No. 18-7038

IN THE

Supreme Court of the United States

WILLIAM OWENS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

Jerry D. Rochelle
Criminal District Attorney
Bowie County, Texas
601 Main Street
Texarkana, Texas 75501

By: Randle Smolarz
Assistant District Attorney
Texas Bar No. 24081154
Counsel of Record

Counsel for Respondent

I. QUESTIONS PRESENTED

The state court denied relief because the undisclosed police report was not material under a *Brady* analysis. *Brady v. Maryland*, 373 U.S. 83 (1963).

The Question Presented is:

1. Whether the undisclosed police report—from a different sexual assault investigation—that included statements by a detective and trial witness that the victim was confused and getting sexual assault charges "mixed up" with another individual was material under a *Brady* analysis; and

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IV. BRIEF IN OPPOSITION

Respondent, the State of Texas (the "State") respectfully files this brief in opposition to William Owens's petition for writ of certiorari.

INTRODUCTION

Petitioner argues that the State suppressed an exculpatory police report material to his defense. Specifically, Petitioner argues that (1) the State failed to disclose a police report that was generated in another case that proves another individual committed the sexual assault of the victim and (2) there is a reasonable probability that the jury would not have convicted Petitioner.

The Texas Court of Criminal Appeals dismissed Owen's subsequent state habeas application because Petitioner failed to establish a *Brady* claim.

Even if the lower court's opinion addressed a substantial question of federal law, this case is a poor vehicle to address the question that Owens seeks review. Petitioner does not dispute that the legal standard for materiality was used improperly. The lower court applied the established law in the correct manner. There are no conflicts between the circuits or the States regarding an important question of federal law. This case would not clarify the law. The Texas Court of Criminal Appeals correctly applied the law based on well-established laws and principles. Because Petitioner cannot demonstrate the admissibility of the police report would have led him to admissible evidence. Therefore, the petition for certiorari should be denied.

V. STATEMENT OF THE CASE

A. Statement of Facts

The victim[1] is the daughter of Petitioner. At four years old, the victim told her mother and grandmother that "daddy" did something to her. During her CAC examination, the victim told the forensic interviewer that her "daddy" touched her "tutu" with his fingers. The victim identified her "tutu" as her vagina. The victim also told the interviewer that "daddy" touched her at his house in his bedroom under her panties, and it hurt. The victim displayed characteristics of a child who has been sexually abused during the interview. During the SANE exam, the victim told the examiner that her daddy touched inside her tutu with his fingers, and it hurt.

The victim also made statements against a third-party (Billy Speights) at a different CAC interview. The victim stated "Uncle Billy" hurt her and sexually assaulted her. when asked what did "Uncle Billy" did to her, the victim pointed to her vagina and said he toucher her with his finger. The victim made several inconsistent statements. The police

[1] The child victim in the present case was given the pseudonym Julie Mae. In the police report in question, which was generated in another case, the same child victim is referred to as Jane Smith. They are one in the same individual.

report states the specifics of the sexual assault were unclear—such as the when and where. As a result, the State did not pursue any charges against Speights for sexual abuse against the victim.

B. Procedural History

On October 27, 2011, a jury convicted Petitioner of Aggravated Sexual Assault of a Child and assessed a punishment of Life in prison. On September 20, 2012, the Texas Court of Criminal Appeals affirmed the Petitioner's conviction and sentence after direct appeal. On August 29, 2016, Petitioner filed an application for a writ of habeas corpus. Petitioner asserted that (1) the State suppressed and failed to disclose *Brady* evidence favorable to Petitioner (among other things). On December 15, 2016 the Court of Criminal Appeals remanded Petitioner's claims to the trial court for resolution. On May 10, 2017, the trial court filed its Findings of Fact and Conclusions of Law. On September 14, 2017, the Court of Criminal Appeals issued an Order requiring both parties to submit a brief regarding the materiality issue (as well as the ineffective assistance of counsel issue). On November 7, 2018, the Court of Criminal Appeals denied any habeas relief holding that Petitioner failed to prove the *Brady* materiality prong. The Court of Criminal Appeals did hold that

the police report was newly discovered evidence. On March 27, 2019, the Court of Criminal Appeals denied Petitioner's Motion for Rehearing.

VI. Argument

A. This Is a Poor Vehicle to Consider the Materiality Issue.

Even if the lower court's opinion addressed a substantial question of federal law, this case is a poor vehicle to address the question that Owens seeks review. Petitioner does not dispute that the legal standard for materiality was used improperly. There are no conflicts between the circuits or the States regarding an important question of federal law. This case would not clarify the law. The Texas Court of Criminal Appeals correctly applied the law. Also, the report is not *Brady* because Petitioner cannot demonstrate the admissibility of the police report would have led him to admissible evidence. Therefore, the petition for certiorari should be denied.

B. The Police Report is Not Material Because It is Not Relevant.[2]

The State has no duty to disclose evidence that is irrelevant or not admissible at trial.[3] The trial court considered the relevance of Petitioner's defensive theory that only one person committed the assault against the victim. The trial court narrowed the discussion to whether the evidence meets the standard in *Kesterson v. State*.[4] If the victim alleged only one assault occurred—where victim makes an outcry one time about Petitioner and the other time an outcry that Speights committed the assault, then the evidence would be admissible. If there were two separate assaults, the evidence is not admissible.[5]

Petitioner reasoned that the two allegations are about the same exact assault solely because Speights allegedly committed the assault in a comparable manner.[6] Later, Petitioner's trial counsel admits that he does not know whether the allegation is about the same event or separate events. In *Kesterson*, the defensive theory was that the child was

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[2] Petitioner limits the argument to materiality (to directly address the lower court's decision). As such, the State limits the argument to materiality. The State argues that Petitioner fails on each *Brady* prong.

[3] *Graves v. State*, 382 S.W.2d 486 (Tex. Crim. App. 1964); *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997)("[T]he prosecution has no duty to turn over evidence that would be inadmissible (sic) at trial.").

[4] *Kesterson v. State*, 997 S.W.2d 290, 293 (Tex. App.—Dallas 1999).

[5] 2 RR 162.

[6] 2 RR 158 ("(Speights) stuck his finger in her and that he moved it around.").

confused about which adult male actually committed the only assault, and the two males lived in the same residence. The court of appeals deemed the evidence relevant and exculpatory because the two adult males actually lived at the same residence.

Here, the police report does not in itself establish that the child victim was not assaulted by Petitioner. It also does not establish that the child victim was not assaulted by Speights. Nothing in the report suggests that Speights committed the sexual assault of the victim in this case on the same date and time—instead of Petitioner. At most, the report indicates that the victim made an outcry against Speights, which does not in itself cast doubt that she was also assaulted by Petitioner. Also, there is no evidence that links the allegations to be relevant to this set of facts on guilt-innocence. Petitioner and Speights each have distinguishing characteristics (i.e. hair color). The victim could adequately identify each perpetrator during each separate investigation. The police report states that the victim refers to Speights as "Uncle Billy" and then the victim uses dad or "Bubba" in Petitioner's CAC interview to refer to Petitioner. The similar motion to assault the victim is not a distinguishing property. The fact that the allegation is made in the "same

time period" have no relevance without more to link them together. Otherwise, it is just two separate assaults that occurred within the "same time period". There is nothing to suggest Speight had an opportunity to sexually assault the victim for the exact same assault allegation of the victim. The victim describes open windows and a fence—both of which indicate the Petitioner's house. There is nothing to suggest that Speights committed the sexual assault at Petitioner's house. Petitioner lived with one other person—and this was not Speights.[7] There is nothing that connects Petitioner to either location—Nora Mitchell or Elizabeth Mitchell or the Texarkana Mobile Home Park. The sexual assault by Petitioner occurred where Petitioner lived in Glenn Acres Mobile Home Park.[8] This is a different trailer park than where her mother lived.[9] No one else was living at the victim's mother house.[10]

Also, a prosecutor must use its own judgment to determine whether any particular evidence is required to be turned over. "[T]here are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source

[7] 3 RR 178.
[8] 3 RR 43; 3 RR 72.
[9] 3 RR 179.
[10] 3 RR 180.

which probably would make it very persuasive to a fair-minded jury."[11] Even if the prosecutor knew the document existed, the police report is just not "very persuasive" since everything points directly to Petitioner. The only evidence that is similar in both cases is the perpetrator used a similar motion to commit a sexual assault. This is not unique and does not make the evidence "very persuasive". There must be more of a connection to support the defensive theory at trial. This evidence does not undeniably support the proffered defensive theory, and the police report is not inconsistent with the prosecution's theory of the case.[12]

The strength of the State's case relied on the victim's testimony as well as the corroborating witnesses. Corroborating testimony by law enforcement and the outcry witness of the victim can increase the overall strength of the State's case when determining materiality.[13] The victim provided consistent testimony and was able to resolutely explain the false story. Therefore, the report does not tend to excuse or clear Petitioner

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[11] *Means v. State*, 429 S.W.2d 490, 495 (Tex. Crim. App. 1968).

[12] *Id.* ("The findings of the unidentified hairs on the body of the deceased may have been consistent with the theory advanced by the defense that someone could have possibly entered the hotel room after [petitioner] left, but such findings do not undeniably support the defensive theory in view of the undisputed fact of the deceased's avocation and the fact that the deceased did not meet the [petitioner] until 6:30 p.m. on the day in question, approximately 2 hours prior to the estimated time of her death. Further, such findings were not inconsistent with prosecution's theory of the case.").

[13] *Harm v. State*, 183 S.W.3d 403, 409 (Tex. Crim. App. 2006).

from the alleged guilt. The trial court did not abuse its discretion when it ordered the evidence would not be admissible.

C. Petitioner was Sufficiently Aware of the Contents of the Police Report Prior to Trial.

"[T]he state is not required to seek out exculpatory evidence independently on [petitioner]'s behalf[] or furnish [petitioner] with exculpatory or mitigating evidence that is fully accessible to [petitioner] from other sources."[14] The record makes it abundantly clear that Petitioner was aware of all the relevant information prior to trial. In *Mosley v. State*[15], the court discussed an analogous situation. The defendant, the father of the victim, requested a continuance during trial

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[14] *Harm v. State*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006)(footnotes omitted); *Jackson v. State*, 552 S.W.2d 798, 804 (Tex.Crim.App.1976).

[15] *Mosley v. State*, 960 S.W.2d 200, 206 (Tex. App.—Corpus Christi 1997); *See also Means v. State*, 429 S.W.2d 490, 495 (Tex. Crim. App. 1968)(the State did not disclose the inconclusive forensic report on the unidentified hairs found on the body. This again involves a document. The defendant was aware of the information prior to trial. As a result, the court held that there was not *Brady* claim and the defendant was not entitled to any relief—even if such evidence would have been material); *Moore v. State*, 143 S.W.3d 305, 317 (Tex. App.—Waco 2004)(the defendant conducted its own investigation and found out that a witness had previously been indicted. The court held that no *Brady* violation occurred because the defendant was aware of the information.); *Graves v. State*, 382 S.W.2d 486, 490 (Tex. Crim. App. 1964)(the court reasoned that a defendant had knowledge of information based on his access in jail prior to trial. "It appears that the alleged newly discovered evidence was available to defendant as both Kennard and [defendant] had been in the same jail for some time before and during the time of the trial, and such evidence could have been ascertained before the conclusion of the main trial by the exercise of reasonable diligence."); *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976)(the defendant issued a subpoena duces tecum of Mrs. Ramsey, but the defendant's follow-up to obtain the sought-after information and documents. "We cannot conclude that the prosecutor violated his duty to disclose favorable evidence to the [defendant] when the evidence was already available to him.").

to locate a police report known to him prior to trial. The police report allegedly contained information about an assault by a step-sister against another child. The defendant was specific in his request. "Neither the prosecutor nor [defendant]'s counsel [was] able to locate the alleged report; the prosecutor reported that no such police report number was listed in the computer system." The court affirmed the trial court's ruling that defendant was aware of the information prior to trial, and no *Brady* violation occurred. This case shows that it is irrelevant that a prosecutor stated a document does not exist, but the document does actually exist.

In *United States v. Milstead*[16], the defendant complained that a sworn statement of a third party taken by the bank that described the third parties "similar business and personal liason (sic) with [an intimate friend of defendant] carried on during the same period as [the defendant]." The court determined that evidence was not exculpatory because it was essentially irrelevant—"how the fact that [the intimate friend of defendant] had engaged in conduct with other customers similar to his with [defendant] tends to exculpate [defendant] is unclear to us." The court also concluded that the sworn statement was available to the

[16] *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982).

both parties, and the information was communicated to the defendant prior to trial.

Here, these cases show that the physical report has negligible effect on the analysis—the important aspect is the information the document contains. The only difference is a physical document surfaced, which the contents were known prior to trial. Petitioner was aware of all the relevant information contained in the police report:

- The victim made allegations against Petitioner and Speights;[17]
- The State did not purse the allegation against Speights;[18]
- The recantation, which was also admitted via testimony by the State, did not concern Speights;
- The victim described the perpetrator as her dad who had white hair, which was known because Petitioner was provided access to the victim's CAC interview;[19]
- Petitioner made the trial court aware that Speights had blonde hair with white tips at the time of the outcry;[20]
- The victim alleged that both Petitioner and Speights used a similar motion in the assault against her;[21] and
- Petitioner met with Speights during pre-trial.[22]

[17] Trial Counsel Affidavit, page 2.

[18] Trial Counsel Affidavit, page 2 ("… that Speights was not charged with any offense against the girl because the investigators in the Speights case thought the victim was confused as to which defendant committed which act").

[19] 2 RR 156.

[20] 2 RR 156.

[21] 2 RR 158.

[22] 2 RR 155; Trial Counsel Affidavit, page 2.

The record makes it abundantly clear that trial counsel was aware of all the relevant information because (1) the record states trial counsel's knowledge prior to trial, (2) Petitioner was aware of the information prior to trial because of Speights told Petitioner that the victim made a similar allegation against Speights[23], and (3) Petitioner communicated with Nora Mitchell who confirmed the victim recanted the allegation against Petitioner.

However, in *Flores v. State*[24], the court held that the State committed a *Brady* violation for not disclosing an oral statement that contradicted the previously written statement. The defendant had access to the State's file and the written statement. The oral statement was favorable to the defendant. The court held that the defendant could not have learned of the oral statements with reasonable investigation even if the defendant knew of the written statement and the identity of the witness. The defendant was not informed of the oral statement. The court stated that the defendant "would not reasonably be considered by defense counsel as someone to approach for exculpatory evidence". This is different than the facts at issue. Here, the record is unclear whether

[23] Trial Counsel Affidavit, page 2.
[24] *Flores v. State*, 940 S.W.2d 189, 190 (Tex. App.—San Antonio 1996).

Petitioner was aware of the following information from the police report: the victim described several things in the CAC interview such as a gate, the perpetrator came in through the window, the grandmother came in during the assault, Speights admitted being a gay man, the police report states "Ms. Stout got the anatomical dolls out and Jane picked which one looked like Uncle Billy. She described him as being white, a grown up, a boy and his hair is cut off"[25], and Speights was also the live-in boyfriend of the biological mother at the time of the outcry.[26] Speights informed Petitioner of the allegation—a statement against penal interest.[27] The defendant was aware of the allegation and all the relevant parties. Nora Mitchell was the person that stated whether the victim mixed up the allegations and who provided information to the officer that helped close the case of the victim against Speights. Nora Mitchell did not remember herself coming into the victim's room and telling Speights to stop messing with the victim. Nora Mitchell also always kept the window in the victim's room locked. The information was fully accessible from other sources, and Petitioner obtained exculpatory (i.e. the recantation) and

[25] Police report, page 4.
[26] 2 RR 156.
[27] See *State v. Blanco*, 953 S.W.2d 799 (Tex. App.—Corpus Christi 1997).

pertinent information. The pertinent information needed investigating, but it never garnered any exculpatory information.

Also, the State had an "open file" policy during the time period in question.[28] The burden is on Petitioner to establish materiality. Trial counsel for the State explained that Petitioner would have access to the Speights information if he would have asked and would have pursuant to the open file policy. The trial court's Findings of Fact and Conclusions of Law does not change this. The trial court states "[e]ven if trial counsel had taken advantage of the State's 'open file' policy and reviewed the file in the [Petitioner]'s case, he would not have discovered the Speights report or the allegations the victim made against Speights."[29] The trial court limits its factual conclusion to whether the Petitioner viewed the Petitioner's file. Petitioner does not proffer anything that discounts whether requesting access to the open file policy would allow him to view the Speights file. Trial counsel for the State stated that the Speights file would have been accessible to Petitioner. There is nothing to indicate that a mere phone call to the DA's office would have allowed Petitioner to view

[28] See State's Trial Counsel's Affidavit.
[29] See page 9 of the Trial Court's Findings and Conclusions.

the Speights file or other investigation could have uncovered the information.

D. The Police Report is Not Material Because It is Too Little, Too Weak, or Too Distant From the Main Evidentiary Points to Meet Brady's Standards.

"Under our existing law, the defendant bears the burden of showing materiality."[30] The test for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[31] "To make this determination we must examine the alleged error in the context of the entire record."[32] "Furthermore, we must examine the error in context of the overall strength of the State's case."[33] "[A] verdict which is only weakly supported by the record is more likely to be affected by the prosecutorial error than a verdict which is strongly supported."[34]

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[30] *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997).

[31] *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985).

[32] *Thomas v. State*, 841 S.W.2d 399, 404–05 (Tex. Crim. App. 1992) (discussing *United States v. Bagley,* 473 U.S. 667, 683 (1985) and *United States v. Agurs*, 427 U.S. 97, 113 (1976)).

[33] *Id.*

[34] *Id.* at 405.

A *Brady* claim requires that the evidence is not "too little, too weak, or too distant from the main evidentiary points to meet Brady's standards."[35] Applicant's defensive theory is that Speights committed the sexual assault—and not Applicant. The police report does not support this conclusion. In *Means v. State*[36], the court held the that the report of the unidentified hairs on the deceased victim does not establish his defensive theory that a third party entered the hotel after the defendant left. The defendant tried to establish that the victim was a prostitute. The defendant was suggesting that victim had another appointment after the defendant left and the next person committed the crime. The defendant tried to establish his theory by showing that the police found unidentified hairs on the victim. The results of the forensic report were inconclusive. The court opined that no *Brady* violation occurred because the unidentified hairs do not "undeniably support" the defensive theory when considering all the evidence (i.e. the victim was a prostitute and the defendant's appointment was two hours before the time of death) while the results were not inconsistent with the State's theory of the case.

[35] *Turner v. United States*, 137 S. Ct. 1885, 1887 (2017).
[36] *Means v. State*, 429 S.W.2d 490, 495 (Tex. Crim. App. 1968).

Therefore, the court held that the evidence was not material and not prejudicial to warrant reversal.

In *Gowan v. State*[37], the court determined that a DNA report that did not match defendant may have exonerated him on some uncharged offenses but does not "necessarily exclude him as a suspect in the assault on the victim in the indictment" and does not undermine the confidence in the outcome of the trial.

Here, as stated above, the police report points to Applicant as the perpetrator of the sexual assault. Applicant could not provide the crucial link that establishes there was only one sexual assault that occurred. Applicant admittedly stated he was not sure whether one or two occurred.[38] Applicant was merely speculating and seeking to find out via the *Brady* request.

Trial counsel makes asserts in his affidavit that the police report is material.

> It is clear from the trial court's comments that had I been in possession of the sheriff's department report regarding Speights, the trial court would have made a very

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[37] *Gowan v. State*, 927 S.W.2d 246, 251 (Tex. App.—Fort Worth 1996).

[38] 2 RR 165 ("Defendant: … the problem for the defense in this case is that without being able to be – you know, have the Court order the prosecuting attorney to have the police department turn over the file to us, we don't know if we're talking about two similar incidents or the same incident.).

> different ruling on the defense's request to put on the evidence that the victim had made a false outcry at the insistence of her mother to exonerate her boyfriend Billy Speights.[39]

This assessment is not supported by the record. The determination of the trial court was not dependent on whether the document was physically present in the court room.[40] The trial court was notified of the significant portions of the police report and made its decision accordingly.

Trial counsel further interjects information that is not in the record. During the pre-trial, he stated that the mother made the child provide a false story or the female would get a whipping. There is nothing that suggests the female victim recanted to protect Speights. This is just mere speculation without any corroborating evidence to make it admissible at trial. The police report points toward an assault at the Applicant's residence. Nothing links this speculative motive or bias to anything not "too little, too weak, or too distant from the main evidentiary points".

Therefore, even if Applicant did not know all the information in the police report, the evidence would not have influenced the verdict.

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[39] Trial Counsel Affidavit, page 3.

[40] 2 RR 166 ("there's an allegation made against Mr. Speight, and the allegations are very, very, very similar about what was done. But that's not the same thing as saying there's only one assault.").

VII. Conclusion

This Court does not "normally consider questions of … fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion."[41] This case falls well within this rule.

Based on the foregoing, Respondent respectfully submits that Petitioner's application should be denied.

Respectfully Submitted,

Jerry D. Rochelle
Criminal District Attorney
Bowie County, Texas
601 Main Street
Texarkana, Texas 75501

By: /s/ Randle Smolarz
Randle Smolarz
Assistant District Attorney
Bowie County, Texas
State Bar No.: 24081154
randle.smolarz@txkusa.org

COUNSEL FOR RESPONDENT

[41] See *Wetzel v. Lambert*, 132 S.Ct. 1195 (2012)(Breyer, J., dissenting).