No. 17-991

# In the Supreme Court of the United States

PAYSUN LONG, PETITIONER,

*v.*

RANDY PFISTER, Warden, RESPONDENT.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

At petitioner's murder trial, a prosecution witness testified on direct examination that she saw petitioner shoot the victim. On cross-examination, that witness falsely denied having previously told representatives of the State's Attorney's office that she had not witnessed the crime. Defense counsel corrected the perjury by presenting the testimony of the State's Attorney's investigator.

On federal habeas review, the Seventh Circuit, sitting *en banc*, declined to address whether petitioner's due process claim was preserved and denied habeas relief because no clearly established Supreme Court precedent held that due process is violated where defense counsel elicits perjury and corrects that perjury prior to the close of evidence.

The question presented is:

Does a clearly established Due Process violation occur when defense counsel elicits perjury from a state witness and then fully exposes that perjury to the jury before the close of evidence through the testimony of a state investigator?

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## STATEMENT

### I. Trial and direct appeal

1. Petitioner was twice tried and convicted of the 2001 murder of Larriec Sherman. SA56.[1] The evidence presented at petitioner's second trial established that he shot Sherman in the back as Sherman bicycled through a Peoria, Illinois housing development. SA57–62.

2. At petitioner's first murder trial, state witness Brooklyn Irby identified petitioner as the shooter, but admitted on cross-examination by defense counsel that she had previously recanted her identification to representatives of the State's Attorney's office. SA44–45. Defense counsel then called Frank Walter, an investigator for the Peoria County State's Attorney, who corroborated Irby's testimony that she had previously recanted her identification of petitioner as the shooter. Doc. 13-12 at 55–58. The State presented identifications of petitioner as the shooter from three additional witnesses (Keyonna Edwards, Sheila Cooks, and Shawanda Walker), and petitioner was convicted of murder. SA42–51. The Illinois Appellate Court reversed that conviction for reasons unrelated to Irby's testimony. *Id*.

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[1] "Pet. __" refers to petitioner's petition for writ of certiorari; "Pet. App. __" refers to petitioner's appendix to his petition for writ of certiorari; "Doc. __" refers to the Seventh Circuit's docket in this case; and "SA__" refers to petitioner's supplemental appendix to his appellant's brief in the Seventh Circuit, appearing at Doc. 23 of *Long v. Butler*, No. 13-3327 (7th Cir.).

3. At petitioner's second trial, Cooks and Walker identified petitioner as the shooter through their videotaped statements to police, while Edwards identified petitioner as the shooter on the witness stand. SA57–62. Irby again identified petitioner as the shooter upon direct examination by the prosecutor. SA59; Pet. App. 82a. But, unlike at the first trial, when defense counsel asked on cross-examination whether she had ever recanted her identification Irby denied having done so. SA59; Pet. App. 82–83a. Defense counsel did not impeach Irby with the available transcript of her prior testimony in which she had admitted recanting her identification. Pet. App. 83a. And the prosecutor did not address Irby's false testimony on redirect examination. *Id*.

As in the first trial, the defense called Walter, who testified that in 2001, while he was serving Irby with a subpoena, she told him that she had lied when she identified petitioner as the shooter. A83a. Walter testified that he then transported Irby to the State's Attorney's office, where she repeated to Walter and several prosecutors, including Assistant State's Attorney (ASA) Mermelstein (the lead prosecutor on the case), that she had lied when she identified petitioner as the shooter. Pet. App. 83–84a. On cross-examination, Walter again testified upon questioning from ASA Mermelstein that Irby had once recanted her prior identification and that one of the prosecutors on the case directed him to write a report to document the recantation. Pet. App. 84a.

4. During closing argument, the prosecutor again acknowledged Irby's perjury, positing that Irby may have recanted her identification in the hope that she would not be called upon to testify at trial. SA149–50. But the prosecutor argued that Irby had told the truth at trial when she identified petitioner as the shooter. *Ibid*. The defense highlighted Irby's false testimony in its closing argument, SA160–61, and the prosecution again acknowledged in its rebuttal argument that Irby had lied, SA171.

5. The jury found petitioner guilty and the trial court sentenced him to fifty-one years of imprisonment. SA62. On direct appeal, petitioner raised no claim related to Irby's perjury.

## II. State collateral review

6. In April 2007, petitioner filed a *pro se* post-conviction petition, *see* 725 ILCS 5/122-1, *et seq*. (2006), arguing, as relevant here, that his appellate counsel was ineffective for failing to argue that the State violated his due process rights under *Napue v. Illinois*, 360 U.S. 264 (1959), by allowing Irby to testify falsely. Pet. App. 84a. The court appointed counsel and later dismissed the petition on the State's motion. *Id*.

7. Petitioner appealed, renewing his claim that appellate counsel was ineffective for failing to argue that the State allowed Irby to testify falsely. Pet. App. 82a. The state appellate court affirmed, holding that appellate counsel was not ineffective for failing to

raise a *Napue* claim because, in light of Walter's testimony, there was no reasonable likelihood that Irby's perjury could have affected the jury's verdict. Pet. App. 85–91a. Petitioner pressed his claim in a petition for leave to appeal (PLA) that the Illinois Supreme Court denied on May 25, 2011. SA107.

**III. Federal habeas proceedings**

8. Petitioner then filed a 28 U.S.C. § 2254 petition in the United States District Court for the Central District of Illinois claiming, as relevant here, that (1) he was denied a fair trial because the prosecutor allowed Irby's false testimony to go uncorrected, and (2) appellate counsel was ineffective for failing to raise the perjury claim. SA1–40.

9. The district court denied the petition, finding that the stand-alone due process claim was both defaulted—because it was presented in state court only as the basis for his claim that appellate counsel was ineffective—and meritless. Pet. App. 59–72a. The district court further held that petitioner's appellate counsel claim was meritless. Pet. App. 72–74a.

10. On appeal, a panel of the Seventh Circuit reversed, holding that petitioner's due process rights were violated when the prosecutor failed to correct Irby's perjury and that appellate counsel was ineffective for failing to so argue. Pet. App. 25–46a.

11. The Seventh Circuit granted respondent's ensuing petition for rehearing *en banc* and vacated the panel decision. Pet. App. 2–4a. The *en banc* court

affirmed the district court's judgment, declining to address whether petitioner's stand-alone *Napue* claim was preserved, A4a, and holding that neither the *Napue* claim nor the derivative appellate counsel claim had merit because no clearly established Supreme Court precedent holds that perjured testimony that has been disclosed to defense counsel and corrected by defense counsel before the jury violates due process, Pet. App. 5–10a.

## REASONS FOR DENYING THE PETITION

Petitioner's certiorari petition elides three critical facts: (1) Irby's perjury was fully aired before petitioner's jury through the testimony of the State's Attorney's investigator; (2) petitioner procedurally defaulted his *Napue* claim by raising it in state court only as the basis for a claim of ineffective assistance of appellate counsel; and (3) this case comes to the Court on federal habeas review, where petitioner is not entitled to relief unless the state court unreasonably applied the clearly established precedent of this Court. Each of these facts makes this case a poor vehicle to address petitioner's question presented.

Moreover, no split of authority is implicated by this case; none of the cases cited by petitioner conflicts with this one because, unlike here, the perjury in those cases was not revealed to the jury. Finally, the Seventh Circuit correctly held that the state appellate court's decision was not unreasonable because no clearly established precedent of this Court holds

that due process is violated where defense counsel elicits perjury from a state witness and corrects the perjury prior to the close of evidence.

## I. Petitioner's procedural default of his claim makes this case a poor vehicle.

The Seventh Circuit expressly declined to address whether petitioner's *Napue* claim was procedurally defaulted for failure to raise it in state court. A4a. But to grant petitioner relief this Court would need to first find that the claim was preserved. In state court, petitioner claimed only that appellate counsel was ineffective for failing to raise a *Napue* claim on direct appeal. Pet. App. 82–84a. Because petitioner did not present his freestanding *Napue* claim to the state courts, the claim is defaulted on habeas review. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

Every court of appeals to address the issue has recognized that a state-court claim of ineffective assistance of counsel does not ordinarily preserve an "embedded" claim for federal habeas review. *See*, *e.g.*, *Levasseur v. Pepe*, 70 F.3d 187, 192 (1st Cir. 1995); *Gattis v. Snyder*, 278 F.3d 222, 237 & n.6 (3d Cir. 2002); *Fitzgerald v. Thompson*, 943 F.2d 463, 469 (4th Cir. 1991); *Wilder v. Cockrell*, 274 F.3d 255, 261 (5th Cir. 2001); *Davie v. Mitchell*, 547 F.3d 297, 312–313 (6th Cir. 2008); *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004); *El-Tabech v. Hopkins*, 997 F.2d 386, 389 (8th Cir. 1993); *Castillo v. McDaniel*, 120 F.

App'x 59, 64 (9th Cir. 2005); *Bailey v. Nagle*, 172 F.3d 1299, 1304 n.8 (11th Cir. 1999). Holdings permitting habeas review of embedded claims have been limited to the idiosyncratic facts of particular cases. *See Malone v. Walls*, 538 F.3d 744, 754–55 (7th Cir. 2008) (finding embedded claim preserved where state court relaxed forfeiture rules and reached merits of embedded claim); *Ramdass v. Angelone*, 187 F.3d 396, 409 (4th Cir. 1999) (due process claim fairly presented to state court when facts and legal analysis were "squarely" presented, albeit under an ineffective assistance of counsel heading); *Odem v. Hopkins*, 192 F.3d 772, 775–76 (8th Cir. 1999) (finding embedded due process claim preserved where factual and legal substance were unambiguously presented to state court).

Given petitioner's failure to provide the Illinois courts an opportunity to pass upon his embedded *Napue* claim, this case is a poor vehicle to address whether due process is violated when defense counsel elicits and then corrects perjury by a state witness.

## II. Certiorari is unwarranted because this case does not implicate any circuit split.

There is no conflict of authority on the question presented that would justify certiorari review. Petitioner's alleged split is illusory: no state or federal court has held that due process is violated when defense counsel elicits and then corrects the perjury of a

government witness, much less that this Court's clearly established precedent dictates that result.

To the contrary, the cases cited by petitioner can be sorted into four categories, none of which conflicts with the decision below. The cases in the first category track *Napue* and find a due process violation because the prosecution failed to disclose the perjury to the defense. *See* Pet. 17–18 (citing *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146–52 (3d Cir. 2017) (finding *Napue* violation where state witness falsely testified that she received no consideration for her testimony and State failed to correct perjury or disclose it to defense); *Drake v. Portuondo*, 553 F.3d 230, 240–47 (2d Cir. 2009) (finding *Napue* violation where expert witness falsely claimed to have begun work on the case the preceding day and prosecutor neither corrected nor disclosed perjury); *Hayes v. Brown*, 399 F.3d 972, 978–88 (9th Cir. 2005) (*en banc*) (finding due process violation where prosecutor knowingly presented witness's false testimony that he received no consideration for testimony and lied to defense counsel and court about existence of deal)).

In the second category, courts have held that due process is also violated where the prosecution discloses the perjury to the defense but defense counsel's efforts to expose the perjury to the jury are thwarted. *See* Pet. 17–20 (citing *Jenkins v. Artuz*, 294 F.3d 284, 292–96 (2d Cir. 2002) (finding *Napue* violation where witness falsely testified that he had no deal with State and prosecutor reinforced the perjury on redirect); *N.*

*Mariana Islands v. Bowie*, 243 F.3d 1109, 1114–23 (9th Cir. 2001) (finding due process violation where prosecutor was aware that state witnesses were conspiring to commit perjury, did nothing to stop it, and took actions to thwart defense counsel's exposure of the perjury); *United States v. LaPage*, 231 F.3d 488, 489–92 (9th Cir. 2000) (finding due process violation where prosecutor knowingly presented false testimony and defense counsel's efforts to expose the perjury were "ineffectual"); *State v. Brunette*, 501 A.2d 419, 421–25 (Me. 1985) (finding due process violation where prosecutor discovered perjury after the fact, disclosed it to defense and court, but on court's order it was not corrected before jury).

In the third category of cases cited by petitioner, the court found that there was no due process violation either because the defendant failed to establish that the witness had testified falsely or because the false testimony was harmless beyond a reasonable doubt. *See* Pet. 18–22 (citing *Soto v. Ryan*, 760 F.3d 947, 967–71 (9th Cir. 2014) (holding state court reasonably rejected claim because petitioner failed to establish that witness lied); *DeVoss v. State*, 648 N.W.2d 56, 63–64 (Iowa 2002) (denying *Napue* claim because there was no perjury, but noting that it is incumbent on defendant who is aware of perjury to raise the issue at trial); *United States v. Langston*, 970 F.2d 692, 700–01 (10th Cir. 1992) (holding that if witness testified falsely, it was harmless beyond a reasonable doubt); *United States v. Santiago*, 798 F.2d 246, 247

(7th Cir. 1986) (holding that inconsistencies between state witness's grand jury and trial testimony did not rise to the level of perjury and defense had ample opportunity to cross-examine witness regarding discrepancies).

Finally, in the remaining cases on which petitioner relies, courts made fact-specific rulings regarding whether due process was violated when the prosecution disclosed perjury to the defense and defense counsel chose not to reveal it to the jury. *See* Pet. 17–21 (citing *United States v. Stein*, 846 F.3d 1135, 1150 (11th Cir. 2017), cert. denied, 138 S. Ct. 556 (finding no violation where perjury disclosed to defense and prosecution did not rely on it); *Meece v. Commonwealth*, 348 S.W.3d 627, 680 (Ky. 2011) (same); *United States v. Mangual-Garcia*, 505 F.3d 1, 10–11 (1st Cir. 2007) (same); *United States v. Crockett*, 435 F.3d 1305, 1317–18 (10th Cir. 2006) (same); *Beltran v. Cockrell*, 294 F.3d 730, 736–37 (5th Cir. 2002) (same); *State v. Yates*, 629 A.2d 807, 807–810 (N.H. 1993) (finding due process violation where prosecutor knowingly presented false testimony, the subject of which was disclosed to the defense, and made statements regarding efforts to conceal it from jury); *DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) (finding due process violation where prosecution disclosed perjury to defense, but neither party corrected it and prosecution relied upon it in closing argument); *United States v. Foster*, 874 F.2d 491, 493–95 (8th Cir. 1988) (finding due process violation where prosecu-

tion disclosed witness immunity to defense, failed to correct perjury it elicited from its witnesses on that subject, and also endorsed trial court's incorrect response to jury question regarding witness immunity)).

None of these cases conflicts with the Seventh Circuit's judgment below because none found a due process violation where the perjury was revealed to the jury prior to the close of evidence. *Napue* was decided nearly sixty years ago, and the four categories of cases applying it refute any claim that it has sown confusion calling out for this Court's review. To the extent there is residual uncertainty within the fourth category of cases—concerning whether due process is violated where the prosecution discloses perjury to the defense and the defense chooses *not* to reveal it to the finder of fact—that question is not presented on the facts of this case and the Court may decide whether to entertain it when such a case arises.

## III. The Seventh Circuit's judgment was correct.

Finally, this Court should deny review because the Seventh Circuit's judgment was correct. Petitioner fails to grapple with the dispositive feature of this case: no clearly established precedent from this Court holds that due process is violated when defense counsel elicits perjury from a state witness and then fully exposes that perjury to the jury before the close of evidence.

The "starting point" for this Court's analysis "is to identify the 'clearly established Federal law'" governing the claim, as determined by this Court. *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (per curiam) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); 28 U.S.C. § 2254(d)(1). If no such precedent exists, then, in a case like this one, where the state courts considered the claim on the merits,[2] habeas relief is unavailable. *Rodgers*, 133 S. Ct. at 1449.

This Court first recognized a due process violation arising from the presentation of perjured testimony in *Mooney v. Holohan*, 294 U.S. 103 (1935). *Mooney* held that the knowing and deliberate solicitation of perjured testimony by the prosecution, while withholding evidence of such perjury from the defense and the court, violated the defendant's due process rights. *Id.* at 110–12.

*Napue v. Illinois* extended the rule to cover not only the circumstance in which the prosecutor intentionally solicits perjured testimony, but also "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269. The perjured testimony—elicited by the pros-

[2] As discussed, petitioner's *Napue* claim is procedurally defaulted. But even if this Court were to find that he fairly presented the claim in state court by embedding it in his claim of ineffective assistance of appellate counsel, the state appellate court's determination that there was no reasonable likelihood that Irby's perjury affected the verdict would still stand as a bar to relitigation under 28 U.S.C. § 2254(d)(1).

ecutor, not disclosed to the defense, and not revealed to the jury—resulted in a deprivation of due process because there was a reasonable likelihood that it affected the jury's verdict. *Id.* at 265–72; *see also Giglio v. United States*, 405 U.S. 150, 153–54 (1972) (restating prejudice standard and clarifying that prosecutor's failure to disclose perjury need not be intentional to constitute due process violation).

This Court has never found a due process violation under the circumstances presented here. In each case where the Court has found a violation, the prosecution failed to disclose the perjury to the defense and the perjury was never revealed to the jury.[3]

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[3] *See Giglio*, 405 U.S. at 152–54 (accomplice falsely testified that no consideration given in exchange for testimony and defendant learned only after trial that prosecutor had promised accomplice that he would not be charged); *Giles v. Maryland*, 386 U.S. 66, 74–81 (1967) (remanding where officers falsely testified that victim had claimed immediately after attack that all three defendants assaulted her and prosecution refused to produce police reports showing that victim had claimed that only two of defendants assaulted her); *Miller v. Pate*, 386 U.S. 1, 1–7 (1967) (defense denied access to physical evidence before trial and learned only after conviction that allegedly blood-soaked shorts were actually soaked with paint and prosecutor knew this fact at trial); *Napue*, 360 U.S. at 265–69 (prosecutor failed to disclose consideration given to witness in exchange for testimony and failed to correct or disclose falsity of witness's testimony with respect to that consideration); *Alcorta v. Texas*, 355 U.S. 28, 28–32 (1957) (sole witness to murder gave false testimony and prosecutor deliberately hid falsity from defense); *Price v. Johnston*, 334 U.S. 266, 286–94 (1948) (remanding where defendant

While it is true that near-identity of facts between clearly established Supreme Court precedent and petitioner's case is not required for relief under § 2254(d)(1), Pet. 15 (citing *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)), Supreme Court precedent does not clearly resolve the constitutionality of a state-court judgment where material differences exist between the circumstances presented. *See, e.g., Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (Supreme Court precedent holding that complete denial of closing argument is structural error does not clearly establish that restricting theories presented in closing argument is structural error); *Lopez v. Smith*, 135 S. Ct. 1, 3–4 (2014) (reversing grant of habeas because no Supreme Court decision held that prosecution must disclose aiding-and-abetting theory prior to trial); *Wright v. Van Patten*, 552 U.S. 120, 122–25 (2008) (reversing grant of habeas because no clearly established Su-

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alleged that prosecutor improperly persuaded witness to change testimony); *White v. Ragen*, 324 U.S. 760, 763–64 (1945) (defendant alleged due process violation where affidavits from state witnesses averred that prosecutor bribed them to secure their false testimony); *State of N.Y. ex rel. Whitman v. Wilson*, 318 U.S. 688, 688–92 (1943) (remanding where defendant claimed that prosecutor knowingly presented false testimony and deliberately suppressed evidence with which to impeach that testimony); *Pyle v. Kansas*, 317 U.S. 213, 213–16 (1942) (petitioner sufficiently alleged that his imprisonment resulted from State's knowing use of perjured testimony and from deliberate suppression of favorable evidence); *Mooney*, 294 U.S. at 110–115 (intentional and undisclosed presentation of false testimony by prosecution).

preme Court precedent held that counsel's participation in plea hearing via speaker phone was complete denial of counsel); *Carey v. Musladin*, 549 U.S. 70, 72–77 (2006) (reversing grant of habeas because Supreme Court precedent addressed inherently prejudicial courtroom practices by State, but did not address spectator conduct).

Here, petitioner can point to no Supreme Court case where a witness's perjury was disclosed to the defense, much less where it was exposed to the jury by the defense through the testimony of an agent of the State. *Napue* provides that due process is violated "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," and where there is any reasonable likelihood that the false evidence could have affected the judgment of the jury. 360 U.S. at 269–72. *Napue* does not address whether disclosing the perjury to the defense and allowing defense counsel to correct it violates due process. Because "the precise contours of the right remain unclear," the state appellate court here had "broad discretion" under § 2254 to reasonably interpret the rule in a way that excluded petitioner's claim. *See Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015).

Moreover, the state appellate court was free to determine—as it did—that although the prosecutor *should* have corrected Irby's perjury, no due process violation resulted where there was no reasonable likelihood that Irby's perjury could have affected the ju-

ry's verdict because Walter's testimony had exposed the perjury to the jury. Walter—a representative of the State's Attorney's office—testified that Irby had recanted her identification of petitioner to him, ASA Mermelstein, and another prosecutor. Doc. 13-12 at 329–33. Mermelstein then elicited from Walter on cross-examination that Mermelstein or another prosecutor had asked Walter to document Irby's recantation. *Ibid*. Moreover, the prosecution acknowledged the perjury—and defense counsel highlighted it—in closing arguments. SA150, 160–61, 167–71.

In light of the thorough airing of the perjury before petitioner's jury, the state appellate court reasonably determined that "the jury was informed that Irby had recanted to Walter and the prosecutors her identification of [petitioner] as the shooter, and the jury had the necessary information to weigh Irby's credibility." Pet. App. 88a. The state appellate court's decision did not rest upon the weight of the evidence against petitioner or upon the propriety of the prosecutor's actions but, instead, upon its conclusion that Irby's perjury was "corrected at trial." Pet. App. 87–88a. If no reasonable jurist could find the error cured under these circumstances, then *Napue* errors are *per se* incurable, a result that *Napue* itself rejects. *Napue*, 360 U.S. at 269.

In short, petitioner's claim fails under § 2254(d)(1), for no clearly established precedent of this Court holds that false testimony results in a due process violation where the prosecution has fully dis-

closed the perjury to the defense—here, through Walter's report detailing Irby's recantation, as well as Irby's and Walter's testimony in the first trial—much less where defense counsel elicited the perjured testimony and exposed it to the jury through an agent of the State, and where the prosecutor acknowledged the falsity of the testimony before the jury. Accordingly, the Seventh Circuit's judgment was correct.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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