No. 19-685

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

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED BY RESPONDENT'S BRIEF IN OPPOSITION

Whether the equitable bar created by *Teague v. Lane*, 489 U.S. 288 (1989), applies to a false testimony claim that a habeas petitioner could not have raised on direct appeal because the State suppressed the evidence necessary to prove that the testimony was false.

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INTRODUCTION

Before Petitioner Edward McGregor's capital murder trial, lead prosecutor Elizabeth Shipley agreed to reward inmates Delores Gable, Adam Osani, and Marvin Paxton for their testimony that McGregor had confessed to them on different occasions. She not only failed to disclose the agreements to the defense before trial but also elicited and failed to correct the witnesses' false testimony denying any agreements. When the truth emerged six years later at a habeas corpus evidentiary hearing, the trial court recommended relief because the State had suppressed favorable impeachment evidence and elicited and failed to correct false testimony that was "material" to the conviction. However, the Texas Court of Criminal Appeals (TCCA) unanimously held that the false testimony was "immaterial." It concluded that the witnesses' false denials that they had agreements with the prosecution "did not relate to or refute the witnesses' substantive testimony" that McGregor had confessed to them and that "the outcome of this case would have been the same even if the jury had heard evidence" of the agreements. Petitioner's App. A at 35a-36a.

McGregor's certiorari petition contends that the TCCA's materiality analysis is contrary to *Napue v. Illinois*, 360 U.S. 264 (1959). Respondent opposes certiorari on the basis that: (1) McGregor did not make this specific argument regarding the flawed "materiality" analysis in the TCCA; (2) the conflict among the lower courts cited in his petition is "illusory"; and (3) he seeks a "new rule" that could not apply retroactively under

Teague v. Lane, 489 U.S. 288 (1989). Brief in Opposition (BIO) at 5. These purported hurdles to a grant of certiorari are illusory.

Respondent does not cite a case from any jurisdiction to support the TCCA's flawed materiality analysis that counterfactually assumed what would have happened at trial if the lying witnesses had told the truth about their agreements with the prosecution. Additionally, respondent seeks to profit from the trial prosecutor's criminal conduct in suborning and failing to correct false testimony by invoking the *Teague* doctrine to bar consideration of the issue. Applying *Teague* would reward the prosecution for suppressing the evidence that would have impeached the false testimony and thereby preventing McGregor from raising the issue in a motion for new trial and, if necessary, on direct appeal.

ARGUMENT

A. The Legal Argument Encompassed Within The Question Presented Is Properly Before The Court As Part Of The Larger Federal Question Concerning False Testimony And The Due Process Clause.

Respondent asserts that certiorari should be denied because McGregor allegedly did not make the legal argument contained in the Question Presented, which prevented the TCCA from having an opportunity to address it. BIO at i, 2, 6. To the contrary,

McGregor contended in his state court brief that a materiality analysis should take into account the probable effect on the verdict had the jury learned of the witnesses' lies during the trial: "The undisclosed agreements and benefits and the false testimony were material to the credibility of all three key prosecution witnesses. . . . This evidence reasonably could be considered to put the case in such a different light as to undermine confidence in the verdict. . . . " Respondent's App. B at 4-5. "Had the jury known that Gable was lying about applicant's 'confession,' it would have viewed the testimony of Paxton and Osani with greater skepticism. . . ." *Id.* at 6.

The state habeas trial court concluded that the false testimony was "material" and recommended relief. Petitioner's App. B at 60a-63a; Petitioner's App. C at 65a-66a. There was no dispute regarding how to determine materiality until the TCCA held that the false testimony was immaterial based on its erroneous counterfactual assumption that the jury would have convicted McGregor if the prosecution witnesses had told the truth about their agreements instead of lying. This novel view of *Napue* materiality was neither based on precedent nor foreseeable. McGregor challenged it in his motion for rehearing. Respondent's App. D at 11-15. The TCCA denied rehearing without explanation. Petitioner's App. D at 69a.

Regardless of whether McGregor raised a "new" argument in his petition, respondent's position is foreclosed by several decisions of this Court. *See*, *e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("Once

a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (citing cases). McGregor has always contended that the State's knowing use of and failure to correct false, material testimony violated due process. The TCCA addressed the merits of that federal question, cited *Napue*, and held that the false testimony was immaterial. Petitioner's App. A at 5a-6a, 31a-36a. Thus, this Court can consider the issue even if McGregor made a "new" argument on rehearing in the TCCA and in his petition.[1]

Had McGregor framed the Question Presented as, "Whether the TCCA erred in holding that the State's knowing use of and failure to correct false testimony was immaterial," respondent could not plausibly contend that the TCCA did not resolve the federal question. That McGregor articulated the issue more precisely in the Question Presented does not prevent this Court from addressing the federal question.[2]

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[1] For this reason, respondent's contention that McGregor did not raise this specific argument in his motion for rehearing (BIO at 7-9) is a red herring.

[2] Respondent also invites the Court to defer resolution of the issue until a federal habeas corpus proceeding. BIO at 14. This is a trap. Respondent knows that McGregor cannot file a federal petition because his AEDPA deadline expired before he filed the state application. Even if he could, the constitutional issue would be considered under a deferential rather than a *de novo* standard of review. *See Madison v. Alabama*, 586 U.S. ___, 139 S. Ct. 718, 726 (2019) (*de novo* rather than deferential standard of review applies to this Court's review of state post-conviction proceeding). To be clear, if this Court denies relief, the State will have

B. The Division Among The Lower Courts Is Not Illusory.

Respondent seeks to categorize the division among the lower courts as "illusory," contending that, in the cases cited by McGregor, the courts' *Napue* materiality analyses were either irrelevant or constituted *dicta*. BIO at 15-17. To the contrary, McGregor has identified a clear division between the TCCA and several other courts on this important issue.

In *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991), the Second Circuit observed, "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." *See also United States v. Cargill*, 17 Fed. App'x 214, 229 (4th Cir. 2001) (quoting this portion of *Wallach*). Respondent acknowledges that the TCCA determined *Napue* materiality differently in McGregor's case than the Second Circuit did in *Wallach*: "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." BIO at 15. Nonetheless, respondent asserts that "*Wallach* is inapposite." BIO at 16. This assertion cannot withstand scrutiny.

Likewise, the Sixth Circuit focused its *Napue* materiality analysis in *Rosencrantz v. Lafler*, 568 F.3d 577,

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protected a conviction obtained by the lead prosecutor's felonious and unethical conduct.

588 (6th Cir. 2009), on "the impact on the jury had the prosecutor corrected Lasky, or the defense counsel confronted Lasky with her false denial." The Ninth Circuit similarly addressed *Napue* materiality in *Jackson v. Brown*, 513 F.3d 1057, 1077 (9th Cir. 2008), as follows:

> The State argues that the *Napue* violations were immaterial, because even if the prosecutor had corrected the false testimony, the truth would have done little to impeach the informants' credibility. . . . The State underestimates the impeachment value that the prosecutor's correction of McFarland's testimony could have served. Both the district court and the state court referee found that McFarland would likely have been thoroughly discredited. . . . Moreover, that McFarland was willing to perjure himself in order to cover up prosecutor Marin's promise would surely have called into question the truth of all of his testimony. . . . We similarly reject the State's arguments that Mikles's revealed perjury would have had little impact on the jury.

Id.

Respondent attempts to distinguish *Jackson* on the basis that the Ninth Circuit conducted a more demanding materiality analysis because the petitioner was sentenced to death. BIO at 16-17. To the contrary, the Ninth Circuit did not even hint that the materiality analysis is different where the false testimony affected a death sentence instead of a conviction, and it cited *Napue* rather than Eighth Amendment death penalty precedent. *Id.* at 1071, 1075; *cf. Banks v.*

Dretke, 540 U.S. 668, 701-03 (2004) ("materiality" analysis applicable to suppressed evidence that affected death sentence same as analysis applicable to conviction).

The TCCA's conclusion that the false testimony was "immaterial"—based on its counterfactual assumption that the jury still would have convicted McGregor if the witnesses had told the truth about their agreements—is an outlier among the lower courts. Notably, the TCCA did not cite a case from any jurisdiction that supports its flawed materiality analysis. Nor has respondent. There is a clear division among the lower courts, with the TCCA standing alone on the wrong side.

C. *Teague v. Lane* Does Not Bar Consideration Of The Question Presented.

Respondent asserts that if this Court adopts McGregor's proposed materiality analysis, it would constitute a "new rule" that could not apply retroactively under *Teague v. Lane*, *supra.* BIO at 20-22. As discussed below in Part D., McGregor's argument is supported by *Napue* and, if accepted, would not constitute a "new rule." But even if it did, *Teague* should not apply to a claim that has to be raised in a habeas corpus proceeding because the prosecutor's criminal and unethical conduct prevented it from being raised on direct appeal. Indeed, the issue of whether *Teague* should apply to a claim of prosecutorial misconduct alone merits a certiorari grant.

When a constitutional right "is susceptible of vindication only on habeas review, application of *Teague* to bar full consideration of the claim would effectively foreclose any opportunity for the right ever to be recognized." *Jackson v. Johnson*, 217 F.3d. 360, 364 (5th Cir. 2000) (refusing to apply *Teague* to such a claim). *Teague* should not apply because McGregor could not have raised the *Napue* claim in a motion for new trial or on direct appeal because the prosecution suppressed evidence of the agreements, even though the trial court had ordered it to disclose all evidence favorable to the defense. Petitioner's App. B at 46a-47a. McGregor's conviction became final on direct appeal in 2013. Shipley did not disclose her agreements with the witnesses until she "confessed" to his habeas counsel during an interview in December 2015. *Id*. at 46a. The second-chair prosecutor, Jeff Strange, testified at the habeas hearing in 2016 that Shipley never told him about her agreements with the witnesses. *Id*. at 52a-55a. Thus, McGregor cannot be faulted for failing to raise the *Napue* claim in a motion for new trial (a prerequisite for raising it on direct appeal) in view of the fact that Shipley suppressed the favorable impeachment evidence not only from him but also from her co-counsel.

This Court, in an analogous situation, rejected the State's attempt to invoke the doctrine of procedural default to defeat a suppression of evidence claim in a federal habeas proceeding where the trial prosecutor's misconduct prevented the petitioner from raising the claim earlier. *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). The same rationale should apply to the State's attempt

to invoke *Teague* to bar consideration of a prosecutorial misconduct claim. *Teague* is a non-jurisdictional "equitable" doctrine that is subject to waiver and cannot fairly be invoked when the State has "unclean hands." *See Danforth v. Minnesota*, 552 U.S. 264, 278 n. 15 (2008) (*Teague* is an "equitable doctrine"); *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (a *Teague* bar is subject to waiver); *U.S. Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457, 465 (1957) (recognizing the "equitable doctrine" of "unclean hands").

Because Shipley knowingly suppressed evidence of the agreements, suborned and failed to correct the false testimony of the witnesses, and failed to disclose these matters to anyone until five years after McGregor was sentenced, *Teague* should not constitute an equitable bar to relief.

D. *Napue V. Illinois* Establishes That The False Testimony Was "Material."

Assuming *arguendo* that the lower courts are not divided on how to determine the materiality of false testimony, certiorari still should be granted because the TCCA's materiality analysis conflicts with *Napue* and its progeny. *Napue* emphasized that a prosecutor has a duty to *correct* false testimony by its witnesses. *See Napue*, 360 U.S. at 265, 269; *see also Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., Circuit Justice) (noting that this Court's precedent, including *Napue*, requires prosecutor to "correct" testimony known to be false). This necessarily means that

the jury will learn that the witnesses lied under oath and consider this in determining the credibility of their substantive testimony. If a prosecutor violates her duty to correct false testimony—as Shipley did at McGregor's trial—the logical question in a "materiality" analysis is what the effect would have been on the jury had the prosecutor or defense counsel corrected the lies at trial. The lower court cases cited in McGregor's petition determined materiality on this basis. The TCCA appears to be the only court that does not do so.

If the jury had known that the witnesses lied about their agreements with the prosecution and that Shipley suborned perjury, it likely would have disbelieved their testimony that McGregor had confessed to them. If the witnesses had been impeached, the State would have had to rely solely on the fact that McGregor's DNA was found at two crime scenes four years apart. However, the DNA evidence established only that he had sexual intercourse with the women; no evidence indicated that it was non-consensual or that it occurred contemporaneously with the murders. The impact of the DNA evidence also was diminished by the fact that he knew both women, and they were engaged in the business of providing adult entertainment to men.

Significantly, the state habeas trial court credited Strange's testimony that the prosecution relied on the testimony of Gable, Osani, and Paxton because the DNA evidence was insufficient to convict in concluding that McGregor probably would not have been convicted

had the jury known that they lied. Petitioner's App. D at 66a-67a. Thus, the prosecution did not satisfy its burden under *Napue* to prove *beyond a reasonable doubt* that the witnesses' false testimony did not affect the verdict. *See United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985); *cf. 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.") (emphasis in original).

The TCCA's materiality analysis jettisons over 60 years of this Court's false testimony precedent. Its opinion allows unscrupulous prosecutors to suppress favorable evidence and elicit and fail to correct false testimony, secure in the knowledge that, if they are caught, the convictions will be upheld because the false testimony would impeach only the witnesses' motive to testify rather than the substance of their testimony. It guides prosecutors on how to make agreements, not disclose them to the defense, and present false testimony denying their existence, thereby increasing the likelihood of an unjust conviction without jeopardizing it. Finally, it rewards and encourages prosecutorial corruption and ignores that a conviction obtained without honor has no value. This Court must intervene.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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