No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALBERT NORMAN PIERRE, SR. --- PETITIONER

VS.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF MY CASE)

PETITION FOR WRIT OF CERTIORARI

ALBERT NORMAN PIERRE #541302

LOUISIANA STATE PENITENTIARY

GENERAL DELIVERY

ANGOLA, LA 70712

QUESTION(S) PRESENTED

1) Whether petitioner, who maintains his innocence, was denied due process and a fundamentally fair trial base on victim's false testimony and post-trial recantation that was allegedly unknown to the prosecution at time of trial.

2) Whether this Court should resolve the split among the circuit courts, as well as in this Court, regarding perjured testimony that was unknown to the prosecution at the time of trial.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is a follows:

Albert Norman Pierre, Sr.
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

Darrel Vannoy, Warden
Louisiana State Penitentiary
Angola, LA 70712

Jeff Landry
Attorney General, State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005

Joseph L. Waitz, Jr., District Attorney
32nd Judicial District
Parish of Terrebonne
P.O. Box 3600
Houma, LA 70361-3600

albert n pierre
Albert Norman Pierre #541302

TABLE OF CONTENTS

PAGE NUMBER

TABLE OF AUTHORITIES CITED

PAGE NUMBER

UNITED STATES CONSTITUTION:

STATUTES AND RULES:

CASE LAW:

OTHER:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix - A to the petition and is

[X] reported at 2018 WL 2338813 ____ F.3d ____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States District Court for the Eastern District of Louisiana appears at Appendix - B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the Louisiana Supreme Court to review the merits appears at Appendix - ___ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the Louisiana _____ Circuit Court of Appeal appears at Appendix - ___ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Fifth Circuit Court of Appeals decided my case was May 23, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the Louisiana Supreme Court decided my case was _____.

A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE[1]

On December 4, 2007, a Terrebonne Parish, Louisiana, grand jury returned an indictment against petitioner, Albert N. Pierre, Sr., charging him with the aggravated rape of a female juvenile, identified as "C.C.," in violation of La. Rev. Stat. § 14:42A(4). Trial commenced on June 17, 2008, with voir dire examination of potential jurors. The Louisiana Court of Appeal for the First Circuit summarized the facts of the case established at trial as follows:

C.C. was born [in] ... 1994 .... [When] she was approximately six years old[,] ... C.C. moved in with [Gayle] Aucoin [her paternal grandmother], who shared a trailer with the defendant on Shrimper's Row in Dulac. Aucoin and the defendant were not married.

According to C.C., the trailer was a two-bedroom trailer, but one of the bedrooms was for "storage," so she slept in the same bed as Aucoin and the defendant. C.C. stated that oftentimes Aucoin would complain of back problems and leave the bedroom in order to sleep on the sofa in the living room. During these times, the defendant would touch C.C. on her breasts and vaginal area on top of her clothing. As C.C. grew older, the defendant's actions became more frequent and the touching progressed to where the defendant would place his hands underneath C.C.'s clothing.

After approximately two years of living in the trailer, Aucoin, the defendant, and C.C. moved to a residence also located on Shrimper's Row. According to C.C., when she was approximately eight years old, the defendant escalated his sexual activity toward her and began putting his mouth on her vagina. C.C. testified that the defendant did this approximately three to four times a week and it made her feel "disgusting." C.C. stated that the defendant told her he was "teaching" her.

When C.C. was approximately eleven years old, the defendant began vaginally raping her. C.C. testified that she felt the defendant put his penis inside of her vagina. According to C.C., these rapes would often occur when she was alone with the defendant on fishing trips or in the back of his truck.

C.C. testified that she was afraid to tell anyone what the defendant was doing because he had threatened to hit her with things. C.C. described how, during the time she lived with the defendant, he became increasingly possessive and reluctant to allow her to visit [other people] .... C.C. further said that when she asked the defendant for money, he would give her $100.00 at a time. C.C. testified that the defendant bought her expensive gifts, usually given in close temporal proximity to the episodes of sexual activity. C.C. stated that she felt as

1 The Statement of the Case is taken from the "State Court Factual and Procedural Background" in the Magistrate Judge's Report and Recommendation. See Appendix-C.

if the defendant were giving her these things to keep her quiet....

C.C. testified that as she got older, she would tell the defendant to stop the sexual activity, and would even push against him, but was reluctant to resist too much because she feared a physical confrontation with the defendant. Because she wanted the abuse to stop and wanted to change schools, C.C. decided in the fall of 2006 to live with her father, Todd Crews, and her stepmother, Angela Crews.

On Sunday, October 1, 2006, while C.C. was at her father's residence, the defendant called to complain that C.C. was there. Angela Crews had placed the defendant on speakerphone and C.C. heard the defendant state that he did not want her to live there because Todd was a child molester. At that point, C.C. blurted out, "You have the room to talk." When the call ended, Angela questioned C.C. about whether the defendant had ever done anything to her. C.C. initially did not respond, but a short time later admitted to Austin Neil, her younger step-brother, that the defendant had been abusing her. Austin relayed the information to his mother, Angela Crews, and C.C. finally revealed what the defendant had been doing for the previous six years.

The following day, Todd and Angela Crews took C.C. to the Terrebonne Parish Sheriff's Department to report the allegations....

Later that day, Detective Pitre and Detective Joey Quinn arrived at the defendant's residence. Defendant immediately told the officers that he knew why they were there and claimed Aucoin was "trying to put molestation charge on him" regarding C.C. Detective Pitre testified that the defendant never alleged C.C. had fabricated the abuse complaint in an effort to live with her father....

Dana Davis was accepted as an expert clinical social worker and psychotherapist. Davis testified she is affiliated with the Terrebonne Parish Children's Advocacy Center. Davis testified that she first saw C.C. on October 17, 2006, and treated her at least once a month for the following eighteen months. Davis described how during the course of her counseling of C.C., she observed cut marks on C.C.'s arms that were indicative of suicidal ideation and recommended that C.C. be hospitalized at Children's Hospital in New Orleans. C.C. was treated for two weeks as an inpatient at Children's Hospital. At trial, C.C. indicated she no longer thought about suicide.

The State also introduced testimony from [Paula] Martinez [an aunt who was C.C.'s guardian], who corroborated C.C.'s testimony that the defendant became very possessive of C.C. and would not allow her to spend extended periods of time visiting either her or C.C.'s father....

The defense presented testimony from Aucoin. According to Aucoin, C.C. never

> slept in the same bed as the defendant .... Aucoin denied seeing any behavior on C.C.'s part that would lead her to suspect the defendant was abusing her....
>
> Defendant testified that C.C. always slept in her own room in her own bed and never slept with him. According to the defendant, when C.C. was around ten years old, she began hitting her grandmother and would not listen to them....
>
> Defendant denied engaging in any sexual behavior with C.C. and acknowledged that on the same day C.C. reported her allegations against him to the police, he had spoken with Cheryl Carter, an assistant district attorney, regarding C.C.'s ungovernable behavior and what steps were available to him.

State v. Pierre, No. 2009 KA 0454, 2009 WL 3162246, at *1-3 (La.App. 1st Cir. 2009).

On June 20, 2008, the jury returned a guilty verdict as to the aggravated rape charge. The trial court sentenced the defendant to a term of life imprisonment at hard labor without the benefit of probation, parole or suspension of sentence.

On direct appeal, the Louisiana First Circuit affirmed both the conviction and the sentence in its fully reasoned opinion issued on September 11, 2009. On April 16, 2010, the Louisiana Supreme Court denied writs of direct review.

However, after trial and while Pierre's appeal was pending, events occurred that amounted to a recanting of a significant aspect of C.C.'s trial testimony and that shaped the post-conviction proceedings. The Louisiana Supreme Court, in reversing the trial court's grant of Pierre's application for post-conviction relief, described the events leading to the new evidence as follows.

> In her [trial] testimony.... C.C recalled for jurors that when she was 12 years old, [Pierre] had sent her for a medical examination to determine whether she had become sexually active. The nurse practitioner who conducted a general medical examination took C.C. at her word that she was not sexually active and did not attempt more detailed physical findings. C.C.'s [trial] testimony prompted the prosecutor to ask whether she had in fact been "sexually active other than the things that [Pierre] had done to you," to which C.C. replied, "No."

* * *

.... In February 2009, C.C. reported to the police that she and a girlfriend had been riding around with a teenage boy, B.B., they had just met and that he had forced both of them to perform sexual acts. An arrest warrant issued for B.B., but only days after she made the complaint, C.C. met with prosecutor Rhodes, who had developed a relationship with her over the course of preparing her testimony for [Pierre's] trial, and [she] admitted the report was false and that the sex with B.B. was consensual. The warrant for B.B. was never executed. At the end of October 2009, C.C. then revealed ... that, in fact, Michael Percle [the husband of C.C.'s legal guardian's daughter; C.C. lived with the Percles after she was removed from her grandmother's house, including during the trial] had also been sexually abusing her during the same period of time [Pierre] was molesting her. Detective James Daigle investigated the complaint and on November 5, 2009, C.C. was interviewed at the Terrebonne Parish Children's Advocacy Center, where she had also been interviewed after revealing [Pierre's] abuse of her. The investigation did not result in the arrest or prosecution of Michael Percle and Detective Daigle closed his file at the end of the year.

C.C.'s allegations against Michael Percle resurfaced, however, in Claim Three of an application for post-conviction relief filed by [Pierre] in 2011. The application quoted directly from a letter prosecutor Rhodes had written to [Pierre's] appellate counsel on March 23, 2011. The letter advised counsel that while C.C. had denied at trial sexual activity with anyone other than [Pierre], she had subsequently made allegations against a third party (Percle), "stating that the two molestations ... overlapped." The letter further advised counsel that [Rhodes] had agreed with the detective handling the case they did not have "near enough to make an arrest" because the victim "is a very troubled young girl and comes from a dysfunctional family," who had been placed in therapy "to determine whether she would recant the story about the third party molestation." Rhodes also acknowledged, however, that to date, "she had continued to state that she was molested by this third party [Percle]." The upshot of these revelations in the March 2011 letter, post-conviction counsel asserted in [Pierre's] Claim Three, was that "[t]his fact, which could not have been introduce at trial, coupled with the fact that C.C.'s father is a convicted child molester and that C.C. contends that two men very close to her, both of whom have served as father figures in her life, both molested her during the same time period, is highly probative and damaging to C.C.'s credibility and would have very likely caused the jury to render a different verdict."

At the post-conviction hearing conducted on August 8 and August 9, 2012, various witnesses testified, including C.C., Rhodes, and Detective Daigle. Rhodes and Daigle recalled ... deciding that the detective needed something more before pursuing C.C.'s claims against Percle. Daigle testified that at the time, he

"was not familiar at all with Mr. Pierre's case; because he had not been involved in [Pierre's] prosecution. The detective thus did not appreciate the implications of C.C.'s claims against Percle for [Pierre's] own case, and other than the investigation he conducted through November and December 2009, [Daigle] did nothing further in the case.... Rhodes, on the other hand, had prepared C.C.'s testimony for trial and he testified that at the time, she "was always pretty clear that it was a one-perpetrator situation." Although he deemed the B.B. incident "fairly insignificant," Rhodes fully understood the implications of C.C.'s allegations against Michael Percle for [Pierre's] case and thus felt duty bound to reveal them to appellate counsel "as soon as I could." C.C. testified that she did not reveal the abuse at the hands of Percle either before or during [Pierre's] trial, because she was afraid that if she did so, she would be removed from the home and deprived of her "nanny" [Percle's wife], as in fact happened after her interview at the Children's Advocacy Center. C.C. testified that she decided to come forward when her nieces, ages three and six, began visiting the Percle home and she became afraid that what had happened to her would happen to them. As for the incident involving B.B., C.C.'s girlfriend had made the first complaint and C.C. testified she lied to cover her friend and initially to protect herself.

* * * * *

C.C.'s testimony was the only direct evidence of criminal activity introduced against Pierre at trial. Her credibility at trial had been the key component of the State's case against Pierre. Thus, the circumstances revealed post-trial of her recanting of her trial denial that she had been sexually active with anyone other than Pierre, coupled with her apparently false reports to authorities of two other instances of sexual molestation, seriously undermined her credibility.

Based on these events and after an evidentiary, the state trial court made the following findings:

> [T]he Court finds that the petitioner has made a bona fide claim of actual innocence which warrants the granting of his application [for a new trial]. The evidence adduced at the hearing, including but not limited to the child victim's post-trial recanting of her prior denials under oath of having been abused by others, one of whom she now accuses of abusing her during the same time periods involved in this case and the other of whom she falsely accused, at the very least undermines the prosecution's entire case and deprived the defendant of being able to use the information to cross-examine her at the trial....

On April 5, 2013, a three-judge panel of the Louisiana First Circuit Court of Appeal denied the State's application for a writ from the trial court's order for a

> new trial, with two judges agreeing with the trial court and the third judge dissenting and finding that no new trial was warranted. On October 15, 2013, the Louisiana Supreme Court reversed the state trial court's grant of a new trial, reinstated Pierre's conviction and sentence, and remanded the case to the trial court for consideration of the other claim Pierre had asserted in application for post-conviction relief. Pierre's further state court post-conviction proceedings asserting his ineffective assistance of counsel claim ended on February 6, 2016, after both the trial court and the appellate court had denied relief and when the Louisiana Supreme Court denied his writ application. State v. Pierre, 183 So.3d 509, 2016 WL 445371 (La. Fed. 5, 2016).

See Appendix-C, Pgs. 1-8 (Report and Recommendation).

Pierre filed a timely federal habeas petition in the United States District Court for the Eastern District of Louisiana. Pierre raised two grounds for relief, inter alia, that:

> Petitioner's Sixth and Fourteenth Amendment rights to a fair trial as provided by the United States Constitution was violated (a) when the Louisiana Supreme [Court] reversed the trial court's grant of a new trial (b) where the prosecution withheld (c) Brady evidence of (d) actual innocence based on prior inconsistent statements of the alleged victim and her (e) Napue allegations of sexual misconduct by other men which she recanted at trial.

See Appendix-C, Pg. 9.

The magistrate judge rejected Pierre's claims under both Brady v. Maryland, 373 U.S. 83 1963, and Napue v. Ilinois, 360 U.S. 264 (1959) – as well as his argument that his conviction violated a freestanding due-process right to a fundamentally fair trial – because "the prosecution did not know and could not have known at the time of trial that there was anything false about C.C.'s testimony." Pierre v. Vannoy, No. 16-1336, 2016 WL 9024952, at *8-9, *10-18 (E.D. La. Oct. 31, 2016). As the magistrate judge explained, "the majority of federal circuit courts, including significantly the Fifth Circuit ... require a petitioner to prove governmental knowledge of the false testimony," and there is no Supreme Court precedent to the contrary. Id. at *14-17 ("[W]hen there is no Supreme Court precedent to control a legal issue raised by a habeas

petitioner, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, and no federal habeas relief is warranted."). Accordingly, the magistrate judge recommended denying relief.

The district Court adopted the magistrate judge's report and recommendation "in all repects" – except for its conclusion. Pierre v. Vannoy, No. 16-1336, 2017 WL 226795, at *1-2 (E.D. La. May 23, 2017). Despite the fact that the State lacked knowledge of the falsity, the district court nevertheless granted the writ. The district court vacated and set aside Pierre's conviction and sentence, and ordered him released from custody unless the State retry him within 120 days of the court's judgment. See Appendix-B.

On May 23, 2018, the United States Fifth Circuit Court of Appeals reversed the District Court's grant of habeas corpus relief. See Appendix-A.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the split among the circuit courts, and this Court, concerning whether due process and a fundamentally fair trial is violated based on perjured testimony of a material witness, which was unknown to the prosecution at the time of trial.

I.

Petitioner adopts the factual and legal findings of the Magistrate Judge, as well as the District Court's written reasons for granting habeas relief, as stated below:

1. Magistrate Judge's Report and Recommendation

(c) Newly Discovered Evidence: Due Process Fundamentally Fair Trial

The most difficult constitutional component of Pierre's first claim is his due process claim that the Louisiana Supreme Court's reversal of the state trial court's order granting him a new trial denied him a fundamentally fair trial. The question of fundamental fairness at trial under the Due Process Clause presents a mixed question of law and fact. Wilkerson v. Cain, 233 F.3d 886, 890 (5th Cir. 2000); see also Brazley, 2002 WL 760471, at *4 n.4 (prosecutorial misconduct resulting in denial of fundamental fairness is a mixed question of law and fact); Livingston v. Johnson, 107 F.3d 297, 309 (5th Cir. 1997) (admission or exclusion of evidence under the Due Process Clause is a mixed question of law and fact). Thus, this court must determine whether the denial of relief by the Louisiana Supreme Court was contrary to or an unreasonable application of federal constitutional law, particularly "clearly established" Supreme Court precedent.

New evidence discovered after trial is not alone a basis for federal habeas corpus relief. The newly discovered evidence must be material to some underlying constitutional violation to warrant habeas relief. Construed broadly, Pierre's petition argues that the evidence discovered post-trial demonstrates C.C.'s propensity to make false allegations of sexual abuse. Petitioner contends that the victim's false trial testimony concerning her other sexual activity at the time of his alleged abuse, coupled with her post-trial false allegations against others of sexual abuse, rendered his trial fundamentally unfair in violation of his due process rights under the Fifth and Fourteenth Amendments. Significantly, however, none of these circumstances was known, either by the prosecution or by Pierre, at the time of trial, and the state trial court had no role in their exclusion from evidence.

In a number of claim contexts, courts have found that the due process right to a fundamentally fair trial is violated only when substantial error that probably affected the verdict has occurred. For example, when a habeas petitioner challenges a state court's denial of a motion for a mistrial, federal habeas corpus relief is warranted only if the denial was an "'error . . . so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause.'" Hernandez v. Dretke, 125 F. App'x 528, 529 (5th Cir. 2005) (quoting Bridge v. Lynaugh, 838 F.2d 770, 772 (5th Cir. 1988)) (ellipsis in original). To obtain relief on such a claim, a petitioner

> must show that the trial court's error had a "substantial and injurious effect or influence in determining the jury's verdict." [The petitioner] must show that "there is more than a mere reasonable possibility that [the error] contributed to the verdict. [The error] must have had a substantial effect or influence in determining the verdict." In determining harm, this court should consider (1) the importance of the witness's testimony; (2) whether the testimony was cumulative, corroborated, or contradicted; and (3) the overall strength of the prosecution's case.

Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Woods v. Johnson, 75 F.3d 1017, 1026 (5th Cir. 1996)) (citing Sherman v. Scott, 62 F.3d 136, 142 n.6 (5th Cir. 1995)).

Similarly, when the exclusion of evidence at trial is alleged to deny "a fundamentally fair trial, the evidence must be 'material,' in the constitutional sense that it 'creates a reasonable doubt that did not otherwise exist' as evaluated 'in the context of the entire record.'" Jimenez v. Walker, 458 F.3d 130, 146 (2nd Cir. 2006) (quoting Agurs, 427 U.S. at 112-13). "'If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.' But 'if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.'" Id. at 146-47 (quoting Agurs, 427 U.S. at 112-13). When prosecutorial misconduct is the alleged basis of the due process violation, a habeas petitioner must demonstrate that the misconduct rendered his trial fundamentally unfair by showing "a reasonable probability that the verdict might have been different had the trial been properly conducted." Rogers v. Lynaugh, 848 F.2d

606, 609 (5th Cir. 1988) (footnote and citations omitted); accord United States v. Sanchez, 432 F. App'x 371, 374 (5th Cir. 2011); Brown v. Dretke, 419 F.3d 365, 377 (5th Cir. 2005).

Thus, Pierre's fundamental fairness claim for habeas corpus relief is that he is entitled to a new trial based on this newly discovered evidence that – although unknown at the time of trial – was material to the case against him, which was based substantially on the victim's testimony and her credibility. His argument appears to be that post-trial events have demonstrated C.C.'s propensity for lying about sexual abuse and her concomitant lack of veracity in making allegations of sexual abuse against him.

In evaluating the significance of newly discovered evidence,

> [t]he clearly established federal law standard in [the Fifth] Circuit relative to the issue of whether a motion for new trial should be granted based upon newly discovered evidence is set forth in Berry v. State, 10 Ga. 511, 1851 WL 1405 (1851). Such standard is known as the Berry rule and has been recognized by the U.S. Fifth Circuit Court of Appeals as the applicable standard under the circumstances as recently as last year. See, U.S. v. Piazza, 647 F.3d 559 (5th Cir. 2011). Under the Berry rule, the four (4) elements that a defendant must show to obtain a new trial based upon newly discovered evidence are: ["](1) that the evidence is newly discovered and was unknown to him at the time of trial; (2) that the failure to discover the evidence was not due to his lack of diligence; (3) that the evidence is not merely cumulative, but is material; and (4) that the evidence would probably produce an acquittal." U.S. v. Gutierrez, [No. SA-05-CR-639-XR,] 2007 WL 3026609[, at *9] (W.D. Tex. [Oct. 16,] 2007), quoting U.S. v. Blackthorne, 378 F.3d 449, 452 (5th Cir. 2004).

Spring v. Sec'y, La. Dep't of Corr., No. 11-308-BAJ-CN, 2012 WL 1065530, at *6 (M.D. La. Mar. 8, 2012), report & recommendation adopted, 2012 WL 1065498 (M.D. La. Mar. 28, 2012);[24] accord Holton v. Cain, No. 3:11-CV-00749-BAJ-RL, 2014 WL 3189737, at *8 (M.D. La. July 8, 2014) (citing Piazza, 647 F.3d at 565); Kuenzel v. Allen, 880 F. Supp. 2d 1162, 1177 (N.D. Ala. 2009), aff'd sub nom. Kuenzel v. Comm'r, Ala. Dep't of Corr., 690 F.3d 1311 (11th Cir. 2012) (citing Lucas v. Johnson, 132 F.3d 1069, 1074, 1075 n.3 (5th Cir. 1998)); Smith v. Quarterman, No. SA-07-CA-399-XR, 2008 WL 2465400, at *6 (W.D. Tex. June 17, 2008) (citing Blackthorne, 378 F.3d at 452); Jacobs v. Waller, No. 1:05CV130-LG-RHW, 2008 WL 681034, at *8 (S.D. Miss. Feb. 6, 2008) (citing Lucas, 132 F.3d at 1076); Baker v. Cain, No. 05-3772, 2007 WL 1240203, at *6 (E.D. La. Apr. 26, 2007) (citing Lucas, 132 F.3d at 1076).

Although the Fifth Circuit's decisions in Piazza and Blackthorne (which are cited in some of the district court habeas corpus cases listed above) involved motions for a new trial pursuant to Federal Rule of Criminal Procedure 33 by defendants who had been convicted in federal court, the Fifth Circuit has also applied the Berry rule in cases alleging that newly discovered evidence justified habeas corpus relief, such as Bell v. Cockrell, 31 F. App'x 156, 2001 WL 1748398, at *2 (5th Cir. 2001), cert. granted &

---

[24] The Fifth Circuit sometimes describes the Berry rule as having five, rather than four, factors. Cases using the five-part test typically separate the element of materiality from whether the evidence is merely impeaching or cumulative. Piazza, 647 F.3d at 565 n.4.

judgment vacated on other grounds, 536 U.S. 954 (2002), and Lucas, 132 F.3d at 1074, 1075 n.3 (citing United States v. Freeman, 77 F.3d 812, 816-17 (5th Cir. 1996); Berry, 10 Ga. at 511). In these cases, the Fifth Circuit applied the Berry factors as a threshold step in evaluating whether the petitioner had presented enough newly discovered evidence to assert an underlying constitutional claim, such as a claim of actual innocence (Lucas) or ineffective assistance of counsel (Bell). See Kuenzel, 880 F. Supp. 2d at 1177 (A threshold question is whether "evidence proffered in support of an innocence claim is new. 'New evidence' has not been defined by the Supreme Court or the Eleventh Circuit Court of Appeals in the context of the actual innocence gateway, but the Fifth Circuit Court of Appeals, evaluating both a free-standing actual innocence claim and a 'gateway' claim in Lucas . . . , set the same evidentiary standard for both.")

Applying the foregoing standards in the instant case would support Pierre's argument. The evidence that C.C. lied about the extent of her sexual activity at the time of Pierre's alleged abuse and had a motive to lie about it before and during Pierre's trial is newly discovered and was unknown to petitioner at that time. There is no indication that the failure to discover the evidence was due to Pierre's lack of diligence. The prosecutor discovered the new evidence in late October or November 2009, at least 16 months after the verdict, when the prosecutor investigated C.C.'s complaint of sexual abuse by Percle. The new facts were not revealed to Pierre's counsel until March 2011.

The evidence is not merely cumulative. It is material to C.C.'s credibility, which was essential to the case against Pierre. No specific evidence was presented at trial to attack her credibility, other than Pierre's denial in his own testimony that he had abused C.C. No physical evidence of rape or other corroborating evidence of the most crucial aspects of C.C.'s testimony was presented at trial. The new evidence that she lied at trial, had a motive for lying at trial and has a propensity to make false allegations of sexual abuse against others is significant and was not previously considered by the jury.

Although the last Berry factor is a close one, I find that the new evidence in this case would probably produce an acquittal. In Piazza, defendant was one of several adult brothers whom the buyer of illegal guns had known but not seen since their childhood. The newly discovered evidence in that case did not directly controvert the buyer's testimony that the defendant had sold the guns to him, but the new evidence did "greatly strengthen the defendant's argument that Jed [another brother], and not [defendant], was the one who sold the guns to [the buyer]–an argument that the jury heard below and that a jury could properly consider in determining guilt or innocence in a new trial." Piazza, 647 F.3d at 569. The Fifth Circuit affirmed the trial court's finding that the "proposed testimony would probably produce an acquittal for [defendant] because it connects [his brother Jed] to the guns and to the phone call placed to [the buyer]. The district court determined that it was more likely than not that the Piazza brother who sold the guns to

[the buyer] was [Jed] rather than [the defendant]." Id. at 569 (emphasis added). "The totality of the new evidence could rise to the level of creating a reasonable doubt" that the defendant had committed the crime. Id. at 570 (emphasis added).

In Pierre's case, the totality of the new evidence makes it more likely than not that a reasonable doubt about his guilt would be created in the minds of the jury members because the evidence severely undermines C.C.'s credibility when she testified about Pierre's sexual abuse. The totality of that evidence could very well rise to the level of creating a reasonable doubt about whether Pierre sexually abused C.C. that would probably produce an acquittal.

Despite my foregoing findings, however, the case law that provides the most closely analogous analysis to Pierre's claim creates a substantial barrier to granting relief in this case, because there is no indication that the State, either through prosecutorial conduct or omission or through the court's exclusion of evidence, was involved in the alleged due process violation in any way.

In Pierre's favor, the United States Courts of Appeals for the Second and Ninth Circuits have both held that a federal constitutional due process violation can result from false testimony at trial, even when there is no knowledge or misconduct by the prosecutor. As explained by a district court in the Second Circuit,

> [a] petitioner's claim that his or her conviction was based on perjured testimony is analyzed under the Due Process Clause of the Fourteenth

> Amendment. The threshold question is whether the witness in fact committed perjury. "A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory."
>
> Once that threshold determination has been met, "[w]hether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury." "Where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." When there is no indication the government knew that the testimony may have been perjured, "a new trial is warranted only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted."

Thornton v. Smith, No. 14-CV-3787, 2015 WL 9581820, at *11 (E.D.N.Y. Dec. 30, 2015) (citing Napue, 360 U.S. at 269) (quoting United States v. Monteleone, 257 F.3d 210, 219 (2d Cir. 2001); United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991)) (internal citations and quotations omitted) (emphasis added); see also Maxwell v. Roe, 628 F.3d 486, 506 (9th Cir. 2010) (quotation and citations omitted) (Petitioner's due process rights were violated when perjured testimony by the prosecution's main witness undermined confidence in the verdict, even if the prosecutor did not know of the perjury. "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.").

In contrast, however, the majority of federal circuit courts, including significantly the Fifth Circuit, decline to follow the Second and Ninth Circuits and instead require a

petitioner to prove governmental knowledge of the false testimony as a prerequisite to a new trial or habeas relief. "'The Fifth Circuit has long abided by the standard requiring that for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction.'" United States v. Lawrence, No. 4:03-0436-1, 2014 WL 7151362, at *3 (S.D. Tex. Dec. 12, 2014) (quoting Black v. Collins, 962 F.2d 394, 407 (5th Cir. 1992)) (emphasis added); see also United States v. Puma, 210 F.3d 368, 2000 WL 293955, at *1 (5th Cir. Feb. 17, 2000) (In a 28 U.S.C. § 2255 case, resolving petitioner's "allegation of a due process violation based on a coconspirators's [sic] perjured testimony is unnecessary because even if he could establish that the testimony was perjurious, he failed to make any showing that the Government knew that the testimony was untrue."); May v. Collins, 955 F.2d 299, 315 (5th Cir. 1992), superseded by statute on other grounds as stated in Duncan, 70 F. App'x at 746 (citations omitted) (To succeed on a due process claim based on the use of perjured testimony, petitioner must show that (1) a witness "gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false.").

The United States Supreme Court has not resolved this split among the circuit courts, leaving no "clearly established Federal law, as determined by the Supreme Court" to guide the lower courts in applying the Section 2254(d)(1) standard of review. The law

is clear, however, that when there is no Supreme Court precedent to control a legal issue raised by a habeas petitioner, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, and no federal habeas relief is warranted. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) (quotation omitted) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law."); Gomez v. Thaler, 526 F. App'x 355, 359-60 (5th Cir. 2013) (citing Van Patten, 552 U.S. at 126) (When no Supreme Court precedent directly addressed the presented issue, it could not be said that the state court unreasonably applied clearly established federal law.).

Instead, the Supreme Court has revealed a dramatic split of opinion on this issue in a series of denials of petitions for writs of certiorari, which of course do not result in clearly established Supreme Court precedent. "'[T]he Supreme Court has never held that due process is offended by a conviction resting on perjured testimony where the prosecution did not know of the testimony's falsity at trial.'" Lotter v. Houston, 771 F. Supp. 2d 1074, 1101-02 (D. Neb. 2011) (quoting LaMothe v. Cademartori, No. 04-3395, 2005 WL 3095884, at *5 (N.D. Cal. Nov. 11, 2005), aff'd, 235 F. App'x 411 (9th Cir. 2007) (citing Jacobs v. Scott, 513 U.S. 1067, 1067 (1995) (Stevens, J., dissenting from denial of certiorari))); see also Cash v. Maxwell, 132 S. Ct. 611, 615 (2012) (Scalia, J.,

dissenting from denial of certiorari) (The Ninth Circuit "stretched the Constitution, holding that the use of false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. We have never held that, and are unlikely ever to do so. All we have held is that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."); Kinsel v. Cain, 647 F.3d 265, 271 (5th Cir. 2011) (The Supreme Court has never clearly established whether a due process violation occurs "when perjured testimony is provided by a government witness even without the government's knowledge."); but see Jacobs, 513 U.S. at 1067 (Stevens, J., dissenting from denial of certiorari) (urging that the Supreme Court had not, but should, consider whether due process is violated by a conviction based on perjured testimony regardless of the prosecutor's knowledge).

In Cash v. Maxwell, cited above, the Supreme Court denied the State of California's petition for a writ of certiorari from the Ninth Circuit's grant of habeas corpus relief based on a due process violation arising from perjured trial testimony by a jailhouse informant. In the underlying case, Maxwell v. Roe, 628 F.3d at 486, Maxwell had been arrested and charged with murdering ten men in downtown Los Angeles, a series of murders dubbed the "Skid Row Stabber" killings. The prosecution's only physical evidence was Maxwell's palm print from a bench in an area frequented by

Maxwell near the murders. The prosecution also relied on the testimony of a known jailhouse informant, Sidney Storch, who claimed that Maxwell had confessed to him when they shared a cell. Although Maxwell maintained his innocence and said that Storch was lying, Maxwell was convicted after nine months of trial.

Years later, after equitably tolling an otherwise untimely request for post-conviction relief, the California state courts denied Maxwell relief on his claim that Storch had given perjured testimony at Maxwell's trial. Maxwell's argument was based on substantial evidence that, after his trial, Storch was found to have provided false and misleading information to state prosecutors over the years in an effort to manipulate the system and obtain benefits as a jailhouse informant. The state courts nonetheless held that Storch had not lied at Maxwell's trial.

The federal district court in California denied Maxwell's related habeas petition, finding that Maxwell had failed to establish a due process violation resulting from the prosecutor's knowing use of perjured testimony by Storch and other jailhouse informants. This decision was based on the district court's findings that the state court's factual conclusions were not objectively unreasonable and that Storch's false testimony did not prejudice Maxwell.

On appeal, the Ninth Circuit detailed the series of misinformation that Storch had provided to the State over many years, which tended to establish that he was a perpetual

liar. Id. at 500-03, 504-05. The Ninth Circuit cited the factors outlined in Napue, 360 U.S. at 269, focusing on the fact that the verdict resulted from false information which the State had not corrected. Id. at 499-500. The appeals court held that the state court's conclusion that Storch had testified truthfully at trial was an unreasonable determination of the facts and that Storch's testimony was material to the verdict. Id. at 500-01, 507-08. The Ninth Circuit found that Storch's many non-material lies at Maxwell's trial "indicate[] a willingness to lie under oath and lend[] credence to Maxwell's arguments that Storch lied when he testified about the alleged confession and that the prosecution knew or should have known that Storch gave false testimony." Id. at 501.

After finding the state courts' factual conclusion unreasonable, the Ninth Circuit made no finding whether the prosecution knew or should have known about Storch's lies. Instead, the court relied on its prior case law, holding "that irrespective of whether the prosecutor knew that the informant had given false testimony, 'one [could not] reasonably deny that [the jailhouse informant] gave perjured testimony at [petitioner's] trial.'" Id. at 506 (quoting Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002)). The appeals court further recognized that "a government's assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness." Id.

(quotation omitted). The Ninth Circuit ultimately decided that Maxwell was entitled to federal habeas relief and reversed the federal district court's denial of relief on the due process issue.

When the Supreme Court denied the State's petition for a writ of certiorari, Justice Sotomayor wrote in support of the denial that "powerful evidence supported Maxwell's claim that Storch falsely testified" and that the false testimony was made in an attempt "to manipulate the integrity of the judicial system as he did in numerous other cases." Cash v. Maxwell, 132 S. Ct. at 612. Justice Sotomayor stated that "the Ninth Circuit conducted precisely the inquiry required by § 2254(d)(2) and our precedents." Id.

In dissenting from the denial of certiorari, Justice Scalia, joined by Justice Alito, disagreed that Maxwell had established an unreasonable determination of the facts by the state courts. He wrote:

> To make matters worse, having stretched the facts, the Ninth Circuit also stretched the Constitution, holding that the use of Storch's false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. . . . We have never held that, **and are unlikely ever to do so**. All we have held is that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." This extension of due process by the Ninth Circuit should not be left standing.

Id. at 615 (quoting Napue, 360 U.S. at 269) (bold emphasis added).

Although not specifically addressed in Maxwell, the denial of certiorari at least tacitly allowed to go unquestioned the Ninth Circuit's determination that due process can

be violated by false testimony at trial even without a finding that the prosecution knew of the perjury. With Justice Scalia's death, the Supreme Court may now be evenly divided on the crucial question of whether State knowledge, action or omission is a prerequisite for a due process violation when a key witness's testimony is subsequently revealed to have been perjured or substantially and materially untrustworthy.

Applying the foregoing disparate standards to the amorphous, highly subjective constitutional concept of substantive due process leads me to the definite impression that C.C.'s demonstrated peregrinations around the truth concerning sexual abuse deprived Pierre of a fundamentally fair trial. Judge Bethancourt of the state trial court in Houma, Louisiana, was the only judge of the dozen or so who have reviewed this matter who actually observed firsthand the bearing and demeanor of all witnesses, both at trial and at the post-trial evidentiary hearing. He concluded that a new trial is warranted. Two judges of the three-judge court of appeal panel reviewing the trial court's order agreed. Some deference should be accorded to this view in this mixed question of law and fact.

On the other hand, as Judge Crain of the Louisiana First Circuit wrote in his dissent from that court's order upholding Judge Bethancourt's grant of a new trial:

> The victim's false statement that she was abused by no one else does not require a conclusion that the defendant did not rape her. The victim never recanted her testimony regarding the defendant raping her. The new evidence does not establish the defendant's actual innocence. Further, the post-trial false accusation did not exist at the time of the defendant's trial. It cannot now be used to measure either the victim's credibility at that trial

> or the defendant's innocence. It cannot be said that it is more likely than not that no reasonable juror could have convicted the defendant in light of all of the evidence.[25]

The Louisiana Supreme Court thoroughly reviewed the case and overturned the new trial order in a thoughtful and well-reasoned opinion. Congress has expressed its will in AEDPA and has clearly prohibited federal courts from granting habeas relief in these circumstances, unless the state courts' decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. There is no clearly established Supreme Court precedent applicable to these circumstances. Instead, there is only the split of opinion expressed by Justices Sotomayor and Scalia/Alito in a Court that now awaits the uncertain appointment of a new justice whose views may break the tie. It would be pure speculation to conclude that the tie will be broken in a manner that favors the granting of relief to Pierre. Stacked against such speculation is the clear precedent of the United States Court of Appeals for the Fifth Circuit that, even when perjury at trial is clearly established, which has not been done in Pierre's case, no relief can be granted unless the State has been complicit in the presentation of false testimony. No such finding can be made in this case.

My own conclusion is that Pierre should receive a new trial because the newly discovered evidence of C.C.'s untrustworthiness establishes that he did not receive a

---

[25] State Rec. Vol. 6 of 7, Case No. 2013-KW-0150, La. App. 1st Cir. Order 4/5/13 (Crain, J., dissenting).

fundamentally fair trial. I agree with Judge Bethancourt's decision – although not his reasoning – granting a new trial. However, it is my unalterable view that a judge must find the law and apply it. In AEDPA, Congress has made the law clear: Federal habeas relief is not available unless the Louisiana Supreme Court's decision was contrary to or an unreasonable application of clearly establish Supreme Court precedent. I must apply that law. The Fifth Circuit precedent cited above is binding on me. Under these circumstances, I regretfully recommend that Pierre's request for federal habeas relief on the first claim asserted in his petition should be denied.[1]

1 See Appendix-B, Pgs. 23-40.

2. District Court's Order and Reasons for Judgment

The Court agrees with the magistrate judge's conclusion that the new evidence discussed in the opinion would likely produce an acquittal in this case because of its devastating effect as to the victim's credibility. There were no eyewitnesses or physical evidence of the sexual abuse of C.C. for which Pierre was convicted so her credibility as the victim was central issue at trial. And it has now been revealed that the victim, C.C., testified falsely at trial on direct examination when asked whether she had been sexually active "other than the things" that Pierre had done to her.[1] The state court judge who presided over the four day trial, and therefore had the benefit of observing first-hand all of the witnesses' testimony and the State's evidence, was so troubled by the evidence presented at the post-conviction hearing that it persuaded him that Pierre had satisfied the extraordinarily high actual innocence standard, which all parties now readily agree was not satisfied. The Louisiana Supreme Court reversed the trial court because even assuming that free-standing claims of actual innocence not based on DNA evidence are cognizable in state post-conviction proceedings under Louisiana Code of Criminal Procedure article 930.3, Pierre could not satisfy that extraordinarily high standard. State v. Pierre, 125 So.3d 403, 409 (La. 2013). That question of state law is not before this Court.

---

1 See Appendix-B, Pgs. 1-2, n.2

Q. "Had anyone ever asked you directly whether Michael Percle was abusing you during either the preparation for the trial or during the trial itself?"
A. "Yes."
Q. "And what did you say?"
A. "No."

That the issue was material cannot be gainsaid. C.C.'s testimony against Pierre was bolstered and made more credible by the fact that it was "textbook" for child sexual abuse cases, and that her description of Pierre's behavior toward her hit on all of the classic indicators for child sexual abuse. The prosecutor explained this at the post-conviction hearing when refuting the suggestion that the case did not turn on C.C.'s allegations alone.... Of course, the State's contentions regarding C.C.'s classic abuse allegations vis `a vis Pierre's guilt is eviscerated by the fact that we now know that C.C. was being sexually abused by someone else, in near like manner, in the same time frame that she claimed that Norman was abusing her.

What is before this Court is whether allowing Pierre's conviction to stand results in an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). In particular, whether Pierre was denied due process because his conviction rests in part – to what extent no one will ever know – on material testimony now known to be false.[2] This Court is persuaded that Pierre's conviction and life sentence rest on evidence that resulted in a fundamentally unfair trial in violation of Pierre's due process rights, this notwithstanding that there is no evidence to suggest that the State (or anyone whose knowledge was imputable to the State) knew that C.C. was offering false testimony at trial.

---

2 See Appendix-B, Pgs. 2-3, n.3.

> Undoubtedly the state trial court was also troubled by the evidence presented at the post-conviction hearing of a false accusation of rape that C.C. made against a teenage boy, B.B., in 2009. This false accusation occurred, however, after Pierre's criminal trial in June 2008, which means that this particular incident could not have contributed to any due process issues with Pierre's trial. Nonetheless, C.C.'s explanation for fabricating the accusation was stunningly cavalier and indicative of a complete lack of concern for the consequences of falsely accusing someone of a sexual crime.
>
> Additionally, the state trial court had to be perplexed at the State's lack of interest in pursuing criminal charges against Percle, whom C.C. accused of the exact same crime, in the very same time frame, that she accused Pierre. The Court recognizes that there may be various reasons why the State declines to pursue a case but as Detective Daigle testified at the post-conviction hearing, he interviewed C.C. regarding the serious allegations against Percle and he perceived credibility issues with C.C.

3. Fifth Circuit Court's Reasons for Reversing the District Court's Grant of Habeas Relief[1]

Pierre argues the Louisiana Supreme Court unreasonably applied "constitutional principles guaranteed by federal law" -- specifically, that " conviction based in part on false testimony ... violates a defendant's right to a fundamentally fair trial," even if "the State was not aware of the false testimony."

But Pierre cites no Supreme Court precedent to support this proposition. Nor can he. As he conceded both in briefing and at oral argument, "no Supreme Court case holds specifically that [State] knowledge is *not* required." That ends this case: "clearly established law signifies the holdings ... of [the Supreme] Court's decisions." *Howes v. Fields*, 565 U.S. 499, 505 (2012) (internal quotation marks omitted). See also *Williams v. Taylor*, 529 U.S. 362, 381 (2000)(Stevens, J.) ("If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.").

Without a Supreme Court case holding that the State's unknowing use of false testimony violates the Due Process Clause, Pierre cannot show that the Louisiana Supreme Court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States. Indeed, as the Supreme Court "has held on numerous occasions," "it is not 'an unreasonable application of 'clearly established federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 121-23 (2009)(citing cases). See also *Wright v. Van Patten*, 552 U.S. 120, 123-26 (2008)(no unreasonable application when Supreme Court "cases give no clear answer to the question presented, let along one in [petitioner's] favor") (citing *Carey v. Musladin*, 549 U.S. 70, 77 (2006)); *Gamez v. Thaler*, 526 F.App'x 355, 359 (5th Cir. 2013)("Because no decision of the Supreme Court has addressed the issue presented before us, it cannot be said that the state court unreasonably applied clearly established Federal law.")(brackets and

1 See Appendix-A, Pgs. 5-8

internal quotation marks omitted). Accordingly, AEDPA requires us to deny Pierre's habeas petition.

This is not a close case. Pierre cannot point to a single case, either from the Supreme Court or our court, to support his argument. To the contrary, our precedent establishes precisely the opposite proposition. In *Kinsel v. Cain*, we explained that, "[a]lthough some circuits recognize a due process violation when perjured testimony is provided by a government witness even *without* the government's knowledge, we are limited by the AEDPA to applying only established Supreme Court precedent," which "demands proof that the prosecution made knowing use of perjured testimony." 647 F.3d at 271-72 & n.26. See also *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) ("[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured.").[2]

The district court's failure to even mention *Kinsel* is particularly troubling, as *Kinsel* is practically indistinguishable from this case. In *Kinsel*, as here, a Louisiana jury found the defendant guilty of child rape "based primarily on [the victim's] trial testimony." 647 F.3d at 266. The victim in *Kinsel* later recanted her accusations. Id. at 266, 268. We nevertheless denied relief. As we explained, we could not "say that the state court unreasonably applied established federal law in determining that Kinsel's due process rights were thus *not* violated" because the State "did *not* know that [the victim] was lying at trial." Id. at 272. "In fact," we emphasized, "Kinsel ultimately does not allege a constitutional error at all given that the prosecutors did not knowingly present false testimony at his trial." Id. It is impossible to square the grant of habeas in this case with our denial of habeas in Kinsel.[3]

Moreover, a year before the Louisiana Supreme Court decision denying relief here, Justice Scalia reiterated that the Supreme Court has "never held" that the unknowing use of false testimony violates the Due Process Clause – and that it is "unlikely ever to do so." *Cash v. Maxwell*, 132 S.Ct.

2 See Appendix-A, Pg. 7, n.3, for cases cited therein.
3 See Appendix-A, Pg. 8, n.4

611, 615 (2012) (Scalia, J., joined by Alito, J., dissenting from denial of certiorari) ("All we have held is that "a conviction obtained through use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment.' ") (quoting *Napue*, 360 U.S. at 269).

* * *

As the district court recognized, and as Pierre concedes, the State did not knowingly present false testimony at trial. So the Louisiana Supreme Court decision denying relief was neither contrary to, nor involved an unreasonable application of, clearly established Supreme Court precedent. We reverse the judgment of the district court and issue the mandate forthwith.[4]

4 See Appendix-A, Pg. 8, n.5

II.

The Supreme Court has not addressed the issue of whether a due process violation occurs if a conviction is based on perjured testimony which was unknown to the prosecution at the time of trial. See *Jacobs v. Scott*, 513 U.S. 1067 (1995). Furthermore, there is a circuit split regarding which standard applies in federal cases dealing with these facts. See *Evenstad v. Carlson*, 470 F.3d 777 (8th Cir. 2006), and cases cited therein.

In *Braxton v. United States*, 500 U.S. 344, 347-48 (1991), this Court stated that "[a] principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours."

Pierre submits that this Court, in the interest of justice and fundamental fairness, should resolve the conflicts among the circuit courts concerning a conviction based on false testimony, that was unknown to the prosecutor at the time of trial. Pierre conceded that the prosecutor did not know that CC.'s testimony was false; nonetheless, the Fifth Circuit still required him to prove that the prosecutor had contemporaneous knowledge of the falsity. As the Second Circuit stated in *Sanders v. Sullivan*, 863 F.2d 218, 224 (1988),

> There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony

> by witnesses with some affiliation with a government agency. Such a rule elevates form over substance. It has long been axiomatic that due process requires us "to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). It is simply intolerable in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies. A due process violation must of course have a state action component. We believe that Justice Douglas accurately articulated the appropriate definition that accords with the dictates of due process: a state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation. *See Durley v. Mayo*, 351 U.S. 277, 290-91, 76 S.Ct. 806, 813-14, 100 L.Ed. 1178 (1956).

While the State had no knowledge of C.C.'s false testimony at the time of trial, "the State now knows that the testimony of the only witnesses against petitioner was false." *Durley v. Mayo*, 351 U.S. at 290-91.

Finally, it should be noted that the Fifth Circuit mentioned that C.C. had never recanted her accusations of sexual abuse against Pierre. However, in a sworn affidavit dated March 6, 2015, C.C.'s grandmother stated "that approximately a month ago, during a telephone conversation with my daughter, Brandy Hayles, I was told by Brandy that [C.C.] told her that Albert N. Pierre, did not have sex with her. Brandy is the aunt of [C.C.]." See Appendix-E (Sworn Affidavit of Gayle Aucoin). This latest recantation is proof that Pierre is actually innocent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Albert N. Pierre

Albert Norman Pierre #541302
Louisiana State Penitentiary
17544 Tunica Trace
Angola, Louisiana 70712

Prepared by:

Norman Billiot

Norman Billiot #88265
Offender Counsel Substitute
Legal Programs Department
Louisiana State Penitentiary

Date: August 3, 2018