No. _____

IN THE

Supreme Court of the United States

KAREEM DANIELS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Fourteenth Amendment, prosecutors may not knowingly secure convictions using false or misleading evidence. This Court has never limited the scope of false or misleading evidence to perjurious testimony and has invalidated convictions where the testimony was not shown to have been perjured. The question presented is whether the Constitution permits a prosecutor to knowingly use false or misleading testimony, as long as it does not constitute perjurious testimony.

PARTIES TO THE PROCEEDING

Petitioner is Kareem Daniels, who was appellant in the Georgia Court of Appeals. Respondent is the State of Georgia, which was appellee in the Georgia Court of Appeals. Neither party is a corporation.

RELATED PROCEEDINGS

This case arises from the following proceedings in Georgia state courts:

- *State* v. *Daniels*, No. 12SC114801 (Superior Court of Fulton County, Georgia) (entering judgment of conviction on October 23, 2013; denying the motion for new trial on June 29, 2016; and denying the motion for new trial again following hearing on remand from appellate courts on January 9, 2018);
- *Daniels* v. *State*, No. A17A0239 (Court of Appeals of Georgia) (remanding the case to the trial court for rehearing on the motion for new trial on March 28, 2017);
- *Daniels* v. *State*, No. A18A1865 (Court of Appeals of Georgia) (affirming the trial court's denial of the motion for new trial on March 8, 2019 and denying the motion to reconsider on March 25, 2019); and
- *Daniels* v. *State*, No. S19C1070 (Supreme Court of Georgia) (denying a writ of certiorari on December 23, 2019).

There are no other proceedings in state or federal trial or appellate courts or in this Court that are related to this case.

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PETITION FOR A WRIT OF CERTIORARI

This Court held in *Napue* v. *Illinois* that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U. S. 264, 269 (1959). Petitioner Kareem Daniels respectfully seeks a writ of certiorari to the Court of Appeals of Georgia to resolve whether the Fourteenth Amendment due process clause will tolerate a prosecutor's knowing use of false or misleading testimony, so long as that testimony does not amount to the crime of perjury. There is a deep divide in the lower courts—federal circuits and state courts of last resort—whether proof of perjury is necessary to make out a *Napue* violation. This Court should grant review to resolve this divide.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia (App. 1a–13a) is published at 824 S. E.2d 754. The Georgia Court of Appeals' order denying petitioner's motion for reconsideration of that opinion (App. 14a) is unpublished. The Supreme Court of Georgia's opinion denying certiorari (App. 15a) is unpublished. And the relevant order from the trial court (App. 16a–22a) is unpublished.

JURISDICTION

The Court of Appeals of the State of Georgia affirmed the trial court's denial of a new trial on March 8, 2019. App. 1a–13a. Petitioner timely petitioned the Supreme Court of Georgia for a writ of certiorari,

which it denied on December 23, 2019. App. 15a. On March 19, 2020, in light of the health concerns created by the spread of COVID-19, this Court issued an Order providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment[.]" Misc. Order, 589 U. S. ___ (Mar. 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of . . . liberty . . . without due process of law . . . ." U. S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The Facts Below

Lakeidra Taylor, the complaining witness, was working at a Kroger grocery store when she first met Kareem Daniels and gave him her phone number. App. 3a. Although Taylor called Daniels that same day, they only spoke on the phone once and did not run into each other again until several months later on September 28, 2012. T. 338–41, 381.[1] That day, Taylor was walking to her apartment when she noticed a man she thought she recognized—who later turned out to be Daniels—driving an

[1]"T. __" refers to the designated page of the reporter's transcript from Daniels' trial. "R. __" refers to the designated page of the clerk's record from Daniels' trial. "Remand Hr'g T. __" refers to the designated page of the reporter's transcript from Daniels hearing on remand from the Georgia Court of Appeals.

SUV. App. 2a. After exchanging pleasantries from the car window, Daniels parked his vehicle, got out of it, and allegedly forced Taylor into the back seat. *Id.* Taylor testified that she pushed Daniels away and managed to get out of the vehicle, but Daniels took Taylor's wallet out of her hand during the struggle. *Id.* The two argued back and forth about returning the wallet, prompting Taylor to eventually call the police and Daniels to leave the apartment complex. *Id.* He was apprehended later that evening, although the allegedly stolen wallet and its contents were never recovered.[2] *Id.*

Based on Taylor's allegations, Daniels was charged with one count of robbery by force (Ga. Stat. Ann. § 16-8-40); one count of attempted rape (Ga. Stat. Ann. §§ 16-4-1, 16-6-1); one count of false imprisonment (Ga. Stat. Ann. § 16-5-41); one count of hindering a person making an emergency call (Ga. Stat. Ann. § 16-10-24.3); and one count of driving on a suspended license (Ga. Stat. Ann. § 40-5-121). App. 2a & 2a n.1.

B. The Trial

At trial, the State presented the testimony of six witnesses: Taylor and five police officers who assisted with the investigation. On direct examination, Taylor testified about meeting Daniels months before when she was working at Kroger and explained that by the time of the alleged incident, she was working somewhere else. App. 3a. After

[2] Taylor described the stolen item as a black "mini-sized" wallet that was covered in colorful decorations that were either butterflies or stars. T. 360, Def.'s Ex. 1 at 19:13:29–19:14:00. Taylor told the police that she had the following items inside the wallet: an "old" I.D.; her social security card; her transportation card; and $60 in cash. T. 375. Even though those items were never found, Taylor's recorded police interview begins with a detective handing Taylor her I.D., which she then puts into a mini-sized black wallet that is sitting on the table in front of her. T. 398–99, 574, Def.'s Ex. 1 at 18:32:20–18:32:34.

prompting from the State about the "transition" from Kroger to her new job, Taylor testified that "[she] basically left Kroger because [she] wanted to . . . get into the healthcare field . . . [because she] still had [her] CNA at that time[.]" *Id.* at 3a, 23a. This testimony, however, was untrue.

On cross-examination, trial counsel confronted Taylor by asking if the true reason she left Kroger was because she had been caught shoplifting, to which Taylor replied: "No, I wasn't caught shoplifting." App. 3a, 25a. The State objected that the topic was irrelevant, that it was improper character evidence, and that it was otherwise inadmissible because the defense failed to provide the State with any information about the shoplifting in discovery.[3] App. 25a–26a. Trial counsel rejoined that the shoplifting incident was relevant impeachment material—thus, not subject to discovery—and read into the record Taylor's signed, handwritten resignation letter, admitting to shoplifting:

> I did a transaction for a refund that I put on a gift card that I didn't buy. I didn't receive as a gift. I kept the gift card and used it. I've also used another employee's Kroger card to get his employee discount. Earlier this week, I did another transaction, the same as one month ago and did the same thing. I'm willing to pay back the money that I put on the gift cards and the money that was discounted to me from the employee Kroger card. As of March 31, I will resign from Kroger.
>
> *Id.* at 4a, 26a–27a.

Trial counsel went on to argue that Taylor's prior act of dishonesty was relevant to Taylor's character for truthfulness and was admissible as a

[3] Though it would appear from the State's objection that it was unaware of circumstances of Taylor's resignation, Taylor told the prosecutor before trial about the incident—which the prosecutor admitted at the hearing on remand. Remand Hr'g T. 26, 27.

prior inconsistent statement. App. 27a–28a, 29a–30a. In response, the State doubled down on its objection, asking the court to instruct the jury that it should not "take any improper inference about the improper line of questioning." App. 28a–29a. The court declined to give a limiting instruction, finding that the initial question was proper, but it prohibited any further questioning on the matter.[4] *Id.* at 29a, 30a–31a. Immediately thereafter, trial counsel concluded her cross-examination of Taylor and the State conducted a brief redirect examination. *Id.* at 32a–35a. Despite having the obligation and the opportunity to address the falsehood on redirect, the State did nothing to try to correct Taylor's false testimony. *Id.*

In closing, the State repeatedly argued that Taylor had absolutely no reason to lie[5] and that her subsequent consistent statements—to the police, to the District Attorney's office, and to the jury—all provided "direct evidence corroborating her prior statement[s]" and enhanced her credibility[6]. But the defense was prevented—due to the State's earlier objection—from arguing that Taylor's motivation for making false allegations was simply that she was a liar. Hamstrung by the court's ruling, the only argument trial counsel could propound was that Taylor's motivation for lying was irrelevant and that it was not the defense's burden to establish why Taylor would lie. T. 579–80.

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[4] Despite that ruling, the court noted that if the attorneys for the State and defense came to an agreement "to clarify what it is . . . shoplifting versus stealing the gift cards[,]" that it would permit that agreement to be put before the jury in some fashion. App. 31a.

[5] T. 599, 602, 603, 604, 607, 619, 622.

[6] T. 588, 599, 599–601, 603–05, 615–16.

After the close of evidence, the jury found Daniels guilty of robbery by force and the two misdemeanor charges of hindering an emergency call and driving on a suspended license, but he was acquitted of the attempted rape and false imprisonment charges. App. 2a n.1. The trial court imposed a sentence of 20 years, 5 to be served in confinement. *Id.*

C. The Motion for New Trial and Appeal

Following his conviction, Daniels timely moved for new trial and was appointed new appellate counsel. After a hearing on his motion, the trial court denied Daniels a new trial but vacated his misdemeanor convictions due to insufficient evidence. App. 2a n.1. Daniels appealed. Shortly after his case docketed in the Georgia Court of Appeals for the first time, that court remanded for a hearing on whether the State knowingly elicited false testimony from Taylor in violation of Daniels' due process rights.[7] App. 2a.

At the hearing on remand, the trial court received in evidence a copy of Taylor's resignation letter, the testimony of trial counsel, and the testimony of the prosecutor who tried the case. During the hearing, trial counsel testified that the prosecutor approached her immediately following the bench conference about Taylor's statements and chided her for trying to ask about Taylor's resignation in front of the jury. Remand Hr'g T. 20–22. Trial counsel responded that the prosecutor's question about Taylor's "transition" from Kroger had opened the door to impeachment, even if the State was not aware of it. *Id.* But the prosecutor retorted that she had, in fact, known that shoplifting played a role in Taylor's decision

[7] Daniels case docketed in the Georgia Court of Appeals for the first time under case number A17A0239. Docketing Not. 1, Sept. 7, 2016. Daniels was granted remand by the court on March 28, 2017. Or. Granting Remand 1, Mar. 28, 2017.

to leave Kroger because Taylor had disclosed that fact before trial. Remand Hr'g T. 20–22, 26. The prosecutor confirmed this in her own testimony on remand, when she testified that she had spoken with Taylor prior to trial, had asked Taylor why she left Kroger, and that Taylor had informed her that she left Kroger because of allegations of misuse of Kroger coupons, discounts, or gift cards. Remand Hr'g T. 26, 27, 31.

After the hearing on remand, the trial court again denied Daniels a new trial. App. 16a–22a. In so ruling, the trial court found that "the prosecutor admitted she knew Taylor had been caught stealing from Kroger as an employee and that Taylor left her employ at Kroger because of the theft." App. 20a. Nevertheless, the trial court determined, "[e]ven where a person is caught stealing, she may have other reasons for wanting leave her current employment[,]" and so while Taylor's "stated reason for leaving Kroger was not the whole truth of the matter, . . . her testimony [wa]s not *necessarily* false." App. 21a (emphasis added). And so the trial court concluded Taylor's testimony on direct did not constitute the type of false testimony that constitutes a due process violation.[8] Further, the court explained, even if the testimony were false, it was not material because the statement went only to Taylor's credibility. App. 21a–22a.

[8] Daniels argued at every stage that Taylor's testimony on direct *and* cross-examination were false, but the trial court's order only addressed the testimony elicited on direct examination. Daniels moved the court to reconsider its ruling and issue an opinion on the State's duty to correct the false testimony elicited on cross-examination. R. 36–44. The court denied that motion, holding that "[t]here is no analysis needed as to whether the State was under some obligation to ask additional clarifying questions [on redirect] as to why Taylor left her job at Kroger; the court specifically precluded any further questions about the matter." R. 45.

Daniels appealed to the Georgia Court of Appeals a second time (under docket number A18A1865). There, he argued that the State had violated his due process rights when it secured his conviction through the knowing use of false evidence—specifically, Taylor's misleading assertion on direct examination about her reason for leaving Kroger and her untruthful statement on cross-examination that she was not caught shoplifting. App. 8a–10a. The Court of Appeals affirmed, finding that Daniels had failed to establish that Taylor's testimony "was actually false and rises to the level of perjury." App. 9a–10a.

To reach that conclusion, the Court of Appeals began with what it said were four necessary showings to prove a *Napue* violation:

> (1) That the statements in question were actually false;
>
> (2) That the State knew the statements were false but failed to correct the falsehood;
>
> (3) That the statements were material to the case; and
>
> (4) That the witness committed the offense of perjury, as defined by Ga. Stat. Ann. § 16-10-70(a).
>
> App. 8a.[9]

Applying those elements, the court of appeals determined that Daniels had failed to make the fourth showing. First, the court determined that Taylor's comment on direct—that she left Kroger to pursue nursing—was not perjurious or actually false because "a person may have more than one reason for leaving a job, so even if her stated reason for leaving Kroger was not the whole truth of the matter, it was not necessarily false." App. 9a (internal quotations and alterations omitted). The court

[9] To support its interpretation of what is required to establish a *Napue* violation, the court of appeals relied on an unpublished Eleventh Circuit opinion, *United States* v. *Clarke*, 442 F. App'x 540, 543–44 (11th Cir. 2011). App. 8a.

went on to say that the presence of conflicting evidence does not support a showing that the witness was being dishonest or that the State knowingly elicited false testimony. *Id.*

Next, as to Taylor's testimony on cross-examination, the court of appeals departed from the trial court's finding that the theft of Kroger goods had been at least part of the reason for her leaving her job. See App. 9a–10a. The appellate court instead engaged in a *de novo* review of the facts and—based on its own reworking of the facts—announced that "the written resignation statement . . . does not clarify where the [gift] card was from or to whom it belonged, how Taylor obtained it, and how it was used."[10] App. 9a–10a. In the end, the court held that Daniels failed to establish that Taylor's denial of having been caught shoplifting was actually false or rose to the level of perjury because

> [w]hile that statement apparently show[ed] misuse of a gift card, given the lack of specificity about the essential elements required to prove the offense of shoplifting, it cannot be said with certainty that such a crime occurred. Even if . . . the acts in question could form the basis for a shoplifting charge, there is no evidence that any such charge was ever made or that Taylor knew that her conduct might be construed to support such a charge when she denied having been caught shoplifting.
>
> *Id.* at 10a.

"Under the circumstances," the court said, "Daniels has not shown that

[10] Assuming for argument's sake that Daniels had to establish that Taylor had committed the essential elements of shoplifting, the court of appeals would still have erred. The court of appeals only addressed the portion of Taylor's statement concerning her misuse of gift cards. App. 9a–10a. But it ignored the part where Taylor admitted that she had improperly used another employee's discount. *Id.* Taken together, Taylor's admissions add up to a confession to shoplifting, which under Georgia law includes "[w]rongfully caus[ing] the amount paid to be less than the merchant's stated price for the merchandise." Ga. Stat. Ann. § 16-8-14(a)(5). According to her resignation letter, Taylor committed at least two offenses of shoplifting by using another employee's Kroger discount *and* improperly obtaining the gift cards.

the testimony was false since there are alternative explanations for the discrepancy[,]" and it affirmed. App. 10a.

REASONS FOR GRANTING THE PETITION

The Georgia Court of Appeals erred by holding that only proof of perjury would satisfy the false-evidence element of a due process claim under *Napue* v. *Illinois*, 360 U. S. 264 (1959), which this Court has never held to be so.

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959). Likewise, a prosecutor "has the responsibility and duty to correct what he knows to be false and elicit the truth[,]" even if the State did not actually solicit the false testimony and even if the false testimony goes only to the witness's credibility. *Napue*, 360 U. S. at 269–70. The importance of these principles is undeniable, as any failure to fulfill them "prevent[s] . . . a trial that could in any real sense be termed fair," *id.*, because the State's use of testimony that it knows to be false "involve[s] a corruption of the truth-seeking function of the trial process[.]" *United States* v. *Agurs*, 427 U. S. 97, 104 (1976).

The Georgia Court of Appeals subverted those principles when it held that the State's knowing presentation of testimony, however false or misleading, does not offend the Constitution unless a defendant could prove that the witness who gave the testimony committed perjury, as defined by Georgia Code Section 16-10-70. That holding is incorrect in

light of this Court's precedent, is in conflict with almost half of the federal circuits and numerous state courts of last resort, and is inconsistent with the "truth-seeking function of the trial process[.]"

Daniels's case epitomizes the problems with interpreting "false testimony" so narrowly that it embraces only perjured testimony: Such an interpretation renders the protections of the Fourteenth Amendment a hollow shell, easily frustrated by carefully crafted questions and answers that are technically true in isolation, but taken together create an impression that is anything but the truth. Under this interpretation, a prosecutor may not knowingly permit perjury, but any lesser contrivance would be fair game.

The follies of such a narrow understanding are implicit in this Court's holdings in numerous cases—most especially *Alcorta* v. *Texas*, 355 U. S. 28 (1957) and *Miller* v. *Pate*, 386 U. S. 1 (1967). Nevertheless, there is an entrenched conflict in both state courts of last resort and federal circuit courts that has spanned decades—and the court of appeals decision in Daniels' case is just the most recent addition to an ever-deepening rift. This Court's review is warranted to resolve an important issue that has divided the lower for almost 60 years.

A. This Court has never held perjury to be an essential element of a *Napue* claim and such a holding would run counter to this Court's precedents.

This Court has long held that a prosecutor's knowing deception of the jury corrupts the truth-seeking function of a trial. The issue first surfaced in *Mooney* v. *Holohan*, 294 U. S. 103 (1935). There, the peti-

tioner sought leave to file a habeas petition, alleging that his confinement violated due process because the state knowingly relied on perjured testimony at his trial. *Mooney* v. *Holohan*, 294 U. S. 103, 110 (1935) (per curiam). Because Mooney had not properly presented his claim in state court, this Court denied him leave to file. *Id.* at 115. But it nonetheless condemned the state's conduct, noting that knowing reliance on perjured testimony undermines fundamental fairness:

> [Due Process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.
>
> *Id.* at 112.

Seven years later, this Court relied on *Mooney* in *Pyle* v. *Kansas*, reiterating that, if properly pleaded, a state's knowing use of perjured testimony would constitute a due process violation. *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942).

The Court had occasion in *Alcorta* v. *Texas*, 355 U. S. 28 (1957), to substantively apply the principle first announced in *Mooney* and *Pyle*. In *Alcorta*, the state charged the petitioner with malice murder for killing his wife. *Alcorta* v. *Texas*, 355 U. S. 28, 28–29 (1957) (per curiam). Although the petitioner had admitted the homicide, he claimed to have committed it in a fit of passion, sparked by the discovery of his wife kissing another man late at night in a parked car. *Id.* at 28. That claim, had the jury accepted it, would have mitigated the petitioner's culpability

and capped his punishment at five years' imprisonment. *Id.* at 29. To counter the petitioner's claim, the state called the only eyewitness: the man whom the petitioner alleged his wife had been kissing. *Id.* The eyewitness testified that he had given the victim rides home a couple of times, but that he had had no dates with her and that they were not in love—giving the impression that he and the victim were nothing more than casual friends. *Id.* Rejecting the petitioner's claim, the jury found him guilty of murder with malice and sentenced him to death. *Id.*

At the habeas corpus hearing, however, the eyewitness revealed that he in truth had been in a sexual relationship with the petitioner's wife and that he had disclosed that fact to the prosecutor before trial. *Id.* at 30–31. But the prosecutor had advised the eyewitness not to volunteer that information unless specifically asked about it by the defense. *Id.* at 31. This Court, in a per curiam opinion, held that "[i]t cannot seriously be disputed that [the eye-witness's] testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship." *Id.* Because the false testimony was prejudicial, the Court concluded that, under the principle announced in *Mooney* and *Pyle*, the state violated the petitioner's right to due process. *Id.* at 30–31.

Soon after it decided *Alcorta*, this Court issued the seminal opinion on prosecutors' knowing reliance on false testimony: *Napue* v. *Illinois*, 360 U. S. 264 (1959). There, the prosecutor promised to recommend a sentence reduction if the principal witness—an accomplice—would testify against the petitioner. *Napue*, 360 U. S. at 266. At trial, however, the accomplice denied that he had received any promises in exchange for his testimony and the prosecutor failed to correct that fact. *Id.* at 267

n.2. This Court unanimously reaffirmed that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and explained that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U. S at 269. And the Court went further, holding that "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* Because the state had presented false testimony that prejudiced the jury's ability to evaluate the reliability of the state's star witness,[11] the petitioner's conviction could not stand. *Id.*

Eight years later, in *Miller* v. *Pate*, this Court revisited the issue of the knowing presentation of false evidence. 386 U. S. 1 (1967). During the petitioner's trial for the brutal murder of a child, the prosecution introduced a pair of heavily "bloodstained" shorts, along with expert testimony that blood type found on the shorts matched the victim's blood type. *Miller*, 386 U. S. at 3–4. Then, in closing, the prosecution highlighted how important the "bloodstained" shorts were to the case. 386 U. S. at 4–5. As it turned out, the shorts were stained with paint, not blood—a fact that the prosecutor knew about before the trial. *Id.* at

[11] The state in *Napue* argued that the Court was bound by the lower court's factual conclusions regarding the prejudice suffered as a result of the false testimony. *Napue*, 360 U. S.at 271–72. The Court, however, disagreed noting that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Id.* at 271.

6. But Miller did not discover this fact until his federal habeas proceeding when he first had an opportunity to examine the shorts independently. *Id.* at 5. During that proceeding, Miller presented the testimony of a chemical microanalyst, who testified that all the reddish-brown stains on the shorts were paint. *Id.* On cross-examination, the "[state's] counsel content[ed] himself" with eliciting testimony from the expert conceding that there could have been blood on the shorts at some time. *Id.*

But this Court did not oblige the petitioner to prove technical falsehood or perjury before it would grant relief after the state knowingly misled the jury. The microanalyst's inability to fully contradict the state's trial evidence notwithstanding, this Court unanimously determined that "[t]he prosecution deliberately misrepresented the truth" and reversed: "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." *Id.* at 6, 7 (internal citations omitted).

Thereafter, this Court addressed the known-false-testimony problem twice in 1972: *Giglio* v. *United States*, 405 U. S. 150 and *Moore* v. *Illinois*, 408 U. S. 786.

Giglio's facts were similar to *Napue*'s. The prosecution exchanged immunity for an accomplice's testimony against the petitioner. But, when asked if he had been promised anything in exchange for his testimony, the accomplice denied the existence of any deal. *Giglio* v. *United States*, 405 U. S. 150, 151–52 (1972). The difference between *Giglio* and *Napue* is that the prosecutor who tried the case was unaware of the deal,

which a different prosecutor had struck. *Id.* at 152. This Court, however, found the distinction immaterial, holding that imputed knowledge could support a due process claim based on false testimony. *Id.* at 153–55.

The same term, this Court decided *Moore* v. *Illinois*, 408 U. S. 786 (1972), holding (in a 5–4 decision) that the petitioner had not been denied due process when the state neglected to disclose or correct testimony that seemingly contradicted known facts. *Moore*, 408 U. S. at 799–800. The petitioner in *Moore* was convicted and sentenced to death for murdering a bartender in a crowded bar outside of Chicago. *Id.* at 788–90. The trial evidence comprised testimony from two eyewitnesses, a waitress and a patron, as well as testimony from others recounting the petitioner's supposed various admissions in the days following the homicide. *Id.* In post-conviction proceedings, the petitioner challenged that the state had violated his due process rights when it twice knowingly elicited false testimony. *Id.* at 788–93. This Court agreed that the first instance of allegedly false testimony (an incorrect identification of the petitioner as someone the witness had met before) was, in fact false, but concluded that the falsity was immaterial because it did not impeach any of the eyewitnesses' identifications of the petitioner as the murderer or other witnesses' statements identifying the petitioner as the person who later confessed to the murder. *Id.* at 795–96. And so, because the petitioner could not establish that he was prejudiced by such false testimony, he was not entitled to relief.

The second instance of alleged false testimony involved one of the eyewitnesses: At trial, the bar patron testified that while in the midst of a card game, he saw the petitioner enter the establishment with a shotgun, walk to the bar, and shoot the bartender. *Id.* at 789. After trial, the

petitioner discovered a police statement from another card player and an accompanying diagram which showed that the eyewitness patron had been seated with his back to the door the evening of the murder. *Id.* at 793. The petitioner argued that the diagram necessarily contradicted the patron's testimony because the patron could not have seen the person who entered the bar with a shotgun. *Id.* at 797–98. But the majority was unpersuaded that the diagram itself proved that the patron's testimony was actually false. *Id.* at 798. Although the statement and diagram disclosed the placement of the patron's chair, "[t]here is nothing in the diagram to indicate that [the patron] was looking in another direction or that it was impossible for him to see the nearby door from his seat at the card table." *Id.* In other words, the diagram alone could not establish that the patron's testimony was false or materially misleading.

This Court has not substantively addressed the prosecution's knowing use of false testimony since *Giglio* and *Moore*. But this Court has restated the principle, in dicta, in two subsequent cases: *United States* v. *Agurs*, 427 U. S. 97 (1976) and *United States* v. *Bagley*, 473 U. S. 667 (1985). In *Agurs*, this Court granted certiorari to address whether the government's failure to disclose the victim's criminal record amounted to a due process violation under *Brady* v. *Maryland*, 373 U. S. 83 (1963). *Agurs*, 427 U. S. at 98–99. Before addressing the operative issue, the majority noted that *Brady* arguably applied in three situations, the first of which—typified by *Mooney*—was where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U. S. at 103. Nine years later in *Bagley*, the Court echoed the

"perjured testimony" language from *Agurs*, even though that case likewise involved no allegations that the government had knowingly relied on false evidence. *Bagley*, 473 U. S. at 679–80.

Despite *Bagley*'s and *Agurs*'s references to perjured testimony, this Court has never required defendants to prove perjury before it will find a due process violation for the prosecutor's knowing presentation of false testimony.[12] Indeed, the word "perjury" does not appear in any case addressing this issue after *Pyle*; rather, each time this Court has dealt substantively with the question, it has classified the offending evidence as "false,"[13] as constituting a "misrepresent[ation] of the truth,"[14] or as having created a "false impression."[15]

More telling, perhaps, is that this Court has never engaged in a discussion of whether the complained-of testimony constituted perjury or even was "necessarily false." It has instead focused on the potentially misleading nature of the evidence. For instance, the eyewitness in *Alcorta* may well have been telling the truth when he testified that he was not in love with the petitioner's wife and had never been on any dates with her—it would depend on how he understood love and dating. The same could be said of the state's forensic scientist in *Miller*: The petitioner did not conclusively disprove the trial testimony that the shorts were stained with the victim's blood. But in neither case was the Court

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[12] True, *Mooney* and *Pyle* refer to "perjured testimony," but both opinions addressed only the petitioners' ability to assert claims in a habeas corpus petition; neither involved a substantive analysis of whether petitioners' claims had merit. *Mooney*, 294 U. S. at 110–12; *Pyle*, 317 U. S. at 214–16.

[13] *Moore*, 408 U. S. at 797–98; *Giglio*, 405 U. S. at 153–54; *Miller*, 386 U. S. at 7; *Napue*, 360 U. S. at 269–72; *Alcorta*, 355 U. S. at 30.

[14] *Miller*, 386 U. S. at 6.

[15] *Alcorta*, 355 U. S. at 31.

was concerned with parsing whether the complained-of testimony was technically false. The dispositive issue in both cases was that the prosecution intended to mislead the jury and secure a conviction based on such misleading evidence. Indeed, were perjury an essential element, the claims in *Alcorta* and *Miller* might have failed.

Even in *Moore*—the only cases where this Court found that a defendant failed to meet his burden in establishing a due process violation—this Court did not engage in a technical discussion about whether either the witness or patron committed perjury. As to the first allegation of false testimony at issue in *Moore*, it was clear that the witness was merely mistaken, and yet this Court treated such testimony as "false testimony"—it simply found that it was not prejudicial. As for the second instance of allegedly false testimony, this Court simply evaluated whether the existence of the diagram showed his trial testimony to have been false or misleading, which it did not. In short, this Court has never dismissed a *Napue* claim by finding that a defendant failed to establish that the witness committed perjury by giving the testimony in question.

That this Court referred to "perjured testimony" in dicta, does not change that the focus of the "false testimony" inquiry is on preventing "the corruption of the truth-seeking function of the trial process." *Agurs*, 427 U. S. at 104. Yet the Georgia Court of Appeals ignored that point when it burdened Daniels with proving technical perjury and denied him relief when he could not. True, proof of perjury would doubtless be sufficient to show that a prosecutor relied on false evidence, but this Court has never held it to be necessary. The Georgia Court of Appeals' contrary opinion departed from precedent and is incompatible with fundamental principles of justice.

B. Lower courts are divided on whether proof of perjury is necessary to sustain a *Napue* claim and require this Court's guidance to resolve the split.

The Georgia Court of Appeals is not the only court to have relied on the "perjured testimony" language appearing in dicta in *Agurs* and *Bagley*. Following *Agurs*, state courts of last resort and federal circuit courts have become deeply divided over whether proof of "perjury" is required to establish a due process violation. The split is almost perfectly even, in fact.

About half the states have addressed whether proof of perjury is necessary to make out a due process violation or whether misleading—albeit technically correct—testimony will suffice. Of those, 14 have disagreed with the Georgia Court of Appeals, holding explicitly or implicitly that that technical perjury is not essential and that a prosecutor's knowing reliance on false or misleading testimony will support a due process violation. *People* v. *Morrison*, 101 P. 3d 568, 581–82 (Ca. 2004); *Greene* v. *Comm'r of Corr.*, 190 A. 3d 851, 861 (Conn. 2018); *Johnson* v. *State*, 44 So. 3d 51, 53–54 (Fla. 2010); *Birano* v. *State*, 426 P. 3d 387, 413 (Haw. 2018); *State* v. *Lankford*, 399 P. 3d 804, 830–32 (Idaho 2017); *Smith* v. *State*, 34 N. E. 3d 1211, 1220 (Ind. 2015); *State* v. *LaCaze*, 208 So. 3d 856, 866 (La. 2016), *cert. granted, judgment vacated on other grounds*, 138 S. Ct. 60, 199 L. Ed. 2d 1 (2017); *People* v. *Smith*, 870 N. W.2d 299, 305 (Mich. 2015); *Rippo* v. *State*, 423 P. 3d 1084, 1105 (Nev. 2018); *People* v. *Robertson*, 190 N. E. 2d 19, 21 (N. Y. 1963); *Commonwealth* v. *Simmons*, 804 A. 2d 625, 635 (Pa. 2001); *Riddle* v. *Ozmint*, 631 S. E. 2d 70, 75 (S. C. 2006); *Ex Parte Weinstein*, 421 S. W. 3d 656, 665–66 (Tex. Crim. App. 2014); *State* v. *Davis*, 992 A. 2d 302, 306–07 (Vt. 2010). But 12 states

have followed the same route as the Georgia Court of Appeals, finding that proof of perjury is an essential element of a *Napue* claim or that misleading but technically correct testimony will not suffice. *Perkins* v. *State*, 144 So. 3d 457, 469–70 (Ala. Crim. App. 2012); *Stephens* v. *State*, 737 S. W. 2d 147, 149 (Ark. 1987); *DeLuzio* v. *People*, 494 P. 2d 589, 592 (Colo. 1972); *Romeo* v. *State*, 21 A. 3d 597, 2011 WL 1877845 at *3 (Del. 2011) (unpublished); *Hamann* v. *State*, 324 N. W. 2d 906, 909 (Iowa 1982); *State* v. *Saenz*, 22 P. 3d 151, 156 (Kan. 2001); *Meece* v. *Com.*, 348 S. W. 3d 627, 676–77 (Ky. 2011); *Commonwealth* v. *Daigle*, 399 N. E. 2d 1063, 1067 (Mass. 1980); *Howell* v. *State*, 163 So. 3d 240, 252 (Miss. 2014); *State* v. *Denmon*, 635 S. W. 2d 345, 349–50 (Mo. 1982); *McDonald* v. *State*, 553 P. 2d 171, 177 (Okla. Crim. 1976); *Teleguz* v. *Com.*, 643 S. E. 2d 708, 729 (Va. 2007).

Federal circuit courts are equally fractured. Five have consistently held that the due process clause protects against more than just the knowing use of perjured testimony. *Gilday* v. *Callahan*, 59 F. 3d 257, 267 (1st Cir. 1995); *United States* v. *Dvorin*, 817 F. 3d 438, 452 (5th Cir. 2016); *United States* v. *Freeman*, 650 F. 3d 673, 679–80 (7th Cir. 2011); *Hayes* v. *Brown*, 399 F.3d 972, 981 (9th Cir. 2005); *United States* v. *Sitzmann*, 893 F.3d 811, 828 (D. C. Cir. 2018), *cert. denied*, No. 19-7525, 2020 WL 1124539 (U. S. Mar. 9, 2020). But three have endorsed the perjury-only standard. *Akrawi* v. *Booker*, 572 F. 3d 252, 265 (6th Cir. 2009); *United States* v. *Payne*, 940 F. 2d 286, 291 (8th Cir. 1991); *United States* v. *Garcia*, 793 F. 3d 1194, 1207–08 (10th Cir. 2015). And four circuits—

the Second,[16] Third,[17] Fourth,[18] and Eleventh[19]—have internally inconsistent holdings.[20]

Whether a *Napue* claim requires proof of perjury has been fully ventilated in over a dozen state high court opinions and in every federal

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[16] *Compare United States* v. *Zichettello*, 208 F. 3d 72, 102 (2d Cir. 2000) ("Reversal is not justified unless the appellant establishes four matters: (i) the witness actually committed perjury, (ii) the alleged perjury was material, (iii) the government knew or should have known of the alleged perjury at time of trial, and (iv) the perjured testimony remained undisclosed during trial[.]") (internal citations and quotation marks omitted) *with Jenkins* v. *Artuz*, 294 F. 3d 284, 294 (2d Cir. 2002) (holding that "testimony was probably true but surely misleading" constituted false testimony and required reversal).

[17] *Compare United States* v. *Hoffecker*, 530 F. 3d 137, 183 (3d Cir. 2008) (explaining that the defendant must show that the witness committed perjury in order to establish that his due process rights were violated) *with United States* v. *Harris,* 498 F. 2d 1164, 1169 (3d Cir. 1974) ("We do not believe . . . that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury.").

[18] *Compare United States* v. *Griley*, 814 F. 2d 967, 970–71 (4th Cir. 1987) ("A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured") *with Campbell* v. *Reed*, 594 F. 2d 4, 7 (4th Cir. 1979) ("Not only did the prosecutor allow the jury to be misled as to Miller's reasons for testifying, but by keeping Miller ignorant of the terms of the plea bargain, he contrived a means of ensuring that this evidence would not come before the jury.")

[19] *Compare United States* v. *McNair*, 605 F. 3d 1152, 1208 (11th Cir. 2010) ("To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material") *with United States* v. *Rivera Pedin*, 861 F. 2d 1522, 1530 n.14 (11th Cir. 1988) (explaining that "the *Napue* rule applies where testimony, even though technically not perjurious, would surely be highly misleading to the jury") (internal citations and quotation marks omitted).

[20] Apart from the dicta in *Agurs* and *Bagley*, the source for the perjury element is uncertain. But a possible culprit is the newly-discovered-evidence precedent. The general rule is that recantations are looked at with the utmost suspicion, but that suspicion is lessened if the recanting witness was convicted of perjury. *See, e.g.*, *United States* v. *DiPaolo*, 835 F. 2d 46, 49 (2d Cir. 1987). That sensible-in-the-newly-discovered-evidence-context rule was "founded in the . . . public policy of suppressing [both] perjury" and "the fabrication of evidence to meet . . . the cause, after the full bearing and weight of the testimony are understood by all the parties." *Wood* v. *Mann*, 2 Sumn. 316, 30 F. Cas. 451, 452–53 (C. C. D. Mass. 1836). That rule is misplaced in the *Napue*–due process context, however, where the crux of the claim is that the opposing party knew about the falsity when it was uttered at trial.

circuit. Still, the split has persisted for decades, and there is little evidence, save for a few internally inconsistent circuits, that either side will reverse course. And even in the internally inconsistent circuits, no later opinion explicitly overruled the prior contradictory caselaw. Putting the question off will neither resolve the split nor clarify the issues for this Court's review. The jurisdictions are intractably fractured. They need this Court to clarify what counts as false evidence to support a due process claim.

Without an answer from this Court, the measure of process a defendant is due will continue to vary by jurisdiction: In no jurisdiction will prosecutors be free to knowingly secure convictions through lies. But in some jurisdictions, it will be acceptable for prosecutors to do so through both misleading, albeit technically true, testimony and even factually incorrect testimony elicited from a mistaken or ignorant witness. Indeed, in some jurisdictions the measure of process will depend on the sovereign a defendant appears before: if, for example, a defendant in Michigan, Mississippi, or Pennsylvania were convicted of identical offenses in federal and state court on the same misleading but technically true testimony, the resolutions on appeal would be diametrically opposed. But resolution of this issue, which strikes at the heart of the truth-seeking function of a trial, should not be so arbitrary as to depend on jurisdictional happenstance.

C. The question presented is of great concern because it addresses the basic integrity of the criminal trial process.

This Court has maintained that "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). But combatants in the ring, as well as their referees, need to know where the beltline is. By interpreting the constitutional assurances so narrowly as to only protect against perjurious testimony, twelve states and three to seven federal circuits (depending on the panel) would allow prosecutors to score points through misleading testimony and false impressions.

In the technical-perjury jurisdictions, only testimony "given with the willful intent to provide false testimony and not as a result of a mistake, confusion, or faulty memory[,]" can contravene the due process clause requirements. *United States* v. *Ellisor,* 522 F. 3d 1255, 1277 n.34 (11th Cir. 2008). By constraining the due process clause, those jurisdictions would tolerate convictions obtained on false testimony uncorrected by the prosecutor, so long as

(a) the witness was merely forgetful and testified inaccurately by mistake;

(b) the witness is mentally ill or an infant and unable to form the requisite intent to lie;

(c) the witness is unaware that she is testifying falsely because the prosecutor intentionally kept the truth from her; or

(d) the witness provides technically true, but carefully crafted answers that, taken together, paint a warped picture of reality that intentionally distorts the truth.

As far back as 1935, this Court has insisted that it would not "approve such a narrow view of the requirement of due process." *Mooney*,

294 U. S. at 112. This Court made plain in 1957 and again in 1967 that misleading or false testimony, knowingly used by the state to secure a conviction, is incompatible with the fundamental principles of justice and due process. *Napue*, 360 U. S. at 269; *Miller*, 386 U. S. at 7. "There [should] be no retreat from that principle here." *Miller*, 386 U. S. at 7.

The criminal justice system's legitimacy depends an understanding that only those who were fairly convicted should suffer a deprivation of liberty. This understanding is countermanded if prosecutors can knowingly mislead juries into guilty verdicts with false-but-not-technically-perjurious evidence. Justice demands more than technical niceties.

D. This case is a suitable vehicle to resolve whether proof of perjury is a necessary element of a *Napue* claim.

For three reasons, Daniels' case is an appropriate one to decide the question presented.

First, the issue was squarely presented to and decided by the lower court. App. 8a–10a. And because it would arrive in this Court via direct appeal, this Court could decide the question under the broadest standard of review, free of the procedural restraints that attend review of state judgments under the AEDPA.

Second, only the false evidence element of the claim is in play. The other elements—that the prosecution knew of the falsity and that the false testimony was material—were met: The trial prosecutor testified on remand that she was aware of the real reason Taylor left Kroger before the trial began and admitted that she learned the full details surrounding Taylor's resignation before beginning her redirect examination when Daniels's counsel read the resignation letter aloud. Remand Hr'g

T. 20–22, 26, 31–32. And Taylor's false testimony was material because she was the only eyewitness in a case where there was little to no physical evidence that a crime had even occurred at all. *Cf. Giglio*, 405 U. S. at 154 ("A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.") (internal citations and quotations omitted). Moreover, despite the prosecutor's attempts to bolster Taylor's credibility in closing, the jury apparently had some doubts about Taylor's veracity, since it acquitted Daniels of the two most serious charges, attempted rape and false imprisonment—even without knowing that she lied about the circumstances of her departure from Kroger. In sum, the only issue reasonably in dispute is whether Taylor's testimony was false or misleading such that it would trigger the prosecutor's duty to elicit or expose the truth.

Third, Daniels's case cleanly presents exactly the sort of factual issues that have split the lower courts, as Daniels' case involves both misleading testimony that was not necessarily untrue and patently false testimony that may not have risen to the level of perjury. First, Taylor's direct testimony that she left Kroger to pursue a career in healthcare may not have been "necessarily false," but it was surely not her whole or even principal reason; Taylor's relationship with her employer ended because she stole from it. See App. 21a. But, as in *Alcorta* and *Miller*, the distinction between technically false and not-wholly-true is without a difference: Taylor's testimony that she left Kroger because she wanted to pursue a different career deliberately misled the jury. Even if Taylor left both because she was caught shoplifting *and* because she was ready for a new career, by telling only the half of the story that cast her in a

sympathetic light, the prosecutor prevented the jury from fully assessing her credibility. Such an omission—unlike the omission at issue in *Moore*—presented a distort picture of the truth. Nevertheless, courts across the country have struggled over whether such intentionally misleading testimony is false in the constitutional sense.

Next, Taylor's testimony on cross-examination that she was not caught shoplifting went beyond deception by omission, it was an outright falsehood. She admitted in her own handwriting to taking gift cards without permission; keeping those gift cards for personal use; impermissibly using another employee's discount; and to feeling remorse for her thefts—enough that she was willing to pay back the money Kroger was deprived of by her actions. App. at 4a, 26a–27a. The prosecutor and defense counsel testified that they understood Taylor had stolen gift cards from Kroger or had gotten a discount of some sort on Kroger items to which she was not otherwise entitled. Remand Hr'g T. 16, 27. Even assuming the technical elements of shoplifting—rather than its vernacular usage—are what matters, Taylor's actions were shoplifting, under Georgia law. Ga. Stat. Ann. § 16-8-14. It is unclear, however, if Taylor committed the offense of perjury by saying otherwise, because the record is silent as to whether Taylor knew that fact. But whether Taylor was aware that her testimony was false is of no moment: the state was aware of the falsity and failed to correct it. Daniels's case, therefore, presents an opportunity to address both kinds of false testimony that have vexed courts.

CONCLUSION

In most other states that have considered the issue and nearly half the federal circuits, controlling caselaw would mandate a reversal of Daniels' conviction. But because Daniels was prosecuted in Georgia, his conviction stood because Taylor's testimony, while false and misleading, was not technically perjurious. Were this Court to grant certiorari in this case, it could ensure that similarly situated defendants would receive an equal measure of justice in every jurisdiction.

The petition for a writ of certiorari should be granted.

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