No. _____

In The
Supreme Court of the United States

FIDENCIO VALDEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. When a defendant knows or should know that a prosecutor has used or introduced false or perjured evidence before the trier-of-fact, is there an obligation on the part of the defendant to lodge a timely objection to such testimony?

2. Is a prosecutor authorized to disregard the rule that he or she is to refrain from knowingly presenting or using as substantive evidence false or perjured statements where the prosecutor's intent in presenting or using such evidence is to explain the reason or reason(s) why the witness lied or failed to tell the truth?

3. Where defense counsel impeaches a witness and demonstrates that the witness lied to the police, does the prosecutor comply with his or her constitutional duty to correct false evidence or testimony by introducing as substantive evidence before the trier-of-fact extrinsic evidence of these lies by the witness, along with self-serving explanations from the witness to explain these lies?

4. Can a defendant rely on circumstantial evidence to prove the existence of a tacit or implied agreement between the State and a witness wherein the witness agrees to testify for the State in exchange for immunity or leniency, or is a defendant limited to proving up the existence of such an agreement through direct evidence only?

QUESTIONS PRESENTED FOR REVIEW –
Continued

5. Is the subsection of the Texas capital murder statute under which Valdez was convicted void under the void for vagueness doctrine, based on the way the Texas Court of Criminal Appeals applied and interpreted this subsection of the capital murder statute in Valdez' case?

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OPINION BELOW

There is only one court opinion in this case because death penalty appeals in Texas are automatically appealed directly to the Texas Court of Criminal Appeals, the highest criminal court in Texas. There is therefore no intermediate appellate court decision in this case. On the last page of the *Opinion* issued by the Texas Court of Criminal Appeals in this case, the words "Do not publish" appear. This unpublished *Opinion* is reproduced at App. A.

JURISDICTION

The Texas Court of Criminal Appeals issued its *Opinion* on June 20, 2018. Petitioner did not file a motion for rehearing with the Court of Criminal Appeals. This Court has jurisdiction to hear this petition for writ of certiorari under and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V, states in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

U.S. Constitution, Amendment XIV, provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

Section 19.03(a)(2) of the Texas Penal Code states:

> CAPITAL MURDER. (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and . . . :
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6).

STATEMENT OF THE CASE

Petitioner, Fidencio Valdez, was sentenced to death after he was convicted of the capital murder offense of knowingly or intentionally causing the death of Julio Barrios during the course of committing a robbery. (*Opinion*, p. 1). According to Veronica Cera, the State's only alleged eyewitness to what transpired during the initial encounter between Barrios and Valdez, Petitioner Valdez acquired possession of 30-40 ecstasy pills Barrios offered to sell him without paying for them. (*Opinion*, p. 4). Cera identified herself as

Valdez's girlfriend and although not charged with any offense, she testified at trial that she accompanied Valdez – who was driving her 1997 Saturn Vue – to the location where Valdez was to purchase four ecstasy pills from Barrios. (*Opinion*, pp. 2-4). Cera testified that once Barrios arrived at the meeting location, Barrios exited Herrera's vehicle and approached the Saturn Vue, the vehicle Petitioner Valdez had driven to the meeting location. (*Opinion*, p. 4). Cera testified that Barrios was then told by Valdez to get into the back seat of the Saturn Vue and that after Barrios complied, Valdez drove a few blocks away to a more secluded location before telling Barrios to hand over the ecstasy pills in his possession. (*Opinion*, p. 4). When Barrios then handed to Valdez a plastic baggie containing approximately 30 to 40 ecstasy pills, Valdez in turn handed this baggie of ecstasy pills to Cera and told her to begin counting them. (*Opinion*, p. 4). At this point Barrios demanded payment for the ecstasy pills, but Valdez told him that he was not going to pay him "shit" and ordered Barrios to exit his vehicle, before pulling out a hand gun in his possession and shooting Barrios in the head. (*Opinion*, p. 4). At the time he was initially shot, Barrios was positioned in the rear passenger seat of the SUV immediately behind the driver's seat. (*Opinion*, p. 4). Cera testified that she looked up immediately after the shooting and observed that Valdez had shot Barrios in the head. (*Opinion*, p. 4). From inside the SUV, Cera then claims to have witnessed

Valdez shoot Barrios and pull Valdez out of the vehicle. (*Opinion*, p. 4).[1]

Cera next testified that right after the first shots were fired, she exited the front side passenger's door of the SUV and went around to the rear of her vehicle. (*Opinion*, p. 4). But Valdez, upon seeing her, ordered her to immediately get back into the vehicle, so she complied. (*Opinion*, p. 4). Cera then stated that she observed Valdez shoot Barrios again on the ground and then shoot twice at Samuel Herrera's Chrysler Sebring parked behind them before he re-entered the Saturn Vue and drove off. (*Opinion*, pp. 3-5). Cera testified that after she and Valdez fled the scene, she cleaned up the blood from inside the Saturn Vue and burned and destroyed a shoe and physical clothing belonging to Valdez and Barrios. (*Opinion*, p. 7).

On cross-examination, Valdez's trial counsel demonstrated that Cera lied in a videotaped statement and in a subsequent written statement she had given to Detective Samaniego. (*Opinion*, pp. 10-11, 14). The Court of Criminal Appeals acknowledges that "Cera testified on cross-examination that, in her 2010 and 2012 interviews, she omitted facts and made statements that were not true." (*Opinion*, p. 14). One such

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[1] The record reflects that Cera's trial testimony was refuted in part by a statement made by Barrios' uncle (Samuel Herrera), who drove Barrios to the meeting location. Herrera indicated that after Barrios walked up to the Saturn Vue, he (Herrera) saw a white flash (gunshot) from the passenger's side of the Saturn Vue, thereby implicating Cera as the person who possibly shot and killed Julio Barrios.

omission was that she had counted pills for Valdez after Barrios handed the bag of ecstasy pills to Valdez. (*Opinion*, p. 14). Cera also admitted that she lied to Detective Samaniego about "what Filo [Valdez] did once [she] got back to [her] apartment" after the shooting and admitted that she lied when she told Detective Samaniego that she had stayed home that night after leaving the scene of the shooting. RR 50, 145-146. When Valdez' trial counsel asked Cera, "Do you recall what you told Detective Samaniego you did while you were at home that night?", she replied: "I said I was crying. But the reason I said that was because I didn't want to get my sister involved." RR 50, 146. Cera was also asked on cross-examination if she had ever seen the gun used to shoot Julio Barrios and admitted that she had told Detective Samaniego: "I didn't see the gun" even though this testimony squarely contradicted her direct testimony before the jury. RR 50, 146-147.

During the trial, Cera also maintained that she had blacked out for a minute or two right after the shooting. RR 50, 145. However, this testimony and the earlier statement Cera had made to this effect contradicted her testimony that she exited the Saturn Vue right after the shooting and walked toward the rear of the vehicle before Valdez ordered her to get back in the vehicle. RR 50, 103; RR 50, 145; RR 62, 83-84, RR 62, 105-106. Cera further confirmed that she had lied to Detective Samaniego when she had answered "No" to the question of whether the blasts (gun shots) had come from inside the car and acknowledged that this earlier statement contradicted her testimony at trial

that she had witnessed Valdez discharge a handgun from inside the Saturn Vue. RR 50, 148-149.

After Valdez' trial counsel finished his cross-examination of Cera, the prosecutor immediately introduced into evidence, without objection, a copy of the videotaped interview Veronica Cera had provided to Detective Samaniego as well as a copy of the written statement Cera had earlier provided. (*Opinion*, p. 15).[2] After introducing these prior statements by Cera, the following exchange occurred between the prosecutor and Veronica Cera:

> Prosecutor: Ms. Cera, let's talk about some of the differences in your testimony today versus what the – what we've got contained in State's Exhibit 81 and 83. RR 50, 157.
>
> You've testified today – today is what? – May 28th of 2014. The first time you talked to police, you're speaking to them on December 17th. Approximately seven days after the shooting, you're speaking with Detective Samaniego. And then you're asked to come back to the Crimes Against

[2] Petitioner's trial counsel did ask that Cera's videotaped and written statements to the police be redacted to omit any reference to any other crimes Petitioner may have committed. But this redaction request did not serve as an objection to the admission of Cera's videotaped and written statements to the police, even though both the prosecutor and defense counsel knew that these statements contained numerous falsehoods.

Persons Office again on October – or I'm sorry – August 29th of 2012 to clear up or give additional information regarding the information you gave on December 17th of 2010. Okay. So these are the different statements that we're referring to. RR 50, 157-158.

. . . .

Prosecutor: Would you – would Veronica Cera – if I had told Veronica Cera on her birthday, December 9th of 2010, the day before the shooting occurred, you would be cooperating with the El Paso Police Department, you would have sat and talked to me, a prosecutor with the district attorney's office, and you would have agreed to be cooperating in a capital murder trial against Fidencio Valdez, would the Veronica Cera on December 9th of 2010 – would she have agreed to that? Would you have seen this? RR 50, 158-159.

V. Cera: No, ma'am. RR 50, 159.

Prosecutor: What was your lifestyle back then, Mrs. Cera? Were you using drugs? RR 50, 159.

V. Cera: Yes, ma'am. RR 50, 159.

Prosecutor: Were your friends good people? RR 50, 159.

V. Cera: No, ma'am. RR 50, 159.

Prosecutor: Were you a big fan of cops, law enforcement, FBI agents?

Is that who Veronica Cera cooperated with and helped back in December of 2010? Is that who you were. . . . RR 50, 159.

V. Cera: No, ma'am. RR 50, 159.

. . . .

Prosecutor: Has your lifestyle changed significantly? RR 50, 159.

V. Cera: Yes, ma'am. RR 50, 159.

Prosecutor: Do you cooperate with law enforcement at this point in your life? RR 50, 159.

V. Cera: Yes, ma'am. RR 50, 159.

Prosecutor: When you gave this statement back in December – December 17th of 2010, you've admitted that there are parts that you're not being truthful about? Is that correct? Do you need me to repeat that? RR 50, 159-160.

V. Cera: Yes, ma'am. RR 50, 160.

Prosecutor: When Mr. Blake was asking you questions, and he went through

your statement and he said, Was this true? And today you said, No, it wasn't. Was this true? And then you agreed, No, it wasn't. There were lies or inconsistencies when you were talking to Detective Samaniego back in December of 2010. Agree? RR 50, 160.

V. Cera: Yes, ma'am. RR 50, 160.

. . . .

Prosecutor: There are things in your statement that you are either omitting or not being truthful about. Is that correct? RR 50, 160.

V. Cera: Yes, ma'am. RR 50, 160.

Prosecutor: In the statement of December 17th of 2010, I believe one of the reasons you wanted to give today was you were attempting, on part of – one of the reasons for your lies that you were protecting your sister. Is that why you didn't mention the fact that you saw your sister or you were in your sister's truck? RR 50, 160.

V. Cera: Yes, ma'am. RR 50, 160.

. . . .

Prosecutor: There are things in your statement that you are either

omitting or not being truthful about. Is that correct? RR 50, 160.

V. Cera: Yes, ma'am. RR 50, 160.

Prosecutor: Sure. Are there any other reasons to explain why you wouldn't have given Detective Samaniego the full truth on December 17th of 2010, all of it? You gave him some, but not all. Why? RR 50, 161.

V. Cera: I didn't want to get in trouble. RR 50, 161.

Prosecutor: Okay. So you don't tell him about burning clothes. Right? RR 50, 161.

V. Cera: No, ma'am. RR 50, 161.

. . . .

Prosecutor: In August of 2012, when you were brought back in to clarify some questions regarding your statement that was taken in 2010, you do tell the detective at that point that Filo gave you the pills to count the pills. Is that correct? RR 50, 165.

V. Cera: Yes, ma'am. RR 50, 165.

Prosecutor: And you do tell them at that point that your sister was involved, and that you, after the shooting, went to your sister's, that she lived in San Eli, and that you, later on that evening, drove your sister's truck, that you went back to Liz's house in that truck, and that that's the time that you got pulled over on Alameda by the sheriff or the trooper. You tell them that at that point. Correct? RR 50, 165.

V. Cera: Yes, ma'am. RR 50, 165.

Prosecutor: And you tell them – you clear up and give them the additional information that you burned the clothes and the victim's shoe in a barrel at your sister's house. Correct? RR 50, 165.

V. Cera: Yes, ma'am. RR 50, 165.

Prosecutor: And that you had cleaned the car. I believe you mention in your statement in 2010 that you did clean the blood off the speaker of your car, of the white SUV. Correct? RR 50, 165.

V. Cera: Yes, ma'am. RR 50, 165.

Prosecutor: And you tell them again that you – you tampered with that car

and cleaned it as well. Correct? RR 50, 165.

V. Cera: Yes, ma'am. RR 50, 165.

In rejecting Valdez' argument that the prosecutor knowingly introduced false and perjured testimony, the Texas Court of Criminal Appeals ruled that Valdez did not preserve his complaint of "a due process violation and the State's submission of – or failure to correct false and inconsistent statements within – these exhibits." (*Opinion*, p. 16). It further ruled that "To the extent that Cera made inconsistent, implausible, or conflicting statements in her testimony, appellant could 'reasonably be expected to have known' that her testimony 'was false at the time that it was made.'" (See *Opinion*, pp. 19-20). It further stated: "Thus, we again conclude that appellant had a duty to raise a timely and specific objection on due process grounds and he did not do so" and that " . . . he [Valdez] did not preserve this claim." (*Opinion*, p. 20). The Court of Criminal Appeals further held that "Through its redirect examination of Cera, the State complied with its "'constitutional duty to correct known false evidence' in Cera's 2010 statement." (*Opinion*, p. 17).

The Court of Criminal Appeals also overruled Valdez' argument that the State's prosecutors violated *Giglio v. United States*, 405 U.S. 150 (1972) and deprived him of due process by failing to inform the jury that they had entered into a tacit agreement or implied understanding with Veronica Cera to not prosecute her for robbery, tampering with evidence, or any other crime if she testified for the State. In doing so, the Court of Criminal Appeals disregarded Samuel

Herrera's testimony that he "thought he saw a flash from the passenger side of the SUV" where Cera was positioned, even though this evidence indicated that there were two shooters and that Cera was also involved in the shooting of Barrios. See *Opinion*, p. 5. However, the Court of Criminal Appeals did acknowledge Cera's argument that Cera was at least guilty of tampering with evidence because she:

- knew that appellant had no money to buy the ecstasy pills;
- knew that he first sought a male friend to accompany him to buy the pills;
- accompanied appellant to his friend's house where she knew he had hidden guns;
- did not offer to pay Barrios for the pills or return the pills to him, even after appellant told Barrios he was not "going to pay him shit";
- counted the 30-40 pills, as appellant instructed her, without objecting that they were only buying four pills;
- hid her SUV, burned or discarded appellant's clothing, burned Barrios's shoe, and cleaned Barrios's blood from her SUV; and
- in light of Herrera's testimony, may have discharged a firearm.

See *Opinion*, p. 34.

Yet despite Valdez' argument that the State had entered into a tacit agreement with Cera to not prosecute her for robbery, tampering with evidence, or any other crime, the Court of Criminal Appeals determined that:

> Cera did not make misleading statements about such an agreement or understanding because she did not testify about the subject at all. Further, appellant has not cited to any other evidence in the record affirmatively demonstrating that any such agreement or understanding ever existed or showing whether Cera was ever charged with a crime in connection with these events.

Opinion, p. 37.

The Court of Criminals accordingly determined that any error that resulted from the State's violation of *Giglio* and *Napue* by failing to disclose the existence of a tacit or implied agreement between the State and Cera was waived by Petitioner Valdez:

> However, if, as appellant contends, the trial record contains "overwhelming evidence that a tacit or implied immunity agreement was reached between the State and Veronica Cera which was never disclosed[,]" then appellant was obliged to object to this failure to disclose as soon as the "ground of objection" became apparent, and to obtain a ruling on that objection.
>
> Even if we were to find that appellant was not obliged to adhere to the rules of error preservation in this instance, the authorities he invokes involve dissimilar fact patterns and do not persuade us that he is entitled to relief on the merits.

Opinion, pp. 35-36.

Finally, the Court of Criminal Appeals ruled that even if Cera could be prosecuted for tampering with evidence, "this does not in itself prove that Cera had an express or implied arrangement with the State for leniency in exchange for her testimony." (*Opinion*, p. 37).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Texas Court of Criminal Appeals' ruling that a defendant must timely object to false or perjured evidence that a prosecutor has presented to a jury to preserve error conflicts with the holding of several federal circuit courts that have held otherwise

A sharp divide exists within the federal circuit courts of appeals as to whether a prosecutor's knowing use of false or perjured testimony can be waived where the defendant knew, or should have known of that fact and could have objected, but did not do so. In this case, the Texas Court of Criminal Appeals has adopted the view taken by those federal circuit courts on this circuit split that no due process violation occurs when a defendant's trial counsel is aware or should be aware that the prosecutor has used or introduced false or perjured evidence, but fails to timely object to such evidence. Thus, the Court of Criminal Appeals sanctioned the prosecutor's knowing use of this false evidence in this case based on defense counsel's failure to object,

even though it acknowledges in its *Opinion* that the prosecutor knowingly introduced written statements by Cera to the jury that were not truthful and omitted important information.

The United States Court of Appeals for the First Circuit has itself noted that there is a division within the federal circuit courts whether the Government should be excused for its knowing exploitation of false evidence if the government disclosed evidence showing the falsity or the defendant otherwise knows that the testimony is false. On the one side of the coin are cases such as *United States v. Mangual-Garcia*, 505 F.3d 1, 10 (1st Cir. 2007), where the First Circuit held that "Although there is some division within the circuits on the issue, we agree with the majority of circuits that 'absent unusual circumstances, the right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the [false testimony] chooses not to present such information to the jury.'" The Fifth Circuit in *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) has adopted the same position, ruling that "[T]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." The Eleventh Court of Appeals has adopted the same rule. *DeMarco v. United States*, 928 F.2d 1074, 1076 (11th Cir. 1991). The Seventh Circuit in *Evans v. United States*, 408 F.2d 369,

370 (7th Cir. 1969), has also analyzed this error preservation issue in the same way:

> . . . the fact that the alleged statement was known to petitioner and his counsel during the trial compelled petitioner to raise this issue then or not at all. When a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at the trial, and "cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding."

Likewise, in *United States v. Meinster*, 619 F.2d 1041, 1045-1046 (4th Cir. 1980), the Fourth Circuit held that the issue of perjured testimony waived because defense counsel waited until after the trial to bring the perjured testimony issue to the attention of the judge.

In contrast, at least three federal circuit courts have refused to entertain the notion that such a due process violation can be readily waived. In *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991), the Second Circuit held: "Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic,'" a ruling that was consistent with its earlier holding in *Mills v. Scully*, 826 F.2d 1192 (2d Cir. 1987) that "even

where defense counsel is aware of the falsity, there may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument, . . . or by posing misleading questions to the witnesses." *Id*. at 1195. A similar analysis was employed by the Eighth Circuit in *United States v. Foster*, 874 F.2d 491 (8th Cir. 1988), where the prosecutor misrepresented to the jury that no immunity agreements had been made with certain of its witnesses when letters reflecting these promises of immunity were in the prosecutor's file and that defense counsel was aware of them. In arriving at this conclusion, the Eighth Circuit ruled that defense counsel's "fail[ure] to correct the prosecutor's misrepresentation, is of no consequence" since "This [omission] did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions." *Id.* at 495.

The same reasoning was relied on by the Ninth Circuit in *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000). In *LaPage*, the witness for the Government (Manes) presented false testimony that the prosecutor knew was false. *Id.* at 490. After acknowledging the merit to this due process complaint, the Government "argue[d] on appeal that the false testimony did not affect the outcome of the trial because the defense knew that Manes's testimony was false at the time it was given and had the opportunity to impeach him with the prior trial transcript, and because the government finally conceded that Manes had lied in its rebuttal closing argument." *Id*. at 491. But the Ninth Circuit rejected this argument. It instead held that "The due

process clause entitles defendants in criminal cases to fundamentally fair procedures" and that "It is fundamentally unfair for a prosecutor to knowingly present perjury to the jury." *Id.* It further held that "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false" and that "All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial." *Id*.

The United States Courts of Appeals for the Second, Eighth, and Ninth Circuits have provided the correct analysis of how courts should treat a prosecutor's knowing use of false or perjured evidence. These federal circuit courts have recognized, as did this Court in *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959), that one of the bedrock principles of our democracy, "implicit in any concept of ordered liberty, is that the State may not use false evidence to obtain a criminal conviction" and that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" since "A lie is a lie, no matter what its subject, 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." *Id.* at 269-270.

There is no way to sugarcoat or correct the many lies, falsehoods, and material omissions contained in Cera's prior statements that the prosecutor introduced into evidence. Although the prosecutor introduced Cera's videotaped interview and prior written statement to undo the harm caused by defense counsel's impeachment of Cera with the falsehoods contained therein and to make the jury believe that Cera was now a changed person who no longer lied to the police or obstructed justice, these self-serving justifications do not obviate the fact that the prosecutor knowingly introduced several false statements before the jury by introducing Cera's prior videotaped interview and prior written statement into evidence.[3]

This Court should therefore resolve the split of authority between the circuits relating to whether error under *Napue* must be preserved, and adopt the

[3] Although the *Opinion* (at p. 15) attempts to characterize the impeachment of Veronica Cera as a mere development of inconsistent statements, the trial record reflects that the Texas Court of Criminal Appeals, the prosecutor, and even Cera admitted on the record that Cera's videotaped statement and written statement to the police contained lies and half-truths. There accordingly can be no dispute in this case that the prosecutor knowingly introduced false evidence to the jury when she introduced Cera's 2010 videotaped statement and her 2012 written statement into evidence. See RR 157-160; *Opinion*, p. 14.

analysis of the Second, Eighth, and Ninth Circuits, as these federal circuit courts do not impose any obligation on a defendant to timely object to a prosecutor's knowing use of false or perjured evidence to preserve error.

II. By ruling that Valdez waived any error by failing to object to the prosecutor's knowing use of false evidence, the Court of Criminal Appeals has decided an important question of federal law that has not, but should be, settled by this Court

Petitioner asserts that this Court should reject the analysis by those federal courts that have held that a defendant can waive the due process violation that results when a prosecutor knowingly presents false or perjured evidence to a jury. See, e.g., *United States v. Mangual-Garcia*, 505 F.3d 1, 10 (1st Cir. 2007) and *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002). Those federal circuit courts have adopted the view that a prosecutor's knowing use of false or perjured testimony results in a due process violation that is waived by a defendant who is aware of the violation but fails to timely object to the violation. This analysis conflicts with prior cases of this Court that have uniformly recognized that it is the duty of a prosecutor to refrain from presenting or to correct evidence it knows to be false or perjured. See *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); and *Alcorta v. Texas*, 355 U.S. 28 (1957). If this type of due process violation can readily be waived, there really is

no duty imposed on prosecutors to refrain from introducing evidence they know to be false or perjured.

The Court of Criminal Appeals' treatment of this due process violation as normal trial error disregards the importance of the duty this Court has impressed on prosecutors to refrain from knowingly presenting false or perjured testimony to a trier-of-fact. As explained by this Court in *United States v. Agurs*, 427 U.S. 97 (1976), the knowing use of perjured testimony involves not only prosecutorial misconduct, but more importantly, "a corruption of the truth-seeking function of the trial process." *Id*. at 104. The egregiousness of this type of error perhaps explains why this Court has never held that a prosecutor's knowing use of false or perjured testimony is a due process violation that can be waived by a defendant. The serious and devastating effect this type of error has on the truth-seeking function of a trial is what should be of controlling importance. Under any fair reading of this Court's precedent, the knowing use by a prosecutor of false evidence must be viewed as a due process violation that is not subject to waiver. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957).

Whether such an error is material and warrants the reversal of a defendant's conviction is of course a different question. See *United States v. Agurs*, 427 U.S. at 104. If false or perjured evidence is of no importance to the outcome of a case, a court cannot be criticized for refusing to reverse a defendant's conviction. But whether the defendant failed to preserve error is irrelevant.

Under the *Giglio/Napue* line of case authority, the question presented is whether the jury was improperly influenced by the due process violation – not whether the defendant was surprised or obtained a strategic advantage by not objecting to the injection of false or perjured evidence. Consequently, this Court should clarify its precedent and rule that whether a defendant has preserved error in connection with a prosecutor's knowing use of false or perjured evidence is irrelevant to the due process issue presented. The decision to vacate or not vacate the defendant's conviction should therefore be limited to ascertaining whether the false or perjured testimony is material or not material.

In this case, the prosecutor's knowing use and presentment of videotaped and typewritten statements that she knew contained numerous lies and falsehoods was material. The prosecutor introduced these evidentiary exhibits to convince the jury that these lies and falsehoods (many of which defense counsel used to impeach Cera) were not important because Cera was now a changed person. The prosecutor's obvious intent was to show the jury that the lies and falsehoods Cera had told the police were not reflective of the good person she had become.

But the prosecutor's use of Cera's videotaped and written statements for the purpose of convincing the jury that these lies were insignificant deprived Valdez of due process of law. The prosecutor accomplished this objective by adducing testimony from Veronica Cera that she no longer used illegal drugs, as she did at the time she gave her videotaped and written statements to the

police; by adducing testimony from Cera that she no longer associated with bad people as she did in the past; by securing testimony from Cera that she had lied in her earlier videotaped statement in order to protect her sister; by adducing testimony from Cera that she was now a friend of law enforcement and cooperated with them, but that she did not like law enforcement back in 2010 and 2012 when she had given her initial statements to the police. To create sympathy for Cera, the prosecutor even asked Cera if there were any other reasons that she did not tell the "full truth" on December 17, 2010. In response, Cera explained: "I didn't want to get in trouble." See RR 50, 160. The prosecutor also secured an admission from Cera that she had not told Detective Samaniego the truth about where the gun used in the shooting might be because "I was scared" and "I did not want to be labeled as a snitch." See RR 50, 161.

It was not the prosecutor's place to put her "spin" on Cera's lies by asking Cera whether she had changed her lifestyle and was no longer the same person she was when she had been questioned by the police in 2010 and 2012. It was also wrong for the prosecutor to justify Cera's lies by having Cera testify that she lied in her 2010 videotaped interview to protect herself and her sister from criminal prosecution or to say that she had lied because she was scared. Once Petitioner's defense counsel impeached Cera with her prior false statements and lies, his defense counsel should not have been put in the position of having to object when the prosecutor moved to introduce Cera's previous

false statements and lies as set forth in State's Exhibits 81 and 83.

A lie is a lie and the prosecutor should have accepted the fact that Cera lied without presenting and using Cera's prior videotaped and written statements to diminish the seriousness of Cera's lies. Such conduct by the prosecutor in Valdez' case resulted in a corruption of the truth-seeking function of a jury trial. The self-serving testimony the prosecutor adduced through Cera does not change the fact that the prosecutor knowingly introduced as substantive evidence numerous false statements for the jury to consider.[4] Although the Court of Criminal Appeals asserts on page 17 of its *Opinion* that "Through its redirect examination of Cera, the State complied with its 'constitutional duty to correct known false evidence' in Cera's 2010 statement," this contention finds no support in the record. The prosecutor did not correct false statements made by Cera in her videotaped statement; the prosecutor provided self-serving excuses for Cera's lies.

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[4] It is understandable why defense counsel did not object to Cera's videotaped statement or to her written statement. Defense counsel had just impeached Cera's credibility on many of the statements she had previously told Detective Samaniego. To object in front of the jury to these prior statements would had made the defendant appear as if he were hiding or concealing evidence from the jury. Forcing defense counsel to lodge an objection would have also put the defendant in an awkward position since it is on these statements that defense counsel proved that Cera was a liar. This might explain why this Court has never adopted a waiver analysis when confronted with the fact that defense counsel is aware that a prosecutor has introduced false or perjured evidence.

The prosecutor's redirect examination did not correct Cera's false testimony or any false impression left with the jury. The purpose of the prosecutor's redirect examination was merely to minimize the seriousness of Cera's previous lies and falsehoods that Valdez had exposed based on defense counsel's impeachment of Cera during cross-examination. This was not false evidence, as defense counsel's impeachment of Cera's testimony with prior inconsistent falsehoods and lies she had previously made does not constitute substantive evidence. It is mere impeachment. If the prosecutor in Valdez' case truly intended to correct false testimony or false impression left with the jury, all the prosecutor had to do was inform the jury of any false testimony before the jury that needed to be corrected – no more. Further, correcting false or perjured testimony does not involve providing excuses or self-serving explanations for the lies and falsehoods that defense counsel has already in large part exposed during cross-examination, as in this case.

This Court should therefore grant certiorari and clarify that a prosecutor cannot knowingly present or use before the trier-of-fact false testimony of a witness for any self-serving purpose – whether that be to explain to the finder-of-fact that the witness was scared or afraid, that the witness had made lifestyle changes and was now a law-abiding citizen who cooperated with law enforcement, to show that the witness lied because she was afraid of a criminal prosecution, or for any other reason.

III. By ruling that circumstantial evidence cannot be relied on to prove a tacit or implied agreement between the Government and a witness in exchange for that witness's testimony, the Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by this Court

In *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985), the government contended that because there was no explicit agreement on whether an agreement between the government and a testifying witness for the government existed, it had nothing to disclose. The Ninth Circuit disagreed with this analysis and ruled that facts which imply an agreement that bear on the witness's credibility must be disclosed by the Government. *Id*. In *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), the Tenth Circuit found that a duty to disclose tacit agreements existed after stating that "Four circuits have found a duty to disclose under *Brady* where there was a tacit agreement promising potential or actual leniency." Similarly, in *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005), the Seventh Circuit recognized "there might have been a tacit understanding that if [the witness's] testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. . . . Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense." Even in the absence of an agreement, the Eighth Circuit has held that "[t]he fact that there was no agreement . . . is not

determinative of whether the prosecution's actions constituted a *Brady* violation requiring reversal. . . ." [and that] " . . . viewed in the context of petitioner's trial, the fact of [the witness'] impending commutation hearing was material . . . and that petitioner therefore is entitled to relief." *Id*. More recently, in *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008), the Sixth Circuit acknowledged "[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady's* disclosure mandate. . . ." If [Defendant] could prove that [the witness] and [the prosecutor] had reached a mutual understanding, albeit unspoken, that [the witness] would provide testimony in exchange for the district attorney's intervention in the case against him, such an agreement would qualify as favorable impeachment material under *Brady*.

Petitioner has been unable to find precedent from this Court which addresses whether circumstantial evidence can be relied on to prove that the Government has entered into a tacit or implied agreement with a witness and offered that witness immunity or lenient treatment in exchange for that witness's testimony. Petitioner therefore relies on the above-cited federal circuit court cases that have held that circumstantial evidence can be relied on to prove such an agreement. The above-cited federal circuit opinions reveal that a mutual understanding or tacit agreement, albeit unspoken, can be proven based on circumstantial evidence.

These decisions squarely conflict with the Court of Criminal Appeals' analysis in this case, which refused to consider the strong and persuasive circumstantial

evidence Valdez presented that a tacit or implied agreement existed between the Government and Cera to refrain from prosecuting Cera in exchange for her agreement to testify as a State's witness. Specifically, the Court of Criminal Appeals overlooked the following circumstantial evidence which pointed to the existence of a tacit agreement between the State and Cera to not prosecute Cera in exchange for her willingness to testify against Valdez: (1) Cera provided Valdez with her Saturn SUV that enabled Valdez to drive to the meeting location where Barrios was shot and killed; (2) Cera admitted to counting the baggie of 30 to 40 ecstasy Valdez handed her to count after Barrios handed these pills to Valdez, thereby distracting and delaying Barrios from acting and giving Valdez the time he needed to pull the gun allegedly concealed on his person and shoot Barrios; (3) Cera claims the stated purpose of the trip to meet Barrios was only to purchase from Barrios four ecstasy pills for recreational use, but at trial Cera admitted that she counted the 30-40 ecstasy pills Valdez handed her to count under circumstances that would have led Barrios to believe that she and Valdez were going to purchase these pills; (4) Cera told several lies to the police about her involvement in the case when she was interviewed a week after the shooting; (5) Cera assisted in concealing her SUV after the shooting so the police would not find it; (6) Cera admittedly burned and destroyed clothing items belonging to both Barrios and Valdez that contained blood and evidence of the murder; and (7) Cera cleaned up blood and blood splatter located inside the Saturn SUV that resulted when Barrios was shot

while inside the SUV. All of the foregoing evidence provides strong circumstantial evidence that the State of Texas had entered into a tacit or implied agreement with the State to refrain from charging Cera with capital murder, murder, robbery, tampering with evidence, or with any of several other crimes she appears to have committed in exchange for her testimony.

All of such evidence was ignored by the Court of Criminal Appeals, however. It states in its *Opinion* that Valdez failed to present any evidence at all that an implied or tacit agreement existed between Cera and the prosecution team. See *Opinion*, p. 37. By emphasizing that no direct evidence or testimony existed in the record to prove that there was a tacit or implied agreement, the Court of Criminal Appeals essentially has ruled that there must be direct evidence or testimony of a tacit or implied agreement before such an agreement can be found to exist. See *Opinion*, pp. 36-37. In fact, on page 36 of its *Opinion*, the Court of Criminal Appeals distinguishes cases cited by Valdez in his principal brief relating to tacit or implied agreements because the tacit agreements in these cases were later divulged and shown to exist by direct testimony.

This Court should reject the Court of Criminal Appeals' artificial and narrowly crafted analysis and settle, once and for all, the question of whether a tacit or implied agreement can be proven through circumstantial evidence alone. It should also adopt the analysis that the federal courts cited above have utilized and rule that a tacit or implied agreement between the

Government and a cooperating witness can be proven through circumstantial evidence, without direct testimony or anything in writing. To skirt this issue will be to make it impossible for a defendant to prove that a tacit or implied agreement with a cooperating witness exists that is based on a nod and a wink and nothing more.

IV. As interpreted and applied by the Texas Court of Criminal Appeals in this case, the subsection of the Texas capital murder statute under which Valdez was convicted is void under the void for vagueness doctrine

Petitioner Valdez was prosecuted under Texas Penal Code § 19.03(a)(2), which provides: "A person commits an offense if he commits murder as defined in Section 19.02(b)(1) and . . . (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation." Robbery was the underlying felony alleged in the capital murder indictment filed against Valdez in this case. Under Texas law, to commit or attempt to commit robbery, the State had to prove that the offense was committed "in the course of committing theft." Texas Penal Code § 29.01(1). To commit theft, Texas Penal Code § 31.03(a) states that the person must " . . . unlawfully appropriate property with intent to deprive the owner of property." Texas Penal Code § 30.01(5) defines "property" as: "A. Real Property; (B) tangible or intangible personal property including

anything severed from land; or (C) a document, including money, that represents or embodies anything of value."

In his principal brief to the Court of Criminal Appeals, Petitioner argued that he was not guilty of capital murder because the ecstasy pills Valdez allegedly took from Barrios were not "property" within the meaning of the Texas Penal Code. In making this argument, petitioner relied on the Black's Law Dictionary definition of "property," which defined "property" as the "right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)" or "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised." Petitioner further argued in his principal brief that ecstasy pills are not "property" that a person has a right to possess, use, or enjoy because possession of these pills is a felony offense under Texas law. See Tex. Health & Safety Code §§ 481.103(a)(1), 481.116(a). But the Court of Criminal rejected this argument and cited to the 1950 intermediate appellate court decision of *Erwin v. Steele*, 228 S.W.2d 885 (Tex. Civ. App.–Dallas 1950, writ ref'd n.r.e.) for the following definition of "property": "In a broad and general sense, 'personal property' includes everything that is the subject of ownership not coming under the denomination of real estate." It then provided the following analysis to support its determination that the ecstasy pills Petitioner Valdez allegedly took from decedent, Julio Barrios, were property:

> The ecstasy pills that appellant took from Barrios were personal property that could be

> seen, weighed, measured, felt, and touched. As the person in possession of the pills who was negotiating their sale, Barrios had a greater right to possess them than appellant. Thus, the ecstasy pills constituted "property" for the purposes of the robbery statute.

See *Opinion*, p. 29.

The fallacy in the Court of Criminal Appeals' reasoning is self-evident. First, the Court of Criminal Appeals fails to recognize that even in the *Erwin v. Steele* case there is qualifying language of "everything that is the subject of ownership" in the definition. Ecstasy pills are not an item people in Texas can own. Second, the Court of Criminal Appeals' assertion that "Barrios had a greater right to possess them [the ecstasy pills]" than Petitioner Valdez is simply incorrect. Assuming the State brought a criminal action against Valdez for having committing the theft of the ecstasy pills belonging to Barrios and prevailed, the ecstasy pills would not be returned to Barrios. In Texas, ecstasy pills fall within the definition of "Contraband." *Saldana v. State*, 150 S.W.3d 486, 488 (Tex. App.–Austin 2004, no pet.). And under Article 59.02(a) of the Texas Code of Criminal Procedure, "Contraband" is subject to forfeiture under Texas law.

Indeed, § 481.153(a) of the Texas Health & Safety Code specifically provides that "Controlled substance property that is manufactured, delivered, or possessed in violation of this chapter is subject to seizure and summary forfeiture to the state." Subsection (b) of this statute further provides "that the department or a

peace officer may summarily destroy the property under the rules of the department." The contention that Barrios has a greater right of possession to illegal ecstasy pills than Petitioner Valdez is thus an unfounded, disingenuous argument. Even if Barrios had not been killed, but had survived and sued Petitioner for the return of the ecstasy pills, these pills would not have been returned to Barrios by any court of law. It is thus a fiction for the Court of Criminal Appeals to hold that Barrios had a greater right of possession to these ecstasy pills (an illegal controlled substance) when in fact no person has the right to possess ecstasy pills in Texas, for medical purposes or otherwise.

As a general rule, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994). On its face, the subsection of the capital murder statute under which Valdez was indicted clearly gives fair notice to the average citizen and to the public in general of the conduct that is prohibited and that will or can result in a capital murder prosecution. Thus, a person who holds up a liquor store owner at gunpoint in Texas and kills the owner in order to commit theft of the cash kept in the cash register cannot honestly dispute that he committed the offense of capital murder. A person in this situation would have received fair and adequate warning

that killing the store owner while stealing the cash the store owner kept on hand would subject him to a capital murder prosecution.

But the same analysis does not apply to a case such as this where a person takes away a drug dealer's illegal drugs without his consent. The average person would not have fair warning under this section of the capital murder statute that taking of illegal drugs from a drug dealer who is killed in the encounter would subject that person to a capital murder prosecution under the theory that the murder occurred during the course of an alleged robbery. The average person would conclude that he or she has no right to possess ecstasy pills under any circumstances. Were the police ever to catch Barrios or any other person with these drugs, such a person would immediately be arrested and the ecstasy pills found on his or her person ultimately destroyed. Thus, in this case, had the police stopped the vehicle Julio Barrios occupied 5 minutes before he arrived at the location where the shooting had occurred and seized the 30 to 40 ecstasy pills Barrios possessed, Barrios would have been arrested and prosecuted on a felony charge for unlawful possession of ecstasy pills. See Tex. Health & Safety Code §§ 481.103(a)(1), 481.116(a).

Accordingly, this Court should conclude that Texas Penal Code § 19.03(a)(2) is not void for vagueness on its face. On its face, the statute gives fair notice to the average citizen of the criminal conduct that is prohibited. But as interpreted and applied by the Court of Criminal Appeals in this case, the subsection of the capital murder statute under which Valdez was

convicted is void for vagueness, and violates Petitioner Valdez' right to due process of Law. Further, this Court should note that there is not a single published decision by the Texas Court of Criminal Appeals that has held that an illegal controlled substance such as "ecstasy" constitutes "property" within the meaning of the Texas Penal Code theft or robbery statutes. Petitioner thus requests this Court to declare that the subsection of the capital murder offense, as interpreted and applied by the Texas Court of Criminal Appeals in this case, is void for vagueness, and violated Valdez' right to due process of Law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioner, Fidencio Valdez, asserts that this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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