No. 21-6424

IN THE
Supreme Court of the United States

ELIJAH DWAYNE JOUBERT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Should this Court consider a false testimony claim, much of which is not properly before the Court, to address hypothetical conflicts in other courts, not present here because the state court applied the correct and rote materiality standard?

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BRIEF IN OPPOSITION

Respondent, the State of Texas, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Elijah Dwayne Joubert.

STATEMENT OF THE CASE

I. Facts at the Trial

At trial, the evidence showed that "Dashan Glaspie recruited his longtime friend, [Elijah Joubert], and another friend, Alfred Brown, to help him commit robbery at a check-cashing business." *Joubert v. State*, 235 S.W.3d 729, 730 (Tex. Crim. App. 2007). "Glaspie was to act as a lookout while [Joubert] and Brown went inside." *Id.* The next morning, the trio tried to rob one check-cashing business but abandoned the attempt "because the owner had displayed a weapon." *Id.*

The group then went to another check-cashing business. *Id.* "When Alfredia Jones arrived to open the store, [Joubert] approached her at gunpoint and walked her into the store." *Id.* Glaspie and Brown followed afterward. *Id.* While inside, Jones made a call to another store and provided them a surreptitious code indicating a robbery. *Id.* "Police Officer Charles Clark arrived at the scene and entered the store. [Joubert] accused Jones of tipping off the police, and he shot her. The evidence suggested that Brown shot Officer

Clark. Jones and Clark both died as a result of the gunshot wounds." *Id*. Joubert was found guilty of capital murder. 31.RR.134.[1]

II. Facts Relevant to Punishment

A. State's punishment case

At fourteen, Joubert was arrested while carrying a .25 caliber semi-automatic pistol after police received a call about a weapons disturbance. 33.RR.32. For this, he was convicted as a juvenile for aggravated assault with a deadly weapon and unlawfully carrying a weapon, and he received a year of probation. 42.RR.SX.227.

Later that same year, a thirteen-year-old girl confronted Joubert about a rumor that the two were engaged in a sexual relationship. 33.RR.214, 217. Joubert shoved the girl and began to walk away, when she then threw a soda can at him. 33.RR.218, 220. Joubert responded by turning around and hitting her in the eye "like . . . a man." 33.RR.221.

Less than a year later, and while still on probation, Joubert participated in the armed robbery of a grocery store during which an employee was shot in

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[1] The jury was instructed that Joubert could be found guilty of capital murder under two manners and means: (1) murdering Jones while committing or attempting to commit a robbery and (2) murdering Officer Clark and Jones during the same criminal transaction. 2.CR.291–306. Moreover, he could be found guilty as a principal or a party, the latter being permissible if Joubert either intended to promote or assist the offense or engaged in a conspiracy to commit the underlying offense which resulted in the charged offense. 2.CR.291–306. Summarized, the State's theory of Joubert's criminal culpability was exceptionally broad.

the stomach. 33.RR.53, 75. Joubert was convicted as a juvenile for this offense, along with possession of cocaine and marijuana, and sentenced to youth detention. 33.RR.57; 42.RR.SX.226. While in a youth placement facility, Joubert absconded. 33.RR.103. And while on parole, Joubert failed to check in with his parole officer and a warrant for his arrest was issued. 33.RR.124, 127.

A couple years after the grocery store robbery, Joubert shot a man in the leg who had told him to stop selling drugs. 33.RR.85, 87. The man was hospitalized for two days, but the bullet could not be removed causing him discomfort and pain to the then-present day. 33.RR.89, 93. In the weeks following the shooting, Joubert would threaten the man by making hand gestures in the shape of a gun and pointing it toward him. 33.RR.96. He was later convicted of aggravated assault for the shooting and sentenced to four years' imprisonment. 33.RR.98; 42.RR.SX.228.

While incarcerated, Joubert continued his violent ways. He yelled at other inmates, fought with other inmates, tampered with a cell door, refused to work on multiple occasions, argued with a teacher, threatened to beat and rape correctional officers, destroyed state property, and masturbated in public numerous times. 42.RR.SX.228.

After his release, and about five years after the shooting, Joubert traded drugs to borrow a pickup truck. 33.RR.136. After keeping the truck beyond the agreed loan period, the truck owner was able to get it back with the help of his

neighbors who knew Joubert. 33.RR.140. But Joubert returned and stole the truck again, which the truck owner reported to the police. 33.RR.141. While the truck owner was able to retrieve the truck without police intervention, Joubert later followed him to a fast-food restaurant, beat him, and left. 33.RR.145.

That same month, police attempted to stop a car in which Joubert was a passenger and a high-speed chase ensued. 33.RR.227–29. After stopping the vehicle, a police officer smelled marijuana and discovered a pistol in the vicinity of where Joubert was reaching before being removed from the car. 33.RR.229, 231.

The following month, Joubert participated in a revenge killing. 34.RR.96, 126, 189; 35.RR.9–10. Joubert repeatedly shot and killed one man, putting what one witness called a fist-size hole in the victim's head, while a co-conspirator shot another man causing his hospitalization for more than a month. 34.RR.23, 116–17, 190, 251; 35.RR.64. The mother of the deceased testified that he had a young son and was killed on her birthday. 35.RR.84–85.

A few months later, Joubert was driving a vehicle with an expired registration. 33.RR.159. When officers attempted to stop him, Joubert fled, and officers gave chase. 33.RR.160–61. Upon his apprehension, officers noted that Joubert was intoxicated and had marijuana and cocaine on him. 33.RR.164–65.

That same month, Joubert participated in an armed robbery of a convenience store. 33.RR.244, 248, 263. The store manager was struck in the head with a gun and several thousand dollars were stolen. 33.RR.248, 253.

Then, a month later, Joubert shot and killed Jones during the check-cashing-store robbery. Her brother testified that Jones had two children, a ten-year-old son, and a three-month-old daughter at the time of her death. 35.RR.96. As a result, Jones's mother, in her sixties, was raising the two children. 35.RR.98. Her loss deeply affected her mother, brother, and son. 35.RR.101, 103–04.

B. Joubert's punishment case

Joubert's grandmother was young when she had her children, including Joubert's mother, and raised them at times by herself. 35.RR.105–13. Having to support her family, she worked a lot and therefore didn't spend much time with her children. 35.RR.114. She admitted that she wasn't affectionate with her children but tried her best to raise them. 35.RR.124.

She also testified that Joubert's mother was young when she got pregnant and had little help from Joubert's biological father. 35.RR.117–21. She further stated that Joubert's mother started doing drugs decades before the trial started and was doing them up to that point. 35.RR.122.

Joubert's mother confirmed what his grandmother stated—that she was impregnated at young age and had been doing drugs since her teens. 36.RR.7,

11–12. She lived in the Villa Americana apartments for more than a decade, a place that was not good for her or her children to be raised. 36.RR.16–17. While there, her husband was a drug dealer, and she was convicted of cocaine possession. 36.RR.18, 21, 23. She too admitted to not being a good mother—she wasn't there for her kids, instead being "out there with other guys," she didn't help her kids with homework, or take them on vacation. 36.RR.24–25.

Joubert's older sister added more detail to Joubert's youth. 36.RR.35. At the Villa Americana, they witnessed drug dealing and murder. 36.RR.37. Their mother lived with them intermittently, had a drug problem, and was married to a drug dealer. 36.RR.39–44. Her uncles also abused drugs, one went to prison for a violent assault, and a cousin joined him for dealing drugs. 36.RR.48–50. Joubert's friends, she said, were either locked up or dead. 36.RR.51.

She additionally testified that she recalled only once her mother saying that she loved her children, but never hugged them, showed them no affection, and provided them with no support. 36.RR.52. There were no nighttime tuck ins, no homework help, and no weekend activities. 36.RR.54. Joubert's mother beat them with switches, verbally abused them, and would leave them alone, locking them in their apartment. 36.RR.56–61.

Joubert's sister said the family was poor and on government assistance. 36.RR.64. To help supplement income, Joubert began selling drugs around the

age of ten. 36.RR.64–65. He once bought his mother a gift basket and bought the family clothes to attend a funeral. 36.RR.67. Despite helping the family, Joubert's mother still stole from him. 36.RR.68.

To contextualize this background, two experts testified. The first was a master's level social worker. 35.RR.129. She began by describing the stages of development and how the failure to achieve milestones in earlier stages impedes development in the later. 35.RR.129–37. To tie that in with Joubert, she interviewed him, reviewed volumes of documents about him, and spoke with multiple family members of his. 35.RR.138. From this information, she opined that Joubert's childhood was "very neglectful. Parenting being very absent. A sense of being loved and cared about being nonexistent." 35.RR.153.

She continued, stating that Joubert's mother was chronically addicted to drugs and was therefore emotionally unavailable to him. 35.RR.153. He began doing drugs at eleven and selling them at twelve or thirteen, modeling what he had seen growing up. 35.RR.154. Moreover, no one set limits for him, and children need those to believe that their parents care for them. 35.RR.156. Accordingly, she believed that Joubert didn't complete any developmental stage completely or appropriately, and that his neglect was so widespread that he didn't develop psychologically to a place where he could become a functioning, productive adult. 35.RR.164.

The second expert was a clinical and forensic psychologist. 37.RR.33–34. He too reviewed many documents concerning Joubert, and interviewed Joubert, numerous of his family members, and an expert who conducted psychological testing of Joubert. 37.RR.52–53. He stated that, "[w]e are all houses that have been constructed with materials that largely we didn't choose by craftsmen who were our parents and teachers," and that "[c]hoice comes out of who you are and how you were formed." 37.RR.92, 97. And he contextualized Joubert's development by pointing out numerous risk factors, including prenatal exposure to drugs, attention deficit hyperactivity disorder, and delayed development and brain functioning problems. 37.RR.99–104. Further, he was born to a young mother, was emotionally neglected and abused, lacked a father figure, and didn't have an emotional connection with his mother. 37.RR.121–32. He observed family violence, had a chaotic and unstable home life, and there was criminality in his extended family. 37.RR.137–42.

Because of this, Joubert had significant vulnerability to drug and alcohol abuse, certain criminal behaviors were normalized, and so was aggressive behavior. 37.RR.151–61. As a result, Joubert began abusing drugs at a very young age, and he had less self-control and regard for himself and others. 37.RR.161–68. In short, Joubert had no protective factors in his life and was "simply profoundly developmentally damaged as a child and a teen." 37.RR.176–78.

Finally, a prison conditions specialist testified that if Joubert received life imprisonment, his custody level would be high and that Texas prisons are incredibly secure. 39.RR.5–32. Looking at then recent statistics, there were few escapes, homicides, and use of force in comparison to the overall prison population and, in some instances, the statistics were less than comparably sized Texas cities. 39.RR.47–56. After reviewing Joubert's incarceration-related data, he believed that Texas authorities could safely house Joubert. 39.RR.59. After considering the evidence, the jury answered the punishment special issues in such a way that Joubert was sentenced to death. 40.RR.3.

III. Joubert's Postconviction Litigation

Joubert's conviction and sentence were upheld on direct appeal by the Texas Court of Criminal Appeals (CCA). *Joubert*, 235 S.W.3d at 730–35. The CCA also denied Joubert's initial state habeas application. *Ex parte Joubert*, No. WR-78,119-01, 2013 WL 5425127, at *1 (Tex. Crim. App. Sept. 25, 2013).

Joubert then turned to federal court. Petition for Writ of Habeas Corpus by an Inmate in State Custody 1–137, *Joubert v. Lumpkin*, No. 4:13-CV-3002 (S.D. Tex. Sept. 24, 2014), ECF No. 19. This is where Joubert first raised claims that the State presented false testimony via Glaspie. *Id.* at 38–49. Because that and some other claims had never been presented in state court, the district court granted a stay of the proceeding and placed the case in abeyance to

permit state court exhaustion. Order, *Joubert v. Lumpkin*, No. 4:13-CV-3002 (S.D. Tex. Oct. 15, 2015), ECF No. 41.

Joubert filed his subsequent state habeas application. 1.SHCR-02, at 2–175. Relevant here, Joubert alleged that "[t]he State violated . . . Due Process of Law by presenting false and misleading testimony through co-defendant Dashan Glaspie relating to Alfred Brown's participation in the robbery, and by falsely vouching for Glaspie's credibility based on the zero-tolerance plea agreement which was premised upon Glaspie's complete truthfulness." 1.SHCR-02, at 52, *see also* 1.SHCR-02, at 44–60. The CCA found that Joubert overcame the bar on subsequent applications, so it was remanded the to the trial court for merits consideration. *Ex parte Joubert*, No. WR-78,119-02, 2016 WL 5820502, at *1 (Tex. Crim. App. Oct. 5, 2016).[2]

Considering the merits, the state habeas trial court recommended denial of relief, and the record and proposed findings were forwarded to the CCA. 1.Supp.SHCR-02, at 96–122. The CCA, however, remanded the case to consider additional developments and evidence. Order, *Ex parte Joubert*, No. WR-78,119-02 (Tex. Crim. App. June 12, 2019). On remand a second time, the trial

[2] The CCA authorized "consideration of Claims One and Two." *Ex parte Joubert*, 2016 WL 5820502, at *1. Claim One was Joubert's false testimony claim and Claim Two was Joubert's suppression of evidence claim. 1.SHCR-02, at 44–60 (Claim One), 60–71 (Claim Two). Because Joubert does not raise any complaint concerning the *Brady* claim, the State does not further discuss it.

court reversed course, recommended that relief be granted, and a supplemental record was sent to the CCA. 3.Supp.SHCR-02, at 3–71. The CCA disagreed with the trial court's recommendation. *Ex parte Joubert*, No. WR-78,119-02, 2021 WL 2560170, at *2 (Tex. Crim. App. June 23, 2021).

With respect to Joubert's "*Napue* claim," the CCA laid out the legal standard: "[Joubert] must show by a preponderance of the evidence that (1) false testimony was presented at his trial and (2) the false testimony was material to the jury's verdict." *Ex parte Joubert*, No. WR-78,119-02, 2021 WL 2560170, at *2. It then held that it was "not reasonably likely that Glaspie's false testimony about Brown's participation in the offense affected the judgment of the jury in [Joubert's] case." *Id.* In so holding, it reiterated the materiality standard: "false testimony is 'material' only if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Id.* (citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014)). As such, on its "own review, [the court] den[ied] relief." *Id*. Joubert now seeks a writ of certiorari off this decision. Pet. Writ Cert. 1–40. He doesn't deserve one.

REASONS FOR DENYING THE WRIT

I. The State Court Applied the Correct Rule and Joubert Simply Disagrees with the Result, but That Provides Little Reason for Further Review.

Joubert complains that the CCA misapplied this Court's false testimony precedent in three ways: (1) it didn't require the prosecution to know that the testimony was false; (2) it didn't assess materiality cumulatively; and (3) it applied a preponderance standard when assessing materiality. Pet. Writ Cert. 22–24. He's wrong on all counts.

First, it's true that the CCA has found due process violations even when the prosecution *unknowingly* presented false testimony. *See, e.g.*, *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011) ("This Court allows applicants to prevail on due-process claims when the State has unknowingly used false testimony."). But that is not an oversight, it's a purposeful choice by the CCA to read due process more broadly. And while the State believes that the CCA's wrong on this point, *see Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting) ("We have never held that [false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity], and we are unlikely ever to do so."), it matters not where the erroneous interpretation *lightened* Joubert's elemental burden—he had to prove only two prongs (falsity and materiality) to garner relief, rather than the typical three (falsity, knowingness, and materiality). Stated differently,

Joubert *benefited* from the CCA's due process interpretation, so he can hardly complain about that matter here.[3]

Second, while the CCA didn't consider the cumulative impact of all the alleged falsities, there's good reason—Joubert didn't plead multiple instances of false testimony in his habeas application. Rather, he pled that "the State presented false and misleading testimony through its star witness, Dashan Glaspie, not simply to convict . . . Joubert, but, more importantly, to support a death sentence against him for being the individual to have caused . . . Jones's death during the botched robbery." 1.SHCR-02, at 53; *see also* 1.SHCR-02, at 54 ("[T]he State knew Glaspie was not telling the truth, at least with respect to such a key aspect of his testimony as [to] Brown's participation, and, by extension, Brown shooting Clark."); 1.SHCR-02, at 56 ("To compound Glaspie's false testimony, the prosecutor specifically compounded the error by emphasizing Glaspie's veracity through the zero-tolerance plea bargain."); 1.SHCR-02, at 57 ("Absent the assurances conveyed to the jury from Glaspie's plea agreement, the jurors might have concluded that Glaspie had gotten away with murder."). Reviewing what was before it, the CCA authorized merits

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[3] To be clear, the State *would* challenge the CCA's wrongful interpretation of the Due Process Clause as a basis to sustain its judgment should further review occur, though it would not matter as the CCA assumed that Glaspie testified falsely about Brown's participation in the capital murder and therefore had no reason to decide knowledge given its interpretation of due process. *See Joubert*, 2021 WL 2560170, at *2 (noting the State's concession of falsity, but not adopting the trial court's proposed findings or independently make a finding itself). The State does not waive this point.

consideration of only "Claim[] One . . . in which [Joubert] alleged that the State . . . presented Glaspie's false testimony about Brown's participation in the offense." *Ex parte Joubert*, 2021 WL 2560170, at *1. In short, Joubert alleged only that Glaspie testified falsely, no one else, and that's all the CCA authorized when it remanded the case for merits adjudication. This is important because a Texas capital habeas applicant may not amend his or her claims after a timely initial or authorized subsequent filing because it is considered abusive.[4] *See, e.g.*, *Ex parte Graves*, 70 S.W.3d 103, 110 n.24 (Tex. Crim. App. 2002) ("As noted above, this is actually applicant's fourth habeas [application], as he made his present claims only in an 'amended' second subsequent habeas [application]."). Here, Joubert attempted to amend his false testimony claim, thereby adding additional claims of falsity, without going through the statutory authorization process.[5] *See* Tex. Code Crim. Proc. art. 11.071 § 5.

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[4] This is hardly a unique system. The federal court analogue is an attempt to bring new claims after final judgment or plead new claims after circuit court authorization of a second or successive petition. *See, e.g.*, *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005).

[5] Not only does Joubert's failing to raise these additional claims of false testimony explain why the CCA didn't cumulate them for purposes of materiality, but it means that the Court either cannot or should not reach them because they were neither appropriately raised or passed upon by the CCA. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 217–24 (1983).

During his subsequent state habeas proceeding, Joubert obtained new counsel because his initial attorney accepted a job precluding private representation of clients. 2.Supp.SHCR-02, at 7–11; 3.Supp.SHCR-02, at 1. The new attorney, in her proposed findings, expanded Joubert's assertions of falsity, 3.Supp.SHCR-02, at 46–47, well beyond what was pled in his application and what the initial counsel asserted in his proposed findings, 1.Supp.SHCR-02, at 125–51. Through these proposed findings, Joubert attempted to amend his false testimony claim beyond Glaspie's testimony thereby raising new claims.[6] But that went beyond what the CCA authorized for merits consideration, so the CCA didn't consider Joubert's new claims of false testimony. *See, e.g.*, *Ex parte Graves*, 70 S.W.3d at 110 n.24. Should he desire merits consideration of his new claims of false testimony, there's a proper path. Tex. Code Crim. Proc. art. 11.071 § 5. This process should not be difficult to engage as he obtained authorization in this very case, just not on his new falsity claims. *Ex parte Joubert*, 2016 WL 5820502, at *1. Ultimately, what Joubert calls error in cumulating falsity is really his attempt to surreptitiously raise new claims without authorization.[7]

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[6] Joubert's new false testimony claim was so capacious that he claimed even *he* provided false testimony. 3.Supp.SHCR-02, at 46 ("The Court finds that [Joubert's] recorded statement concerning . . . Brown's participation and involvement in the offense was false.").

[7] The reason the CCA didn't cumulate falsity is entirely independent of whether it *should* cumulate when properly presented with multiple findings of falsity. Indeed,

Third, Joubert's effort to find error in the CCA's materiality review misreads the CCA's opinion and its precedent. When summarizing Joubert's false testimony claim, the CCA cited *Napue*. *Ex parte Joubert*, 2021 WL 2560170, at *1 (citing *Napue v. Illinois*, 360 U.S. 264 (1959)). The court, in fact, used shorthand when referencing Joubert's false testimony claim, calling it a "*Napue* claim." *Id.* at *2. Addressing materiality, it found that it was not "*reasonably likely* that Glaspie's false testimony about Brown's participation in the offense affected the judgment of the jury." *Id.* (emphasis added). And it reiterated, in its citation to law on materiality, that "false testimony is 'material' only if there is a '*reasonable likelihood*' that it affected the judgment of the jury." *Id.* (emphasis added) (citing *Weinstein*, 421 S.W.3d at 664). The materiality standard used by the CCA is plucked straight from *Napue*. *Compare id.*, *with Napue*, 360 U.S. at 271 (requiring a new trial if "the false testimony could . . . in any *reasonable likelihood* have affected the judgment of the jury" (emphasis added)). Unless there is a requirement that a court say the standard thrice, the CCA identified and applied the right one.

Joubert implicitly concedes that this Court has never required cumulation in such cases—he points to only circuit and state precedent. *See* Pet. Writ Cert. 35–37. But where this Court is clear on cumulation, like when assessing suppression, the CCA listens, including in his very case. *Ex parte Joubert*, 2021 WL 2560170, at *2 (considering suppressed evidence "collectively"). But it's a moot point here because Joubert had but a single allegation of falsity properly before the CCA.

Nonetheless, Joubert tries to convince the Court that the CCA utilized a preponderance standard on top of, or instead of, the reasonable likelihood standard that it explicitly stated twice. Pet. Writ Cert. 4, 24–29. He does this by misreading the CCA's opinion in this case and then, in a novel argument, pointing to other CCA cases as if they are character in conformity evidence—because the CCA didn't use the right standards in other cases, it didn't use the right standard in this case. *Id*. He's wrong on both counts.

As to the former, the CCA did not replace the reasonable likelihood standard with a preponderance standard. Rather, it noted that Joubert bore an evidentiary burden, "a preponderance of the evidence," to prove that "false testimony was presented at his trial." *Ex parte Joubert*, 2012 WL 2560170, at *2. "In context, . . . this statement is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions." *Holland v. Jackson*, 542 U.S. 649, 654 (2004) (per curiam). To be sure, if the CCA had created any ambiguity when spelling out the elements of how it interprets a *Napue* claim, the word "preponderance" isn't used elsewhere in the opinion, let alone when explaining or applying the materiality standard. *Ex parte Joubert*, 2012 WL 2560170, at *1–2. To read it as Joubert suggests "would needlessly create internal inconsistency in the opinion." *Jackson*, 542 U.S. at 654. The CCA did not require Joubert to preponderate a different result in applying *Napue* materiality.

As to the latter, his unique attempt at using conformity evidence as judicial review falters. At the outset, he provides no authority that his proposed form of review—using alleged error in other cases to demonstrate error in this case—has been accepted by this or any court. What Joubert is trying to do wouldn't be permissible under the Rules of Evidence, *see* Fed. R. Evid. 608(b), and the State has been unable to find any judicial endorsement of this behind-the-curtain review. State courts deserve more respect than that. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) (requiring respect for state court opinions "unless it is an obvious subterfuge to evade consideration of a federal issue"). They, like any court, might be wrong at times, but comity requires a presumption of good faith. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) ("Intervention . . . is also a direct aspersion on the capabilities and good faith of state appellate courts."). In any event, none of Joubert's cherry picking proves his point.

In his first cited case, *Ex parte Robbins*, the CCA explicitly used the *Agurs* definition of materiality, explaining the falsity "must have been material to the defendant's conviction, meaning 'there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011) (quoting *United States v. Agurs*, 427 U.S. 97, 103–04 (1976)). While the CCA acknowledged in a footnote that it has "used the language of 'more likely than not' in lieu of 'reasonable

likelihood,'" *id*. at 459 n.13 (citing *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009)), it didn't use that formulation in either *Ex parte Robbins* or this case. Regardless of its acknowledgment that it had in the past used imprecise language, rather than imprecise analysis, the case referenced by the CCA was an *unknowing* use of false testimony case, *Ex parte Chabot*, 300 S.W.3d at 771 ("[T]he present case involves unknowing, rather than knowing, use of [false] testimony."), thereby failing to implicate an erroneous interpretation of this Court's materiality standard, *see Maxwell*, 132 S. Ct. at 615; *Pierre v. Vannoy*, 891 F.3d 224, 227 (5th Cir. 2018) ("[N]o Supreme Court case holds specifically that [State] knowledge is *not* required." (second alteration in original)).

Joubert's second cited case, *Ex parte De La Cruz*, is also an *unknowing* use of false testimony case. *Ex parte De La Cruz*, 466 S.W.3d 855, 865 (Tex. Crim. App. 2015) ("[T]he legal basis underlying applicant's claim, this Court's recognition of a due-process violation stemming from the State's unknowing use of false testimony, was not firmly established by this Court until its 2009 opinion in *Ex parte Chabot*."). So yet again, Joubert presents the Court with an opinion having no bearing on the standard it has set out, although there was no misapplication of *Napue* materiality in *Ex parte De La Cruz* regardless.

The applicant in *Ex parte De La Cruz* claimed that the victim was killed where his body was found, rather than the State's theory of a body dump, and

thus the State's theory was therefore false testimony. *Id.* at 858. Evidence supporting both theories was presented to the jury. *Id.* at 858–61. In habeas, a second expert agreed with the defense's trial expert that the body had not been moved. *Id.* at 861–63. After finding no falsity, *id.* at 867–71, the CCA alternatively found no materiality, in part because "the jury could have convicted [the defendant] even if it" believed "that the shooting occurred [where the body was found] while also believing that portion of [the eyewitness's] testimony identifying [the defendant] as the person who caused [the victim's] death," *id.* at 871. Rather than substituting legal sufficiency for materiality, the CCA was noting that the claimed falsity was not a particularly important matter vis-à-vis the defendant's guilt. This is hardly a revelation in terms of materiality review. *Cf. Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."), *disapproved on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991). Indeed, it proves that the CCA understands *Napue* materiality.

After trying to use *Ex parte Robbins* and *Ex parte De La Cruz* as judicial conformity evidence, Joubert then points out that it's easier to prevail under *Napue* than *Brady*, materiality-wise. Pet. Writ Cert. 26–29. In this very case, the CCA was aware of the distinction between these types of materiality tests,

laying out the "reasonable likelihood" standard for the former and the "reasonable probability" standard for the latter. *Ex parte Joubert*, 2021 WL 2560170, at *2. Nevertheless, the CCA has explicitly acknowledged the difference in other cases. *See, e.g.*, *Thomas v. State*, 841 S.W.2d 399, 403 (Tex. Crim. App. 1992) ("[I]n situations of the knowing use of perjured testimony the Court retained the harmless error standard. . . . [F]or situations where the prosecutor failed to disclose favorable evidence . . . '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.'" (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985))). While it's not entirely clear the point that Joubert is trying to make, if it's that materiality is easier to prove under *Napue* than *Brady*, the CCA understands.

All the above is to say, the CCA didn't err in identifying the proper materiality standard applicable to Joubert's false testimony claim. Clearing through the smoke, all that remains is a request for error correction. That, however, is hardly an adequate justification for expending limited judicial resources on a ubiquitous claim. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring) ("[W]e rarely grant review where the trust of the claim is that a lower court simply erred in applying a

settled rule of law to the facts of a particular case."). That is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). There's no reason to deviate from the Court's mainstream practice in this case, especially where further litigation in federal court is a guarantee, *see infra* Reasons for Denying the Writ III, so no writ of certiorari should issue.

II. Joubert's Claimed Conflicts, to Whatever Extent They Exist, Have No Relevance to This Run-of-the-Mill Case.

Joubert claims that the CCA's unpublished and brief opinion conflicts with other cases on whether (1) *Napue* materiality is lower than *Brady* materiality; (2) whether *Napue* materiality is equivalent to the *Chapman* harm standard and, if so, which party shoulders the burden; and (3) whether *Napue* materiality requires cumulative error assessment. These are all interesting, but ultimately academic matters, because none were decided in this case.

Joubert's argument seems designed to draw this case into the ambit of the certiorari grant in *Brown v. Davenport*, 141 S. Ct. 2465 (2021). There, the interplay of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and *Chapman v. California*, 386 U.S. 18 (1967), viewed through the lens of 28 U.S.C. § 2254(d), may be decided. *See, e.g.*, Petition for a Writ of Certiorari i, *Brown v. Davenport*,

No. 20-826 (U.S. Dec. 14, 2020). Joubert tries to tie that certiorari grant into this case—"That raises the question whether a habeas petitioner who has satisfied *Napue*'s 'any reasonable likelihood' standard must also satisfy *Brecht*." Pet. Writ Cert. 30. But it doesn't, at least not in this case, because *Brecht* is a federal habeas standard, as Joubert admits, and has no play here. *Id*. ("*Brecht* adopted for purposes of federal habeas cases the standard applied to non-constitutional errors in direct appeals."). If this case finds itself back in front of the Court at the end of *federal* habeas, then maybe it would be an appropriate time to address that question, but not now, not from state court where *Brecht* doesn't apply. The Court should not grant certiorari to review a red herring.

It's difficult to understand the remainder of Joubert's alleged conflicts. He says that all the federal circuits to have addressed whether *Napue* is easier to meet than *Brecht* have concluded that it is. Pet. Writ Cert. 30–31. Again, not relevant here since the CCA doesn't apply *Brecht*—it's a *federal* habeas harm standard. Joubert's real point may be that because these courts have noted it's easier to grant relief on a *Napue* claim than on one subject to *Brecht*, the CCA erred because it should have readily granted relief. *See id*. at 31. But that's not a conflict between this case and circuit precedent, that's just Joubert's opinion that relief should have been granted here. In other words, he's asking for mere

error correction. As explained above, that's not a reason to grant certiorari review. *See supra* Reasons for Denying the Writ I.

Then Joubert notes that many states have placed the burden on defendants to show *Napue* materiality. Pet. Writ Cert. 31. He doesn't say whether this is wrong or right, so the State isn't certain what his point is. *Cf. id.* ("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."). It appears that the real point may be Joubert's desire to reiterate that *Napue* materiality is "such a low bar that [it] is 'readily shown'" and, therefore, the CCA *must* have gotten it wrong. *Id.* (quoting *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003)). Once more, this reflects disagreement with the CCA's decision, not an actual conflict between the CCA or any other court (unless every decision presents a conflict when a petitioner believes another court might have decided the matter differently).

Entirely absent from Joubert's scholarly review of *Napue* materiality law is how it has any impact on this case. He doesn't suggest that the CCA decided these discrete issues, nor could he—the short, unpublished opinion denying Joubert habeas relief mentions not a one, probably because he didn't brief them. What Joubert appears to be saying is that there are conflicts between

other courts regarding *Napue* materiality, so those issues are necessarily wrapped up in the CCA's decision because it applied *Napue* materiality too. That stretches this Court's "passed upon" jurisprudence to a breaking point, meaning every case to apply a ubiquitous claim standard includes every hypothetical conflict in the entire nation. The Court should reject Joubert's attempt to eviscerate an important reason for exercising certiorari review—to adjudicate *actual* conflicts addressed in the case before the Court.

In his final alleged conflict, Joubert says that several courts require a cumulative materiality assessment in false testimony cases. Pet. Writ Cert. 35–37. That is well and fine, but it is not an issue here. As explained above, the only claim before the trial court, and the only claim adjudicated by the CCA, was whether Glaspie falsely testified about Brown's participation in the double murder. *See supra* Reasons for Denying the Writ I.[8] With nothing else before it, there was nothing to cumulate. *See, e.g.*, *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero."). There is no conflict between this case and any of the others identified by Joubert because

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[8] Later, Joubert asserts that "there can be no dispute before this Court regarding whether the CCA failed to consider all of the [alleged] false testimony." Pet. Writ Cert. 38. "Failed" suggests that the CCA overlooked or ignored this evidence, but as explained above, it was not cumulated because it was not properly before the court. *See supra* Reasons for Denying the Writ I. Correcting Joubert's argument, it should read, the CCA did not "consider all of the false testimony" allegations because Joubert didn't present them in a procedurally proper manner by raising them in his habeas application and seeking authorization from the CCA to consider these claims on the merits.

the CCA had no reason to address the matter. A writ of certiorari should not be granted on an illusory conflict.

III. The Prudent Path Is the Normal Path—Allowing Federal Habeas Proceedings to Resume—Because This Case Is a Horrible Vehicle to Decide Anything.

This case comes to the Court off a subsequent state habeas proceeding that occurred because of a federal stay. *Ex parte Joubert*, 2021 WL 2560170, at *1. What was started should now be allowed to finish. Congress expressed its preference for limited federal review of state habeas proceedings by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner."). This deference is at its zenith when a state court applies the correct law. *Id.* (describing the AEDPA standard of review as "difficult to meet" and requiring "state-court decisions be given the benefit of the doubt"). As discussed above, that happened here. *See supra* Reasons for Denying the Writ I. Limited federal review, the normal course of things, should now be permitted to resume.

Indeed, "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." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). And that is because "the Court usually deems

federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." *Id*. The same is true here, especially given Congress's codification of comity and federalism expressed in AEDPA. "[I]t is appropriate for this Court to deny this application for review of the State's denial of collateral relief and thus clear the way for the prompt [re-]initiation of federal habeas corpus proceedings." *Id*.

Clearing the path for federal review has even more weight in this case. The CCA, in denying relief, did not adopt the habeas trial court's proposed findings. In Texas's postconviction system, the CCA, where writs are exclusively returnable in felony convictions, "is the ultimate factfinder in habeas corpus proceedings." *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). Thus, the proposed trial court findings that Joubert so heavily relies upon are a legal nullity as the CCA denied relief "[b]ased upon [its] own review," not the trial court's review. *Ex parte Joubert*, 2021 WL 2560170, at *1. As such, this Court has no explicit factual findings to review, just a limited record with no adversarial testing of the evidence. That is problematic because this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and to decide the matters here, the Court would be thrust into the role of factfinder. That too is problematic because this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Court should not break with the norm

to grant certiorari review here and it should allow the federal habeas process to continue.

Nonetheless, Joubert believes that this is "an excellent vehicle for resolving the lower courts' conflicting applications of *Napue*." Pet. Writ Cert. 37. Notably absent is any argument that the CCA expressly decided something in conflict with these "lower courts," so Joubert, in fact, asks for an advisory opinion. But that is not what this, nor any of the federal courts, do. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions,' are the requisite." (quoting *United Pub. Workers of Am. (C.I.O) v. Mitchell*, 330 U.S. 75, 89 (1947))).

Setting aside Joubert's request for an advisory opinion, he claims that this case arrives with "undisturbed findings of fact from a trial court." Pet. Writ Cert. 37.[9] That's true to the extent that they weren't adopted by the CCA and therefore have no relevance to its adjudication or at all. Suggesting otherwise is like suggesting that a federal magistrate's proposed findings and

[9] Joubert seems to suggest that the legally irrelevant proposed findings of the trial court have weight because prosecutors did not object to them. Pet. Writ Cert. 38. That is not atypical, nor does it have or add weight, because matters "not admitted by the state are deemed denied." Tex. Code Crim. Proc. art. 11.071 § 7(b). Prosecutors' postconviction silence is not agreement under Texas law.

recommendations have weight on appeal even if not adopted by the district court. "Undisturbed," here, means legally null, and it also means that the Court would need to become a fact finder to decide the matters before it. The Court should reject that unfamiliar role and permit the matter to proceed in federal district court where such matters may be hashed out in adversarial litigation, including possible factual development that is lacking here.

IV. The CCA Not Only Applied the Correct Law but It Also Came to the Right Decision.

Joubert spends little time on whether the CCA's decision was right. Maybe that's because he knows error correction is not a persuasive justification for this Court's review and that's why he instead puts his effort into disguising his error correction request as conflict. Regardless of the reason he pays so little attention to this issue, the CCA's denial of *Napue* relief was correct.

As discussed above, the State's theory of criminal culpability was broad. 2.CR.291–306. There are myriad ways that Joubert was criminally liable for either his conduct or the conduct of Glaspie, assuming that Brown[10] is entirely

[10] All of Joubert's allegations of false testimony stem from a *belief* that Brown is actually innocent. That matter has not been litigated adversarially nor has a court issued findings on the matter. Rather, what exists is an order dismissing Brown's capital murder indictment because a prosecutor *believed* he was actually innocent. *In re Brown*, 614 S.W.3d 712, 715 (Tex. 2020). This type of order is one way to prove entitlement to compensation for time spent in prison. *Id.* at 716 ("Brown seeks compensation under [Texas Civil Practice and Remedies] Section 103.001(a)(2)(C), which requires that . . . . the district court's dismissal order is based on a motion to dismiss in which the state's attorney states that [i] no credible evidence exists that inculpates [Brown] and . . . [ii] the state's attorney believes that [he] is actually

removed from the mix, because of his admitted conduct or because he promoted or assisted the conduct of Glaspie or engaged in a conspiracy to commit the underlying conduct and a murder ensued. *See* 31.RR.15 ("But who the shooter was today is not a dispositive issue. Let me say that again. Who shot Ms. Jones and shot [Officer] Clark today is not a dispositive issue."), 17 ("The law of parties, law of conspiracy, inculpates all three of these suspects."), 25 ("[I]n the end it makes no difference today because [Joubert] still can be held criminally responsible for this offense. He is involved in this capital murder. He bears responsibility for those deaths."), 26 ("[Y]ou may believe that with the law of parties and the law of conspiracy that he's guilty of both ways of committing that offense."), 39 ("[T]he State of Texas is up here asking you-all not to focus so much on the killer.").

Given this broad theory of criminal responsibility, the evidence was exceptionally strong—Joubert *confessed* to participating in a robbery where a

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innocent of the crime for which [he] was sentenced." (alterations in original) (emphasis added)). There is significant evidence to believe that the prosecutor got it wrong. For example, the supposedly exculpatory phone call from Brown's girlfriend's place to her employer is actually inculpatory because it was, in fact, a three-way call from the home where the trio went after the murders. Defendant Harris County's Rule 12(b)(6) Motion to Dismiss Claims Related to Alleged Brady Violations 7–14, *Brown v. City of Houston*, No. 4:17-CV-1749 (S.D. Tex. May 8, 2018), ECF No. 61. For purposes of this appeal, it is neither here nor there. What really matters is that there is no direct appeal or collateral relief opinion explaining why Brown is actually innocent and the State does not believe he is. This disagreement with the fundamental premise of Brown's false testimony claim is another reason why federal habeas should be allowed to proceed.

murder occurred and was foreseeable. 1.Supp.SHCR-02, at 66–77. Texas's party liability laws make that confession a capital murder confession.[11] And "[a] defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him.'"[12] *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) (quoting *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting)); *see also id*. at 313 (Kennedy, J., concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would

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[11] Under the broad criminal liability theories on which the jury was instructed, Joubert's confession to participating in the robbery was a confession of capital murder in at least three ways: (1) promoting and assisting in the killing of Jones (Joubert walked her into the store and knew she'd die if the police came), (2) engaging in a conspiracy to rob Jones, her murder occurring in the course of a robbery or attempted robbery (he agreed to work with Glaspie to commit a robbery and Jones was shot and killed during the offense), and (3) engaging in a conspiracy to rob Jones, with her and Officer Clark being murdered in the same criminal transaction (he agreed to work with Glaspie to commit a robbery and Jones and Officer Clark were shot in the same criminal transaction during the offense).

[12] It's worth noting that during Brown's state habeas proceeding, Joubert said that Brown didn't participate in the murders and could say this because Joubert had "personal knowledge of the facts and circumstances before, during, and after the incident at [the] check cashing [store] on April 3, 2003." Affidavit of Elijah Dewayne Joubert, *Ex parte Brown*, No. WR-68,876 (351st Dist. Ct., Harris County, Tex. May 29, 2008). In other words, Joubert was able to exculpate Brown because *he participated in the murders*, so he knew who was there or wasn't. Joubert recanted his exculpatory-to-Brown statement, saying that he was promised $2,000 in exchange for it. Exhibit A-5, *Brown v. City of Houston*, No. 4:17-CV-1749 (S.D. Tex. May 8, 2018), ECF No. 108-1.

have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.").

In the factually related but analytically separate *Brady* claim, the CCA acknowledged the power of confessions and the breadth of the State's criminal liability theory:

> The State presented evidence that three people participated in the instant offense. Glaspie and [Joubert] named Brown as the third participant, but the true identity of the third participant does not ultimately matter in light of [Joubert's] own statement to the police. [Joubert] admitted that he actively participated in the offense and he knew Jones was "gonna" die if the police came to the scene. Therefore, the suppressed evidence supporting Brown's alibi does not undermine our confidence in the outcome of [Joubert's] trial.

Ex parte Joubert, 2021 WL 2560170, at *2. The Court has acknowledged both as well, the latter specifically in terms of *Brady* materiality. *See Strickler v. Greene*, 527 U.S. 263, 292 (1999) ("More importantly, however, petitioner's guilt of capital murder did not depend on proof that he was the dominant partner: Proof that he was an equal participant with [a co-conspirator] was sufficient under the judge's instructions. Accordingly, the strong evidence that [the co-conspirator] was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.").

On top of that, eyewitnesses testified to seeing Joubert as part of the conspiracy. Latonya Hubbard testified that she saw Joubert and Glaspie, as

part of a trio[13] and with a white sedan, at a gas station between 7:00 AM and 8:00 AM the day of the murders. 26.RR.182–85. The gas station was near a check-cashing store where there had been an attempted robbery around 7:30 AM, which the owner of the store described. 26.RR.161–69, 182. Joubert admitted that he participated in this failed robbery. 27.RR.215. Then, at around 8:15 AM, Alisha Hubbard saw Joubert and Glaspie, again as part of a trio,[14] in the parking lot of the Villa Americana apartments near a white sedan. 26.RR.203–06. She heard Glaspie say, "Are y'all ready to go do it?" 26.RR.207. In short, there is overwhelming evidence that Joubert is guilty as a party and had Glaspie been impeached regarding Brown's alleged lack of participation, it would not have affected the jury's decision on guilt. *See Strickler*, 527 U.S. at 292.

Moreover, Glaspie testified about the aborted robbery and return to the Villa Americana in a white sedan, 29.RR.23, 28–33, then going to a second check cashing where Jones and Officer Clark were murdered, the former by Joubert, 29.RR.41–65, and then coming back to the Villa Americana and disposing of Jones's murder weapon, 29.RR.69–75. Glaspie's description of the murders, and the before and after, is corroborated by the other evidence

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[13] Latonya Hubbard testified that Brown was the third participant. In his state habeas proceeding, she recanted her identification of Brown. 3.SHCR-02, at 620–21.

[14] Alisha Hubbard testified that Brown was the third person she saw. She later retracted her sighting of Brown in his state habeas proceeding. 1.SHCR-02, at 55.

presented. He described the attempted robbery of the first check cashing store, 29.RR.28–33, which lined up with the store owner's and Latonya Hubbard's testimony, 26.RR.161–69, 182–85. After the failed robbery, he said they went back to the Villa Americana to regroup, 29.RR.33–34, consistent with Alisha Hubbard's testimony, 26.RR.203–06. After driving out to the location of the second check cashing store, Glaspie said two of the trio, including himself, went into a furniture store to await the check cashing store's opening, which was supported by the furniture store's employees, 26.RR.242–50, 278–83. He also admitted to passing off the weapon used to kill Jones to someone at the Villa Americana after the murders, 29.RR.71, leading to its recovery with a convoluted provenance, 26.RR.226–36, 257–68; 27.RR.4–22, 46–61, 73–82, 93–98, 178–80. And then he described the trio going to a particular apartment, 29.RR.73–75, which was confirmed by the *defense's* witness, 30.RR.35–48.[15] This generally lined up with the phone activity from Joubert and Glaspie's cell phones and it was consistent with the cash store's security data. 29.RR.214–27, 238–44, 250. In short, Glaspie's testimony was well corroborated and therefore powerful evidence of Joubert's guilt even if impeached by Brown's

[15] The defense called this witness because he overheard Glaspie on a telephone call say that he killed Jones. 3.RR.46. He also testified that Brown was with Joubert and Glaspie following the murders but recanted his observation of Brown in Brown's state habeas proceeding. 3.SHCR-02, at 623–24.

supposed non-participation.[16] *See Strickler*, 527 U.S. at 293 ("Furthermore, there was considerable forensic and other physical evidence" that powerfully supported "the conclusion that two people acted jointly to commit a brutal murder.").

But that is not to say that Glaspie wasn't impeached, because he was. 29.RR.84–166. For example, Joubert's counsel pointed out that Glaspie didn't provide a written statement until a year after the murders, that the statement was created with his attorneys and the police, and that he had been studying it for his testimony. 29.RR.84–88. Counsel also pointed out that Glaspie faced either life imprisonment or death for his participation in the murders, that his trial was first in line but didn't go forward because he struck a deal, and that now he could get parole out of prison in fifteen if he stuck "with the script." 29.RR.89–92. Counsel then meticulously went through Glaspie's initial interview with the police, pointing out lie after lie after lie. 29.RR.97–114. So much so that Glaspie admitted that almost everything he initially told the police was not true. 29.RR.169. And then counsel questioned the believability of his story, using other evidence to cast doubt on it. 29.RR.138–66. Thus, any

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[16] Indeed, at the close of the guilt-innocence phase, counsel argued, amongst other things, that Glaspie wasn't believable and that he killed Jones, see 31.RR.38–92, but "[i]dentification [of the participants] was never a question." 31.RR.63; *see also* 31.RR.67 ("And we know that all three individuals were there, but what we don't know is what happened."), 94 ("We're not asking for not guilty. We're just saying in this case find . . . Joubert guilty of aggravated robbery.").

additional impeachment of Glaspie with Brown's alleged non-participation would have been cumulative and not impactful. *See Turner v. United States*, 137 S. Ct. 1885, 1894 (2017) ("With respect to the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial."). Accordingly, the CCA was correct to hold that there was no reasonable likelihood it affected the jury's decision as to Joubert's guilt even if Glaspie's testimony about Brown's participation was false.

The same is true regarding Joubert's sentence of death. The *Edmund–Tison* jury instruction given at punishment permitted a death sentence if Joubert killed Jones or Officer Clark or, if he didn't, that he intended to kill them or anticipated that a life would be taken. 2.CR.322. As mentioned above, the jury already had the competing theories that either Joubert or Glaspie killed Jones. But there was physical and forensic evidence supporting Glaspie's account that Joubert killed Jones. For one, Glaspie testified that Joubert grabbed Jones by her clothing as he moved her throughout the check cashing store. 29.RR.59–60. This was supported by a four-inch tear under the right armpit of Jones's dress, consistent with being pulled. 28.RR.98–101. By contrast, Joubert said Glaspie held Jones by the back of her neck, not her clothing. 1.Supp.SHCR-02, at 73–74. For another, during his interview with the police, Joubert demonstrated how Glaspie supposedly shot Jones from a

distance of less than a foot away. 28.RR.12. But there was no stippling at the gunshot entry on Jones's head, normally meaning that the gun was twelve to eighteen inches from the wound. 28.RR.88. Accordingly, the evidence was more consistent with Joubert as Jones's killer than Glaspie.

But setting that question aside, Joubert admitted that "if the laws come she, [Jones,] she gonna die, I already knew this." 1.Supp.SHCR-02, at 70. As to Officer Clark, Joubert said, "if I would have anything to do with it, I can't say if the . . . law man would of got shot, but I know that woman wouldn't of got shot." 1.Supp.SHCR-02, at 90. Not only that, but Joubert undoubtedly anticipated that a life would be taken during a check cashing store robbery as the trio aborted the prior attempt because the store owner pulled a gun. 1.Supp.SHCR-02, at 66. Indeed, waived off that attempt saying, "I ain't fixin to get killed." 1.Supp.SHCR02, at 67. Joubert's own words, "the most probative and damaging evidence that can be admitted against him.'" *Fulminante*, 499 U.S. at 292 (quoting *Cruz*, 481 U.S. at 195 (White, J., dissenting)), proved either an intent to kill or the anticipation that someone would lose their life.

Additionally, as described above, there was abundant evidence that Joubert was an exceptionally violent man. *See supra* Statement of the Case II(A). Without belaboring the evidence, he "committed another murder—'the most powerful imaginable aggravating evidence.'" *Wong v. Belmontes*, 558 U.S. 15, 28 (2009) (per curiam). This evidence went to whether Joubert intended or

anticipated that a life would be taken during the check cashing store robbery, whether he was a future danger, and whether the mitigating evidence called for a sentence less than death. And the evidence was overwhelming on all those points regardless of whether Glaspie's recitation of Brown's participation was false or not. *See Strickler*, 527 U.S. at 295 ("With respect to the jury's discretionary decision to impose the death penalty, it is true that [the eyewitness] described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking . . . or the powerful message conveyed by the 69-ound rock that was part of the record before the jury."). As such, the CCA came to the right conclusion, no writ of certiorari should issue, and this case should proceed in federal habeas.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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