

NO. 17-7929 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR BROWN, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner, Arthur Brown, Jr. ("Brown"), filed his Petition for a Writ of Certiorari ("Petition") in this Court on February 26, 2018. Respondent filed his Brief in Opposition ("BIO") on May 22, 2018. Petitioner now files this Reply to Respondent's Brief in Opposition.¹

I. The state habeas court found the State either knew or should have known its testimony was false.

Contrary to Respondent's claim, Brown has not "attempt[ed] to sidestep a requirement under federal law." BIO at 12. The state habeas court found that the

¹ Petitioner addresses only those assertions on the part of the State that he deems necessary of a response.

State’s expert – whose knowledge was imputed to the State – “either knew or *should have known*” that his testimony at Brown’s trial was false. Petition Appendix C at 40-41, ¶ 21 (emphasis added). While *Napue* refers only to the State’s knowing use of false testimony, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), this Court, in *Agurs*, clarified that *Napue*’s falsity prong is satisfied if the State *should have known* the testimony was false. See *United States v. Agurs*, 427 U.S. 97, 103 (1976). Consistent with *Agurs*, the Courts of Appeals for the Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have all found that a *Napue* claim will succeed if a petitioner demonstrates the State *should have known* the testimony it sponsored at trial was false. *United States v. Straker*, 800 F.3d 570, 603 (D.C. Cir. 2015); *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008); *Smith v. Massey*, 235 F.3d 1259, 1271 n.6 (10th Cir. 2000), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001); *United States v. O’Keefe*, 169 F.3d 281, 292 (5th Cir. 1999); *United States v. Verser*, 916 F.2d 1268, 1271 (7th Cir. 1990).²

As Respondent notes, under *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009), a Texas state habeas applicant can claim his right to due process was violated by the State’s *unknowing* use of false testimony. BIO at 12-13. Brown, however, did not raise a *Chabot* unknowing use claim in state court proceedings. Rather, Brown raised a claim under *Napue*, and argued, in the alternative, that at a minimum, he

² Respondent apparently also believes *Napue*’s falsity prong is satisfied if the State *should have known* its testimony was false. BIO at 13 (“And it is evident the State could not or *should not have known* the evidence was false or misleading”) (emphasis added).

had made the showing required by *Chabot*. Nevertheless, the trial court found the State knew or should have known its trial testimony was false under *Napue*.³ Petition Appendix C at 40-41, ¶ 21 (emphasis added). The CCA noted that its review of factual findings made by the trial court regarding whether the testimony was false would have been under a deferential standard. Petition Appendix A at 4. The CCA assumed the testimony was false (and by extension that the State knew or should have known it was false) and focused its decision to deny Brown relief exclusively on the materiality prong, a question that it reviewed *de novo*. *Id.*

Because falsity was not at issue, the CCA would have given deference to these findings made by the trial court. *See Ex parte Van Alstyne*, 239 S.W.3d 815, 823 (Tex. Crim. App. 2007). By arguing in his brief in opposition that there was no basis for the

³ The trial court made extensive findings that the credible evidence before it clearly demonstrated that Anderson's trial testimony was *plainly* false. Petition Appendix C, Findings of Fact, ¶¶ 30-51; Conclusions of Law ¶¶ 7-16, 21. These findings demonstrate that the court did not base its conclusions on an unknowing use of false evidence by the State. Rather, when all the findings are considered, it is a clear implication that the State's expert must have known he was testifying falsely. The court found that both Brown's expert, Edard W. Love, Jr., and the State's expert, Donna Eudaley, both of whom reexamined the firearm's evidence and came to very similar conclusions, found virtually no indications on the evidence and test bullets that would allow them to declare a match, much less conclude with one-hundred percent certainty that the firearms fired the bullets recovered in the autopsies and the crime scene, as Anderson had asserted at trial. The court concluded that "the evidence before the Court credibly demonstrates that these conclusions by Anderson and the HPD Crime Lab in 1992-93 [through secondary firearms analysts Davis and Klien] were false and, as such, gave the jury a false impression of the evidence." *Id.*, Conclusion of Law ¶ 16. Based on the obvious import of this evidence, the Court drew its conclusion that Anderson knew or should have known that his testimony was false. *Id.*, Conclusion of Law ¶ 21. Moreover, with respect to the firearm that the State asserted Brown fired, the court noted that, at the very least, Anderson's testimony "demonstrate[d] a manifest and reckless disregard for the truth." *Id.*

State to know its trial testimony was false and ignoring the state habeas court's contrary conclusion, BIO at 13, Respondent is attempting to sidestep the deference a federal court must give to a state court's decision.

II. Respondent's Brief in Opposition misrepresents this Court's holding in *Osborne*, which is irrelevant to the question presented.

The issue in *Osborne* was what process a petitioner is due under the Fourteenth Amendment when a state gives him the right to attempt to prove his innocence through forensic analysis and he avails himself of that process. *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-68 (2009). In explaining the liberty interest Osborne had in availing himself of Alaska's state-created process, the Court explained that because the right at issue did not arise until after Osborne had been convicted, *Brady* was not the appropriate lens through which to evaluate Osborne's interest in the state-created post-conviction right. *Id.* at 68. *Brady* and its progeny are, of course, not post-conviction rights because they are concerned with the State's behavior before and at trial. Brown's *Napue* claim concerns the false testimony the State sponsored *at* his trial.

The claim at issue in *In re Bolin*, 811 F.3d 403 (11th Cir. 2016), the case cited by Respondent in support of his *Osborne*-based argument, BIO at 16, is inapposite to this Court's consideration of the question presented by Petitioner. Bolin was convicted and sentenced to death in 2001. *In re Bolin*, 811 F.3d 403, 405 (11th Cir. 2016). The claim at issue in the Eleventh Circuit's opinion was whether the State violated Bolin's right to due process by failing to disclose that another person had confessed to the crime for which he was convicted in 2013. *Id.* at 408-09. In other

words, Bolin’s claim was that the State had violated *Brady* by not informing him of exculpatory evidence it learned of *twelve years after* he was convicted. The Eleventh Circuit appropriately denied relief because “*Brady* is not a cognizable constitutional right in post-conviction proceedings.” *Id.* at 409. Brown’s claim does not pertain to false testimony offered by the State in post-conviction proceedings. It pertains to false testimony offered by the State during his trial.

Similarly, the claims at issue in *In re Masterson*, 638 F. App’x 320 (5th Cir. 2016), and *Jones v. Ryan*, 733 F.3d 825 (9th Cir. 2013), BIO at 16, involved evidence either discovered by the State after trial or of which it should have become aware. *In re Masterson*, 638 F. App’x 320, 327 (5th Cir. 2016) (“More basically, with the exception of the misstatement in Dr. Shrode’s application to Harris County, all of the supposedly exculpatory impeachment evidence that the State allegedly concealed either had not yet occurred when Dr. Shrode testified at Masterson’s trial in 2002 ... or could not have been discovered by the State of Texas at that time”); *Jones v. Ryan*, 733 F.3d 825, 837 (9th Cir. 2013) (“Jones asserts that the State was on notice, based on two of his initial *habeas corpus* claims, of the possible malfunction of the monitoring system”) (emphasis added). The false testimony at issue in Brown’s claim is testimony sponsored by the State *at his trial*, which the state habeas court found the State either knew of should have known was false when it was offered.

Osborne is instructive and relevant to the opinions issued in *Bolin*, *Masterson*, and *Jones* because the claims at issue in these cases involved exculpatory evidence the State learned of only after the defendants had been convicted. *Osborne* does not

control Brown's claim, which pertains to false testimony – testimony the state habeas court found the State knew or should have known was false – offered at, not after, Brown's trial.

III. This Court should grant certiorari to resolve confusion in the Courts of Appeals and in the state courts over whether the “entire record” that must be reviewed in accordance with *Agurs* in determining materiality should include post-trial developments or other evidence outside of the trial transcript.

The jury was authorized to convict Brown as a party to the offense. Petition Appendix A at 4. However, as the CCA noted, the jury still had to find that he at least intended to kill the victims or anticipated a life would be taken. *Id.* See TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). The CCA decided the false testimony was not material because it believed the jury could have found Brown anticipated a life would be taken based on the testimony of the surviving witnesses and his sister.⁴ Petition Appendix A at 4. The CCA, however, ignored evidence developed post-trial that calls into question the veracity of this testimony, evidence that Brown presented to the state habeas court in his state habeas application.

Specifically, Brown presented to the state habeas court that the surviving witness's testimony at a subsequent trial of one of Brown's co-defendants departed materially from his testimony at Brown's trial. Petition at 8. During the co-

⁴ Respondent's argument that the false testimony is not material, BIO at 22-25, goes beyond the reasoning contained in the CCA's opinion, which was focused exclusively on the testimony of Brown's sister and the surviving witness. Respondent asks this Court to consider whether the state court's conclusion might be correct for reasons not articulated in its opinion. As this Court recently made clear, when a state court gives the reasons for its decision, a federal court “simply reviews the specific reasons given by the state court.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

defendant's trial, the witness was unable to identify Mr. Brown. *Id.* Regarding the testimony of Brown's sister, Brown presented to the state habeas court an affidavit obtained during post-conviction proceedings from another of Brown's sisters who was present at the time his other sister claimed he confessed. Petition at 13. This sister gave sworn testimony that Brown did not confess. *Id.*

The CCA's decision to ignore subsequently developed evidence in assessing the materiality offered at Brown's trial departed from its previous practice, or at least the previous practice of four of its judges. In *Ex parte Tiede*, 448 S.W.3d 456 (Tex. Crim. App. 2014), Judge Alcala authored a concurring opinion, which Judges Price, Johnson, Cochran joined, in which she considered post-trial testimony when determining whether false testimony offered at Tiede's trial was material. This testimony was from a prosecutor who said he would have sought a different punishment had false evidence not been presented at trial. *Ex parte Tiede*, 448 S.W.3d 456, 461 & n.4 (Tex. Crim. App. 2014) (Alcala, J., concurring). The *Tiede* opinion is consistent with the cases cited in Brown's petition from this Court and the Seventh and Eighth Circuit Court of Appeals in which evidence developed after trial was considered.⁵ Petition at 18-19 (*citing Banks v. Dretke*, 540 U.S. 668 (2004); *Makiel v. Butler*, 782 F.3d 882, 909 (7th Cir. 2015), and *Walker v. Lockhart*, 763 F.2d 942

⁵ Respondent's interpretation of *Walker v. Lockhart* is incorrect. BIO at 21-22. The wrongly withheld evidence at issue in *Walker* was the transcript of a police interview. 763 F.3d at 957-59. When considering whether the transcript was material, the court took into account entries from a diary that was found after Walker's trial. *Id.* at 959-60. The court considered evidence discovered post-trial in its analysis of the materiality of the transcript.

(8th Cir. 1985)). The state courts of Minnesota, Delaware, and California have also found evidence developed post-trial should be considered during a court's assessment of materiality. *Walen v. State*, 777 N.W.2d 213, 217 (Minn. 2010) (considering affidavit obtained post-trial in determining whether previously withheld report was material); *In re Brown*, 952 P.2d 715, 724 n.8 (Cal. 1998) ("For purposes of analyzing materiality, we consider both the evidence submitted in support of the petition for writ of habeas corpus and the record of the trial."); *Wilson v. State*, 372 A.2d 198, 199 (Del. 1977) ("When viewed in the context of the entire trial record and subsequent hearings on the various motions, the assertions of materiality of the exculpatory statement became unconvincing.").

By signaling a departure from the *Tiede* concurring opinion, the CCA has seemingly joined the list of courts which believe it is inappropriate to consider evidence developed post-trial, one of which Respondent correctly notes is the Court of Appeals for the Tenth Circuit. BIO at 17 (*citing Browning v. Trammell*, 717 F.3d 1092, 1104 (10th Cir. 2013) ("In the Brady context, however, it is inappropriate to consider evidence developed post-verdict.")). The Second and Fifth Circuit Courts of Appeals have held similarly. *Miller v. Angliker*, 848 F.2d 1312, 1323 (2d Cir. 1988) ("We believe the State is not entitled to seek to minimize the materiality of the withheld information by arguing that it could have produced additional evidence at a fuller trial."); *U.S. ex rel. Rice v. Vincent*, 491 F.2d 1326, 1329 n.1 (2d Cir. 1974) ("The materiality of such evidence should be determined by reference to the record in the case at issue, not by reference to the trials of the other defendants."); *Banks v.*

Thaler, 583 F.3d 295, 311 (5th Cir. 2009) (on remand) (“For the instant *Brady* claim, we can consider *only* the Cook transcript, and the effect, if any, that its suppression had on the jury trial.”). *But see Banks*, 583 F.3d at 343 (“After mistakenly concluding that the Cook transcript suppression by itself is not material, the majority opinion further contends that we cannot consider the Farr-related prosecutorial misconduct collectively with that related to Cook, because it is ‘already-disposed-of’ or because Banks has somehow waived this argument. I must disagree. It is fundamental to the rule of *Brady* that the materiality of a failure to disclose favorable evidence ‘must be evaluated in the context of the entire record.’”) (Dennis, J., dissenting) (*quoting Agurs*, 427 U.S. at 112).

The Courts of Appeals for the Ninth and Eleventh Circuits have decided not to address the question of whether extra-record evidence must be considered when determining whether false testimony offered at trial or exculpatory evidence withheld pre-trial is material. *Browning v. Baker*, 875 F.3d 444, 465 n.9 (9th Cir. 2017) (not deciding the issue but doubting it can consider evidence developed post-trial); *Stano v. Duggar*, 901 F.2d 898, 904 n.30 (11th Cir. 1990) (noting it is an open question).

While this Court’s opinion in *Banks* suggests it is appropriate to consider evidence not contained within the transcript of a petitioner’s trial when considering whether testimony offered at his trial is material, this Court has never squarely held this is required by *Agurs*. As a result, confusion exists in both the state courts and the Courts of Appeals regarding what this Court’s instruction to review “the entire

record” entails. This Court should grant certiorari and subsequently answer the question presented to make clear what is required by *Agurs*.⁶

Conclusion and Prayer for Relief

Petitioner Arthur Brown, Jr. respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and correct electronic version of this Petitioner’s Reply to Respondent’s Brief in Opposition was served on opposing counsel on June 5, 2018, via email to:

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⁶ Because this Court’s decision on the question presented in Brown’s petition would merely clarify what is required by *Agurs* (an opinion issued twenty years before Brown’s trial), *Teague* would not operate to bar Brown from obtaining relief as Respondent has argued. *See* BIO at 31-33.