No. 21-6424

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

REPLY TO BRIEF IN OPPOSTION

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REPLY TO BRIEF IN OPPOSITION

Texas's Brief in Opposition ("BIO") is grounded on (at least) three faulty premises that demonstrate either ignorance of the underlying record, or a need to wish it away. Joubert's Reply exposes these faults and demonstrates how they erode the oppositional arguments levied at Joubert's Petition. First, the State's contention that Joubert "benefited" when the Texas Court of Criminal Appeals ("TCCA") failed to evaluate his claim under *Napue v. Illinois*, 360 U.S. 264 (1959), founders on TCCA cases that impose a higher standard for reversal than *Napue* when a habeas petitioner alleges the State *un*knowingly presented false testimony. The TCCA's more-likely-than-not standard is higher than both *Napue* and the standard for inadvertent suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The TCCA's application of a higher materiality standard than *Brady*'s places the state court at odds with the courts of last resort in a majority of the States and the federal circuits.

Second, Joubert's false testimony claim was not limited to an allegation that Glaspie only testified falsely "about Brown's participation in the offense," as Texas repeatedly asserts. Joubert alleged that Texas presented multiple instances of false or misleading testimony—including false testimony regarding the requirement of Glaspie's plea deal that Glaspie testify 100% truthfully. Before the state trial court, Texas not only conceded that Joubert alleged false testimony concerning the terms of Glaspie's plea deal, but also conceded that Joubert "successfully demonstrate[d]" that the testimony was false and that the State elicited it.

Contrary to the State's arguments, the TCCA authorized the trial court to consider of Joubert's claim without limitation. In fact, after the trial court initially recommended that the TCCA deny relief, *Texas requested* that the case be remanded to the trial court so that it could consider *additional evidence*, including the special prosecutor's report finding that Assistant District Attorney Dan Rizzo abused the grand jury process, intimidated witnesses, and knowingly presented false testimony from a string of witnesses, including Glaspie. The TCCA granted the State's motion, and then Texas itself submitted that report for the trial court's consideration. Texas submitted proposed findings that the additional evidence "should be considered in the applicant's instant writ application," and obviously did not object to the TCCA that the trial judge wrongly based his recommendation to grant relief on the expanded record.

Finally, and most disturbingly, Texas now denies Alfred Brown's actual innocence. Texas took the opposite position in the trial court when *the State* asked that Brown's case be dismissed because Brown is innocent. In now denying Brown's actual innocence, Texas ignores the explicit, unequivocal, and unchallenged finding of the trial court and concocts a legal standard that has no support in the law.

Texas's reliance on misrepresentations about Glaspie's false testimony regarding his plea deal implies the State's answer to the question presented—"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?"—must be "no." The Court should grant Joubert's petition.

I. The Texas Court Applied the Wrong Standard.

Texas insists that the TCCA applied the correct rule to Joubert's false testimony claim. *See* BIO § I. Its arguments fail when read alongside the record and this Court's precedents.

Texas acknowledges that the TCCA did not consider Rizzo's knowledge of the false testimony as an element of Joubert's false testimony claim but suggests this "due process interpretation" by the state court "benefited" Joubert by decreasing his burden, requiring that he satisfy two elements (falsity and materiality) rather than three. BIO 12-13. The argument fails because what the TCCA removed by ignoring the knowledge element of Joubert's *Napue* claim, the TCCA more than added back by requiring Joubert to meet a higher standard of materiality for claims brought under TCCA precedent.

True, the TCCA has recognized a due process violation even when the State *un*knowingly presents false or misleading testimony. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). But, as Texas acknowledges, BIO 18, that claim is distinct from a claim governed by *Napue*.[1] The TCCA has acknowledged that, too. *Valdez v. State*, No. AP-77,042, 2018 WL 3046403, at *4 (Tex. Crim. App. June

[1] *See Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting) (noting that the Court has "never held that [false testimony violates the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of the falsity], and are unlikely ever to do so"); *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).

20, 2018). Texas acknowledges that Joubert raised *both* a knowing-use and an unknowing-use claim, BIO 12-13, and acknowledges the TCCA exclusively applied its own law governing unknowing-use claims.

It is precisely because the TCCA recognizes that its unknowing-false-testimony claims are not governed by *Napue* that the state court required a more onerous showing of materiality than this Court's standard for knowing-use cases. The TCCA is explicit about that: "even under this expanded notion of due process, the State's knowledge is still a relevant factor to determine the standard we use for reviewing an applicant's habeas claim." *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). When a Texas habeas petitioner alleges unknowing use of false testimony, the TCCA deems the evidence material if "a 'reasonable likelihood' exists that the false testimony affected the outcome." *Valdez*, *supra*, at *4 (quoting and citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014), and *Ghahremani*, 332 S.W.3d at 478. This sounds as if it were "plucked straight from *Napue*," BIO 16, but it isn't.

The TCCA uses "reasonable likelihood" in unknowing use cases interchangeably with "the language of 'more likely than not.'" *Ex parte Robbins*, 360 S.W.3d 446, 459 n.13 (Tex. Crim. App. 2011) (quoting *Chabot*, 300 S.W.3d at 772). For example, the TCCA held there was no reasonably likelihood of effect where "the jury could have convicted applicant of … murder even if it credited" evidence showing trial testimony was false. *Ex parte De La Cruz*, 466 S.W.3d 855 871 (Tex. Crim. App. 2015). Because

the court "could not conclude that any such false evidence tipped the scales in favor of persuading the jury," it held the false testimony was not material. *Ibid.*

In upholding a conviction on grounds that the evidence unaffected by falsity was sufficient to convict, the TCCA applied a more onerous standard for materiality than the reasonable-probability test from this Court's inadvertent suppression cases. *See Wearry v. Cain*, 577 U.S. 385, 392 (2016) (petitioner alleging suppression of exculpatory evidence "need not show that he more likely than not would have been acquitted had the new evidence been admitted") (internal quotation marks and citation omitted). As Joubert showed in his Petition, most state and federal courts hold that *Napue* requires a less onerous materiality showing than *Brady* and its progeny. Pet. 29-30. Thus, Texas is wrong that Joubert merely presents an issue of error-correction. BIO 21. The TCCA's decision in this case conflicts with decisions of other state courts and federal courts.

Even the TCCA acknowledges that knowing-use claims governed by *Napue* require reversal under a standard that "is equivalent to the standard for constitutional error, which 'requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Valdez*, at *4 (quoting *Ghahremani*, 332 S.W.3d at 478 (internal citations omitted by court)). Thus, Texas's contention that the Joubert "benefited" from the TCCA's reliance on its more-likely-than-not standard for unknowing-use cases has no basis in the decisions of this Court, the TCCA, or a majority of other state courts of last resort and federal circuits.

Texas acknowledges the TCCA's approach has "no bearing on the standard [this Court] has set out" for false testimony claims like Joubert's. BIO 19. That obviously proves too much. When the TCCA chose to eschew whether prosecutor Rizzo knew Glaspie lied about his plea deal (that he had with Rizzo), the court placed Joubert's claim into the category of unknowing-use cases. That necessarily means the TCCA applied its more-likely-than-not standard for materiality and not *Napue*'s reasonable-likelihood-of-effect standard.

Recognizing the implausibility of its argument, Texas alters course and attempts to rationalize the TCCA's application of the wrong standard by arguing the court applied the correct standard for post-conviction review. *See* BIO 17 (quoting *Holland v. Jackson*, 542 U.S. 649, 654 (2004)). The attempt fails for multiple reasons. First, as Joubert just showed, the TCCA recognized in *Valdez* and the cases cited therein that it must apply *Napue* in habeas cases alleging the knowing use of false testimony. To the extent the TCCA also has tried to justify not applying *Napue*'s harmless-error standard on habeas review, that rationale was based on the clearly erroneous belief that *Napue* was not a post-conviction case. *See Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996) ("the *Chapman* standard need not apply" to false-testimony claims raised in habeas proceedings because "*Napue* involved direct rather than collateral attack[]").

Second, the issues in *Holland* could not be more different from this case. *Holland* was not a direct-review case like this one. *Holland* reversed a federal habeas court's conclusion that a state court misapplied *Strickland v. Washington*, 466 U.S.

668 (1984), by requiring the petitioner to prove prejudice by a preponderance of the evidence. *Holland*, 542 U.S. at 654. This Court held that, "[i]n context," the state court's reliance on the preponderance standard "is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions-for example, those relating to whether defense counsel's performance was deficient." *Ibid*. While it was possible to read the statement "as referring also to the question of whether the deficiency was prejudicial, thereby supplanting *Strickland*, such a reading would needlessly create internal inconsistency in the opinion." *Ibid*.

Unlike *Holland*, in which the state court quoted the *Strickland* prejudice standard, the TCCA *never mentioned* the *Napue* standard in ruling on Joubert's claim. When the TCCA has discussed the interaction of *Napue* and habeas, it has said the habeas standard, not *Napue*, governs. *Fierro*, 934 S.W.2d at 972. Thus, in the context of this case, there is no "internal inconsistency in the [TCCA's] opinion," BIO 17 (quoting *Holland*, 542 U.S. at 654). The TCCA's statement regarding the "preponderance of the evidence" standard exclusively related to falsity and materiality (or prejudice).

Texas argues this Court should not review this case because to do so would be to "thrust [the Court] into the role of factfinder." BIO 27. The argument dissolves on the state court record in which the facts were not disputed. Texas did not object to or otherwise dispute the trial court's findings of fact, and the TCCA did not reject them. The TCCA reached a different legal conclusion based on a standard that is distinct from this Court's cases and those of other state and federal courts.

II. All of Joubert's Allegations were Properly before the State Court

Texas variously claims the TCCA failed to consider the cumulative impact of the false testimony Rizzo presented at Joubert's trial because Joubert either did not raise some of the false testimony at all, or he did not raise it properly. BIO 13-14; *id.* at 16 n.7; *id.* at 25. These arguments fail every possible test from this Court's cases: the record refutes them; the State didn't raise them; state law doesn't support them; and the state court did not clearly rely on them. *See Lee v. Kemna*, 534 U.S. 362, 381-384 (2002) (rejecting state-law-ground argument that was not raised, ruled upon, or supported); *Michigan v. Long*, 463 U.S. 1032, 1038-39 (1983).

The record flatly contradicts Texas's claims that "Joubert didn't plead multiple instances of false testimony in his habeas application." BIO 13. Claim One of Joubert's state habeas application plainly states that Glaspie testified falsely about "Alfred Brown's participation in the robbery, *and … the zero-tolerance plea agreement which was premised upon Glaspie's complete truthfulness*." I WR 52 (Writ p. 51) (emphasis added). *See also* I WR 56 (Writ p. 55) (discussing the State's elicitation of false or misleading testimony regarding Glaspie's "zero-tolerance plea bargain"); *cf.* BIO 25.

Texas conceded in state court that Joubert "successfully demonstrates that the State elicited false testimony from Glaspie, specifically regarding Brown's involvement in the capital murder, *and that his testimony was entirely truthful*." State's Amended Proposed Findings of Fact and Conclusions of Law at 20, ¶ 57 (emphasis added). It is impossible to credit Texas's claim that Joubert's allegation about

Glaspie's plea agreement was not before the trial court, BIO 14 & 25, when Texas conceded in that court that Joubert proved his allegation.

With regard to the other evidence that Rizzo's use of false testimony was knowing, and that he knowingly presented false testimony from witnesses besides Glaspie, Texas affirmatively requested that the TCCA remand the case so that the trial court consider all of that evidence, App. 3a; the State submitted the evidence to the trial court itself, *ibid.*; Texas told the trial court that the evidence "should be considered *in the applicant's instant writ application*," State's Amended Proposed Findings of Fact and Conclusions of Law at 28, ¶ (75) (emphasis added); Texas filed no objection to the trial court's proposed findings and conclusions based on that additional evidence.

This Court cannot consider Texas's assertion that Joubert improperly "attempted to amend his false testimony claim," BIO 14, because Texas affirmatively waived that contention in state court and provides no legal support for it here. Moreover, despite mentioning the State's submission of the additional evidence on remand, the TCCA did not "make clear by a plain statement in its judgment" that it narrowed its focus to Glaspie's testimony about Brown due to a state procedural rule. *Long*, 463 U.S. at 1041.

III. This Case is an Ideal Vehicle for Clarifying the Law.

Texas understandably hopes it will have better chances under "[l]imited federal review" in a habeas court, BIO 26, than it can expect under de novo review here, but that hardly suggests Joubert's case is "horrible vehicle" for this Court to settle a split in the lower courts' application of *Napue*.

Contrary to Texas's claim that review off state post-conviction presents a poor vehicle, BIO 26, this Court has readily accepted cases in the same procedural posture. *See Andrus v. Texas*, 140 S. Ct. 1875 (2020) (granting certiorari, vacating state court judgment, and remanding after holding that trial counsel was constitutionally deficient and where that was a significant question as to whether the TCCA properly considered *Strickland*'s prejudice prong); *Wearry v. Cain*, 577 U.S. 385 (2016) (granting certiorari and reversing state postconviction court's judgment on petitioner's *Brady* claim); *Smith v. Cain*, 565 U.S. 73 (2012) (granting certiorari and reversing state postconviction court's judgment after holding that withheld material by the State was material for petitioner's *Brady* claim); *Sears v. Upton*, 561 U.S. 945 (2010) (granting certiorari, vacating state habeas court judgment, and remanding where state court failed to apply proper prejudice inquiry on *Strickland* claim).

That state post-conviction proceedings present ideal vehicles is reflected in the fact that both *Brady* and *Napue* came to this court of state post-conviction review, *Brady*, 373 U.S. at 84-85, *Napue*, 360 U.S. at 267, as did *Alcorta v. Texas*, 355 U.S. 29, 30-31 (1957), and *Pyle v. Kansas*, 317 U.S. 213 (1942).

Texas argues that this Court should not intervene because it has "no explicit factual findings to review, just a limited record with no adversarial testing of the evidence." BIO 27. As for the detailed and comprehensive factual findings of the state trial court, Texas first mischaracterizes them as "*proposed* trial court findings," and then proclaims the findings a "legal nullity." *Ibid*. (emphasis added). While the TCCA stated that its denial of Joubert's false testimony claim was "[b]ased upon [its] own

review," the court rejected none of the factual findings of the trial court. App. 4a. It merely disagreed with the trial court's legal conclusion and recommendation that relief be granted. *Ibid*. If the TCCA's independent review of the record revealed that the trial court's factual findings were "not supported by the record," the court was free to "exercise [its] authority to make contrary or alternative findings." *Chabot*, 300 S.W.3d at 772. The TCCA did no such thing; it left the trial court's findings undisturbed.

Texas's arguments betray its wishful thinking when it argues this Court "does not grant certiorari to review evidence and discuss specific facts." BIO 27. Clearly, when Texas attempts in footnotes at the *certiorari* stage of a case to retract its concession that Alfred Brown is innocent,[2] BIO 29-30 n.10, and spends over a third of its *Reasons for Denying the Writ* section arguing the facts in defense of the TCCA's decision, *see* BIO 29-38, the State acknowledges that the TCCA's brief order cannot stand on its own. That suggests the state court decision in Joubert's case is on par with *Andrus*, *Wearry*, *Smith*, and *Sears*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[2] Texas claims that Brown's innocence "has not been litigated adversarially nor has a court issued findings on the matter," and all that exists is "an order dismissing Brown's capital murder indictment because a prosecutor *believed* he was actually innocent." BIO 29 n.10. In fact, the trial court "held two hearings on the matter" before dismissing the case "due to Alfred Brown's actual innocence." *In re Brown*, 614 S.W.3d 712, 715 (Tex. 2020). Brown's innocence was not "adversarially" tested because the prosecutor had no good faith basis for doing so. Thus, as the Texas Supreme Court explained, "The [trial] court's formal declaration of actual innocence became final when no appeal was taken." *Ibid*.

Respectfully submitted,

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