Case No.: 20-6890

IN THE

SUPREME COURT OF THE UNITED STATES

CHONG LENG LEE,

Petitioner,

V.

STATE OF WISCONSIN

Respondent.

RESPONSE TO STATE'S BRIEF IN OPPOSITION

CHONG LENG LEE #439266

WAUPUN CORRECTIONAL INSTITUTION

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INTRODUCTION

This Court should review Chong Leng Lee's petition for a Writ of Certiorari because this case does have potential for law development.

ARGUMENT

I. CHONG HAS ESTABLISHED THAT A *BRADY* VIOLATION OCCURRED AND THAT THE REMEDY OF DISMISSAL IS AN AVAILABLE REMEDY FOR *BRADY* VIOLATIONS.

This Court should review this case to see if dismissal is an available remedy for a *Brady* violation and whether the State Courts erred in deciding that there were no *Brady* violation. The State argues that this Court is a Court of review, and not first review and **"regularly"** declines to address issues that a court of appeals below did not reach. (emphasis added) The word regularly suggest that this Court has decided certain cases that needs to be screened to ensure that **"JUSTICE"** is had and that a **"fundamentally fair trial"** was granted to the defendant. (emphasis added). In *Kyles v. Whitley* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490, this Court stated: "The Court says that we granted certiorari "[b]ecause '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case". (citing *Burger v. Kemp,* 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987)." Ante, at 1560.)

The State next argues that, this Court would need to find a *Brady* violation in order to reach the issue of a remedy. This statement is suggestive by the State that a *Brady* violation could have been reached by the lower courts and this Court. The State argues that Chong's argument were premature in that they were abstract, hypothetical, or contingent. Chong's questions were neither, but direct and were questions that focuses directly on what constitutional laws were built on. In *Wade v. Mayo,* 334 U.S. 672, at 692, this Court stated: "The desirability of discretionary limitation of the habeas corpus power of federal courts in respect to state criminal prosecutions which inheres in the dual sovereignties of the federal system is re-enforced by considerations of practical administration: (1) it is not to be assumed that state courts deliberately deny to the individual his rights under the Federal Constitution; (2) the normal paths of review—appeal and petition for certiorari—are open to correct federal constitutional errors in state criminal proceedings; (3) extravagant exercise of federal jurisdiction would furnish another technique of delay in a criminal system which often permits long periods of time to elapse between sentencing and execution of sentence." (emphasis added in bold). This Court through a Certiorari may review lower courts decisions to correct errors.

The State's next attempt to dissuade this Court to not review his petition is farfetched. The State would like this Court to think that Chong recognized whether he can establish a *Brady* violation is ludacris. Chong states that he has established a *Brady* violation and the lower Courts failed to remedy that violation. The State next argues that Chong admittedly did not fully develop an argument because he stated that he could not fully develop this subsidiary issue in this petition. Chong made that statement based on the limitations to word counts, and page limits he is allowed to file in a brief pertaining to Writs of Certiorari. If this petition was reviewed and Chong was allowed an oral argument he would have made those subsidiary issues. Still Chong **did not fail** to make *Brady* arguments but has made sufficient arguments in his brief to compel this Court to review this Certiorari. (emphasis added).

The next argument the State made that "the Wisconsin Court of Appeals soundly rejected Chong's *Brady* claim" is false. The State leads it's argument with saying that the evidence destroyed was not of material or impeaching evidence, and were not favorable to the accused. They argue that any evidence identifying someone other than Chong is misleading. If the Wisconsin Court of Appeals took that statement as misleading then any evidence identifying Chong is the only option they would choose. As the State noted in their brief in opposition "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."" That statement in its entirety is incorrect. Chong specifically cited to a portion of the record where one of the eyewitness, Mikey Thao, who gave an interview to Officers stated he knew Chong personally and did not identify Chong as the shooter. This statement was given through testimony by the Officer who did the 2013 interview and destroyed the evidence. *See Chong's brief App. G* at pg. 37-39 *and App. H* at pg. 97. If this evidence was not material or favorable to Chong then what would be sufficient? The State next argues that Chong did not cite to any evidence suggesting that those descriptions were inconsistent with his own clothing. Let us remind the State that this Court's review of a certiorari is for review of:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S.Sup.Ct. Rule 10 (c), 28 U.S.C.A. and not a complete record of the trial. In Chong's brief he brought up arguments based on federal questions this Court has decided on and explained why he thinks the lower courts decisions are in conflict with this Court's decision. If Chong goes into all the small particulars of his case and states to all portions of the facts of the record, then his brief falls into subsidiary issues. As stated before, this Court is to review important questions of federal law or questions that conflicts with decisions made by this Court. But Chong will answer to the State's statement of Chong not citing to any evidence suggesting that those description were inconsistent with his own appearance. It is simple, Chong's trial attorney had the officer in charge of the 2013 interviews questioned at a hearing and the officer's testimony was that he did not recall anything about the witnesses giving clothing descriptions. *See App. G* at pg. 51-52

and *App. H* at pg. 85-86 and 97-98. If there were no descriptions given by the witnesses pertaining to clothing, Chong cannot suggest that the clothing wasn't or was worn by him. What description the witnesses gave to the officer at the time they arrested Paur Lee (Paul) and not Chong. *See App. G* at pg. 52. After arresting Paul and interrogating him then Chong was arrested. As stated in Chong's brief officers told Paul that if he named Chong as the shooter they would get rid of this case to show it wasn't Paul. *See Chong's pet* at pg 4. These witnesses were interviewed right before the chose to arrest Paul and not Chong.

The last *Brady* issue the State made in it's opposing brief is that Chong cannot prove the materiality/prejudice prong. This statement is why this Court should review Chong's certiorari. As stated before, this question is a federal question and should be settled by this Court. The Wisconsin Court of Appeals held that the evidence at issue was not material and again noted that the destroyed evidence "did not exculpate Chong." (emphasis in original). The court also reasoned that "there is no evidence that the state's suppression of the December 2013 interviews altered Chong's trial strategy." If the evidence were not material or did not exculpate Chong then, why go reinterview these witnesses after learning they had inadvertently provided the identities to the defense? The State is correct that there is [no] evidence the State's suppression of the 2013 interviews altered Chong's trial strategy. That was because there was no evidence left for Chong to use to alter his trial strategy. The State forgets that these witnesses were suppressed by the Court. The State argument that the State was prohibited from calling these witnesses, but not Chong is entirely incorrect. The court's exact words were "the Court (sic) shall be prohibited from calling Ryan Thao, Mikey Thao, and Watou Lee. That said, should the police or, rather, should the defense inquire into the police conduct of the destruction of the tapes, it may present cause to have the issue revisited." *See App. J* at pg. 13. Nowhere in that statement does it say the State was prohibited from calling these witnesses and not Chong. The Court suppressed these witnesses in its entirety and if the defense chose to comment on the destruction of the interviews ("inquire into the police conduct") then the remedy given was moot. The trial court stopped any mention of these witnesses and the destruction of the evidence by the officers in the court to all parties. That is why the trial court made the last statement saying if defense inquire into the police conduct then the issue could be revisited. The court gave no one a choice. The State's view of Chong not calling these witnesses to the stand and use them is incorrect. Chong could not use these witnesses because in the 2015 interviews one of the witnesses(Ryan Thao) was inculpating Chong as the shooter even though he did not know who Chong was and Chong did not have the 2013 interviews to impeach this witness. *See App. G* at pg. 26-27, & 50-51. He named Chong as the shooter because he had seen on T.V. that Chong was locked up for the crime. *See App. G* pg. 50-52. Mikey Thao knew Chong and his 2015 interview was not inculpatory in nature, but without the 2013 interviews it would have been fruitless to bring these witnesses to testify on behalf of defense because there were no impeachment evidence left to impeach these witnesses second interviews and based on the officers testimony they had no recollection of showing these witnesses photos, or of them giving the description of clothing the shooter wore. The defense could not even use these officers to do a thorough cross

so there was no recovering the information destroyed. It was not a mere couple of months within the destruction of evidence when the officers chose to go re-interview these witnesses. It was over a year and a half. By this time the witnesses and officers who did the 2013 interviews were forgetting facts of that first interviews and the witnesses had seen Chong on T.V. arrested for the crime so they concluded he did the crime and inculpated him as the shooter even though in the first interview given, they did not know Chong except Mikey and he definitely did not identify Chong as the shooter. This is the reason Chong used the case *State v. Jordan,* 73 Ohio App. 3d 524, 597 N.E. 2d 1165. The scenario is the same as destroying evidence in hopes of defense not learning about it then, if defense found out about the destruction go and replace the interviews with new ones. The State chose in there brief not to argue this and Chong can only come to the conclusion that his assessment of this was correct. This Court also relied on *United States v. Agurs*, 427 U.S., at 107, 96 S.Ct., at 2399, which required a prosecutor to turn over to the defense evidence that was "clearly supportive of a claim of innocence" even without a defense request. The Court noted that the prosecutor's duty was not one of constitutional dimension unless the evidence was such that its "omission deprived the defendant of a fair trial," id., at 108, 96 S.Ct., at 2399, and explained:

"Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Id., at 110, 96 S.Ct., at 2400 (footnote omitted) Agurs thus made plain that the prosecutor's state of mind is not determinative. Rather, the proper standard must focus on the materiality of the evidence, and that standard "must reflect our overriding concern with the justice of the finding of guilt." Id., at 112, 96 S.Ct., at 2401.

II. CHONG IS NOT PROCEDURALLY BARRED FROM ARGUING HIS *YOUNGBLOOD* CLAIM.

The State's argument is contradicting with the Wisconsin Court of Appeals decision. Here, the Wisconsin Court of Appeals decided that the evidence was potentially exculpatory and it further found that police had acted in bad faith. On appeal the State did not dispute this fact and the the Wisconsin Court of Appeals deemed that point conceded. "As for the second prong of the Youngblood analysis, the circuit court concluded the December 2013 interviews were potentially exculpatory, and it further found that the police had acted in bad faith by destroying the interview recordings. On appeal, the State does not dispute that the interviews were potentially exculpatory. We therefore deem that point conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In order to prove that potentially exculpatory evidence was destroyed in bad faith, a defendant must show that the officers who destroyed the evidence: (1) were aware of its potentially exculpatory value or usefulness; and (2) acted with official animus or made a conscious effort to suppress exculpatory evidence. *Luedtke*, 362 Wis. 2d 1. Here, the circuit court's finding that the officers acted in bad

faith by destroying the interview recordings is not clearly erroneous. The officers interviewed Watou, Mikey, and Ryan early in their investigation, but they did not disclose that fact to the defense. They nevertheless retained the interview recordings for seven or eight months. An officer conceded that the police eventually destroyed the recordings because they knew the defense would be able to obtain them through discovery. These facts support a finding that the officers acted in bad faith by destroying the recordings. As the circuit court noted, the decision to destroy the recordings was "made with some forethought" and was "an unusual practice" that was "inconsistent with the spirit of [the police department's] interview retention policies." Although the circuit court determined that the police violated Chong's right to due process by destroying potentially exculpatory evidence in bad faith, the court nevertheless concluded that dismissal of the homicide charge was not the appropriate remedy for that violation "in light of the facts and circumstances associated with this case." Instead, the court granted an alternative form of relief—namely, it prohibited the State (but not Chong) from calling Watou, Mikey, or Ryan to testify at trial. Chong now argues the court erred by failing to dismiss the homicide charge." *See Wisconsin Court of Appeals Decision* at pg. 17 p. 44-46. (Quotation in original)

The State's argument now that Lee did not object to the suppression is procedurally barred because as stated before the State chose not to dispute this fact on appeal. *See Berkey v. United States,* 318 F.3d 768, 774 (7th Cir.2003)*; Barker v. United States,* 7 F.3d 629, 632 n. 2 (7th Cir.1993). The State's argument that the Wisconsin Court of Appeals decision to dismiss the question of whether a dismissal in this case was proper was adequate and independent to State laws is incorrect. Now this Court may choose to review sovereign laws that affects federal laws. *See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 59*` "As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 4 80 L.Ed. 158 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). Here the foundation of state law was not an adequate foundation of state law and therefore not immune from review. The state relied on facts that are erroneous such as "Chong could have obtained comparable evidence by other reasonable means and that Chong had access to the April 2015 interviews of Watou, Mikey, and Ryan, and a defense investigator had interviewed Ryan prior to trial." *See State's brief in opposition.* First Chong would like to reiterate that the 2015 interviews were inculpatory and without the 2013 interviews to be used as impeachment evidence the point was moot because if the defense chose to inquire into the destruction of the evidence then that would again open all doors to the parties and allow the State to use the 2015 interviews and the remedy given would have been a meaningless remedy. This is why the dismissal remedy would have been a proper remedy to give. The police should not be allowed to destroy evidence in the hopes that a defendant not find out about it and then if they do then just go and replace them to ensure a conviction. The State next argues that Wis. Stat. §908.01(4)(a)1 gave Chong an out to make arguments of prior inconsistent statements is incorrect and misleading. The State is saying that the 2015 interviews could be meaningfully crossed by the defense without the 2013 interviews.

How could Chong prove the 2015 interviews as inconsistent testimony if there is no other interviews to impeach the 2015 interviews? The officers who did take the stand could not remember any of the 2013 interviews other than that they interviewed them and their names. Any inconsistent statements or exculpatory statements given by Watou, Ryan, and Mikey were destroyed. Chong did not need to present the question of whether there was a *Youngblood* violation. He had already proved it at the trial court level and the state chose not to argue it at the appeals level. The State's arguments now contradicts their actions at the lower court levels. Chong is not the one who is barred from litigating this argument, but the State. Chong simply questioned the remedy given because the remedy given is in itself unfair and unjust to a defendant and caused him from calling witnesses who did identify someone other than Chong as the shooter. *See Wade v. Mayo, 334 U.S. 672.* Now the State argued in their opposing brief that the Court should have found no bad faith is entirely opposite to their argument that Chong is procedurally barred from making these arguments. *See State's opposing brief at pg. 16.* The State acknowledges that multiple officers testified that the interviews destroyed were done to protect witnesses who had expressed concern about their safety and that testimony provided a plausible motive for the destruction of the recordings, therefore suggesting that the court erred in finding bad faith. What the State fails to State is that through the officers testimony they knew through a constitutional law, the officers knew they would have to turn this evidence over and knew the exculpatory or potential exculpatory value of this evidence, and that was the reason why they destroyed this evidence. If the State is suggesting that these officers destroyed these recordings because they were concerned about their safety then Chong was correct in that they had identified someone other than Chong because these witnesses were questioned before Paul Lee was arrested and not Chong so they had no right to fear Chong for fear of their safety. See App. G in its entirety.

This Court should review this petition. Chong has shown that a *Youngblood* violation occurred and that the State conceded to this argument but chose the wrong remedy and only gave Chong a remedy that was prejudicial and unfair to his case. The State's argument in these interviews as inadmissible hearsay is an attempt to mock the judicial system. The prosecution team sought these witnesses out and destroyed these evidence. They are eyewitnesses to the crime and could identify the shooter in his characteristics, clothing, direction of travel and personality. So the State argument fails because the State was pushing for the admittance of the 2015 evidence and for them to say it is inadmissible hearsay now is in contradiction to their previous arguments. Again the State fails to recognize the trial court's ruling. The court clearly stated that the [c]ourt (sic) shall be prohibited, not the State. (emphasis added). See App. J at pg. 13. So the State's argument is frivolous. The State also argue's Chong is barred due to the remedy given was a remedy Chong asked for. This is a false statement. Chong did not ask for this remedy. Chong included suppression of identification of Chong from these witnesses as an alternative to dismissal. Chong did not request suppression of the witnesses in it entirety. This case is the perfect case for this Court to review.

III. THE MISSING TRANSCRIPTS WERE OF NEED TO IDENTIFY ERRORS AND CHONG IS NOT BARRED FROM LITIGATING THIS ISSUE FURTHER.

The State is now making an argument that the error made was harmless and Chong should be barred from arguing this to the higher court. The State cannot prove themself that the error made was harmless because there are no transcript to prove if the error made was harmless. They relied on a reading of the inadmissible evidence by a witness. That proved more grounds for this Court to review this issue. How can the trial court allow this evidence he previously suppressed at a pretrial hearing go into evidence and then present it to the Jury during deliberations? We will never know because there are no transcripts to this so there is no identifying where the error occurred. The State's argument that the Court Reporter Act applies to federal courts only is false. The State of Wisconsin has adopted similar laws that are analogous to this law. *See Wis. Supreme Court Rule* 71. Now the State argued that this Court recently decided in *Pope*. In Pope, he was missing the entire transcript and so the State argues that because Chong is not missing the entire transcript he is not entitled to relief. The State does admit in their brief that Chong is missing transcripts showing the parties' discussion of the evidence during in-chambers conference and while the jury was deliberating. *See opposing brief* at pg. 21. These are the most important parts of Chong's trial. To know if there were any objections made by defense attorneys or the State and if there were any errors by the trial court. Deliberation is one of the most important step at trial and if the jury were swayed with any type of prejudicial evidence then it would have resulted in a mistrial. Chong cannot prove neither the ineffective assistance of counsel nor trial court error because there is no transcript to support that theory. Thus making the State's and Wisconsin Court of Appeals argument frivolous. This is an attack on the judicial system saying that the most important parts of a trial may be held without a court reporter to transcribe the ongoings at a critical stage of trial. *See Wis. Stat. W.S.A. 901.03 Rulings on evidence and 904.03. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.* Although we know that evidence that was suppressed made it to the jury we do not know what the objections were or if there were errors made by the trial court. This Court should review this petition.

CONCLUSION

This court should choose to review this petition for a writ of certiorari and allow oral arguments or further briefing.

Dated this 14 day of May, 2021.

Submitted by: