

THIS IS A CAPITAL CASE

No. 21–6804

IN THE
Supreme Court of the United States

Timothy Wayne Kemp,
Petitioner

v.

State of Arkansas
Respondent

**On Petition for Writ of Certiorari to the
Arkansas Supreme Court**

REPLY BRIEF

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PETITIONER’S REPLY BRIEF

The State does not contest whether Kemp’s question presented is worthy of this Court’s review in some cases. It argues that, for three reasons, this is not the case to present such a question. Each reason is erroneous. First, this Court has jurisdiction under its authority to consider “final judgments or decrees” rendered by a state court of last resort. 28 U.S.C. § 1257(a). The State takes a flawed view of this Court’s authority to review the actions of state courts when denying collateral attacks on criminal judgments. Second, though full review of Kemp’s penalty phase prejudice is reserved for the circuit court, the Arkansas Supreme Court reviewed Kemp’s *Brady* claims on the merits and dismissed them on the merits. This is, as Kemp contends, because that court failed to consider the possibility of prejudice at the penalty phase, as required by *Cone*. Third, the Arkansas Supreme Court’s decision, conflating guilt and penalty phase prejudice, does, contrary to the State’s argument, run counter to *Cone*.

Because this petition raises an important question worthy of consideration—and one that this Court has jurisdiction to consider—the Court should grant the petition for a writ of certiorari.

I. This Court has jurisdiction.

This Court has jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). There can be little question that the order under review—the Arkansas Supreme Court’s denial of Kemp’s petition to reinvest the circuit court with jurisdiction to

consider a writ of error coram nobis—is final. Kemp’s application to reinvest jurisdiction was “taken as a case,” and the Court entertained full briefing, heard oral argument, and issued two written opinions on the matter. Order, Oct. 22, 2020. Nor is this a case “where anything further remains to be determined by a State court.” *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). The State does not contest that the Arkansas Supreme Court’s order is non-final. Rather, the State argues that the Arkansas Supreme Court’s decision is not a final “judgment” subject to review. The final judgments, according to the State, occurred in 1996 and 1998, and thus any later motions attacking those judgments cannot create a different “judgment” subject to this Court’s review. However, the State does not point to a case that supports this reasoning. Cases cited in the State’s brief go only to the question of finality, and not to what does or does not qualify as a final judgment. *Florida v. Thomas*, 532 U.S. 774 (2001); *Beard v. Banks*, 542 U.S. 406, 412 (2004) (noting when judgments are final for purposes of applying *Teague v. Lane*’s nonretroactivity principle).

Nor does the State offer an argument based on statutory text. Even if one were to accept, for the sake of argument, that the Arkansas Supreme Court’s order is not a “judgment,” Section § 1257(a) also provides jurisdiction over “decrees.” A decree is simply a court order. *See* Black’s Law Dictionary 471 (9th ed. 2009). Regardless of what happened in Kemp’s earlier litigation, there can be little question that the Arkansas Supreme Court issued an order, accompanied by a reasoned opinion, addressing Kemp’s *Brady* claims, and declining to reinvest the

circuit court with jurisdiction. Such an order is a final, reviewable judgment. *See e.g., Brady v. State*, 57 S.W.3d 691, 693 (Ark. 2001) (“An order is final and appealable if it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy.”)

The State’s argument that the denial of Kemp’s petition to reinvest did not modify or reopen his final criminal judgments is illogical. Such reasoning calls into question this Court’s jurisdiction over *any* state high court ruling denying a collateral attack on a final criminal judgment. An order denying a run-of-the-mill state postconviction petition does not disturb the earlier criminal judgment, nor, using the state’s conception of the term, does it create a “judgment” by itself. On the state’s logic, such orders should not be reviewable either, but obviously they are. *Cf., e.g., Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (reviewing denial of state postconviction petition by Texas Court of Criminal Appeals). The absence of a modified judgment of conviction, or the substance of the state high court’s order, does not affect whether such an order amounts to a “judgment or decree” under § 1257(a). Moreover, a writ of error coram nobis is the only way a *Brady* claim discovered after trial may be brought in Arkansas state courts. *See Roberts v. State*, 425 S.W.3d 771, 779 (Ark. 2013) (*Brady* claims are not cognizable in a Rule 37.5 proceeding but are cognizable in a coram nobis proceeding.) The State’s view of “final judgments” would therefore insulate Arkansas’s treatment of such *Brady* claims from Supreme Court review.

II. The Arkansas Supreme Court decision does invoke the question presented.

The Arkansas Supreme Court will grant the circuit court permission to consider a writ of error coram nobis “when it appears that the proposed attack on the judgment is meritorious.” *Newman v. State*, 354 S.W.3d 61, 65 (2009). The State points out, as did Kemp, that the Arkansas Supreme Court’s duty at the reinvestment stage was to consider whether his claims had “apparent merit,” and such a finding does not resolve the ultimate merits of his *Brady* claim. Kemp’s question presented, however, was not whether the Court erred by not fully resolving the merits of his *Brady* claim. The question was whether the Court committed a legal error by failing to consider the possibility of penalty-phase prejudice in evaluating Kemp’s *Brady* claims for apparent merit.

First, contrary to the State’s argument, the Arkansas Supreme Court did conduct a merits review of Kemp’s claims. The court could not have been clearer, it set aside the State’s diligence arguments and stated: “we resolve this matter on the merits.” *Kemp v. State*, 2021 Ark. 173, 7 (Ark. 2021). Second, while such a review was only a threshold assessment, as required at the reinvestment stage, in making that assessment, the state court failed to consider penalty phase prejudice. As Kemp addressed in his petition, and as the State reiterated, full review of the merits of Kemp’s *Brady* claim is a task left to the circuit court. But such review cannot happen without the permission of the Arkansas Supreme Court. A legal error at the threshold stage is, therefore, significant for it prevents Kemp from ever

receiving full consideration of his *Brady* claims. To obtain full consideration of the merits of his *Brady* claim, a distinction between potential guilt and potential penalty prejudice must be a part of the Arkansas Supreme Court's finding, or failing to find, apparent merit. The question presented asks whether the Arkansas Supreme Court committed error by not making such a distinction.

III. The Arkansas Supreme Court decision does not adhere to *Cone*.

Kemp stands on his previous argument that the Arkansas Supreme Court's summary treatment of his *Brady* claim did not consider whether Kemp was potentially prejudiced at sentencing, even if the Court determined he was not prejudiced at the guilt phase.

The State argues that because Kemp cited to both his original sentencing as well as his resentencing hearing for evidence of prejudice that his *Brady* claim must fail. BIO at 24. It is not clear why this would impact whether Kemp has a meritorious *Brady* claim. Instead, it demonstrates how Mahoney's suppressed statement impacted and prejudiced both his original penalty phase and his resentencing proceeding. The Arkansas Supreme Court did not parse the prejudice at *either* sentencing proceeding.

The State further argues that the suppressed statement "does not corroborate [Kemp's] version of events," but the statement does not have to be corroborative to be mitigating. BIO at 25. Thus, the crux of Kemp's question and *Cone* instructs that potentially mitigating evidence must be analyzed separately at both the guilt and penalty stages of a capital trial. The suppressed statement was material to the issue

of whether the jury could consider not the truth of Kemp's version of events, but whether Kemp believed them to be as he described. The Arkansas Supreme Court argued that evidence of Kemp's guilt was overwhelming, but failed to meaningfully engage with his arguments that the suppressed statement could (not would) have changed the outcome at sentencing.

CONCLUSION

In short, Kemp's claim implicates the *Brady*-materiality issue from *Cone* and asks whether a court errs when it fails to distinguish between materiality of suppressed evidence at guilt and punishment. Kemp raised a meritorious *Brady* claim through the only viable method in state court. That Court issued two written opinions disposing of his claims on the merits, and, in doing so, ran afoul of this Court's decision in *Cone*. Kemp now petitions this Court to redress this serious error.

Respectfully Submitted,
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