No. 20-6890

In The

Supreme Court of the United States

CHONG LENG LEE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Without developing the issue, Petitioner Chong Leng Lee raises an admittedly fact-intensive challenge to the Wisconsin Court of Appeals' rejection of his claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Should this Court decline to review this alleged misapplication of settled law?

2. Chong further asks this Court to grant review to explain what remedies are available for a *Brady* violation. But neither lower court reached that issue because they did not find a *Brady* violation here. Should this Court decline to review this issue because it does not decide constitutional questions that were not reached below?

3. Chong also urges this Court to grant review to decide whether bad-faith destruction of evidence, in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988), entitles a criminal defendant to dismissal of charges. Chong had asked the trial court to suppress some of the State's evidence, alleging that suppression and dismissal were the two available remedies for the alleged *Youngblood* violation. Should this Court decline to review this issue because Chong is barred from raising it and, in any event, because Chong has not shown a *Youngblood* violation?

4. During Chong's homicide trial, the court did not transcribe two discussions where the parties might have addressed the admissibility of a letter where Chong had written that he would "beat this case." Before trial, Chong argued that this letter was inadmissible because it was not relevant to his consciousness of guilt. Taking a 180-degree turn, Chong now argues that this evidence was prejudicial to his defense because it implied a consciousness of guilt. He argues that he is entitled to a new trial,

not because this evidence was *admitted*, but rather because there are no transcripts showing *why* this evidence was admitted. Should this Court decline to review this issue because Chong is barred from raising it, this Court recently declined to review a similar but more substantial issue, the alleged error was harmless, and Chong only asserts a misapplication of settled law?

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STATEMENT OF THE CASE

A fatal shooting occurred at the Luna Lounge in Appleton, Wisconsin on December 8, 2013. (Pet-App. A2.) Security camera footage showed Petitioner Chong Leng Lee and other people exiting the building shortly after the shooting. (Pet-App. A3.)

Three days later, December 11, police interviewed three possible eyewitnesses to the shooting: Ryan Thao, Watou Lee, and Mikey Thao. (Pet-App. A3.) Ryan described the shooter's clothing and said that the shooter had come into the foyer area from the bar with a couple of people. (Pet-App. A3.) Watou and Mikey also provided general descriptions of the shooter. (Pet-App. A3.) None identified the shooter. (Pet-App. A3, A9–A10.) All three of these witnesses told police they were very concerned for their safety, did not want to be identified, and did not want to get involved. (Pet-App. A3.)

Police also interviewed other people with knowledge of the shooting. Police interviewed Joe Thor, who was shown in security camera footage running out of the Luna Lounge right after the shooting. (Pet-App. A2, A3) Thor "told police that Chong had admitted being the shooter and disposing of the gun." (Pet-App. A3.) Police officers also "interviewed 'several females' in Milwaukee who indicated that Chong had 'made some statements to them admitting to doing the shooting.'" (Pet-App. A3.) In total, seven people said that Chong had confessed his involvement in the shooting to them. (Pet-App. A5.)

On December 16, 2013, the State of Wisconsin charged Chong "with one count of first-degree intentional homicide by use of a dangerous weapon and one count of possession of a firearm by a felon." (Pet-App. A4.) The State later added four counts of felony intimidation of a witness as a party to the crime. (Pet-App. A4.)

As the Wisconsin Court of Appeals recounted, "[t]he State did not disclose to the defense that the police had interviewed Watou, Mikey, and Ryan in December 2013. The recordings of those interviews were retained for seven or eight months, and the police then destroyed them." (Pet-App. A4.) A police officer later admitted that the interview videos "were destroyed because the witnesses had requested that the police not disclose their identities and because the police 'knew through discovery the defense would be able to obtain [the recordings].'" (Pet-App. A4 (alteration in original).)

Police inadvertently disclosed Mikey's, Ryan's, and Watou's identities to Chong's defense team. (Pet-App. A4.) The police subsequently reinterviewed these three men in April 2015 and provided Chong's defense team with reports and recordings of these interviews. (Pet-App. A4.)

One of Chong's lawyers requested copies of the initial police interviews with Mikey, Ryan, and Watou. (Pet-App. A4–A5.) Chong's defense team learned that police had destroyed the recordings of the December 2013 interviews with these three men. (Pet-App. A5.)

Chong filed a motion to dismiss the homicide charge or, alternatively, suppress any testimony by Mikey, Ryan, and Watou linking Chong to the shooting. (Pet-App. A5.) The trial court "concluded the police had violated Chong's right to due process by destroying potentially exculpatory evidence in bad faith." (Pet-App. A5.) The court did not think that dismissal of the homicide charge was an appropriate remedy, so it prohibited the State from calling Mikey, Ryan, and Watou to testify at trial. (Pet-App. A5.)

Chong had an 11-day jury trial in February and March 2016. (Pet-App. A5.) "At trial, there was evidence that seven individuals had heard Chong confess his involvement in the shooting. In addition, an officer testified that [Chong's brother] had told law enforcement Chong 'was the shooter.'" (Pet-App. A5.) One witness "read a letter Chong had written to her following his arrest that included the statement, 'I'm pretty sure I'll beat this case though.'" (Pet-App. A5.) Chong's trial lawyers did not object to this testimony about Chong's letter, although the court had ruled this evidence inadmissible before trial. (Pet-App. A5.) While deliberating, the jury asked to see this letter, which the court then provided to the jury. (Pet-App. A6.) "The jury ultimately found Chong guilty of the homicide count, the firearm possession count, and two of the witness intimidation counts." (Pet-App. A6.)

Chong filed a motion for postconviction relief, arguing, as relevant here, that his trial lawyers were ineffective by not objecting to the "beat this case" letter. (Pet-App. A6.) At a postconviction hearing, Chong's two trial lawyers testified that they did

not remember why they did not object to the "beat this case" letter when a witness read it for the jury. (Pet-App. A6–A7.) Chong's trial lawyers indicated that the parties might have discussed this issue with the trial court. (Pet-App. A6–A7.) After the hearing, "Chong argued he had been denied his right to a meaningful appeal because there were no transcripts of the circuit court's discussions with the parties regarding the admissibility of the 'beat this case' letter and the jury's request to review that letter during deliberations." (Pet-App. A7.)

The trial court denied Chong's motion for postconviction relief. (Pet-App. A7.) It determined that Chong had not shown a "colorable need" for the nonexistent transcripts and had not shown "that the transcripts' absence had caused him any prejudice." (Pet-App. A7.)

Chong appealed his convictions and raised three issues. First, he argued that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the December 2013 interviews with Mikey, Ryan, and Watou. Second, he argued that the State's deletion of those interview videos violated due process under *Arizona v. Youngblood*, 488 U.S. 51 (1988). Third, he argued that he was entitled to a new trial due to the absence of transcripts showing why his "beat this case" letter was read to the jury. The Wisconsin Court of Appeals rejected Chong's arguments and affirmed his convictions.

Addressing Chong's *Brady* claim, the court of appeals concluded that the deleted interview videos were neither exculpatory nor material to Chong's defense.

(Pet-App. A8–A16.) The court reasoned that Chong had failed to support his suggestion that Mikey, Ryan, and Watou identified someone besides him as the shooter. (Pet-App. A9–A12.) It further reasoned that Chong's trial lawyers (1) were aware of Mikey, Ryan, and Watou before trial; (2) obtained copies of their 2015 interviews before trial; and (3) could have called them to testify at trial. (Pet-App. A12–A13.) The court also noted that Chong's confessions to seven people were strong evidence of his guilt. (Pet-App. A13–A14.)

Turning to Chong's *Youngblood* claim, the court of appeals upheld the trial court's discretionary decision to suppress the State's evidence instead of dismissing the homicide charge. (Pet-App. A18–A23.) The court of appeals held that Chong had not shown that the deleted 2013 interview videos were apparently exculpatory, and he had access to comparable evidence. (Pet-App. A16–A17.) Nevertheless, the court of appeals held that the police had violated *Youngblood* by destroying these videos in bad faith. (Pet-App. A17–A19.) The court of appeals treated the trial court's determination of bad faith as a not-clearly-erroneous factual finding. (Pet-App. A18 & n.9.) After noting that a trial court has discretion to select a remedy for a *Youngblood* violation, the court of appeals upheld the trial court's selection of remedy. (Pet-App. A19.) It reasoned that the low degree of bad faith, the unimportance of the deleted videos, and the strength of the State's case weighed against dismissing the homicide charge. (Pet-App. A20–A22.)

The court of appeals next rejected Chong's request for a new trial due to the absence of transcripts showing why the jury had heard inadmissible evidence that Chong had written that he would "beat this case." The court reasoned that Chong could have challenged the admission of this evidence even without transcripts showing exactly why the evidence was admitted. (Pet-App. A22–A25.)

Chong subsequently filed a motion for reconsideration, which the court of appeals denied.

Chong then filed a petition for review. The Wisconsin Supreme Court denied the petition after receiving the State's formal response.

ARGUMENT

I. CHONG CANNOT ESTABLISH A *BRADY* VIOLATION, SO THIS COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER DISMISSAL IS AN AVAILABLE REMEDY FOR A *BRADY* VIOLATION.

Chong's first issue presented asks, "Is dismissal available to remedy a *Brady* violation and also did Chong establish a *Brady* violation that warrants dismissal?" (Pet. I (formatting altered).) The State will address the first part of this question now and discuss the second part in the next section of this brief.

This Court should decline to review Chong's question about available remedies for a *Brady* violation because the lower courts did not decide this issue. This Court is "a court of review, not of first view." *Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). It thus regularly declines to address issues that a court of appeals below did not reach. *See, e.g.*, *id.*; *McLane Co.*

v. E.E.O.C., 137 S. Ct. 1159, 1170 (2017); *Cutter*, 544 U.S. at 718 n.7. The Wisconsin Court of Appeals did not find a *Brady* violation here, so it did not decide whether dismissal is an available remedy for a *Brady* violation. (Pet-App. A8–A16.) It instead upheld the trial court's choice of remedy for the alleged *Youngblood* violation. (Pet-App. A16–A22.) *Brady* claims are distinct from *Youngblood* claims. *See, e.g.*, *Illinois v. Fisher*, 540 U.S. 544, 547–49 (2004) (per curiam) (distinguishing *Brady* violations from *Youngblood* violations). Because the lower courts did not decide what remedies are available for a *Brady* violation, neither should this Court.

In addition, to reach the issue of remedy, this Court would have to first find a *Brady* violation. This Court has "often stressed the importance of avoiding the premature adjudication of constitutional questions." *Clinton v. Jones*, 520 U.S. 681, 690 (1997). It has a long practice of not deciding "abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision." *Id.* at 690 n.11 (alteration in original) (citation omitted). This Court thus would not decide whether dismissal is an available remedy for a hypothetical *Brady* violation in this case. Chong's remedy question puts the cart before the horse because it assumes that he can establish a *Brady* violation. And, as explained in the next section, this alleged *Brady* violation is not worthy of this Court's review.[1]

[1] The State does not dispute that some courts are in conflict on whether dismissal is an available remedy for a *Brady* violation. *See Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 254 (3d Cir. 2005) (collecting cases).

II. CHONG'S *BRADY* CLAIM IS A FACT-INTENSIVE AND MERITLESS CHALLENGE TO THE WISCONSIN COURT OF APPEALS' APPLICATION OF SETTLED LAW.

On the merits of his *Brady* claim, Chong does not identify a split of authority or anything of nationwide significance. He instead asserts a "misapplication of a properly stated rule of law," which "rarely" warrants this Court's review. U.S. Sup. Ct. R. 10. This Court should not review the Wisconsin Court of Appeals' rejection of Chong's *Brady* claim for three reasons.

First, even Chong recognizes "the highly factual nature of whether Chong has established a *Brady* violation." (Pet. 12.) This Court should not wade into that factual quagmire.

Second, Chong admittedly does "not fully develop this subsidiary issue in this petition." (Pet. 12.) Chong explains why he thinks that dismissal is an available remedy for a *Brady* violation, but he does not develop an argument showing that the State violated *Brady* here. (Pet. 9–13.) The presence or absence of a *Brady* violation is a threshold issue for Chong, not a subsidiary issue. By failing to develop a *Brady* argument in his petition, Chong has not given this Court a "compelling" reason to review this issue. U.S. Sup. Ct. R. 10.

Third, the Wisconsin Court of Appeals soundly rejected Chong's *Brady* claim. (Pet-App. A8–A16.) For the sake of brevity, the State will summarize that court's reasoning.

A criminal defendant must make three showings to establish a *Brady* violation: "(1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice . . . ensued.' *Skinner v. Switzer*, 562 U.S. 521, 536 (2011) (alteration in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). To show prejudice, a defendant must prove that the suppressed evidence was material. *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* (alteration in original) (citation omitted). "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

Here, the Wisconsin Court of Appeals correctly determined that the evidence at issue—video recordings of the December 2013 police interviews with Watou, Mikey, and Ryan—were not favorable to the accused. The court characterized as "misleading" Chong's argument that "'any evidence identifying someone other than Chong as the shooter would have been favorable' to the defense." (Pet-App. A9–A10.) As the court noted, Chong did "not cite any portion of the record supporting his assertion that Watou, Mikey, or Ryan identified a specific person other than Chong as the shooter during the December 2013 interviews." (Pet-App. A10.) "Instead," the court noted, "the

record shows that Watou, Mikey, and Ryan merely provided general descriptions of the shooter's clothing, appearance, and direction of travel. Chong does not cite any evidence suggesting that those descriptions were inconsistent with his own clothing, appearance, or location on the night of the shooting." (Pet-App. A10.)

Turning to the materiality/prejudice prong of the three-part *Brady* test, the Wisconsin Court of Appeals correctly held that the evidence at issue was not material. It again noted that the deleted interview videos "did not exculpate Chong." (Pet-App. A12.) The court also reasoned that "there is no evidence that the State's suppression of the December 2013 interviews altered Chong's trial strategy." (Pet-App. A12.) It noted that police reinterviewed Watou, Mikey, and Ryan in April 2015; Chong's trial attorneys received copies of those interviews about nine months before trial; a defense investigator interviewed Ryan; and Chong alleged in a pretrial filing that Ryan gave an exculpatory statement to the defense investigator. (Pet-App. A12.) Yet Chong did not call Watou, Mikey, or Ryan to testify at trial, although Chong knew what testimony they "would potentially provide at trial" and he could have called them to testify "if he believed their testimony would exculpate him." (Pet-App. A12.) These facts strongly suggest that these three witnesses did not make statements to police exculpating Chong. And, as the court noted, Chong did not argue that his failure to call them at trial "was caused by the deletion of their December 2013 interviews." (Pet-App. A12–A13.) Finally, the court noted that the State introduced strong evidence of Chong's guilt at trial, including his confessions to seven people. (Pet-App. A13–A14.)

Chong thus cannot establish a *Brady* violation because there is not a reasonable probability that the deleted 2013 interview videos would have changed the verdicts at his trial.

* * *

In sum, this Court should not review Chong's first issue presented. The Wisconsin Court of Appeals did not decide whether dismissal is an available remedy for a *Brady* violation because it found no *Brady* violation. This Court thus should not consider this remedy question, either. Further, this remedy question is contingent on whether Chong can establish a *Brady* violation, but Chong's *Brady* claim is not worthy of this Court's review because it is a fact-intensive and meritless challenge to the state court's application of settled law.

III. CHONG'S *YOUNGBLOOD* CLAIM IS PROCEDURALLY BARRED FOR MULTIPLE REASONS AND WITHOUT MERIT.

Chong's second issue presented asks, "Does a *Youngblood* violation require dismissal when bad-faith is conceded by the State?" (Pet. I (formatting altered).) This Court should decline to review this issue for four reasons: (1) Chong is judicially estopped from raising this issue; (2) the state appellate court rejected this issue on adequate and independent state-law forfeiture grounds; (3) there was no *Youngblood* violation because the destroyed videos were not exculpatory; and (4) the State does not concede bad faith.

A. Chong's *Youngblood*-remedy argument is procedurally barred on two grounds.

The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted).

Chong is pursuing an argument now that contradicts the one he made in the trial court. Before trial, Chong filed a motion to dismiss the homicide charge or, alternatively, "suppress 'any in court identification of Chong' by Watou, Mikey, and Ryan and any testimony by those witnesses 'that links Chong . . . to the homicide in this case.'" (Pet-App. A5.) In a supporting brief, Chong noted that "[i]n cases that involve the destruction of evidence by the government, a court has discretion to fashion an appropriate sanction. *State v. Huggett*, 324 Wis. 2d 786, 800 (Ct. App. 2010)." (R. 97:11.)[2] Chong argued that the trial court "has the discretion to, and should, grant dismissal as an appropriate remedy for the willful destruction of evidence. *See State v. Huggett*, 324 Wis. 2d 786 (Ct. App. 2010)." (R. 97:12.) In the alternative, Chong argued that if the trial court "declines to dismiss the charges against [Chong], it must fashion another remedy for the misconduct and violation of [Chong's] due process rights. The only other available remedy is to limit the evidence that the prosecutor can elicit at trial." (R. 97:12.) The trial court denied the request for dismissal but "prohibited the

[2] Citations to "R." refer to the record in Outagamie County Circuit Court Case No. 2013CF1074.

State (but not Chong) from calling Watou, Mikey, or Ryan to testify at trial." (Pet-App. A5.)

Chong is thus judicially estopped from arguing that dismissal was the only available remedy for the alleged *Youngblood* violation. Chong alleged that suppression was an available remedy. The trial court agreed by granting the suppression that he had requested.

Chong's *Youngblood*-remedy argument is further barred because the Wisconsin Court of Appeals rejected it on adequate and independent grounds. "When a state-court decision is clearly based on state law that is both adequate and independent, [this Court] will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990). Here, after concluding that dismissal was not required, the court of appeals further determined that Chong had not preserved this issue for appellate review. The court of appeals explained: "Moreover, when the [trial] court announced its decision to impose suppression as a remedy for the State's due process violation, Chong did not object on the basis that suppression would be detrimental to him. A specific, contemporaneous objection is required to preserve a claim of error for appeal." (Pet-App. A21–A22.) This forfeiture rationale was an adequate and independent ground for the appellate court to reject Chong's argument that dismissal was required under *Youngblood*.

B. Procedural bars aside, Chong has not established a bad-faith *Youngblood* violation.

Even if Chong could overcome the two procedural bars just discussed, this Court should not review his *Youngblood* claim because he has not established a bad-faith *Youngblood* violation.

For destruction of evidence to violate due process, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). The Wisconsin Court of Appeals correctly held that Chong failed this test. It explained that "Chong is not entitled to relief under the first prong of the *Youngblood* analysis because the December 2013 interviews were not apparently exculpatory." (Pet-App. A16.) The court reasoned that, as it had already explained in rejecting Chong's *Brady* claim, "the December 2013 interviews were not exculpatory." (Pet-App. A17.) The court further explained that "Chong could have obtained comparable evidence by other reasonably available means." (Pet-App. A17.) It reasoned that "Chong had access to the April 2015 interviews of Watou, Mikey, and Ryan, and a defense investigator had interviewed Ryan prior to trial." (Pet-App. A17.) So, "Chong could have called those witnesses to testify at trial if he believed their testimony would exculpate him, and if they testified inconsistently with their April 2015 interviews, he could have introduced those interviews as prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1." (Pet-App. A17.)

Without a *Youngblood* violation, there is no reason for this Court to review Chong's second issue presented. Chong does not independently present the question of whether there was a *Youngblood* violation, nor does he present any argument applying the test from *Trombetta*.

That said, the Wisconsin Court of Appeals found a *Youngblood* violation because it treated the trial court's determination of bad faith as a factual finding and upheld it as not clearly erroneous. (Pet-App. A18 & n.9.) Wisconsin case law views *Trombetta* and *Youngblood* as adopting two distinct tests, such that a defendant can prove a due-process violation under *Youngblood* simply by showing that the government destroyed potentially exculpatory evidence in bad faith. *See McCarthy v. Pollard*, 656 F.3d 478, 484–85 (7th Cir. 2011) (disagreeing with Wisconsin case law on this point). The State maintains that a defendant must satisfy the *Trombetta* test and prove bad faith under *Youngblood* to show that destruction of evidence violated due process. And, even if *Trombetta* and *Youngblood* adopted two alternative tests, Chong has not satisfied either one. The State does not concede that the officers deleted the 2013 interview videos in bad faith.

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56–57 n.*. There is bad faith only if "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.* at 58. "*Youngblood*'s

bad faith requirement dovetails with the first part of the *Trombetta* test: that the exculpatory value of the evidence be apparent before its destruction." *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993).

Here, the court of appeals should have found no bad faith because, as it recognized, "the December 2013 interviews were not exculpatory." (Pet-App. A17.) Further, "[m]ultiple police officers testified that the recordings were destroyed in order to protect the identities of the witnesses who had expressed concerns about their safety. That testimony provided a plausible alternative motive for the destruction of the recordings." (Pet-App. A11.) These facts belie any notion of bad faith.

Putting aside the merits of Chong's claim, his question about remedies for a *Youngblood* violation suffers from the same basic flaw as his question about remedies for a *Brady* violation, discussed above. Before deciding whether dismissal is mandatory for a *Youngblood* violation, this Court would need to first find such a violation here. *See Clinton*, 520 U.S. at 690 & n.11 (noting practice of avoiding hypothetical or contingent constitutional questions). But whether the police here violated *Youngblood* is a disputed, fact-specific issue that is not worthy of this Court's review. *See* U.S. Sup. Ct. R. 10. Tellingly, Chong does not develop an argument on bad faith in his petition or raise it as an independent issue. He instead states that he "will not fully develop this subsidiary issue in this petition." (Pet. 17.) Whether Chong can prove bad faith is

a threshold issue, though, not a subsidiary issue. As with his *Brady* question, Chong's question about the remedy for a *Youngblood* violation puts the cart before the horse.[3]

C. Chong's alternative argument for dismissal, which challenges the trial court's exercise of discretion, does not warrant this Court's review.

Chong alternatively argues that, if dismissal is not a mandatory remedy here, the trial court should have dismissed his case anyway. (Pet. 17–19.) Chong asserts that the deleted 2013 videos "would have presented reasonable doubt as to whether Chong was the shooter, and prohibiting the testimony of theses witnesses had a more detrimental effect." (Pet. 18.) That assertion fails on three fronts.

First, the 2013 interview videos were likely inadmissible hearsay. "Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Britt*, 203 Wis. 2d 25, 38, 553 N.W.2d 528, 533 (Ct. App. 1996) (quoting Wis. Stat. § 908.01(3)). "Hearsay evidence is generally not admissible except as otherwise provided by rule or statute." *Id.* (citing Wis. Stat. §§ 908.02, 908.03). Chong thus would have been generally prohibited from introducing the December 2013 interview videos at trial.

Second, and more importantly, Chong incorrectly assumes that the deleted videos were exculpatory. As already explained, they were not.

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[3] The State does not dispute that some courts are in conflict on whether dismissal is mandatory for a *Youngblood* violation. *See McCarty v. Gilchrist*, 646 F.3d 1281, 1288 (10th Cir. 2011) (collecting cases).

Third, Chong is wrong to suggest that the trial court prohibited him from calling Mikey, Ryan, and Watou to testify at trial. Chong requested that the trial court prohibit the State from calling those three witnesses at trial to link him to the shooting, and the court granted this request. (Pet-App. A5.) As the court of appeals noted, the trial court "prohibited the State (but not Chong) from calling Watou, Mikey, or Ryan to testify at trial." (Pet-App. A5.)

In challenging the trial court's discretionary selection of remedy for the alleged *Youngblood* violation, Chong does not identify a split of authority or legal issue of nationwide significance. He has not offered any "compelling" reason to review the trial court's exercise of discretion. U.S. Sup. Ct. R. 10.

* * *

In sum, this Court should not grant review to decide whether a *Youngblood* violation requires dismissal. It is too late for Chong to argue that the trial court's suppression remedy was harmful to his defense because he asked for this remedy and he did not object when the trial court granted it. Chong is thus judicially estopped from arguing that dismissal was the only appropriate remedy, and the court of appeals determined that he had failed to preserve this issue for review. If this Court wishes to decide what remedies are available for a bad-faith *Youngblood* violation, it should do so in a case that much more clearly presents one.

IV. THIS COURT SHOULD NOT REVIEW CHONG'S ISSUE ABOUT MISSING TRANSCRIPTS.

Although the trial court had ruled this evidence inadmissible, a witness briefly read a letter where Chong had stated, "I'm pretty sure I'll beat this case though." (Pet-App. A5.) Chong's trial lawyers did not object to that testimony. (Pet-App. A5.) The trial court did not transcribe (1) an in-chambers conference where the parties might have discussed the admissibility of this statement, or (2) the parties' discussion with the trial court regarding the jury's request to see this letter. (Pet-App. A22.) Chong's third issue presented asks whether this absence of transcripts entitles him to a new trial. (Pet. 19.)

This Court should decline to review this issue because (1) Chong is judicially estopped from raising it; (2) Chong's argument rests on an inapplicable federal statute; (3) Chong relies on state law; (4) this Court recently denied a certiorari petition regarding a similar but much more substantial issue; and (5) this issue at most presents a harmless error.

First, Chong is judicially estopped from arguing that his "beat this case" comment was prejudicial. As noted, the doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749 (citation omitted). Chong argues that "his comment that he would 'beat this case' supported the inference that Chong was not seeking to prove his innocence." (Pet. 24.) But that argument conflicts with Chong's position in the trial court, where he disputed

the State's argument that this comment showed a consciousness of guilt. In the trial court, the State argued that Chong's statement that he would beat his case was relevant to proving the witness-intimidation charges and thus was also relevant to Chong's consciousness of guilt on the homicide charge. (R. 89:2–3.) Chong disagreed, arguing that this evidence "is not probative of any wrongdoing" (R. 30:1), and that "[o]ther statements may be relevant to indicate consciousness of guilt, but the phrase 'beat his case' itself is not relevant or probative" (R. 72:2; *see also* R. 328:6; 330:124–27). The trial court agreed with Chong that this evidence was inadmissible. (R. 95:2.) Chong is thus judicially estopped from now arguing that his "beat this case" statement indicated a consciousness of guilt. Had he conceded before trial that this statement was relevant to showing his consciousness of guilt, the trial court likely would have ruled it admissible.

Second, Chong's argument erroneously relies on the Court Reporter Act, 28 U.S.C. § 753(b). (Pet. 20.) This statute applies only to federal courts, not state courts. *See* 28 U.S.C. § 753(a).

Third, Chong seems to argue that he is entitled to relief under the Wisconsin Constitution and *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987). (Pet. 20–25.) But this Court has "no authority to review state determinations of purely state law." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). The Wisconsin Court of Appeals held that Chong was not entitled to a new trial under *Perry* and its progeny. (Pet-App. A22–A25.) This Court may not review that issue of state law.

Fourth, even if Chong's argument implicitly relies on federal constitutional law, this Court recently denied a certiorari petition that raised a similar but more significant issue in *Pope v. Wisconsin*, 141 S. Ct. 272 (2020). The petition in *Pope* argued that the complete absence of *any* trial transcripts deprived the petitioner of his constitutional rights to effective assistance of counsel on appeal and to a meaningful appeal.[4]

Chong's issue pales in comparison. Unlike in *Pope*, Chong is not missing all the transcripts of his trial. Chong is not even missing the portion of transcript showing a witness's brief testimony about the allegedly inadmissible evidence, Chong's "beat this case" comment. Instead, Chong is only missing transcripts showing the parties' discussion of this evidence during an in-chambers conference and while the jury was deliberating. On appeal, Chong merely argued that this absence of transcripts made him unable to know whether to raise a claim of ineffective assistance of trial counsel or trial court error. (Pet-App. A23.) As the court of appeals explained, though, Chong could have raised the issue as one of trial court error because he did not need to show that his trial lawyers objected to this evidence during untranscribed discussions. (Pet-App. A23.) It further explained that Chong could have raised an ineffective-assistance claim as an alternative argument. (Pet-App. A24.) Had Chong raised an argument challenging the admission of this evidence, the court of appeals would have

[4] Pet. 13–16, *Robert James Pope, Jr., v. Wisconsin* (No. 19-7939), https://www.supremecourt.gov/DocketPDF/19/19-7939/137238/20200305185244890_Pope.certpetition.pdf.

independently reviewed the record to determine whether the evidence was admissible. (Pet-App. A24–A25.) The court of appeals thus concluded that the absence of transcripts did not entitle Chong to a new trial. (Pet-App. A25.) This Court should not review Chong's meritless argument, especially given that this Court recently declined to review a similar but much more substantial issue in *Pope*.

Chong's transcript issue only asserts a misapplication of settled Wisconsin precedent, which is not a reason for granting review. *See* U.S. Sup. Ct. R. 10. Chong has not pointed to a national split of authority in cases involving missing transcripts, nor has he otherwise shown a compelling reason for granting review. *See id.*

Fifth and finally, the absence of transcripts is harmless error here. "Error in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule." *Perry*, 401 N.W.2d at 752. The "beat this case" testimony was very brief, and, as explained earlier, Chong believed that it was irrelevant because it did not show a consciousness of guilt. It is thus difficult to see how this testimony could have prejudiced Chong's defense. Further, the State had a strong case against Chong: security camera footage showed Chong leaving the Luna Lounge shortly after the shooting, and he confessed his involvement in the shooting to seven people. (Pet-App. A3, A5.) Because the testimony about Chong's "beat this case" comment was harmless, the absence of transcripts showing *why* this evidence was admitted was also harmless.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Dated at Madison, Wisconsin, this 16th day of April 2021.

Respectfully submitted,

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