No. _____

In The
Supreme Court of the United States

EDWARD GEORGE McGREGOR,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
noguilt@swbell.net

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Napue v. Illinois, 360 U.S. 264 (1959), held that a conviction violates due process when it is based on false, material testimony that the prosecution knowingly elicited or failed to correct. False testimony is material unless the prosecution proves beyond a reasonable doubt that it did not contribute to the conviction. Lower courts are divided on the standard for determining the materiality of false testimony. Most have held that materiality is determined by considering the effect on the verdict had the jury known that the witness lied and the prosecutor was complicit. The Texas Court of Criminal Appeals (TCCA), following the minority approach, concluded that false testimony that two witnesses did not have agreements with the prosecution was immaterial because it did not refute the substance of their testimony that petitioner had confessed to them and the prosecution's case was "fairly strong." It ignored the time-honored legal maxim that cross-examination demonstrating that a witness has lied about one matter undermines not only his credibility but also the substance of his testimony.

The question presented is:

> Is the materiality of false testimony knowingly used by the prosecution determined by asking whether the jury would have convicted the defendant had the witnesses told the truth or by asking whether the jury would have convicted him had he been able to impeach them on cross-examination?

RELATED CASES

- *State v. McGregor*, No. 09-DCR-053051, 434th District Court of Fort Bend County, Texas. Judgment entered September 3, 2010.
- *McGregor v. State*, No. 01-10-01085-CR, First Court of Appeals of Texas. Judgment entered August 9, 2012.
- *McGregor v. State*, No. PD-0150-13, Texas Court of Criminal Appeals. Judgment entered April 17, 2013.
- *Ex parte McGregor*, No. 09-DCR-053051-HC1, 434th District Court of Fort Bend County, Texas. Judgment entered November 7, 2016.
- *Ex parte McGregor*, No. WR-85,833-01, Texas Court of Criminal Appeals. Judgment entered June 12, 2019. Rehearing denied September 11, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward George McGregor, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's unpublished opinion (App. 1a-36a) is available at 2019 WL 2439453. The district court's findings of fact and conclusions of law (App. 37a-64a) and supplemental findings of fact and conclusions of law (App. 65a-68a) are unreported. The TCCA's unpublished order denying rehearing (App. 69a) is unreported.

JURISDICTION

The TCCA denied rehearing on September 11, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT

A. Procedural History

Edward McGregor, age 17 at the time of the offense, pled not guilty to capital murder in the 434th District Court of Fort Bend County, Texas. A jury convicted him, and the court sentenced him to life in prison on September 3, 2010.

The First Court of Appeals of Texas affirmed McGregor's conviction in a published opinion issued on August 9, 2012. The TCCA refused discretionary review on April 17, 2013. *McGregor v. State*, 394 S.W.3d 90 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

McGregor filed a state habeas corpus application on March 31, 2016. The trial court conducted an evidentiary hearing and recommended a new trial on November 7, 2016. The TCCA remanded for additional findings of fact and conclusions of law. The trial court entered additional findings and conclusions and again recommended a new trial. The TCCA denied relief in an unpublished opinion issued on June 12, 2019, and denied rehearing on September 11, 2019. *Ex parte McGregor*, 2019 WL 2439453, No. WR-85,833-01(Tex. Crim. App. 2019) (not designated for publication).

B. Factual Statement

McGregor, then age 17, lived with his family in Fort Bend County in 1990 (19 R.R. 47). Kimberly Wildman lived two houses from the McGregors (19 R.R. 8, 10). She called 911 for assistance at 11:45 p.m. on April

17, 1990 (10 R.R. 73, 78-81). An officer entered her home and found her nude on the kitchen floor with multiple stab wounds (10 R.R. 73, 90-91). He asked if she knew who did it (10 R.R. 93). She said, "A black man." He asked, "Do you know him?" She said, "No." The police found nude photos of her and documents indicating that she had worked in a topless club (11 R.R. 47, 49, 52). Her wounds were fatal (12 R.R. 111-13, 120). Sperm cells found on vaginal and anal swabs indicated that she recently had sexual intercourse (12 R.R. 117). However, the pathologist could not determine whether the intercourse occurred contemporaneously with the murder, and nothing indicated that it was non-consensual (12 R.R. 139-41).

Edwina Barnum, a topless dancer and prostitute, was found murdered in her apartment in Harris County in May 1994 (15 R.R. 144, 146, 152, 157). She had been shot in the head, strangled, and stabbed in the back (16 R.R. 136). Police found a condom in her bed sheets (15 R.R. 191, 194). Nothing indicated that she had been sexually assaulted (16 R.R. 141-42).

DNA testing conducted in 2006 and 2007 revealed that McGregor's DNA was consistent with the profiles developed from the condom found in Barnum's bed sheets and the swabs taken from Wildman (12 R.R. 164-66; 16 R.R. 95, 117; 17 R.R. 15, 17). McGregor previously had flirted with Barnum and attended the club where she danced (15 R.R. 189, 220; 17 R.R. 35-37, 45-46, 82-83). Thus, the physical evidence established that he had consensual sex with two women who were murdered four years apart. He was charged with the

capital murders of Wildman in Fort Bend County and Barnum in Harris County.

Delores Gable (also known as Delores Lee), a career criminal with multiple felony convictions, had been in prison since 1995 serving lengthy sentences for possession of two kilograms of cocaine and solicitation of capital murder (11 R.R. 117, 124-26, 133-36). She wrote a letter to Fort Bend County Assistant District Attorney Michael Elliott on October 31, 2006, stating that she could "seal" the State's case against McGregor but that she had colon cancer and was seeking "some relief from [sic] testifying" or she would "just leave well enough alone" (11 R.R. 137-39, 141-45). Investigators interviewed her, and she became a prosecution witness (11 R.R. 147-48). She testified that she heard McGregor tell her husband, Brian, as they stood in their front yard watching the police conduct the investigation across the street, that he had killed "the white lady" (11 R.R. 155-56, 159).[1] Assistant District Attorney Elizabeth Shipley (also known by her married name, Elizabeth Exley) elicited on direct examination that she did not promise Gable anything in exchange for her testimony (11 R.R. 165). Gable initially denied on cross-examination that she knew that a prosecutor could help her obtain parole or that she had asked for any such help but ultimately acknowledged that she had heard that a prosecutor could help (11 R.R. 171).

---

[1] The defense conclusively established at trial and at the habeas evidentiary hearing that neither Delores nor Brian Gable lived in that neighborhood on the night of Wildman's murder (18 R.R 98-102; 2 H.R.R. 68-70, 82-83).

Adam Osani testified that McGregor threatened him while he was in the Harris County Jail on a felony assault charge (15 R.R. 98-100; 102-07). Marvin Paxton, an inmate, told McGregor to leave Osani alone (15 R.R. 112). McGregor responded that he would kill Paxton "like I did those other two bitches" (15 R.R. 113). Osani told his lawyer, who contacted Shipley (15 R.R. 125-27). After Osani testified before the grand jury, he pled guilty to a reduced charge of misdemeanor assault and was sentenced to six months in jail (which amounted to time-served) and released (15 R.R. 99, 128, 138). Shipley elicited on direct examination that Osani was not promised anything in exchange for his testimony and did not know whether she had talked to his prosecutor or done anything in relation to his case (15 R.R. 122-23). He denied on cross-examination that his lawyer told him that he received a reduced sentence for his cooperation (15 R.R. 138).

Paxton, who initially had five aggravated robbery charges, testified that McGregor threatened him and confessed to killing two women (16 R.R. 155-58, 162, 170). Paxton provided this information to his lawyer because "I have a mother" (16 R.R. 166, 169). Before he testified, he pled guilty to two aggravated robbery charges with a cap of 45 years on punishment, and the State dismissed the other three charges (16 R.R. 185-89, 197). Shipley elicited on direct examination that she had not promised him anything in exchange for his testimony (16 R.R. 167, 169). He acknowledged on cross-examination that she told him that, if he provided good information and helped with McGregor's

case, "it was possible" that his cooperation would be brought to the attention of his prosecutor and judge at sentencing (16 R.R. 190-91, 197).

McGregor testified that he had consensual sexual intercourse with Wildman, who was alive when he went home before dark (19 R.R. 54-56). He denied breaking into her home, sexually assaulting her, and killing her (19 R.R. 84). His mother and brother testified that he was home that night (18 R.R. 122-24; 19 R.R. 10-14). He further testified that, four years later, he had consensual sexual intercourse with Barnum while wearing a condom, which he left behind (19 R.R. 67-70). He initially told the police that he did not know these women because he did not remember Wildman's name after 16 years, he knew Barnum only by her nickname ("Nina"), and he was scared after learning that he was under arrest for capital murder (19 R.R. 73-77). He denied killing them or confessing to Gable, Osani, and Paxton (19 R.R. 62, 78, 84).

Linda Christian, a Fort Bend County Jail inmate, testified that Gable said during McGregor's trial that she thought that the parole board would help her as a result of her testimony (20 R.R. 98).

Shipley argued during summation that Gable, Osani, and Paxton credibly testified that McGregor had confessed to them (21 R.R. 18-19, 33-35, 74-78); that, although Gable hoped that her testimony would help with parole, she had no motive to lie and was particularly credible because she had information about McGregor's family that a stranger would not have (21

R.R. 74-75);[2] and that she did not know what defense counsel was talking about in suggesting that the witnesses would receive benefits, as she did not "operate that way" (21 R.R. 75).

A juror sent a note to the court on the second day of deliberations asking to be released because the other jurors disagreed with her (22 R.R. 4-5). The court refused to excuse the juror and denied a defense motion for mistrial (22 R.R. 8). The jury convicted McGregor at the end of the second day (22 R.R. 9).

McGregor filed an application for a writ of habeas corpus alleging that his conviction violated due process because Shipley failed to disclose to the defense that Osani had received consideration for his grand jury testimony before the trial and that Gable and Paxton would receive consideration after the trial and because she elicited and failed to correct their false testimony to the contrary. The trial court conducted a four-day evidentiary hearing.

The evidence established that, before McGregor's trial, Shipley agreed to write a letter advising the parole board of Gable's cooperation and help her obtain a special parole review in exchange for her testimony; and, that Shipley wrote the letter and requested the

---

[2] Testimony at the habeas evidentiary hearing established that Gable met McGregor's former fiancée in prison in 2006 and could have obtained information about the McGregors from her (3 H.R.R. 59-60). The TCCA rejected without comment McGregor's contention that defense counsel was ineffective in failing to elicit this testimony (App. 36a).

special review five days after McGregor was convicted (3 H.R.R. 97-100). Shipley arranged with Osani's prosecutor to reduce the felony charge to a misdemeanor for a sentence of six months (which amounted to time-served) as a result of his grand jury testimony (2 H.R.R. 191-92). Shipley also decided before McGregor's trial to inform Paxton's prosecutor and judge of his cooperation (3 H.R.R. 163-64). One month after McGregor was convicted, Shipley arranged with that prosecutor for Paxton to receive seven-year sentences that made him eligible for parole immediately (3 H.R.R. 169-70; 5 H.R.R. 27-28, 36-37). The trial court found that Shipley failed to disclose these agreements and understandings to the defense; that she elicited and failed to correct the witnesses' false testimony to the contrary; that the false testimony was material because the witnesses were "critical" to the State's case; and that McGregor should receive a new trial (App. 61a-63a).[3]

The TCCA agreed that the record supported the trial court's findings that Shipley failed to disclose to the defense her promises to Gable and Osani and that she elicited and failed to correct their false testimony that they did not and would not receive consideration

[3] The trial court also found that Gable testified falsely that her last name was Gable; that she was married to Brian; that they lived in Wildman's neighborhood on the night of the murder; that she saw McGregor's father that night; that McGregor had a fresh cut on his lip that night,; and that she came forward 16 years later because she had cancer (App. 62a). The TCCA rejected a separate claim based on this false testimony for a variety of reasons (App. 22a-31a). None are relevant to the present petition.

(App. 16a-17a, 20a-21a). It rejected the finding that Shipley agreed to a "seven-year deal" with Paxton before he testified (App. 18a-19a).[4] The TCCA concluded that Paxton's testimony that Shipley told him that she "could" report his cooperation to his prosecutor and judge at sentencing did not mislead the jury, notwithstanding her admission at the habeas evidentiary hearing that she "would" report his cooperation (App. 19a-20a).

The TCCA held that Gable's false testimony was immaterial because the jury knew that she had an interest in testifying for the State in view of her letter to Elliott that she was "seeking relief," her acknowledgment on cross-examination that she had heard that a prosecutor can help an inmate obtain parole, and Christian's testimony that she said that she expected a parole benefit as a result of her testimony (App. 32a). It acknowledged that Osani's false testimony that he did not receive a favorable plea bargain in exchange for his grand jury testimony was "[m]ore significant to the

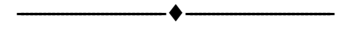
---

[4] The TCCA misconstrued McGregor's contention to be that Shipley agreed to seven-year sentences before Paxton testified. To the contrary, McGregor contends that Shipley suppressed favorable impeachment evidence that she decided before Paxton testified to arrange for him to receive lenient sentences in exchange for his testimony; that she elicited his false testimony that she did not promise him anything; and that she failed to correct his false testimony that it was only "possible" that his cooperation would be brought to the attention of his prosecutor and judge at sentencing. McGregor need not belabor the point in view of the TCCA's acknowledgement that Shipley knowingly elicited and failed to correct the false testimony of Gable and Osani. That said, the TCCA clearly erred with regard to Paxton.

materiality analysis" (App. 33a). However, it held that their false testimony collectively was immaterial because it did not refute the substance of their testimony that McGregor had confessed to them, physical evidence linked him to two women who were murdered four years apart, and the State's case was "fairly strong" (App. 33a-36a):

> We are convinced beyond a reasonable doubt that the outcome of this case would have been the same ***even if the jury had heard evidence that Osani's cooperation as a grand jury witness against Applicant would be taken into consideration by his prosecutor and even if Delores had admitted that she expected a parole letter***. Given the DNA evidence against Applicant and the long odds against the defensive theory that he innocently had sex with two women–whom he knew but denied knowing–shortly before their brutal murders four years apart, ***the State's case was fairly strong***. Viewed in light of the totality of the record, we cannot say that the false testimony was material to Applicant's conviction.

(App. 36a) (emphasis added).



REASONS FOR GRANTING CERTIORARI

A conviction must be set aside where the prosecutor elicited or failed to correct false testimony that was material to the conviction. *Napue v. Illinois*, 360 U.S.

264, 271 (1959). The determination of materiality is governed by the "harmless error" standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires that the prosecution prove beyond a reasonable doubt that a constitutional error did not contribute to the conviction. *United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985) (prosecution must prove beyond a reasonable doubt that false testimony did not contribute to conviction). In applying the *Chapman* standard, a reviewing court must determine "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id*. (emphasis in original).

The TCCA counterfactually determined that, because the prosecution's case was "fairly strong," McGregor would have been convicted at a hypothetical trial at which the witnesses testified truthfully rather than lied under oath. That is, the TCCA analyzed materiality as if the trial occurred "without the error." *Sullivan*, 508 U.S. at 279. As discussed below, most lower courts have taken a contrary approach by considering the effect on the verdict had the witnesses' false testimony been impeached on cross-examination.

This state habeas corpus case presents a rare opportunity for this Court to resolve this issue under a

de novo standard of review instead of the more restrictive standard applicable in federal habeas corpus cases under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[5] This Court's review is warranted to resolve this important issue that has divided the lower courts. SUP. CT. R. 10(b) and (c).

A. There Is An Intractable Conflict Among The Lower Courts Regarding The Standard For Determining The Materiality Of False Testimony.

Professor Anne Bowen Poulin has summarized the division among the lower courts concerning this issue:

> In some cases it is clear that the allegedly perjured information had no impact on the defendant's conviction or sentence. In others, the court's approach to materiality determines the outcome. ***There are two possible approaches: First, the court may assess the likely result had the defense been informed of the contradictory information and the witness testified truthfully, disclosing the facts favorable to the defendant or acknowledging impeaching information. Alternatively, the court may ask how the jury would have judged the case had the jurors learned that the witness had testified falsely under oath.*** Only this second

[5] McGregor is time-barred under the AEDPA from pursuing federal habeas corpus relief.

> approach accounts for the gravity and corrupting effect of false testimony.
>
> When the court merely asks what would have happened had the witness given truthful testimony, the court gives insufficient weight to the witness's willingness to testify falsely or the government's willingness to allow false testimony to stand uncorrected. Instead, the court should focus on how a jury would respond upon learning that the witness had given false testimony under oath and the prosecution had failed to correct it. Thus, the court should assess the impact had the jury heard the witness's false testimony, learned it was false, and, further, learned about the government's awareness of the falsity. The likely impact would be the destruction of the witness's overall credibility as well as the credibility of the prosecution itself, an impact beyond that of the truthful testimony alone. Analyzing the impact of the false testimony in this way, a court is more likely to find materiality.

See Poulin, *Convictions Based on Lies*: *Defining Due Process Protection*, 116 PENN. ST. L. REV. 331, 382-83 (2011) (emphasis added).

The TCCA concluded that McGregor would have been convicted if Gable and Osani had testified truthfully instead of considering the effect on the verdict if the jury had known that they testified falsely (App. 35a-36a). Most lower courts—including four federal circuit courts—have used the latter approach in

determining materiality under *Napue*. *See United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) ("It was one thing for the jury to learn that Guariglia had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie."); *Rosencrantz v. Lafler*, 568 F.3d 577, 588 (6th Cir. 2009) ("[T]urning to the impact on the jury had the prosecutor corrected Lasky, or the defense counsel confronted Lasky with her false denial, it is reasonable to infer that exposing Lasky as untruthful—thereby tipping the jury to another of Lasky's inconsistencies and her willingness to lie under oath—would have affected the jury's view of Lasky's credibility."); *United States v. Mazzanti*, 925 F.2d 1026, 1030 (7th Cir. 1991) (where prosecution witness testified falsely about an important matter, "an analysis that simply evaluates the effect of correcting the false testimony without evaluating the probable impact on the witness's credibility is too narrow," as it must extend to "the fact that the witness lied"); *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005) (*en banc*) (had jury known that prosecutor elicited witness's false testimony denying he would receive consideration, it "would have had a devastating effect on the credibility of the entire prosecution case"); *Jackson v. Brown*, 513 F.3d 1057, 1077 (9th Cir. 2008) (witness's "obvious willingness to lie under oath to keep his promises secret would cast doubt on his entire testimony"); *Adams v. Commissioner of Correction*, 71 A.3d 512, 528 (Conn. 2013) (had jury known that prosecution witness lied in denying he would receive consideration, it

probably would not have believed substance of his testimony; calling his credibility into question is no substitute for cross-examination revealing that he lied about agreement).

B. False Testimony Is *Per Se* Material Where The Prosecution's Case Was Only "Fairly Strong."

The TCCA concluded that the false testimony was immaterial, *inter alia*, because the State's case was "fairly strong" (App. 35a-36a). It used an erroneous standard to determine whether the false testimony was material. The best gauge of materiality is the lengths to which the prosecutor went to conceal the truth. Had the DNA evidence been sufficient to convict McGregor, Shipley would not have entered into agreements with Gable (who had been convicted of solicitation of capital murder), Paxton (who had five aggravated robbery charges), and Osani (who had a felony assault charge) to testify that he had confessed to them, would not have hidden these agreements from the defense, and would not have allowed these criminals to lie to the jury.[6]

---

[6] Co-prosecutor Jeff Strange testified at the habeas evidentiary hearing that Shipley dismissed the Harris County capital murder case because McGregor's DNA was found in the condom rather than inside Barnum's body, and Osani and Paxton were "bad witnesses" (4 H.R.R. 48-49). Shipley almost certainly dismissed the case because she would have had to disclose to the defense that she wrote a parole letter for Gable five days after McGregor's trial and that, one month later, Paxton received seven-year sentences.

The TCCA, by categorizing the State's case as "fairly strong," by inference acknowledged that the evidence was not overwhelming. A conviction must be reversed where the prosecution cannot prove beyond a reasonable doubt that the false testimony did not contribute to it. *Napue*, 360 U.S. at 271; *Bagley*, 473 U.S. at 679 n. 9. False testimony is material, such that a "reversal is virtually automatic," unless the prosecution's case is "so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." *Shih Wei Su v. Filion*, 335 F.3d 119, 127, 129 (2d Cir. 2003). "Fairly strong" is, of course, not the same as "overwhelming."

The DNA evidence established that McGregor had sexual intercourse with Wildman and Barnum, but nothing indicated that it was non-consensual or that it occurred contemporaneously with the murders. Regrettably, by virtue of their chosen profession, these victims subjected themselves to an undue risk of harm and could have been murdered by any of their sexual partners or a random intruder.

The TCCA also failed to consider that the jury deliberated for two days before reaching a verdict, and that the deliberations were so divisive that the defense moved for a mistrial after a juror asked to be released because of how the other jurors were treating her. The jury's difficulty in reaching a verdict demonstrates that the evidence was not overwhelming. *See Adams*, 71 A.3d at 530. Where the State's case was only "fairly strong," the false testimony of key prosecution witnesses,

which the prosecutor emphasized during summation, is *per se* material.

C. False Testimony Is Material Where The Prosecutor Emphasized It During Summation.

The TCCA, by ignoring Shipley's summation and counterfactually considering whether McGregor would have been convicted at a hypothetical trial at which the witnesses testified truthfully, failed to take into account the corrupting effect of the prosecutorial misconduct that is the gravamen of a *Napue* due process violation. "A finding of bad faith on the part of the prosecution should increase the likelihood of a finding of materiality. Similarly, if the prosecutor invoked false testimony to persuade the jury to convict, it is more likely that the testimony is material." Poulin, 116 PENN. ST. L. REV. at 386. The TCCA gave no weight to the fact that Shipley suborned perjury and then implored the jury during summation to believe Gable, Osani, and Paxton.

False testimony that a prosecutor knowingly used and then argued as a basis to convict is material. *See Drake v. Portuondo*, 553 F.3d 230, 245 (2d Cir. 2009). A witness's false testimony that she expected nothing in return for her testimony is material where the prosecution vouches for her credibility during summation. *Haskell v. Greene*, 866 F.3d 139, 152 (3d Cir. 2017). This bad-faith conduct deprives the defendant of due process by enabling the prosecution to obtain a conviction through deceit. *Id*. at 151.

Shipley did not trust the jury enough to elicit testimony that she would write a letter and request a special parole review for Gable in exchange for her testimony; that she had arranged a plea bargain to reduce Osani's felony assault charge to a misdemeanor for time-served in exchange for his grand jury testimony; and, that she had decided before Paxton testified to arrange for him to receive lenient sentences on two aggravated robbery charges after McGregor's trial. Clearly, she was concerned that, had the jury known that these witnesses sought and received or would receive consideration, it would disbelieve their testimony that McGregor had confessed to them. The jury was entitled to know that she purchased their testimony and allowed them to lie about it under oath.

Shipley committed aggravated perjury, a felony under section 37.03 of the Texas Penal Code, by eliciting false, material testimony in an official proceeding. The TCCA failed to consider that she engaged in unethical, bad faith, criminal conduct in prosecuting a capital murder case and gave no weight to its corrupting effect and her summation in determining materiality. It should have held that the State failed to prove beyond a reasonable doubt that the jury would have believed the witnesses' testimony that McGregor had confessed to them if it had known that they lied in denying that they had received or would receive consideration for their testimony.

D. False Testimony Is Material Even Though The Jury Knew That The Witnesses Had A Motive To Testify For The Prosecution.

The TCCA held that Gable's false testimony was immaterial because the jury knew that she had an interest in testifying for the State in view of her letter to Elliott that she was "seeking relief," her acknowledgment on cross-examination that she had heard that a prosecutor can help an inmate obtain parole, and Christian's testimony that she said that she expected a parole benefit as a result of her testimony (App. 32a). It ignored that Shipley argued during summation that Gable was credible; that, although Gable hoped that her testimony would help with parole, she had no motive to lie; and that Shipley did not know what defense counsel was talking about in suggesting that the witnesses would receive benefits, as she did not "operate that way" (21 R.R. 74-75). That the jury knew that Gable wanted parole does not compensate for not knowing that Shipley promised her a letter and a special parole review and was complicit in her false testimony to the contrary.

This Court in *Napue* held that a witness's false testimony denying that he would receive consideration is material even though the jury knew that he had a motive to testify for the prosecution. A co-conspirator, who pled guilty and was serving a lengthy prison sentence, testified and implicated Napue in a murder. He denied on cross-examination that he was promised anything for his testimony. The prosecutor, who had promised to recommend a sentence reduction if he

testified, failed to correct his false testimony. The state court held that the false testimony was immaterial because the jury knew that a public defender would seek a special parole review for the witness. This Court concluded, "[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Napue*, 360 U.S. at 270.

Notwithstanding *Napue*, lower courts are divided on whether a witness's false testimony denying an agreement for consideration is material where the jury knew that he had a motive to testify for the prosecution. *Compare Jackson*, 513 F.3d at 1077 (that jury could speculate that witness serving prison sentence who also had pending robbery charges was testifying to obtain leniency "pales in comparison to the reality" that law enforcement officer promised to try to get parole hold lifted and obtain special parole review and dismissal of pending charges), *with Guzman v. State*, 941 So.2d 1045, 1051 (Fla. 2006) (witness's false testimony that she did not receive reward for turning in defendant was immaterial where she was impeached in other ways). The TCCA's holding that Gable's false testimony was immaterial because the jury knew that she wanted parole conflicts with *Napue*, as the jury was entitled to know that Shipley, after promising to write a letter and request a special parole review, allowed Gable to lie about it.

E. False Testimony Is Material Even Though It Concerned The Credibility Of The Witnesses Instead Of The Substance Of Their Testimony.

The TCCA held that the false testimony of Gable and Osani collectively was immaterial because it did not refute the substance of their testimony that McGregor had confessed to them (App. 35a-36a). This Court has squarely rejected such a distinction. *See Napue*, 360 U.S. at 269-70 ("It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject. . . .") (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. App. 1956)). The TCCA failed to recognize that the jury's assessment of the witnesses' credibility ultimately determines whether it believes the substance of their testimony.

The TCCA erroneously held that the false testimony, to be material, must relate directly to McGregor's alleged confessions rather than to the witnesses' motives to testify that he confessed. It disregarded this Court's well-settled precedent that false testimony is material even though it would impeach the credibility of the witness instead of the substance of her testimony. It also disregarded the time-honored legal maxim, "*falsus in uno, falsus in omnibus*" ("false in one thing, false in everything"), which lawyers have relied on for centuries to argue that a witness who lies about one matter cannot be believed on any matter.[7] "The principle

[7] This Court has recognized that a witness who lies about one matter will lie about other matters. *See Mesarosh v. United States*,

that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269. Thus, if the jury had known that the witness testified falsely that he was not promised anything, it could have concluded that he fabricated his testimony to curry favor with the prosecution to receive consideration. *Id*. at 270.

There is no distinction between impeachment evidence and exculpatory evidence for purposes of a materiality analysis. *Bagley*, 473 U.S. at 676. Where a witness's credibility is important, the jury is entitled to know that he has an understanding or agreement with the prosecution regarding a pending legal problem. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *cf.*, *In re DePuy Orthopaedics, Incorporated, Pinnacle Hip Implant Product Liability Litigation*, 888 F.3d 753, 788-92 (5th Cir. 2018) ($502 million jury verdict set aside based on fraud because plaintiffs' counsel, by making undisclosed contribution to charity of one expert's choice before he testified and paying both experts after

---

352 U.S. 1, 13-14 (1956) (refusing to credit witness's testimony where Solicitor General acknowledged that he testified falsely in other proceedings).

trial, despite representing to jury that they testified *pro bono*, denied defendants opportunity to impeach them with evidence of financial motive). The TCCA erroneously excused Shipley's use of false testimony regarding the witnesses' motives on the basis that it did not impeach the substance of their testimony that McGregor had confessed to them.

F. Summary Reversal Is Appropriate.

Although McGregor has identified a conflict between the TCCA and other lower courts regarding the standard for determining the materiality of false testimony knowingly used by the prosecution—which ordinarily would warrant a grant of certiorari and plenary consideration—the TCCA's analysis is contrary to *Napue*, *Bagley*, and *Sullivan*. This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (*per curiam*) (summary reversal where state habeas court erroneously denied relief on suppression of evidence claim); *see also Hinton v. Alabama*, 571 U.S. 263 (2014) (*per curiam*) (summary reversal on Sixth Amendment ineffective assistance of counsel claim); *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*) (same); *Kaupp v. Texas*, 538 U.S. 626 (2003) (*per curiam*) (summary reversal on Fourth Amendment claim).

At the very least, summary reversal in McGregor's case is warranted under *Napue*, *Bagley*, and *Sullivan*. The TCCA's decision not only rewards a corrupt

prosecutor for suppressing favorable impeachment evidence and eliciting and failing to correct false testimony but also will encourage other prosecutors to engage in similar unethical, criminal conduct. This Court must intervene.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net

November 2019