating Brown's alibi before he presented Glaspie's testimony that Brown participated in the robbery. App. 37a. The trial court made detailed findings regarding Rizzo's knowledge of the false testimony. App. 52a-55a. Texas did not object to those findings before the TCCA, and that court did not reject them.

In sum, this case presents a clear record of a prosecutor going to extraordinary lengths to frame an innocent man for capital murder, and wrongly attribute a callous lethal shooting to another. This Court should take advantage of this undisputed record to resolve the meaning of *Napue*'s standard and bring consistency to the courts below.

There is at least a reasonably likelihood that Glaspie's lies could have affected the verdict. Jurors had to decide whether to believe Glaspie's false account of himself as the getaway driver and Joubert as the in-store robber who executed Jones, or Joubert's account of himself as the getaway driver. According to the prosecutor, Glaspie told the truth, and Joubert was Jones' "cold-blooded killer." According to Joubert, although he anticipated that Glaspie would kill Jones if the police arrived, he also told police that he participated in the robbery because he believed it would never come to that. The judgment could have turned on the view of a single juror. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020).[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

[9] As to liability, a finding that the State did not meet its burden under *Tison v. Arizona*, 481 U.S. 137 (1981), for whatever reason, would have affected the judgment of the jury. As to sentencing, as this Court observed in *Andrus*, Texas' statutory capital punishment scheme is dependent on a unanimous determination by the jurors that a defendant poses a continuing threat to society, *see* Tex. Code Crim. Proc. Art. 37.071, § 2(b)(1) & (d)(2), as well as a unanimous verdict that there are no mitigating factors that warrant the imposition of a life sentence, *see* Tex. Code Crim. Proc. Art. 37.071, § 2(e)(1) & (f)(2). The failure to reach a unanimous punishment decision results in a default sentence of life imprisonment.

Respectfully submitted,

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