No. 19-685

IN THE

Supreme Court of the United States

EDWARD GEORGE MCGREGOR,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, Edward George McGregor (McGregor), contends that the Texas Court of Criminal Appeals (TCCA) erred when it denied his false evidence claims made pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959). Specifically, McGregor argues that the TCCA erred when it concluded that the false testimony of two witnesses was immaterial to the outcome at trial under *Napue*. This is so, he says, because the court did not use his novel test for *Napue* materiality. Pursuant to McGregor's test, a court is compelled to ask whether the jury would have convicted the defendant had the witness lied at trial—and then been hypothetically impeached with that lie on cross-examination. In sum, McGregor asks the Court to hold that his categorical standard to measure materiality under *Napue*—and no other—is required by the Due Process Clause.

Respondent (the "State") objects to McGregor's Question Presented because it ignores several antecedent legal issues, all of which caution against granting certiorari here. The State suggests the following instead:

> Should the Court grant certiorari to determine whether the TCCA erred in failing to utilize McGregor's novel test for *Napue* materiality when he failed to raise the argument below; when the split he describes is illusory; and when the adoption of his novel constitutional measure for materiality would be barred by antiretroactivity principles?

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. Recommendations entered November 7, 2016.

• *Ex parte McGregor*, No. WR-85,833-01, Texas Court of Criminal Appeals. Judgment entered denying state habeas relief, June 12, 2019. Rehearing denied September 11, 2019.

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INTRODUCTION

The TCCA's rejection of McGregor's *Napue* false evidence claims was neither exceptional nor anomalous. The court provided a comprehensive description of the relevant constitutional principles with extensive citation to this Court's precedent. The court then performed a detailed examination of the trial testimony, resulting in a host of mixed fact and law determinations, all made in accordance with controlling constitutional mandates. After conducting its exhaustive analysis, and after an extensive examination of this Court's holdings, the TCCA determined that the false testimony of two witnesses, Adam Osani and Delores Gable, was *not material* under *Napue*. The TCCA's written decision is well reasoned. The outcome is consistent with, and firmly grounded in, a proper understanding of this Court's precedent under *Napue*. As such, there is plainly no good reason to grant certiorari.

To create an issue worthy of certiorari review, McGregor now contends, for the first time in any court, that the TCCA committed a *purely legal* error when it made its immateriality adjudication. In support, McGregor identifies two mutually incompatible methods to analyze the materiality of false testimony under *Napue*. Under the first variant, a court must ask whether the jury would have convicted the defendant had the witnesses told the *truth*. Under the second, a court must ask whether the jury would have convicted the defendant had the witness *lied*, and then been hypothetically impeached on cross-examination. McGregor prefers application of the latter

"constitutional" measure, and he believes the TCCA erred by applying the former.

But McGregor never pressed this novel argument to the TCCA. In failing to raise this argument below, McGregor has created a host of antecedent legal complications, which require resolution before reaching the sole issue McGregor identifies in the Question Presented.

OPINIONS BELOW

The TCCA's opinion denying McGregor's state habeas application (located at Petr's App. 1a–36a) is not reported. Likewise, the TCCA's order denying McGregor's motion for rehearing (located at Petr's App. 69a) is not reported. Finally, the district court's recommended findings and conclusions (located at Petr's App. 37a–68a) are also unreported.

JURISDICTION

McGregor failed to raise the sole legal issue contained within the Question Presented to the Texas courts. The Court has indicated that this failing may present a jurisdictional bar to review. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). If jurisdiction exists, the basis is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Question Presented involves application of the Due Process Clause in Section I of Fourteenth Amendment.

STATEMENT OF THE CASE

McGregor was convicted of a brutal capital murder of Kim Wildman—and because the State did not seek the death penalty, the convicting court automatically assessed punishment at confinement for life. *McGregor v. State*, 394 S.W.3d 90, 99–100 (Tex. App.—Houston [1st Dist.] 2012). An intermediate appellate court affirmed McGregor's conviction and sentence and overruled both his motion for rehearing and motion for en banc rehearing. *Id*. at 90. McGregor filed a petition for discretionary review in the TCCA, but that court refused it on April 17, 2013. *See id*. It appears that McGregor did not file a petition for writ of certiorari in this Court.

McGregor filed an application for writ of habeas corpus in the Texas courts. *See* Resp't App. A 1–26.[1] The state habeas trial court entered numerous proposed findings and legal conclusions when it recommended that habeas relief be granted. *See* Petr's App. 37a–68a. However, in a lengthy opinion, the TCCA rejected most of the factual and legal propositions upon which the trial court justified its recommendation to grant relief—and it replaced those findings and conclusions with its own. *See id*. at 3a–31a. For example, the TCCA repeatedly rebuffed the trial court's opinion that the testimony of various witnesses was actually false. *See id*. at 15a–31a. The TCCA also

[1] "Resp't App." refers the State's appendices, which use the following form: "Resp't App. [identifying letter designation] [page #]".

rejected many of the trial court's findings regarding whether the prosecutor had, in fact, made certain promises. *See id*. After performing its record analysis, the TCCA determined that McGregor met two of *Napue*'s three factors[2] with respect to two witnesses:

> 1. The TCCA found that the trial prosecutor, Elizabeth Shipley (Shipley) promised a witness for the state, Adam Osani (Osani), that she would report his cooperation to a prosecutor handling Osani's unrelated felony charge; Shipley failed to disclose that promise to defense counsel; and Osani testified falsely that he received no benefit for testifying against McGregor, which Shipley necessarily knew was false. Petr's App. 17a.
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> 2. The TCCA also found that Shipley promised a second witness, Delores Gable (Gable),[3] that Shipley would write a favorable letter to the parole board on Gable's behalf; Shipley failed to disclose that promise to defense counsel; and Gable

[2] To establish a *Napue / Giglio* violation, a petitioner must demonstrate: (1) that a witness testified falsely, (2) that the government knew the testimony was false, and (3) that the false testimony was material. *Giglio v. United States*, 405 U.S. 150, 153–54 (1972). The TCCA determined that McGregor met his burden with respect to the first and second prongs for two witnesses.

[3] In its written opinion denying relief, the TCCA refers to Delores Gable as "Delores." Pet. App. at 7a. However, to ensure parity between the petition and this response, the State will refer to her as "Gable."

> testified falsely that she received no benefit for testifying against McGregor, which Shipley necessarily knew was false. *Id*. at 21a.

The TCCA then analyzed Osani and Gable's false testimony, finding that it was not material under *Napue*, and denied McGregor's habeas application. Petr's App. 1a–36a. McGregor filed a motion for rehearing, which the TCCA also denied. *Id*. at 69a. McGregor now seeks a writ of certiorari.

SUMMARY OF THE ARGUMENT

McGregor failed to raise the issue in the Question Presented to the state courts and, unsurprisingly, those courts did not address it. As a result, McGregor's effort to raise the issue for the first time in this Court creates a cascade of antecedent legal problems, all of which counsel against granting a writ of certiorari.

First, McGregor's failure to raise the Question Presented below may mean that the Court lacks jurisdiction to consider it. And even if the Court determines that the failure to raise a claim in this context is not a jurisdictional bar, there are powerful prudential reasons to deny certiorari too. Second, McGregor's suggestion that the decision below is in tension with the holdings of five courts is illusory—there is no split. Third, McGregor's new claim, raised years after his conviction was final, is barred by the Court's antiretroactivity doctrine.

ARGUMENT

I. The Court Should Deny Certiorari Because McGregor Failed to Raise the Sole Issue in the Question Presented in the Courts Below, and Those Courts Did Not Address It.

A. The legal argument within the Question Presented was not raised below.

In his Question Presented, McGregor argues that, by failing to use his novel test for materiality, the TCCA erred when it concluded that the false testimony of two witnesses was immaterial.[4] However, the Question Presented is not properly before the Court because it was neither raised nor addressed below.

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[4] Throughout his petition, McGregor does not limit his argument to the false testimony of Osani and Gable. *See e.g.*, Pet. Cert. 5–9, 15 (showing McGregor referencing the testimony of Marvin Paxton). In this, McGregor may mean to suggest that the TCCA also erred when it denied his *Napue* claims for these other witnesses. But these arguments are beyond the scope of the Question Presented. To begin, the TCCA's materiality analysis under *Napue* concerned *only* Osani and Gable. Petr's App. 31a–32a. In other words, the TCCA resolved McGregor's other *Napue* claims for other reasons, not materiality. Here, the sole legal issue in the Question Presented is limited to the standard for *materiality* under *Napue*. McGregor seemingly acknowledges this limitation in his petition. *See* Pet. Cert. 9 n.4. Thus, the State will address only the materiality arguments related to Osani and Gable in this response.

To begin, in his form habeas application, McGregor makes no reference to his heightened measure for materiality under *Napue*. *See* Resp't App. A 9–22.[5] The same failing extends to his supporting legal memorandum. *See* Resp't App. B 1–6.[6] Indeed, in that memorandum, McGregor twice advised the state postconviction court to apply the generic materiality standard that he now contends *violates* the Due Process Clause.[7] And McGregor again failed to suggest the existence of his novel materiality test in his *supplemental* form application. *See* Resp't App. C 9–11. Thus, when the TCCA finally denied McGregor's *Napue* claims regarding Gable and Osani—after concluding that their false statements were not material, Petr's App. 69a—it did so without an opportunity to pass upon the issue raised in the Question Presented.

To be sure, *after* the TCCA finally denied his state application, McGregor filed a motion for rehearing in which he vaguely faulted the court for failing to

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[5] "Resp't App." refers the State's appendices, which use the following form: "Resp't App. [identifying letter designation] [page #]".

[6] Given the length of McGregor's legal memorandum (i.e., 69 pages), the State's Appendix B has been edited to include *only* McGregor's legal arguments regarding materiality.

[7] *See* Resp't App. B 3 ("The [standard for materiality] . . . is not whether he more likely than not would have received a different verdict, but whether be received a fair trial, understood as a trial resulting in a verdict worthy of confidence[,]" citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *id*. at 5 ("This evidence reasonably could be considered to put the case in such a different light as to undermine confidence in the verdict[,]" again citing *Kyles*, 514 U.S. at 435).

consider, as part of its materiality analysis, whether the jury might have further disbelieved Osani and Gable's testimony had it known the two witnesses *lied*. *See* Resp't App. D 11–12 (the "rehearing motion"). But these passing references are insufficient to raise his present constitutional claim for several reasons. First, McGregor cited no supporting legal authority for his novel rule in the rehearing motion. *See id*. This failing is conspicuous when comparing his rehearing motion with the materiality arguments he now raises to this Court. *Compare id*., *with* Pet. Cert. 10–23 (showing both citation to legal authority and an explicit description of his new legal measure).

Second, McGregor did not frame his materiality argument as encompassing a *categorical constitutional imperative*. *See* Resp't App. D 11–15. In other words, the rehearing motion failed to *mention* that *Napue* and due process *mandated* the TCCA to ask only whether the jury would have convicted McGregor had it known that the witnesses lied, followed by the court's examination of a hypothetical impeachment during cross-examination. *See id*. The TCCA was not on notice that it had used a supposed irredeemably improper measure for materiality. *See id*. And again, this failing is palpable when comparing the materiality arguments in his rehearing motion with those in his petition. *Compare id*., *with* Pet. Cert. 10–23.

Finally, McGregor's rehearing motion was *itself* improper for at least two reasons. First, Texas procedure explicitly prohibits applicants, like McGregor, who have been denied habeas relief from filling a motion for rehearing. *See* Tex. R. App. P. 79.2(d) ("A motion for rehearing an order that *denies*

habeas corpus relief under Code of Criminal Procedure, articles 11.07 or 11.071, *may not be filed*. The [TCCA] may on its own initiative reconsider the case." (emphasis added)). Second, litigants are generally not permitted to raise new legal arguments for the first time in a motion for rehearing without leave of the relevant appellate court. *See Rochelle v. State*, 791 S.W.2d 121, 124–25 (Tex. Crim. App. 1990).

B. Neither was the argument within the Question Presented addressed below.

Under Texas procedure, in "the absence of any indication to the contrary, such as a written opinion on rehearing," there exists a presumption "that the court of appeals *declined*, in its discretion, to consider the new matter." *Rochelle*, 791 S.W.2d at 124–25 (emphasis added). The TCCA continued:

> Thus, the overruling of such a motion for rehearing, without written opinion, will not be considered a ruling on an issue "necessary to final disposition of the appeal" and thus will not be a part of the decision of the court of appeals upon which we will base review.

Id. at 125. Moreover, under *this* Court's precedent the same holds true: a state appellate court's silent denial of a rehearing request that includes a new claim, without more, creates a presumption that the court did *not* address the new claim when it denied the rehearing motion without comment. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550

(1987).[8] And McGregor "bears the burden" of establishing otherwise, *see Adams v. Robertson*, 520 U.S. 83, 86–87 (1997), which he fails to do.

C. The Court is without jurisdiction to consider the new *Napue* materiality claim, or in the alternative, if the Court has jurisdiction, the Court should deny certiorari for prudential reasons.

With "very rare exceptions," the Court has adhered to the rule that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. *Adams*, 520 U.S. at 86. Although the Court has not yet resolved whether the failure to properly raise a claim in the state courts is jurisdictional, it might be. *See Yee*, 503 U.S. at 533. It follows that, because McGregor never raised his new, categorical test for materiality below—and because the TCCA was silent on the issue in its postcard denial of the motion for rehearing—the Court may lack jurisdiction to consider the Question Presented. *Id.*

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[8] Indeed, the Court's opinion in *Rotary Club* is on all fours with the procedural posture of this appeal: "Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Rotary Club*, 481 U.S. at 550 (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983)).

But even if the principles in *Adams* and *Yee* are merely prudential, there are good reasons to deny certiorari here.[9] For instance, McGregor asks the Court to both recognize a categorical test for materiality and then to pronounce its application across an enormous range of hypothetical and unrelated cases. Where such wide-ranging issues are involved "there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Id.* Moreover, the "pressed or passed upon" rule also embodies a "due regard for the appropriate relationship of this Court to state courts." *Id.* at 221 (citation omitted).

Indeed, scrupulous adherence to this prudential rule also helps in other ways. For example, the rule helps to ensure the *adequacy* of the appellate record in this Court because, if the state court addressed the federal question, then it is likely to have compiled the record with the constitutional issue in mind. *Cardinale*

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[9] McGregor's failure to press this claim below informs the Court's decision to grant certiorari. *See City of Canton v. Harris*, 489 U.S. 378, 383–84 (1989) ("[T]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition."). The State does not waive this defect and, instead, cites the defect and urges this Court to deny review for this reason. *See id.* at 384 ("Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived.").

v. Louisiana, 394 U.S. 437, 439 (1969). Moreover, requiring a petitioner to raise the federal question below invests the state court with an opportunity to "rest its decision [against the petitioner] on an adequate and independent state ground[,]" and to thereby render the Court's review of the federal question unnecessary. *See Gates*, 462 U.S. at 222.

This last concern finds special purchase here. Were the Court to adopt McGregor's new materiality standard in this very appeal—but not also hold that application of the new test is retroactive—the TCCA could nevertheless *deny* McGregor the benefit of the new rule on remand pursuant to the TCCA's *own* antiretroactivity analysis. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728–30 (2016) (explaining that unless this Court holds that a new *substantive* constitutional rule is retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), the state courts are free to apply their own antiretroactivity implementations). And, as the State will explain below, McGregor's new rule meets neither of the antiretroactivity exceptions in *Teague*.

In sum, even if the Court has jurisdiction to resolve the sole issue in the Question Presented, prudence calls for the Court to deny certiorari. *See* Sup. Ct. R. 10.

II. The Court Should Deny Certiorari Because There Are Serious Justiciability Concerns, Which Suggest Judicial Restraint.

Even if the Court concludes that McGregor adequately raised his novel materiality argument in

his rehearing motion—or that the lower court sub silentio addressed the claim on rehearing—the procedural framework of this appeal suggests serious concerns with its justiciability. To begin, there are several interpretations of the TCCA's postcard rehearing denial, making it impossible to determine the court's rationale. First, the TCCA may have refused to even consider McGregor's new argument when it denied rehearing. Second, the court may have adopted McGregor's new, categorical standard for materiality as its own, and then denied the claims under the new rule. Third, the court may have simply rejected McGregor's new categorical materiality standard as a matter of law. Fourth, and finally, the court may have reconsidered its materiality determination by measuring the outcome of trial had the jury known that two witnesses testified falsely—all *without* adopting McGregor's new categorical approach. These ambiguities make it impossible to determine whether the TCCA's unreasoned denial was erroneous.

The Court will not ordinarily grant certiorari to review a state court's mere misapplication of a properly stated rule of law. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). And yet, McGregor asks the Court to exercise its Rule 10 discretion anyway, without first establishing whether the TCCA's postcard rehearing

denial was premised on the misapplication of federal law or was merely incorrect.

In sum, this appeal of the TCCA's state habeas denial is a poor vehicle to analyze the Question Presented, or to adopt McGregor's test for materiality. The Court should decline McGregor's invitation to do so here:

> [T]his 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. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1995) (Stevens, J., concurring in denial of a stay). The Court should deny certiorari.

III. The Court Should Deny Certiorari Because McGregor's Suggested Split is Illusory.

Even if the Court concludes that McGregor properly raised the Question Presented in state court (or that it was addressed below), the Question Presented does not warrant review.

A. McGregor fails to identify a split between the decision below and the holding of any court.

McGregor suggests the existence of an "intractable conflict among the lower courts regarding the standard for determining materiality" under *Napue*. Pet. Cert. 12. He further contends that "[m]ost lower courts—including four federal circuit courts—have *used*" the test for materiality identified in the Questions Presented. *Id*. at 13–14 (emphasis added). In advancing this argument, however, McGregor cites five opinions from four federal circuits and a single appellate opinion from a state court. *Id*. at 13–15. Indeed, McGregor fails to show that the decision below is in the "minority" on the sole issue in the Question Presented—or even that a split exists.

The opinions McGregor cites are all distinguishable as either involving standards unique to federal criminal cases; involving imposition of a death sentence; or because the relevant legal statements were in passing or were dicta. To begin, McGregor first cites *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991). Pet. Cert. 14. To be sure, when it analyzed materiality under *Napue*, the Second Circuit mentioned the hypothetical outcome at trial if the jury had affirmatively known a key government witness lied. *Wallach*, 935 F.2d at 457. But it is plain from the opinion that the court was merely performing a common-sense interpretation of the trial evidence as it related to materiality. *See id*. To this end, the passage McGregor references is within a large section of the opinion devoid of legal citation. *Id*. The Second Circuit did not view its materiality inquiry as either controversial or in tension with any holdings of this Court or of any other. *See id*. Like the TCCA, the Second Circuit performed its materiality scrutiny without mentioning or resolving the potential

application of contrasting constitutional standards to weigh materiality. *Id*. Indeed, it is unclear whether the government disputed the court's materiality analysis, or even whether the issue McGregor identifies in the Question Presented was before the court. *See id*. Finally, nowhere in its opinion does the Second Circuit suggest that its reasoning (i.e., consideration of whether the hypothetical outcome at trial would have changed if the jury had known that a witness had lied), was dictated by a categorical imperative flowing from the Due Process Clause. *Id*. *Wallach* is inapposite. And for the same reasons that *Wallach* is inapposite, so are the other cases that McGregor relies upon: *Rosencrantz v. Lafler*, 568 F.3d 577, 588–89 (6th Cir. 2009); *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005) (en banc); *Adams v. Comm'r of Corr.*, 71 A.3d 512, 528–29 (Conn. 2013). Pet. Cert. 14.

McGregor's citation to *United States v. Mazzanti*, 925 F.2d 1026, 1030 (7th Cir. 1991), Pet. Cert. 14, fails for a different reason. The issue in *Mazzanti* was whether, after a government witness recanted part of his trial testimony, the federal criminal defendant was entitled to a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. *Mazzanti*, 925 F.2d at 1027. *Mazzanti* had nothing to do with *Napue*.

Finally, in his effort to establish a split, McGregor cites *Jackson v. Brown*, 513 F.3d 1057, 1077 (9th Cir. 2008). Pet. Cert. at 14. However, *Jackson* fails to suggest a split for at least two reasons. First, it suffers from many of the failings in *Wallach*. *See Jackson*, 513 F.3d at 1077–78. Second, the false testimony at issue was relevant to only the *sentencing* issues of a capital murder trial in which the defendant received a death

sentence.[10] As such, the Ninth Circuit had an independent reason to demand heightened scrutiny of the sentencing outcome. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed."). Ultimately, none of the above cases established a categorical rule of materiality analysis under *Napue*. The courts did not resolve any categorical legal issues, and the opinions are procedurally distinguishable from the case at hand.

B. The law review article is not helpful.

McGregor references an aspirational law review article, suggesting that the author "has summarized the division among the lower courts" regarding the proper test for materiality. Pet. Cert. 12. However, the article does no such thing. In the relevant subsection, titled "Assessing Materiality," the author first makes two unremarkable observations regarding materiality under *Napue*. First, "[i]n some cases it is clear that the allegedly perjured information had no impact on the defendant's conviction or sentence[,]" and second, "[i]n others [cases], the court's approach to materiality

[10] *See Jackson*, 513 F.3d at 1078) ("Here, Mikles and McFarland were the only witnesses to describe Jackson admitting to personally committing the murders. The special circumstances findings did not require that he actually commit the acts (it was sufficient that he 'physically aided' their commission, Cal. Penal Code § 190.2(c) (1977)); nonetheless, it is clear that the jury would be far more likely to find the requisite 'intent to cause death' if it believed that Jackson had personally beat on and sexually assaulted Ott than if it believed only that he was present at the scene of the acts.").

determines the outcome." *See* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 Penn St. L. Rev. 331, 382–83 (2011) (the "article"). In support of the first contention, the author provides no guidance or editorial whatsoever, instead relying on a single "*See e.g.*" citation to a Seventh Circuit opinion, which itself provides the reader with no rationale or methodology to determine if a given case falls within the first or second category. *See id.* at 383 n.246 (citing *Cheeks v. Gaetz*, 571 F.3d 680, 685–86 (7th Cir. 2009)).

As for the second contention, the article again suggests two possible methods to measure *Napue* materiality. *Id.* The first alternative focuses on 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." *Id.* This first alternative is the approach that McGregor now contends is *categorically unconstitutional*. As for the second alternative:

> [A] 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 approach accounts for the gravity and corrupting effect of false testimony*.

Id. (emphasis added). The materiality test just described is essentially the one McGregor now insists is constitutionally *mandated*.

However, the article's justification for the second variant is lacking. It consists of (1) the author's *subjective* view that the favored materiality standard is superior because it might result in more defense-favorable materiality determinations; and (2) that the materiality threshold should be modified to punish prosecutorial misconduct for its own sake. *See id*.; *see also id*. at 384. The author also cites a handful of examples in which a court analyzed *Napue* materiality in a manner consistent with McGregor's preferred test. *See id*. nn.249–251. But the article's citations are mostly the same as those cited by McGregor—and they necessarily fail for the same reasons. *Compare id*., *with* Pet. Cert. 14.

Finally, McGregor fails to justify a writ of certiorari for a deeper reason. Regardless of the moral strength (or weakness) of the author's view concerning the proper measure for *Napue* materiality, something more is required to justify this Court's discretionary decision to explore application of McGregor's novel categorical rule. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("Petitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air."). In failing to provide a meaningful argument to

in support of his rule, McGregor fails to justify certiorari. *See id*.

* * *

In sum, the complete absence of a meaningful split with the decision below—or at the very least, the absence of a *mature* split—is reason alone to deny certiorari. To be sure, if a split ever emerges regarding the propriety and applicability of McGregor's categorical test, the Court would then benefit from the lower courts' analysis and application of the rule—but that did not happen here.

IV. The Court Should Deny Certiorari Because Resolution of the Question Presented in McGregor's Favor Would Be Barred by The Antiretroactivity Principles in *Teague*.

A. *Teague*'s legal standard

Justice O'Connor's plurality opinion in *Teague* affirms that McGregor cannot obtain the benefit of his new and novel test for *Napue* materiality. To begin, "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases *still pending on direct review*." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (emphasis added). However, for those convictions that are already final, a new rule can be given retroactive effect only in two narrow circumstances. *Id*.

The first antiretroactivity exception relates to "new *substantive* rules of constitutional law." *Montgomery*, 136 S. Ct. at 728 (emphasis added). A new rule is *substantive* if it forbids the imposition of a criminal punishment for certain primary conduct, or if it

prohibits a category of punishment for a class of defendants because of their status or offense. *Id*. The second antiretroactivity exception applies to new rules of constitutional *procedure*. *Summerlin*, 542 U.S. at 352. This exception applies if the new rule is a "'watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Id*. (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)). That a new of procedure is "fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Id*. This category is "extremely narrow," and "'it is unlikely that any has yet to emerge.'" *Id*. (quoting *Tyler v. Cain*, 533 U.S. 656, 667, n.7 (2001)).

Finally, an opinion of this Court announces a new rule "'when it breaks new ground or imposes a new obligation' on the government." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague*, 489 U.S. at 301). In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (quoting *Teague*, 489 U.S. at 301). A "holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Id*. (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997)).

B. *Teague*'s antiretroactivity limitation applies to McGregor's petition because he seeks a new procedural rule after his conviction became final.

McGregor's conviction is final. The TCCA denied his petition for discretionary review on April 17, 2013.

See McGregor, 394 S.W.3d at 90. Thus, McGregor's conviction was final ninety days later, July 16, 2013, after the time for filing a petition for certiorari in this Court expired. Moreover, regarding *Teague*'s two antiretroactivity exceptions, McGregor's proposed rule is *procedural* (not substantive) because it contextualizes his culpability for the charged offense. *See Summerlin*, 542 U.S. at 353 ("[R]ules that regulate only the manner of determining the defendant's culpability are procedural.").

Finally, McGregor's proposed test for materiality under *Napue* is plainly "new." It was not dictated by precedent existing at the time McGregor's conviction became final. *See Chaidez*, 568 U.S. 347. Indeed, "[q]uite the opposite is true: [McGregor's] . . . rule is flatly inconsistent with the prior governing precedent." *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). His test is "flatly inconsistent" because it prohibits a court from asking whether the jury would have convicted the defendant had the witnesses told the *truth*.

In sum, the Court should not grant certiorari to analyze McGregor's new test for materiality because doing so would have the same inequitable and disparate impact on similarly situated defendants as it does in federal habeas.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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