No. 17-991

In the
Supreme Court of the United States

PAYSUN LONG,

Petitioner,

v.

RANDY PFISTER, in his official capacity as Warden of Stateville Correctional Center,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

In *Napue v. Illinois,* this Court made clear that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. 264, 269 (1959). The State nonetheless asserts that it had no duty to correct its witness's known perjury. In its view, a prosecutor is free to use perjury to convict a defendant so long as the defense introduces some contrary evidence or cross-examines the witness so the jury can "weigh" the truth against the witness's known lies. BIO.16. Worse still, the State argues that a prosecutor may simultaneously represent to the jury that its lying witness was "under oath," "came in here and raised her hand and told you what happened," and testified "consistent" with "the truth"—as the prosecutor did here. App.108a.

The State's position, adopted by the court below, is "inconsistent with the rudimentary demands of justice," *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and contradicts nearly a century of this Court's clear precedent. Under *Napue*, the prosecution may not sit back while the defense attempts to counter perjury, but rather must affirmatively "correct" the perjury and affirmatively "elicit" the "truth." 360 U.S. at 270. That is so for at least two reasons: (1) it is the *prosecutor's* duty to correct perjury—*not* the *defendant's* and (2) the introduction of contradictory evidence is *not* a "correction". Perjury must be specifically identified as such, and the jury must be instructed that it cannot consider it to convict the defendant. It is not enough to simply treat the known lie as any other piece of evidence and hope it does not mislead the jury.

Unfortunately, the Seventh Circuit is not the only court that has substantially relieved prosecutors of their duty to correct false testimony. While many courts continue to faithfully adhere to *Napue* and this Court's other precedents, other courts have adopted a variety of "exceptions" that allow prosecutors to knowingly use false testimony to convict defendants. While the State studiously ignores these decisions and asserts that there is no split of authority, the lower courts recognize such a "division within the circuits on the issue." *United States v. Mangual-Garcia*, 505 F.3d 1, 10 (1st Cir. 2007).

This case provides an excellent vehicle for this Court's review of this exceptionally important question. The en banc decision raises a clear legal issue as to which there is a sharp divide among the circuits. While the State argues against review on the ground that this is a decision on habeas review from the state courts, *Napue* itself was such a case—involving actions by prosecutors from the same State, Illinois. 360 U.S. at 265. Indeed, *most* of the cases addressing *Napue* violations involve actions by state—not federal—prosecutors, making this a particularly appropriate vehicle for review.

In sum, Paysun Long was convicted based on perjury. It is undisputed that the key witness who identified him as the culpable party repeatedly lied under oath. As a result, Mr. Long faces the strong possibility that he will spend the rest of his life in prison—an outcome that would have been avoided had he been tried in a different circuit. The decision below will lead many other defendants to suffer a similar fate: conviction based on blatant lies that the prosecution never corrects. Such "a deliberate

deception of court and jury" runs counter to fundamental principles of due process. *Mooney*, 294 U.S. at 112. The petition should be granted.

I. This Case Deepens A Conflict Among The Courts of Appeals And State Courts Of Last Resort.

Though this Court long ago made clear "that a State may not knowingly use false evidence … to obtain a tainted conviction," the circuits and state supreme courts have since diverged on whether this baseline requirement of due process is subject to exceptions. *Napue*, 360 U.S. at 269. While the State dismisses this split as "illusory" (BIO.7), lower courts recognize that there is a "division within the circuits[.]" *Mangual-Garcia*, 505 F.3d at 10. Four circuits, and at least two state courts of last resort, have rejected the Seventh Circuit's erroneous determination that there are exceptions to *Napue*. Pet.17–20. In contrast, three other circuits, like the Seventh Circuit, have expressly recognized such exceptions. Pet.20.

The State cannot wish away this obvious conflict. The decisions themselves confirm it. For example, while the Seventh Circuit held that perjury need not be corrected if the defense elicits it, the Third Circuit—consistent with *Napue* and *Giglio v. United States*, 405 U.S. 150 (1972)—recently held the opposite. The court determined that a defendant's due process rights are violated when the government "knowingly presents or *fails to correct* false testimony in a criminal proceeding." *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 145–46 (3d Cir. 2017) (emphasis added). Granting habeas relief, the court observed that "when the state has corrupted the

truth-seeking function of the trial by knowingly presenting or failing to correct perjured testimony, the threat to a defendant's right to due process is at its apex." *Id.* at 152; *accord Jenkins v. Artuz*, 294 F.3d 284, 293–95 (2d Cir. 2002) (recognizing that there is a "heightened opportunity for prejudice where the prosecutor, by action or inaction, is complicit in the untruthful testimony").

The State likewise ignores the split regarding the Seventh Circuit's second "exception" for cases in which defense counsel knows the truth. Unlike the decision below, the Eighth Circuit has held that defense counsel's knowledge of false testimony "is of no consequence" under *Napue* and that a new trial is required where "the prosecutor breache[s] her duty to correct the falsehoods." *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988). Similarly, the Ninth Circuit has emphasized that the burden rests with the government "to correct false testimony given by its witnesses, even when the defense knows the testimony was false[.]" *Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014); *accord United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003).

Several state courts of last resort have similarly acknowledged *Napue*'s mandate. For example, the Michigan Supreme Court has held that "[t]he obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution." *People v. Smith*, 870 N.W.2d 299, 306 n.7 (Mich. 2015). And the New Hampshire Supreme Court has held that prosecutors have "the final responsibility" to "bring to the attention of the court and the jury" the fact that testimony "was probably false." *State v. Yates*, 629 A.2d 807, 810 (N.H. 1993).

The divide over the Seventh Circuit's third "exception" is equally clear. While the Seventh Circuit and some other courts allow prosecutors to shirk their duty to correct perjury where they do not "rely" upon it, others adhere to this Court's precedents, recognizing that the mere introduction of perjury "involve[s] a corruption of the truth-seeking function of the trial process"—regardless of whether the prosecution takes some further action to affirmatively "rely" upon it. *Haskell*, 866 F.3d at 146 (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)); *see also United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (prosecutor may not "knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial").

Finally, the State ignores the split regarding the Seventh Circuit's fourth "exception," under which prosecutors need not correct perjury where a defendant offers some contradictory evidence. BIO.8–9. While the State attempts to characterize these cases as instances in which "defense counsel's efforts to expose the perjury to the jury are thwarted" (BIO.8), courts faithfully applying *Napue* hold that reversal is required where the prosecution fails to correct perjury, *regardless* of any defense efforts—successful or not—to combat it. Under *Napue*, the obligation is on the prosecution to correct perjury—*not* the defense. This duty belongs to prosecutors not merely because they are ethically required to correct perjury, but because their word carries greater weight with juries who "frequently listen[] to defense counsel with skepticism." *LaPage*, 231 F.3d at 492. Accordingly, "the government's duty to correct perjury by its witness is not discharged merely because

defense counsel knows, *and the jury may figure out*, that the testimony is false." *Id.* (emphasis added).[1]

Accordingly, the State's contention that there is no conflict because no court "found a due process violation where the perjury was revealed to the jury prior to the close of evidence" (BIO.11) is simply wrong. Numerous courts have held that prosecutors must correct perjury—regardless of whether the defense offers evidence contradicting the false testimony. Pet.5, 20.

II. The En Banc Decision Violates *Napue* And Fundamental Requirements Of Due Process.

This Court's intervention is further warranted because the decision below contravenes the principle "that a conviction secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *White v. Ragen*, 324 U.S. 760, 764 (1945). *Napue* articulated a general rule requiring prosecutors to correct perjury—*without* exceptions. Indeed, even the majority below acknowledged that this Court has never recognized "exceptions for testimony elicited by the defense, or testimony known by the defense to be false, or testimony corrected before the jury deliberates." App.5a. Moreover, the *Napue* rule is consistent with a long line of authority holding that whenever the government "obtains a conviction through the use of perjured testimony, it violates civilized standards for

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[1] This duty is hardly burdensome: "Many prosecutors, when this occurs, interrupt their own questioning, and work out in a bench conference with the judge and defense counsel how to inform the jury immediately that the testimony is false." *LaPage*, 231 F.3d at 492.

the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law." *Hysler v. Florida*, 315 U.S. 411, 413 (1942).

Napue's categorical requirement to correct perjury was no accident. As the dissent observed below, "*Napue* itself considered and rejected the grounds the majority relies upon to excuse the Illinois' courts failure to follow it." App.11a. The Court was clear that a due process violation occurs when the prosecution, "*although not soliciting false evidence*, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269 (emphasis added). The prosecution violates due process where it "*allows* [perjured testimony] to go uncorrected"—regardless of whether the prosecutor "relies" on it. *Id.* (emphasis added). Nor can the introduction of contradictory evidence "turn[] what was otherwise a tainted trial into a fair one." *Id.* at 270. The *Napue* Court considered and *rejected* such exceptions.

Thus, there is no doubt that the constitutional right at issue here was clearly established. The "precise contours" of a defendant's due process right to a trial free of perjury have been "established [by] a clear or consistent path for courts to follow." *Lockyer v. Andrade*, 538 U.S. 63, 72–73 (2003). Indeed, the State concedes "that near-identity of facts between clearly established Supreme Court precedent and petitioner's case is not required for relief under" AEDPA. BIO.14. Yet, that is the exact hurdle it would have this Court impose in arguing that the Seventh Circuit's decision should be affirmed because allegedly "[t]his Court has never found a due process violation under the circumstances presented here." BIO.13.

Under this Court's precedents, Mr. Long need not show that this Court has already ruled on an identical case. Rather, because the state court did not "reasonably apply the rules 'squarely established' by" *Napue* and its progeny to his case, Mr. Long is entitled to a new and fair trial. *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014). Indeed, the right to a trial free from perjured testimony is "fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

Not only would the State improperly limit *Napue* to its facts, but the rule the State urges is plainly contrary to this Court's longstanding precedents. While the State argues that *Napue* is satisfied if defense counsel "corrects" perjury, *Napue* holds that the *prosecutor* has the "duty to correct what he knows to be false and elicit the truth," 360 U.S. at 270, a holding this Court reiterated in *Giglio*: "[I]t is the responsibility of the *prosecutor*" to ensure that "the due process requirements enunciated in *Napue*" are satisfied, 405 U.S. at 154–55 (emphasis added).

Likewise, while the State contends that perjury may be "corrected" simply by cross-examining witnesses or introducing contrary evidence, *Napue* makes clear that such measures do not constitute a "correction." The *Napue* Court rejected the State's contention that "the fact that the jury was apprised of other grounds for believing that the witness … may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." 360 U.S. at 270. Allowing the jury to "weigh" the "credibility" of a witness who offers false

testimony as the State would have courts do (BIO.16) is precisely what *Napue* prohibits.

The jury must be directed that it cannot consider the perjured testimony. As the dissent observed below, *Napue* is violated when the prosecution fails to correct perjury "whether the defense knew of the false testimony or whether the jury heard evidence contradicting the false testimony." App.11a–12a. "A jury that hears evidence merely contradicting the perjury cannot be said to *know* the truth." App.22 (Hamilton, J., dissenting). Indeed, both the Seventh Circuit and the State below conceded that the perjury in Mr. Long's case was *not* corrected. App.10a; Doc. 30, State Br. at 27 ("It is undisputed that the prosecutor failed to correct the perjured testimony of Brooklyn Irby.").[2]

In fact, the constitutional violation here was much worse than that in *Napue*. While the State argues that the prosecution "acknowledged Irby's perjury" (BIO.3), and that it was "fully aired" (BIO.5), in reality the prosecution emphasized during closing argument that Ms. Irby was "under oath," that she "came in here and raised her hand and told you what happened," and that while there were differences in the witnesses' testimony, "it was the truth that was consistent." App.100a, 109a. As the Third Circuit has aptly observed in adopting a view diametrically opposed to the Seventh Circuit's, "how can a defendant possibly enjoy his right to a fair trial when the state is willing to present (or fails to correct) lies told by its own witness and then vouches for and relies on that witness's supposed honesty in its closing?"

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[2] Citations to the Seventh Circuit's docket appear as "Doc._."

Haskell, 866 F.3d at 152. The Seventh Circuit's affirmance of Mr. Long's conviction calls out for correction.

III. This Case Is An Excellent Vehicle To Address The Significant Question Presented.

This case is an excellent vehicle to resolve the question presented. There is a deep and persistent split among the circuits as to *Napue's* scope, and the issue was thoroughly considered by multiple judges below, culminating in the Seventh Circuit's 5-3 en banc opinion. Moreover, the question is a significant one, of fundamental importance to the criminal justice system. "When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened." *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005) (en banc).

While the State raises the prospect that there was a "procedural default" (BIO.6), the Seventh Circuit panel thoroughly refuted that contention and no member of the en banc court embraced it. BIO.6–7; App.33a–37a. As the panel correctly determined, Mr. Long "fairly presented the factual and legal basis for the perjured testimony claim to the Illinois state court and, importantly, that court considered the issue *on its merits*." App.36a (emphasis added).[3]

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[3] The State's assertion that there is no "reasonable likelihood" that Irby's perjury affected the verdict (BIO.12 n.2) is likewise contrary to the record and the Seventh Circuit's decision. There is no dispute that Irby was a key witness and that there was no physical evidence tying Mr. Long to the crime. As the state court recognized below, **t**he evidence against Mr. Long was far from "overwhelming." App.87a. Courts have repeatedly rejected

Indeed, the State itself conceded that the "state appellate court addressed" Long's "claim relating to *Napue on the merits*." Doc. 30, State Br. at 27 (emphasis added).

Likewise, that this case is presented on habeas review is no obstacle to this Court's review. This Court has clearly and repeatedly held that when a government witness lies, the prosecutor must not "allow[] it to go uncorrected." *Napue*, 360 U.S. at 269. Thus, *Napue* plainly sets forth a "specific legal rule" that provides a basis for habeas relief. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014). Indeed, multiple circuits have granted habeas relief where convictions were secured by false testimony. Pet.17. While the State argues otherwise, *Napue* presents an easy-to-follow directive: "A lie is a lie … and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." 360 U.S. at 269–70. When the court below excused the prosecution from that duty, it allowed Mr. Long to be convicted based on the lies of a government witness and denied him "a trial that could in any real sense be termed fair." *Id.* at 270. This Court should grant review to reaffirm the vitality of *Napue* and ensure that defendants like Paysun Long are no longer deprived of their fundamental constitutional rights.

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similar arguments. *E.g., Haskell*, 866 F.3d at 146 ("key witness" "could have affected the jury's judgment" since, as here, "[a]ll the other eyewitnesses had significant problems with their testimony"); *Hayes*, 399 F.3d at 985 (witness was "the centerpiece of the prosecution's case" and "[n]early all of the other evidence against [the defendant] was circumstantial").

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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