No. 19-____

IN THE
Supreme Court of the United States

CHARLES FARRAR,
Petitioner,

v.

DEAN WILLIAMS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, PHIL WEISER, ATTORNEY GENERAL OF THE STATE OF COLORADO, AND JEFF LONG, WARDEN, STERLING CORRECTIONAL FACILITY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

GAIL K. JOHNSON
JOHNSON & KLEIN, PLLC
1470 Walnut Street
Suite 101
Boulder, CO 80302
(303) 444-1885
gjohnson@johnsonklein.com

CATHERINE E. STETSON
Counsel of Record
KIRTI DATLA
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

The question presented, which has divided fourteen federal courts of appeal and state high courts, is:

Whether the Due Process Clause is violated when the prosecution relies on material, perjured testimony to secure a conviction but did not know the testimony was perjured until after the trial, as six courts have held, or whether the prosecution's contemporaneous knowledge of the perjured testimony is required, as eight courts have held.

PARTIES TO THE PROCEEDING

Charles Farrar, petitioner on review, was the petitioner-appellant below.

Dean Williams, Executive Director, Colorado Department of Corrections; Phil Weiser, Attorney General of the State of Colorado; and Jeff Long, Warden, Sterling Correctional Facility, are respondents on review.

Rick Raemisch, (former) Executive Director, Colorado Department of Corrections; Cynthia Coffman, (former) Attorney General of the State of Colorado; and James Falk, (former) Warden, Sterling Correctional Facility, were respondents-appellees below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *People* v. *Farrar*, No. 01CR505 (Colo. Dist. Ct. July 14, 2005), *aff'd*, No. 02CA1358 (Colo. Ct. App. Oct. 4, 2007), *aff'd*, No. 07SC983 (Colo. Sup. Ct. May 26, 2009) (reported at 208 P.3d 702)
- *People* v. *Farrar*, No. 01CR505 (Colo. Dist. Ct. Jan. 12, 2012), *aff'd* No. 12CA0387 (Colo. Ct. App. Aug. 29, 2013), *cert. denied*, No. 2013SC8917 (Colo. Sup. Ct. Oct. 14, 2014)
- *Farrar* v. *Raemisch, et al.*, No. 15-cv-01425-RPM (D. Colo. May 31, 2017), *aff'd*, No. 18-1005 (10th Cir., May 21, 2019) (reported at 924 F.3d 1126)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 19-

CHARLES FARRAR,
Petitioner,

v.

DEAN WILLIAMS, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS,
PHIL WEISER, ATTORNEY GENERAL OF THE
STATE OF COLORADO, AND JEFF LONG, WARDEN,
STERLING CORRECTIONAL FACILITY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Charles Farrar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 924 F.3d 1126 (2019). Pet. App. 1a-14a. That court's order denying rehearing is not reported. *Id.* at 139a-140a. The District Court's Order and Judgment are not reported. *Id.* at 18a-22a, 23a-24a. The Colorado

Supreme Court's opinion is reported at 208 P.3d 702 (2009). Pet. App. 71a-92a. The Colorado Court of Appeals' opinion affirming the district court's denial of a new trial is not reported. *Id.* at 93a-127a. The District Court, Arapahoe County, Colorado's order denying Petitioner's motion for new trial is not reported. *Id.* at 128a-138a.

JURISDICTION

The Tenth Circuit entered judgment on May 21, 2019. Petitioner filed a timely petition for rehearing en banc, which was denied on August 29, 2019. Justice Sotomayor granted a 60-day extension of the period for filing this petition to January 27, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

Charles Farrar is serving a life sentence for convictions that rest on the testimony of one witness who unequivocally recanted a year after his trial. He sought federal habeas relief on the ground that a conviction that rests on perjured testimony violates due process. In denying his claim, the Tenth Circuit held that a conviction that rests on perjured testimony does not violate due process unless the government knew at the time of trial that the testimony was false.

That holding deepened an existing split among the federal courts of appeals and state high courts. This Court should grant certiorari to resolve this conflict and correct the narrow view of due process adopted in the decision below.

In 2000, Farrar's then 15-year-old stepdaughter ("S.B.") accused both her mother and Farrar of sexually abusing her over a four-year period. S.B.'s testimony was the only direct evidence at Farrar's trial. One year after the jury convicted Farrar, S.B. recanted in an affidavit prepared while she was represented by her own counsel. She explained that she had lied because she wanted to live with her grandparents, and her false accusations were the means to that end.

Farrar sought habeas relief on the ground that his conviction violated due process because it rested on S.B.'s perjured testimony. Because the Colorado courts Farrar turned to first had not addressed the merits of his due process claim, the Tenth Circuit reviewed that claim de novo and held that due process protects against only a *knowing* use of perjured testimony. Farrar did not allege in the Tenth Circuit that the government knew of S.B.'s perjury at the time of trial, and so that court denied relief.

The Tenth Circuit's decision deepened a recognized split across *fourteen* federal courts of appeals and state supreme courts. Six courts recognize that a due-process violation occurs when a defendant is convicted on the basis of material, perjured testimony, regardless of whether the government knew of the perjury at the time of the trial. *See Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003); *Killian* v. *Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Ex parte*

Chabot, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009); *Commonwealth* v. *Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999); *Riley* v. *State*, 567 P.2d 475, 476 (Nev. 1977); *Case* v. *Hatch*, 183 P.3d 905, 910 (N.M. 2008). Had Farrar been convicted in any of these six jurisdictions, he would have received a new trial and likely would have been acquitted. He has not. Instead, the Tenth Circuit joined the seven other courts that require contemporaneous government knowledge to find a due-process violation when a conviction is based on perjured testimony. *See Kutzner* v. *Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002); *Blalock* v. *Wilson*, 320 F. App'x 396, 413-414 (6th Cir. 2009); *Shore* v. *Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir. 1991); *United States* v. *Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994); *People* v. *Brown*, 660 N.E.2d 964, 970 (Ill. 1995); *In re Pers. Restraint Petition of Rice*, 828 P.2d 1086, 1093 & n.2 (Wash. 1992); *State* v. *Lotter*, 771 N.W.2d 551, 562 (Neb. 2009).

This case presents an unusually clean vehicle for this Court to resolve this split. This is the rare federal habeas case where the constitutional claim is subject to de novo review. And the question is outcome determinative. The State itself explained that the verdict against Farrar turned on whether the jury believed S.B., and S.B. herself explained that her testimony was false. The only barrier to Farrar obtaining relief is the Tenth Circuit's erroneous due-process holding. The Due Process Clause preserves the fundamental fairness of trials, and a conviction based on perjured testimony is fundamentally unfair, whether or not the government intended to secure a conviction based on that testimony. The Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

1. In 2000, S.B., then 15, accused both her mother and Farrar of sexual abuse. Pet. App. 72a. S.B. first called her maternal grandmother and told her that Farrar had touched her inappropriately. *Id.* at 212a, 213a-214a. She provided no further details.

The next day, she repeated her allegation to her school counselor. *Id.* at 214a-216a. The counselor notified the authorities. *Id.* at 216a. Later that day, members of law enforcement and social services interviewed S.B. *Id.* at 220a-221a. S.B. painted a picture of systematic and escalating sexual abuse perpetrated by her mother and Farrar. *Id.* at 235a-244a. S.B. was placed in foster care, and later moved to Oklahoma to live with her maternal grandparents. *Id.* at 175a-176a.

2. S.B.'s mother and Farrar were charged with multiple counts of sexual-assault-related offenses against S.B. *Id.* at 72a; *id.* at 37a. Their cases were severed for trial. *Id.* at 37a. At Farrar's trial, S.B. testified that her mother and Farrar had both sexually abused her "at least a hundred times" over the previous four years. *Id.* at 200a. S.B. alleged abuse ranging from inappropriate touching to intercourse with her mother and Farrar. *Id.* at 189a-190a, 193a, 195a-199a, 222a-227a. According to S.B., most of the abuse took place in the master bedroom, which did not have a door for much of this period, in a house where S.B.'s five siblings and Farrar's parents also lived. *Id.* at 188a, 193a-194a, 200a-201a. No one in the house claimed to have witnessed or heard the events S.B. alleged.

Some of S.B.'s allegations were, as the trial court later put it, "difficult to believe" or "bizarre." *Id.* at 133a, 134a. One involved S.B.'s mother prohibiting S.B. from going to a middle school dance unless S.B. "engage[d] in a sex act with her mother after her mother had had sexual intercourse with" Farrar. *Id.* at 134a-135a. Another involved Farrar offering to prostitute S.B. to his friends. *Id.* at 135a.

S.B.'s "testimony was the only direct evidence of the assaults, without physical or eyewitness corroboration." *Id.* at 72a; *see also id.* at 3a. Farrar's two stepdaughters from a previous marriage "testified as to prior sexual contact with" Farrar "while he was living with them and their mother," but the trial court limited this testimony "to refut[e] allegations of recent fabrication and" to show modus operandi. *Id.* at 96a-97a. In the State's words, the "case c[a]me[ ] down to [the] credibility" of S.B. *Id.* at 246a.

The jury convicted Farrar on the counts flowing from S.B.'s more general accusations but acquitted him of six counts "involv[ing] events" S.B. "described in graphic detail" (including the middle-school-dance incident and the offer-to-prostitute incident). *Id.* at 20a, 134a-135a. The trial court sentenced Farrar "to prison for a minimum of 145 years and a maximum of life." *Id.* at 3a. The State dismissed the charges against S.B.'s mother after Farrar's conviction. *Id.* at 37a.

3. A year after the conviction, S.B. recanted. Then 18 years old and living on her own, S.B. called her mother because she "wanted to tell the truth about what had actually happened." *Id.* at 165a. S.B. hired a lawyer and—after repeated warnings that her recantation could expose her to criminal liability,

id. at 165a-170a—swore in an affidavit that her prior accusations and testimony were untrue.

The affidavit explained that after S.B.'s mother started residing with Farrar, and the family expanded to include two of Farrar's sons, she "felt" that she "did not belong with the family." *Id.* at 174a. She "was very resentful of" her stepbrothers, and "felt as though" they "were given more love and attention by" her mother and Farrar. *Id.* She also grew "very angry towards" her mother and Farrar after they barred her from speaking with her maternal grandfather after a family dispute. *Id.* at 175a.

S.B. "came up with an idea that" she "thought would result in" her "being able to stay with" her grandparents: accusing her mother and Farrar of sexual assault. *Id.* But "[t]hese allegations were completely false." *Id.* ("Neither my Mother, nor my Stepfather, ever subjected me to any sexual abuse."). S.B. had gotten cold feet about the lies almost immediately and tried to walk them back. *Id.* at 175a-176a. But according to S.B., the authorities either rebuffed her or warned her that she would be "locked up in a mental institution" if she did not testify. *Id.* at 176a-177a. S.B. "had trouble sleeping since" she "made these allegations," and, when she did sleep, she had "nightmares about ruining innocent lives." *Id.* at 177a.

B. Procedural History

1. Following S.B.'s full recantation, Farrar sought a new trial based on newly discovered evidence. Pet.

App. 128a-129a; Colo. R. Crim. P. 33.[1] The trial court held a "number of evidentiary hearings," at which it heard from S.B., "her maternal grandmother and her maternal uncle; as well as the prosecutors, social workers, guardian ad litem from the parallel dependency and neglect proceedings, and" S.B.'s former boyfriend. Pet. App. 73a.

At two hearings held months apart, S.B. testified that every part of her sexual-assault allegations and testimony was false. *Id.*; *see also id.* at 160a-161a, 164a-173a. She reiterated that she saw her lies as a way for her "to live with her maternal grandparents." *Id.* at 73a. She also denied that she had been pressured to recant. *Id.* And S.B.'s "grandmother testified that she was personally rebuffed before trial when she tried to caution the prosecutors about the victim's lack of credibility." *Id.* at 74a.

The prosecutor, in turn, "denied the victim's allegations of misconduct and testified that" S.B. "never told them her accusations of sexual abuse were false." *Id.* S.B.'s guardian ad litem testified that S.B.'s uncle told him that S.B.'s mother pressured S.B. to recant; S.B.'s uncle testified that he said no such thing. *Id.* at 74a-75a. Finally, S.B.'s former boyfriend "testified that she told him she had actually been sexually abused" and that she was going to recant; S.B. disputed this testimony. *Id.* at 75a.

---

[1] In Colorado, "claims of newly discovered evidence do not draw into question the constitutionality of a criminal conviction." Pet. App. 76a-77a. Instead, whether to grant a new trial is a matter of discretion. *Id*. at 77a.

Colorado state law imposes four requirements for a new trial based on newly discovered evidence: (1) the evidence must have been "discovered after trial"; (2) the defense must have exercised reasonable diligence to discover all "favorable evidence before and during trial"; (3) "the newly discovered evidence [must be] material to relevant issues"; and (4) the defense must show that "the newly discovered evidence would probably bring about an acquittal at a new trial." *Id.* at 132a. The parties stipulated to the first three factors. "[T]he only disputed factor [wa]s whether the newly discovered evidence would probably bring about an acquittal at a new trial." *Id*. Where a conviction rests on later-recanted testimony, this requires determining whether a new jury, at a new trial, would believe the witness's new testimony over the old testimony (which would almost certainly be admitted as evidence). *Id.* at 136a-137a.

The trial court denied Farrar's motion for a new trial. *Id.* at 128a-138a; *see id.* at 67a. It held that S.B.'s recantation would probably not lead to "a complete acquittal at a new trial." *Id.* at 137a. It broke S.B.'s recantation into two pieces: her claim of prosecutorial misconduct, and her general recantation of her earlier allegations. As to the first, the court held that her claim was not "worthy of belief." *Id.* at 135a. As to the second, however, the court explained that S.B. "had substantial credibility issues, with regard to both her testimony at trial and her testimony supporting the motion for new trial." *Id.* at 75a-76a; *see id.* at 136a. And it noted that S.B.'s "performance at trial suggests that jurors were able to sift through her testimony, accepting some of it and rejecting other parts." *Id.* at 136a-137a. The court concluded that the same would likely happen

at a new trial: "In all probability, another jury would accept some of" S.B.'s "contentions and reject others." *Id.* at 137a. Because a new jury would not likely completely acquit Farrar, it denied his motion. *Id.*

Farrar appealed to the Colorado Court of Appeals, arguing, among other things, that the trial court erred in denying the motion for a new trial. *Id.* at 124a-126a; *see id.* at 76a. The Court of Appeals affirmed. *Id.* at 124a-127a.[2]

Farrar sought certiorari in the Colorado Supreme Court. *Id.* at 71a-72a. The court reaffirmed the trial court's ruling that a new trial hinged on establishing that the jury would probably believe S.B.'s recantation over her original testimony. *Id.* at 82a-83a. Thus, a recantation "can justify a new trial only to the extent that it not only impeaches the prior testimony but does so by contradicting it with a different and more credible account." *Id.* at 82a. In a 4-3 decision, the court held that S.B.'s recantation did not meet that standard and that Farrar was not entitled to a new trial. *Id.* at 86a.

2. After seeking state post-conviction relief,[3] Farrar filed a petition for a writ of habeas corpus in the

---

[2] The Colorado Court of Appeals also reversed the conviction and sentence as to one count (a pattern-of-abuse count), because it did not allege a predicate act, and remanded for correction of another count, because the order incorrectly stated that Farrar was convicted of a different crime. *See* Pet. App. 117a. In 2011, the trial court resentenced Farrar on the reversed count and modified its order on the other count. *See id.* at 40a-41a.

[3] In 2011, Farrar moved for reconsideration of his sentence under Colorado Rule of Criminal Procedure 35(b); the trial court denied it. Pet. App. 54a-55a, 70a. He then filed a pro se

U.S. District Court for the District of Colorado, claiming, according to the district court, that the trial court's "refusal to grant him a new trial after" S.B. "recanted all of her testimony is a violation of his Constitutional right to due process of law under the Fourteenth Amendment." *Id.* at 18a. The district court denied relief, holding that the trial court's findings violated no "clearly established Federal law as determined by the United States Supreme Court," as required by 28 U.S.C. § 2254(d). *Id.* at 21a-22a.

The court then appointed Farrar new counsel, and counsel sought alteration of the order and judgment. *Id.* at 15a. Counsel clarified that Farrar's due-process claim was triggered when he was convicted "on the basis of false evidence in the form of perjured witness testimony—even absent proof the prosecution knew about the perjury at the time of trial." *Id.* at 147a. The district court denied the motion, explaining that it "denied relief because of the limitations imposed by 28 U.S.C. § 2254(d)." *Id.* at 16a.

3. Farrar appealed. The Tenth Circuit first held that 28 U.S.C. § 2254(d) did not apply to Farrar's due-process claim because the Colorado courts did not "adjudicate the merits of Mr. Farrar's constitutional claims." Pet. App. 4a-5a. The Tenth Circuit accordingly "engage[d] in de novo review of the district court's legal ruling." *Id.* at 4a. It also recog-

---

motion for post-conviction relief under Colorado Rule of Criminal Procedure 35(c), raising constitutional claims, including that the State's *knowing* use of S.B.'s perjured testimony at trial violated his due-process rights. *Id.* at 36a, 41a-42a. The trial court summarily denied that claim. *Id.* at 50a. The Colorado Supreme Court denied certiorari. *See id.* at 25a.

nized that while "the State asserted a defense of procedural default" in its briefing, it had "expressly waived this defense" at oral argument. *Id.* at 5a n.4.

The Tenth Circuit then rejected Farrar's due-process claim on the merits. *Id.* at 8a-10a. It acknowledged that Farrar had explained that the Second and Ninth Circuits "authorize habeas relief even when the government unwittingly elicits false testimony." *Id.* at 8a. But the Tenth Circuit disagreed with these courts. *Id.* at 9a. It held that "the government's knowledge is required for a constitutional violation." *Id* at 10a. The court based this rule in circuit precedent, nearly all of which had been decided in cases involving allegations that the prosecution *knowingly* used perjury. *Id.* at 9a-10a & nn.7-8. Because Farrar did "not allege that the government knowingly elicited any false trial testimony," it denied relief. *Id.* at 8a, 10a.

The Tenth Circuit denied Farrar's petition for rehearing en banc. *Id.* at 139a-140a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CLEAR SPLIT AMONG FOURTEEN FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

The decision below deepens a well-developed split in the state and federal courts. *See, e.g.*, *Spaulding*, 991 S.W.2d at 656 ("[T]here is a split of authority as to whether the unknowing use of perjured testimony can create a denial of due process."). The Second and Ninth Circuits, as well as the high courts of Texas, Kentucky, Nevada, and New Mexico, hold that due

process is violated where a conviction rests on material, perjured testimony, regardless of whether the government knowingly elicited that perjury. *See Ortega*, 333 F.3d at 108; *Killian*, 282 F.3d at 1208; *Chabot*, 300 S.W.3d at 772; *Spaulding*, 991 S.W.2d at 657; *Riley*, 567 P.2d at 476; *Case*, 183 P.3d at 910. The Tenth Circuit joined the Fifth, Sixth, Seventh, and Eleventh Circuits, and the supreme courts of Illinois, Washington, and Nebraska, in holding that the government's *knowing* use of perjury is required for a conviction based on perjured testimony to violate due process. *See Kutzner*, 303 F.3d at 337; *Blalock*, 320 F. App'x at 413-414; *Shore*, 942 F.2d at 1122; *Michael*, 17 F.3d at 1385; *Brown*, 660 N.E.2d at 970; *Rice*, 828 P.2d at 1093 & n.2; *Lotter*, 771 N.W.2d at 562.

1. In the Second and Ninth Circuits, and in Texas, Kentucky, Nevada, and New Mexico, the government's knowledge of perjury is *not* required to state a due-process violation. Instead, those jurisdictions hold that the Due Process Clause is violated when the defendant can show that there is a reasonable probability that, but for the perjured testimony, she would not have been convicted.

The Second Circuit first adopted this test in *Sanders* v. *Sullivan*, 863 F.2d 218 (2d Cir. 1988). That court noted that "the rule in many jurisdictions" requires governmental knowledge of perjury at the time of trial. *Id.* at 222; *see also id.* at 223-224. But it found these cases "unpersuasive." *Id.* at 224. For the Second Circuit, "[i]t is simply intolerable * * * that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies." *Id.* It thus

held that "recantations of material testimony that would most likely affect the verdict rise to the level of a due-process violation, if a state, alerted to the recantation, leaves the conviction in place." *Id.* at 222.

The Second Circuit reiterated this rule in *Ortega*. There, a purported eyewitness to a murder recanted his testimony, but the State had no "knowledge of the perjury" at the time of trial. *Ortega*, 333 F.3d at 104-106, 108 n.3. The court held that the witness's "purported eyewitness testimony of the * * * murder and his identification of" the defendant "as the shooter was clearly material to" the defendant's conviction. *Id.* at 108-109. The "testimony was essential to the government's case": The trial was a swearing match between the witness and two of the surviving victims—one who testified (and later recanted) that the defendant was the shooter, and one who testified that the defendant was not. *Id.* at 109. The witness's testimony thus "had the probable impact of swinging the balance against" the defendant. *Id.* As the court held, a defendant's due-process rights are violated "when false testimony is provided by a government witness without the prosecution's knowledge," that testimony is 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." *Id.* at 108 (brackets in original and internal quotation marks omitted). Because this test was met, the court granted relief.[4]

---

[4] *Ortega* was a federal habeas case, but like this case, was not governed by 28 U.S.C. § 2254(d) because "the state court never adjudicated the issue of * * * perjury." 333 F.3d at 108 n.4.

The Ninth Circuit reached the same conclusion in *Killian*. There, a witness recanted testimony that went "to the very heart of whether and to what extent" the defendant was involved in the crime. 282 F.3d at 1208. The Ninth Circuit held that a witness's perjury violates a defendant's due-process rights "without deciding that the prosecutor neither knew nor should have known of" the witness's "perjury." *Id.* The court explained that "[w]hile the prosecution may well have known that" the witness "lied" on the stand, "such a belief is not necessary to" resolving the case. *Id.* at 1209. "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness." *Id.* (quoting *United States* v. *Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994)). Thus, the court reiterated its rule that a defendant's due-process rights are violated when "there is a reasonable probability that, without * * * the perjury, the result of the proceeding would have been different." *Id.* (citing *Young*, 17 F.3d at 1203-04). Because the witness in *Killian* "perjured himself several times and because he was the 'make-or-break' witness for the state," this standard was easily satisfied, and the court granted relief. *Id.*[5]

The Texas Court of Criminal Appeals aligned with these federal courts in *Chabot*. 300 S.W.3d at 771. It held that there is "no reason" to distinguish between "unknowing" and "knowing" uses of perjured

[5] Here, too, "AEDPA deference d[id] not apply to" the "perjury claim in this case because the state courts" did not and "could not have made a proper determination on the merits." *Killian*, 282 F.3d at 1208.

testimony. *Id.* Instead, *both* trial errors demand relief where the defendant can "prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Id.* (quoting *Ex parte Fierro*, 934 S.W.2d 370, 374-375 (Tex. Crim. App. 1996)).[6] *Chabot* addressed the testimony of a witness who "provided the only direct evidence that the" defendant "sexually assaulted and killed" the victim. *Id.* at 772. This "testimony was critical to" the State's case, and the State acknowledged "that it predicated its trial theory on [t]his testimony." *Id.* But a DNA test later "refute[d]" this testimony. *Id.* The court therefore held that the defendant's "due-process rights were violated, notwithstanding the absence of the State's knowledge of the perjured testimony at the time of trial." *Id.*

And in *Spaulding*, the Kentucky Supreme Court held "that in the appropriate case the introduction of perjured testimony, which is not known as such by the prosecutor, can result in a violation of the right to due course of law and the right to due process of law as provided by the Kentucky and United States Constitutions." 991 S.W.2d at 657. The court recognized the "split of authority as to whether the unknowing use of perjured testimony can create a denial of due process," *id.* at 656, but held that the

---

[6] The Texas Court of Criminal Appeals has not "definitively" formulated "the materiality standard in unknowing-use-of-false-evidence" cases, but has "strongly suggested" that the defendant must show a "reasonable likelihood that, but for the State's reliance on false evidence," the original "trial would have ended in an acquittal." *Ex parte Fierro*, No. WR-17,425-03, 2019 WL 6896993, at *4 (Tex. Crim. App. Dec. 18, 2019) (internal quotation marks omitted).

"integrity of the judicial process" demands due-process protection against the unknowing use of perjury, *id.* at 657. However, the defendant must still establish that the "conviction probably would not have resulted had the truth been known." *Id.* It was that materiality requirement that doomed the *Spaulding* defendant's due-process claim. Though the main eyewitness had committed perjury in the defendant's trial, eighteen other witnesses had testified to the defendant's involvement in the crime. *Id.* at 653-654, 658. Because honest testimony from the main eyewitness would not have overcome this mountain of testimony, the court denied relief. *Id.* at 658.

The Supreme Court of Nevada followed in *Riley*. It explained that the "truth seeking function of the trial is corrupted by * * * perjury whether encouraged by the prosecutor or occurring without his knowledge." *Riley*, 567 P.2d at 476. Accordingly, the court held that a conviction obtained by the unknowing use of perjury "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* *Riley* concerned an attempted-murder conviction. *Id.* at 475. "At a post-trial hearing, and in response to" a court order "to investigate apparent perjury," the State "advised the court that 'it appears that about ninety percent of the witnesses lied.'" *Id.* at 475-476. Worse, "[s]ome of the perjured testimony concerned the critical issue whether the shooting was accidental or intentional." *Id.* at 476. Although there was "no suggestion * * * that the prosecutor knowingly used perjured testimony," the court held "that if the character of material evidence is false, due process inevitably is denied

the accused." *Id.* And so it reversed the conviction. *Id.*[7]

Finally, the Supreme Court of New Mexico adopted the same approach in *Case*. There, the court recognized that the question whether the unknowing use of perjury entitles a defendant to relief "is unsettled." 183 P.3d at 910 (collecting cases). But the court held that New Mexico's interest "in ensuring accuracy in criminal convictions in order to maintain credibility within the judiciary" demanded due-process protection for the unknowing use of perjury. *Id.* (quoting *Montoya* v. *Ulibarri*, 163 P.3d 476, 483 (N.M. 2007)).[8]

---

[7] *Riley* rooted this decision in the federal Due Process Clause, five Supreme Court cases analyzing the federal Due Process Clause, and its own state Due Process Clause. *See* 567 P.2d 475-476. In an unpublished decision, *Nelson* v. *State*, 401 P.3d 1066 (Table), 2017 WL 4053771 (Nev. 2017), the Nevada Supreme Court suggested that *Riley* was rooted in the Nevada Constitution. *Id.* at *1. *Nelson*, however, misread this Court's no-perjury line of cases, *see infra* pp. 25-29, and ignored a consistent line of Nevada decisions reading its state Due Process Clause as coextensive with the federal Due Process Clause. *See, e.g.*, *Saticoy Bay LLC Series 350 Durango 104* v. *Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970, 972 n.3 (Nev. 2017); *State* v. *Eighth Judicial Dist. Court (Logan D.)*, 306 P.3d 369, 377 (Nev. 2013).

[8] *Case* also cited *Sanders*—a federal-law decision—for this rule. Because *Case* cited federal law and did not explicitly hold that its decision was rooted in state law, this Court may presume that it was decided under federal due-process principles. *See Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) ("[W]hen * * * a state court decision fairly appears to rest primarily on federal law * * * and when the adequacy of any possible state ground is not clear from the face of opinion, we will accept as the most reasonable explanation that" the case was decided under federal law.).

The court then looked to the Second Circuit's decision in *Sanders* for the standard: "[T]he reviewing court must determine whether it is left 'with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *Case*, 183 P.3d at 911 (quoting *Sanders*, 868 F.2d at 226). The court then denied relief on separate grounds: The so-called newly discovered evidence—recantations 20 years after the trial—were not newly discovered because the witnesses had originally told the police that they had no knowledge of the crime. *Id.* at 917.

This issue is frequently litigated in these jurisdictions, and courts routinely reiterate and apply the no-knowledge requirement. *See Quezada* v. *Smith*, 624 F.3d 514, 521-522 (2d Cir. 2010) (applying *Sanders* to allow second habeas application); *United States* v. *Walker*, 289 F. Supp. 3d 560, 566 (S.D.N.Y. 2018) (granting a new trial where "the prosecution * * * did not know, and had no reason to know, of the perjury prior to the conclusion of * * * trial"); *United States* v. *Walker*, No. 2:03-cr-0042-MCE-EFB P, 2017 WL 3438763, at *44 (E.D. Cal. Aug. 10, 2017) (reiterating no-knowledge requirement but not granting relief for failure to show falsity), *report and recommendation adopted*, No. 2:03-cr-0042-MCE-EFB P, 2018 WL 3012474 (E.D. Cal. June 15, 2018); *Fierro*, 2019 WL 6896993, at *4-8 (reiterating no-knowledge requirement but not granting relief for failure to show falsity or materiality); *Ex Parte Weinstein*, 421 S.W.3d 656, 665-669 (Tex. Crim. App. 2014) (reiterating no-knowledge requirement but not granting relief for failure to show materiality); *Meece* v. *Commonwealth*, 529 S.W.3d 281, 290 (Ky. 2017) (same); *Bowling* v. *Commonwealth*, No. 2006-SC-000034-MR,

2008 WL 4291670, at *3 (Ky. Sept. 18, 2008) (same); *Church* v. *State*, 281 P.3d 1161 (Table), 2009 WL 1491047, at *2 (Nev. 2009) (reiterating rule).[9]

2. The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, joined by the high courts of Washington, Illinois, and Nebraska, take the opposite approach. In these courts, the government's *knowing* use of perjury violates a defendant's due-process right—but its unknowing use of perjury does not. Most reached this holding by reading this Court's cases that bar the knowing use of perjury as setting out the *only* way perjury can violate due process. *See United States* v. *Barham*, 595 F.2d 231, 241-242 (5th Cir. 1979); *United States* v. *Jakalski*, 237 F.2d 503, 504-505 (7th Cir. 1956); *Williams* v. *Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984); *Rice*, 828 P.3d at 1093 & n.2; *Lotter*, 771 N.W.3d at 562. Two concluded that government knowledge is required to meet the state-action requirement in the due-process context. *See Burks* v. *Egeler*, 512 F.2d 221, 224 (6th Cir. 1975); *Brown*, 660 N.E.2d at 970.

In *Kutzner*, the Fifth Circuit held that "due 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." 303 F.3d at 337. There, the court denied a defendant leave to file a successive habeas application on the ground that "the State

[9] Other jurisdictions have acknowledged the split but have not decided the question themselves. *See Horn* v. *Comm'r of Corr.*, 138 A.3d 908, 927-928 (Conn. 2016) (recognizing split but declining to reach the issue); *Wolfe* v. *Clarke*, 691 F.3d 410, 416 (4th Cir. 2012) (declining to reach issue).

knowingly put on false testimony" because he had not shown that the State knowingly used perjured testimony. *Id.* at 336-337. Despite that posture, the Fifth Circuit has held that *Kutzner* is "circuit precedent holding that false testimony gives rise to a due process claim *only if* the State had contemporaneous knowledge of the falsity." *Pierre* v. *Vannoy*, 891 F.3d 224, 228 n.3 (5th Cir. 2018) (emphasis added).

Likewise, in *Blalock*, the Sixth Circuit held that "[c]ircuit precedent establishes that the government must have 'knowingly' used perjured testimony at trial in order for the presentation of that testimony to constitute a violation of due process." 320 F. App'x at 413-414 (quoting *Burks*, 512 F.2d at 229-230).[10] The defendant there was convicted for murder based, in part, on the testimony of a particular witness. *Id.* at 398-400. The defendant later came into possession of a recording in which the witness stated that she had lied to the police and suggested that she was the murderer. *Id.* at 403-407. Recognizing that the Second Circuit applies a different rule, *see id.* at 414 n.22, the Sixth Circuit denied federal habeas relief because the defendant did not show "that the prosecutor played a knowing role in the presentation of the allegedly perjured testimony." *Id.* at 414.

The Seventh Circuit applied the same rule in *Shore*, stating that "[i]t is the knowing and intentional use of" perjured "testimony by the prosecuting authorities that is a denial of due process." 942 F.2d

---

[10] In *Blalock*, like in this case, the court did not review "the state court's decision under AEDPA's 'clearly established federal law' standard, because the state court did not consider th[e] claim." 320 F. App'x at 413.

at 1122 (internal quotation marks omitted). There, the defendant claimed that a trial witness lied on the stand. *Id.* at 1121. The Seventh Circuit held that the defendant "d[id] not contend, nor d[id] the record show, that the state knowingly or intentionally used perjured testimony in obtaining his conviction." *Id.* at 1122. In so doing, the court recognized that the Second Circuit would rule differently, but declined to adopt its sister circuit's rule. *Id.*

In *Michael*, the Eleventh Circuit called it "axiomatic"—despite multiple conflicting federal and state appellate court holdings—"that only the knowing use of false testimony constitutes a due process violation." 17 F.3d at 1385. Using that rule, the court affirmed the denial of a new trial based on three alleged instances of perjury during the trial. *Id.* at 1385-86. For each instance, the court held that the defendant had failed to show that "the government knowingly presented false testimony." *Id.* at 1385.

The Supreme Court of Illinois adopted the same approach in *Brown*. In that case, the court acknowledged that the "Federal courts are split on th[is] issue," and concluded that "the better rule is the one expressed in those cases requiring an allegation of knowing use of false testimony in order to establish a constitutional violation." 660 N.E.2d at 969-970. The court thus affirmed the trial court's dismissal of the defendant's claim that his conviction flowed from perjury, which contained "nothing * * * that remotely pointed to the State's knowing use of perjured testimony." *Id.* at 967, 971.

The Supreme Court of Washington, too, finds due-process violations based on perjury only where the "prosecution knowingly used [the] perjured testimo-

ny." *Rice*, 828 P.2d at 1093 n.2. In *Rice*, the defendant argued that the prosecution had "presented a 'false impression' about" certain "psychological evidence." *Id.* But the court rejected that claim because the defendant had put forth "no evidence that the prosecution knowingly used perjured testimony regarding" the defendant's "mental condition." *Id.*

And in *Lotter*, the Nebraska Supreme Court held that "[p]erjury per se is not a ground for collateral attack on a judgment." 771 N.W.2d at 561. *Lotter* concerned a state post-conviction "claim that the mere presence of perjured testimony, regardless of the State's knowledge that it was perjured, violated his rights to due process." *Id.* The court recognized the split of authority on this question, but held that "it is axiomatic that the truth-seeking process is not defective simply because not all evidence weighed by the trier of fact was actually true." *Id.* at 562. The court then applied this rule to the defendant's claim—which arose from the recantation of a key witness—to deny relief. *Id.* at 563.

Nearly every court on this side of the split has acknowledged the division in the cases. *See United States* v. *Castano*, 906 F.3d 458, 464 (6th Cir. 2018) (noting split with Second Circuit); *In re Pers. Restraint of Benn*, 952 P.2d 116, 151 (Wash. 1998) ("[T]here is a split of authority among the federal circuit courts on this issue."); *Smith* v. *Black*, 904 F.2d 950, 962 (5th Cir. 1990) (noting that the Second Circuit's rule "differs from the rule adhered to in the Fifth Circuit"), *cert. granted and judgment vacated*, 503 U.S. 930 (1992); *Blalock*, 320 F. App'x at 414 n.22 (recognizing that Second Circuit applies a

different rule); *Shore*, 942 F.2d at 1122 (same); *Jacobs* v. *Singletary*, 952 F.2d 1282, 1287 n.3 (11th Cir. 1992) (same); *Benn*, 952 P.2d at 151 ("[T]here is a split of authority among the federal circuit courts on this issue."); *Lotter*, 771 N.W.2d at 480 ("The majority of the federal circuits, however, reject the Second Circuit's conclusion that affirmative prosecutorial involvement is not a necessary element of a due process violation based on perjured testimony.").

Moreover, the knowledge requirement is routinely imposed by these courts. *See, e.g.*, *In re Swearingen*, 935 F.3d 415, 420 n.2 (5th Cir. 2019); *Pierre*, 891 F.3d at 228 n.3 (noting that "a long line of circuit precedent hold[s] that false testimony gives rise to a due process claim only if the State had contemporaneous knowledge of the falsity" and collecting cases); *Monea* v. *United States*, 914 F.3d 414, 421 (6th Cir. 2019); *Castano*, 906 F.3d at 464; *Tayborn* v. *Scott*, 251 F.3d 1125, 1130 (7th Cir. 2001) ("It is well-established that the introduction of perjured testimony, without more, does not rise to the level of a constitutional violation warranting federal habeas relief."); *U.S. ex rel. Kendrick* v. *McCann*, No. 08 C 6281, 2010 WL 3700233, at *16 (N.D. Ill. Sept. 8, 2010); *United States* v. *Wright*, No. 8:16-CR-422-T-27MAP, 2018 WL 2451247, at *2 (M.D. Fla. May 31, 2018); *Reid* v. *Bolling*, No. 217CV01659AKKTMP, 2018 WL 6171544, at *2 (N.D. Ala. Nov. 26, 2018); *People* v. *Bomar*, 2019 IL App (3d) 180527-U, 2019 WL 3334666, at *8, *appeal denied*, 135 N.E.3d 568 (Ill. 2019) (Table); *State* v. *Dockery*, 5 Wash. App. 2d 1024, 2018 WL 4603139, at *8 (2018), *review denied*, 432 P.3d 781 (Wash. 2019) (Table).

The Court should grant certiorari and resolve this clear split, which now affects *fourteen* state and federal courts. Eight state and federal courts explicitly require defendants to show that the government knew or should have known of the perjury in order to claim a due-process violation. Six impose no such requirement. This Court's intervention is warranted.

II. THE DECISION BELOW IS WRONG.

The Tenth Circuit's position, on a grave constitutional matter, is wrong. A conviction built on perjury violates due process whether or not the government was aware of that perjury at the time of trial.

1. Constitutional protection against the government's use of perjury flows from the need to "avoid[ ] * * * an unfair trial," not the desire to "punish[ ] * * * society for misdeeds of a prosecutor." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). This Court's no-perjury precedents first addressed the *deliberate* use of perjury. Subsequent cases steadily clarified that the Due Process Clause is concerned with ensuring that the defendant receives a fair process—regardless of the subjective mental state of the prosecutor during trial.

Start with the groundwork. In *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (per curiam), the Court explained that "due process * * * embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 112. *Mooney*'s basic principle would come to form the foundation for this Court's no-perjury line of cases. As *Giglio* put it later, *Mooney* had applied that principle to hold "that deliberate deception of a court and jurors by the presentation of known false evi-

dence is incompatible with 'rudimentary demands of justice.'" *Giglio* v. *United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney*, 294 U.S. at 112). The Court reiterated this bedrock principle in *Pyle* v. *Kansas*. 317 U.S. 213, 216 (1942) (holding that petitioner stated a due-process violation by alleging "that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction").

The Court later applied "the general principles laid down" in *Mooney* and *Pyle* to recognize that due-process protections extend beyond the limited universe of deliberate malfeasance. *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957) (per curiam). In *Alcorta*, the Court determined that a defendant's due-process rights are violated even when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) (citing *Alcorta*). *Alcorta* thus further uncoupled the prosecutor's state of mind from the witness's perjury itself: While *Mooney* and *Pyle* seemed to require intent, *Alcorta* clarified that knowledge will suffice.

In *Napue*, the Court applied the fairness principle to give it another push. The Court first held that the Due Process Clause is violated even when the "false testimony goes only to the credibility of" a witness, reasoning that a "'lie is a lie.'" 360 U.S. at 269-270 (quoting *People* v. *Savvides*, 136 N.E.2d 853, 854-855 (N.Y. 1956)). The Court then explained that the prosecution's subjective motivation in failing to correct such lies is immaterial: "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was

the same, preventing, as it did, a trial that could in any real sense be termed fair." *Id.* at 270 (quoting *Savvides*, 136 N.E.2d at 854-855). In other words, the "concept of ordered liberty," *id.* at 269, is offended not by the prosecution's motive but by perjury's insidious effect on the *trial itself*. The Court reversed for that very reason: "[T]he false testimony used by the State in securing the conviction * * * may have had an effect on the outcome of the trial." *Id.* at 272.

Brady then took the next step. There, the Court "held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'" *Giglio*, 405 U.S. at 153 (quoting *Brady*, 373 U.S. at 87). The Court rooted this rule in *Mooney*, explaining that "[t]he principle of *Mooney* * * * is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87. According to the *Brady* Court, a prosecutor's failure to inform the defense of exculpatory evidence—even if "his action is not the result of guile"—"casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 88 (internal quotation marks omitted).[11]

---

[11] *See also Kyles* v. *Whitley*, 514 U.S. 419, 437-438 (1995) (explaining that *Brady* imposes on the prosecutor "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *United States* v. *Bagley*, 473 U.S. 667, 671 n.4 (1985) (applying *Brady* even though the prosecutor who tried the case testified "that he had not known that the" favorable evidence "existed").

The Court put these rules together in *Giglio*. In that case, the only eyewitness to the crime testified that the government did not offer him a deal for testifying against the defendant. *Giglio*, 405 U.S. at 151-152. That was not true—one prosecutor *had* promised the witness "that he would not be prosecuted if he cooperated with the Government." *Id.* at 153. The prosecutor trying the case, however, had no knowledge of that promise. *Id.* at 152-153.

Giglio held that the line of cases beginning with *Mooney* and extending through *Brady* rendered the trial prosecutor's lack of knowledge immaterial to the due-process violation. The Court first cited *Mooney* and *Pyle*'s no-deliberate-deception rule and *Napue*'s failure-to-correct rule. *Id.* at 153. But in the very next sentence, the Court tied *Mooney* to *Brady*: "[S]uppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." *Id.* at 153-154 (internal quotation marks omitted). As if that were not clear enough, the Court then explained that the prosecutor's state of mind was irrelevant to its holding: A failure to disclose material evidence, no matter the cause, "is the responsibility of the prosecutor." *Id.* This makes sense. "The effect * * * of perjured testimony on the 'truth seeking function of the trial process' is the same whether or not the prosecutor knows of the perjury. The prosecutor's knowledge does not change what the jury hears." Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365, 1410 (1987) (citation omitted).

2. The Tenth Circuit failed to recognize that the lodestar of this Court's no-perjury precedents is the

fairness of the trial itself, not the government's subversive intent.

The proper test is the one rooted in *Mooney*, *Napue*, *Brady*, and *Giglio*, and applied by numerous courts: The Due Process Clause is violated when a witness perjures herself and there is a reasonable likelihood that the perjured testimony affected the jury's decision. *See Napue*, 360 U.S. at 272 (reversing because "the false testimony used by the State in securing the conviction * * * may have had an effect on the outcome of the trial"); *Ortega*, 333 F.3d at 109; *Killian*, 282 F.3d at 1209; *Spaulding*; 991 S.W.2d at 657; *Riley*, 567 P.2d at 476; *Case*, 183 P.3d at 910; *Fierro*, 2019 WL 6896993, at *4. Here, S.B.'s recantation was timely and total. *See supra* pp. 6-8. That she lied on the stand at trial about all of the sexual abuse is consistent with the jury's noted disbelief, even at the time, about some of her particular allegations. *See supra* p. 6; *see also Mesarosh* v. *United States*, 352 U.S. 1, 13-14 (1956) (recognizing that a witness who is willing to lie about one matter cannot be trusted as to any matter). And this perjury undoubtedly affected the trial's outcome: "The parties agree that the jury's verdicts came down to whether it believed the victim's trial testimony." Pet. App. 88a (Bender, J., dissenting).[12] And even as it denied

[12] The Colorado state courts did not make any factual findings under this rubric. Instead, its analysis was cabined to "whether the newly discovered evidence would probably bring about an acquittal at a *new* trial." Pet. App. 132a (emphasis added). In other words, the state courts considered whether a jury would believe S.B.'s recantation over her original testimony. *Id*. at 67; *see also id.* at 81a-83a. But the courts did not consider the recantation on its own merit, or whether the perjured testimony

relief under state law, the trial court recognized the perjury's effect on the original trial: A finding that the jury would believe *some* of S.B.'s recantation over her original testimony means that there is a reasonable likelihood that her perjured testimony affected the jury's decision. *See supra* pp. 9-10.

By also requiring Farrar to establish that the government had knowledge of S.B.'s perjury at the time of the trial, the Tenth Circuit erred.

The Tenth Circuit reached this result only by relying on inapplicable, and outdated, circuit precedent. Pet. App. 9a-10a & nn.7-8. All but one of these cases involved government knowledge and thus do not speak to the question presented here.[13] The one case where the allegations were unclear was decided in 1951 and applied *Mooney* and *Pyle*, which, as explained, offer no support after *Alcorta*, *Brady*, *Napue*, and *Giglio* all made clear that *Mooney*'s engine was *fairness*, not prosecutorial misconduct. *See Wild* v. *Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951) (citing *Mooney* and *Pyle*).

---

affected the outcome of the *original* trial. Indeed, the trial court pointedly did *not* dismiss the veracity of her sexual-abuse allegation. *See* supra pp. 9-10. 28 U.S.C. § 2254(e)(1) therefore does not apply.

[13] *See Graham* v. *Wilson*, 828 F.2d 656, 657 (10th Cir. 1987); *McBride* v. *United States*, 446 F.2d 229, 230 (10th Cir. 1971); *Hinley* v. *Burford*, 183 F.2d 581, 581 (10th Cir. 1950) (per curiam); *Tilghman* v. *Hunter*, 167 F.2d 661, 662 (10th Cir. 1948); *Romano* v. *Gibson*, 239 F.3d 1156, 1173, 1175 (10th Cir. 2001); *United States* v. *Caballero*, 277 F.3d 1235, 1243-44 (10th Cir. 2002); *United States* v. *Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015).

Farrar's due-process right to a fair trial was violated when the jury convicted him based on S.B.'s perjury. He is entitled to habeas relief.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important for at least three reasons.

First, the fundamental requirements of due process should apply uniformly across the country. Whether a defendant's due-process rights have been violated by the introduction of perjury should not depend on the jurisdiction in which the defendant is prosecuted. At least eight jurisdictions tie habeas relief to governmental knowledge of the perjury; six do not. The Court's intervention is warranted to resolve the split.

Second, perjury is "[t]he leading cause of wrongful conviction." *See Perjury*, Innocence Project New Orleans.[14] Indeed, nearly 6 in 10 wrongful convictions can be traced back to perjury. *See % Exonerations By Contributing Factor*, Nat'l Registry of Exonerations.[15] Of the five factors contributing to wrongful convictions—mistaken witness identification, perjury or false accusation, false confession, false or misleading forensic evidence, and official misconduct—only official misconduct (contributing to 54% of wrongful convictions) even comes close to rivalling perjury's clout. *See id.*

---

[14] *Available at* https://bit.ly/2SYyIgs (last visited Jan. 27, 2020).

[15] *Available at* https://bit.ly/2QLQIYU (last visited Jan. 27, 2020).

Perjury is especially rife in cases like this one—where a child has accused an adult of sexual abuse. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). This means that child-sex-abuse convictions are often "based primarily, if not solely, on the word of the victims involved." Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996).

The challenge with such cases is that this word is often shown to be false: Perjury or false accusations contributed to 84% of wrongful child-sex-abuse convictions. Nat'l Registry of Exonerations, *supra*. Not only does that percentage make perjury the most significant contributor to wrongful child-sex-abuse convictions, it does so handily: No contributor to the other wrongful-conviction categories tracked by the National Registry of Exonerations is as significant as perjury is in the child-sex-abuse context. *See id.*

This Court has recognized the importance of constitutional safeguards against perjury in child-sex-abuse trials. In *Coy* v. *Iowa*, 487 U.S. 1012, 1014 (1988), the Court explained that the Confrontation Clause protects against the "false accuser" and may help "reveal the child coached by a malevolent adult." *Id.* at 1020. That protection should not end at the moment of conviction. For this reason, as well, this Court should grant certiorari.

Third, the truth should matter. A conviction built on a lie harms not only the defendant; it sullies the judiciary itself. "[A]rriving at the truth is a fundamental goal of our legal system." *James* v. *Illinois*,

493 U.S. 307, 311 (1990) (quoting *United States* v. *Havens*, 446 U.S. 620, 626 (1980)). And it is the judiciary that is charged with a "fastidious regard for the honor of the administration of justice." *Mesarosh*, 352 US. at 14. Perjury, however, "corrupts[ ] * * * the truth-seeking function of the trial process." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). And this threatens the legitimacy of the judiciary itself, which "ultimately depends on its reputation for impartiality." *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989). Worse yet, convictions based on lies are not just inaccurate—they are the result of a lying witness trading on the court's reputation to advance her own private ends. To take this case as an example, a witness might be willing to coopt the "administration of justice"—what should be "one of the most cherished aspects of our institutions"—in order to move in with her grandparents. *Mesarosh*, 352 U.S. at 14. In this way, the entire "system of the administration of justice"—including the judiciary—"suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

The Court should grant certiorari to affirm that justice demands the truth, and that the Constitution protects those who see the judiciary's processes used against them for private ends—even if the prosecutor and jury are unwitting participants.

IV. THIS CASE IS A CLEAN VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case presents an unusually clean vehicle to address the question presented. This case presents a pure question of law that is dispositive. S.B.'s testimony is false, and her recantation was unequivocal. *See supra* pp. 6-8. The State concedes that her

perjured testimony was "material to relevant issues and is not merely cumulative or impeaching." Pet. App. 132a. And this perjured testimony *must have* affected the original jury's verdict: The case turned, as the State itself argued, on S.B.'s testimony and credibility. *See id.* at 246a.

This is also the rare habeas case that functions as a direct-review case. The Tenth Circuit held that 28 U.S.C. § 2254(d)'s clearly-established standard of review does not apply to this case. *Id.* at 4a-5a. Therefore, the court—like any court sitting in direct review of a question of law— "engage[d] in de novo review of the district court's legal ruling." *Id.* at 4a. Finally, the State expressly waived any defense of procedural default at oral argument, as the Tenth Circuit notes in its opinion. *Id.* at 5a n.4. The only thing this Court needs to do to resolve this case is answer the question presented.

This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GAIL K. JOHNSON
JOHNSON & KLEIN, PLLC
1470 Walnut Street
Suite 101
Boulder, CO 80302
(303) 444-1885
gjohnson@johnsonklein.com

CATHERINE E. STETSON
Counsel of Record
KIRTI DATLA
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

JANUARY 2020