NO. 19-953

In the
Supreme Court of the United States

CHARLES FARRAR,
Petitioner,
v.

STATE OF COLORADO, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner seeks certiorari on the question of whether a defendant's due process rights are violated when a conviction results from perjury even if, at the time of trial, the prosecution did not know the testimony was perjured.

But this is a habeas corpus proceeding under 28 U.S.C. § 2254, and the state district court explicitly found Petitioner's claim of perjury not credible. Under § 2254(e)(1), that factual determination is presumed correct. Petitioner does not even claim to have met his burden of overcoming that presumption by the required clear and convincing evidence.

Because the presumption that § 2254 mandates prevents this appeal from revisiting that perjury claim, it does not include the necessary factual premise of the question presented. This Court's answer either way would not change the outcome of the case.

The question presented is:

Whether this Court should resolve a claimed circuit split on perjured testimony in a case where settled law and the factual findings below compel the conclusion that no such perjured testimony occurred.

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INTRODUCTION

In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court considered whether "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States." *Id.* at 265. The Court concluded that it did, holding: "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Id.* at 269.

The Court acknowledged this principle again in *Giglio v. United States*, 405 U.S. 150 153 (1972). *See* LaFave, Israel, King, Kerr, 6 Crim. Proc. § 24.3(d) (4th ed.) ("These rulings, including *Napue v. Illinois*, and *Giglio v. United States*, have established that the defendant's due process rights are violated whenever the prosecution's case includes false evidence which is material to the outcome, and which the prosecution either knew or should have known was false.").

The Court, however, has not held that a conviction resulting from false evidence such as perjury violates due process if the prosecution did not *know* the testimony was perjured. *Case v. Hatch*, 183 P.3d 905, 910 (N.M. 2008). And the circuits are divided on the question.[1] *Id.*

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[1] Two circuits do not require prosecutorial knowledge. *See Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003); *Killian* v. *Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002). Seven do. Petitioner lists five, not mentioning the Third and Eight Circuits; and he incorrectly presents the Tenth as having just now taken its position, despite the court's citation of eight prior opinions illustrating its position. Pet. at 13, 30 (citing Pet. App. at 9a-10a

All of this is irrelevant, however, because this case does not present the question of such perjured testimony. The state district court personally observed Petitioner's evidence of perjury—the victim's recantation—and found it not credible. This Court presumes that factual credibility determination to be correct because the case arises under AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. *See* § 2254(e)(1). Petitioner does not even claim to have met his burden of overcoming that presumption by clear and convincing evidence. *See id.*

Petitioner is thus seeking certiorari on a question not implicated by the facts of the case. Certiorari should be denied.

& nn.7-8.). Because those are the points on which Respondents disagree, they here provide supporting parentheticals in relation to those circuits: *Graham v. Wilson*, 828 F.2d 656, 659 (10th Cir. 1987) ("In our habeas corpus consideration of the introduction of false or mistaken testimony, the question of error turns not on the witness' knowledge of falsity, but on the *government*'s knowledge."); *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984); *Lindhorst v. United States*, 658 F.2d 598, 601 (8th Cir. 1981) ("Thus, assuming for the purposes of argument that the [witnesses] in fact committed perjury, the district court did not err in dismissing this claim because appellant failed to establish the government's knowing use of the perjured testimony."); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir. 1980); *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980); *Burks v. Egeler*, 512 F.2d 221, 229 (6th Cir. 1975); *Smith v. United States*, 358 F.2d 683 (3d Cir. 1966) ("[N]or does [the motion] allege any facts to show the Government knowingly used false testimony at the trial, which are matters of substance and their absence constitutes a fatal defect to this appeal.").

STATEMENT OF THE CASE

Petitioner, the victim's stepfather, sexually and physically abused the victim for years. Pet. App. 72a, 193a, 235a-239a. When the victim was fifteen, she disclosed this to her grandmother and her school counselor. *Id.* 199a-200a, 212a-216a. The counselor called the police, and a police officer and social worker came to speak with the victim that day. *Id.* 216a, 234a-235a. The victim provided them with details about the abuse and said her mother had participated in some of the incidents. *Id.* 235a-239a.

Petitioner and the victim's mother were charged with multiple counts of sexual assault on a child, and Petitioner's case was tried first. *Id.* 72a. The victim testified that the abuse eventually became a "blurrish nightmare," but that she could recall the first time Petitioner performed oral sex on her, the first time he forced her to perform oral sex on him, and the first time he had intercourse with her. *Id.* 186a-196a. She would cry during the incidents, she said, and did not know what to do. *Id.* 188a. Asked why she had not reported the abuse sooner, she said Petitioner threatened her, and explained, "I felt like it was my fault." *Id.* 192a.

Petitioner's two stepdaughters from a previous marriage did not know the victim, but testified that when Petitioner lived with them, he sexually abused and threatened them as well. *Id.* 96a-97a.

Petitioner testified and denied any sexual abuse. *Id.* 2a.

Of the twenty-eight counts on which Petitioner was tried, the jury found him guilty of twenty-two. *Id.* 72a, 94a. After trial, the victim eventually told the

prosecutors she could not go through with another trial, and the case against her mother was dismissed. *Id.* 74a, 132a.

About a year after trial, Petitioner filed a motion in the state district court seeking a new trial based on "newly discovered evidence." *Id.* 73a. Attached to the motion was an affidavit in which the victim claimed she had made up her accounts of sexual abuse. *Id.* She also claimed that, before trial, she had recanted to a multitude of professionals—both prosecutors, social workers, her guardian ad litem—but they all deliberately ignored her or pressured her to just testify anyway. *Id.* 73a-74a. She said the prosecutors pretended they did not hear her; later told her "these are the answers we want;" and threatened that she would be "locked up in a mental institution" if she changed her story. *Id.* 176a-177a.

The state district court held several evidentiary hearings on the motion. *Id.* 72a. The victim testified, repeating what was in her affidavit by claiming she had fabricated the allegations, had told all of the professionals before trial, and was ignored or threatened by all of them. *Id.* 73a-74a, 130a-133a.

All of the professionals testified as well, and they uniformly denied any pretrial recantation. *Id.* 74a, 130a-133a, 136a. The trial prosecutors both testified that although the victim never recanted, Petitioner's defense attorney did once make a comment about the victim recanting. But when they telephoned the victim to ask, the victim not only denied recanting, but sounded "angry and upset that the question was even being asked of her." *Id.* 74a.

Even as they continued to speak with the victim for months after trial, they said, she was pleased with the verdict, never recanted, and initially did not want her mother to even get a plea offer. *Id.*

The state district court considered all this and other evidence, and ultimately denied the motion for new trial in a written order. *Id.* 74a-75a. The court stated that it had "carefully considered all of the testimony and [the court's] recollection of the trial," *id.* 133a, and found that the victim had "substantial credibility issues," both at trial and in the post-conviction proceedings. *Id.* 74a-75a, 136a-137a. The court explicitly found *false* the victim's testimony about a pretrial recantation and prosecutorial threats. *Id.* 135a.

The court thus refused to order a new trial, finding that a new jury would, like the first, accept some of the victim's allegations and reject others, but would not acquit Petitioner. *Id.* 74a-75a, 136a-137a.

Petitioner appealed the denial of a new trial, and both the Colorado Court of Appeals and the Colorado Supreme Court affirmed. *Id.* 71a, 93a. The state high court took up the case to clarify the state's standard for granting a new trial based on newly discovered evidence, including witness recantations. *Id.* 72a. The court adopted the district court's credibility findings and held that the district court had not abused its discretion in denying a new trial, because the district court "was unable to conclude that the victim's recantation testimony was any more believable than her trial testimony, and therefore it could not find that the victim's new evidence would probably result in the defendant's acquittal." *Id.* 84a.

Petitioner later initiated the federal habeas proceeding underlying this appeal. The federal district court denied relief, concluding that the state court's findings concerning the victim's credibility were not unreasonable. *Id.* 22a. A certificate of appealability was granted, however, allowing Petitioner to appeal. *Id.*; *see* 28 U.S.C. § 2253.

The Tenth Circuit affirmed. Pet. App. 1a. It rejected Petitioner's assertion that Colorado's standard for granting a new trial based on post-trial evidence violates the federal Constitution. *Id.* 10a-14a. The opinion also reiterated long-standing circuit precedent that, to state a due process violation based on witness perjury, the prosecution must have known it was perjury. *Id.* 9a-10a & nn.7-8. The court cited eight prior circuit opinions stretching back more than sixty years to illustrate the long-standing nature of its position. *Id.*

Petitioner now asks this Court to grant certiorari and address whether contemporaneous prosecutorial knowledge is required to state a due process violation "when a witness perjures herself." Pet. 43.[2] According to Petitioner, this Court should address the question now, because the Tenth Circuit here "joined" one side of the circuit split on the question, and thereby "deepened" the split. Pet. 3-4, 12-13.

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[2] Petitioner's statement of the "Question Presented" 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 . . . ." Pet. (i).

Petitioner also maintains that this case "presents an unusually clean vehicle for this Court to resolve this split," because AEDPA's deferential standard of review on questions of law, § 2254(d)(1), does not apply; and because the question whether prosecutorial knowledge of perjury is required would be "outcome determinative," as it is undisputed the victim's trial testimony affected the verdict. Pet. 4.

REASONS FOR DENYING THE PETITION

There is no basis for granting certiorari on whether prosecutorial knowledge of perjury is required to state a due process violation, because this case does not present that question. The state district court found the evidence of perjury not credible. Under § 2254(e)(1), that factual determination is presumed correct, and Petitioner does not even claim to have overcome the presumption by the required clear and convincing evidence.

I. Because this case does not present the question of perjured testimony, it is not a proper vehicle to address a question premised on the existence of such perjury.

Petitioner's "question presented" is "[w]hether 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 . . . ." Pet. (i). This assumes a case involving perjury. But the state district court observed Petitioner's evidence of perjury—the victim's post-trial recantation—and found it not credible. Because that credibility finding is a factual determination that this Court presumes correct under § 2254(e)(1), and because Petitioner

does not overcome (and does not even claim to have overcome) the presumption by clear and convincing evidence, this case does not include the necessary factual premise of the question presented.

A. The state district court found the evidence of perjury not credible, and that finding controls.

In a habeas proceeding challenging a state court conviction under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1).

State court credibility findings are among the factual determinations to which this Court, sitting in habeas, defers. *See, e.g., Rice v. Collins*, 546 U.S. 333, 338-39, 341-42 (2006) (recognizing state trial court's credibility determination as a factual determination); *LaVallee v. Delle Rose*, 410 U.S. 690, 692 (1973) (state district court's implicit "credibility findings" left no doubt that "respondent's factual contentions were resolved against him"); *Townsend v. Sain*, 372 U.S. 293, 310 (1963) (recognizing that "issues of fact" include "recital of external events and the credibility of their narrators").

In fact, even under the prior, *less* deferential version of the habeas statute requiring deference to state court factual determinations, this Court had emphasized that the statute gives "federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (commenting on

former § 2254(d)(8), which allowed presumption of correctness to be set aside for state court factual determinations not "fairly supported by the record").

Several federal courts of appeals have even had opportunity to recognize § 2254(e)(1)'s applicability to state court credibility determinations rejecting post-trial recantations specifically. *E.g., Kirkman v. Thompson*, No. 19-1904, 2020 WL 2215765, at *2 (7th Cir. May 7, 2020); *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011); *Kinsel v. Cain*, 647 F.3d 265, 270 & n.16 (5th Cir. 2011); *Channer v. Brooks*, 320 F.3d 188, 194 (2d Cir. 2003). This is nothing new or controversial. *See Landano v. Rafferty*, 856 F.2d 569, 572 (3d Cir. 1988) (applying former § 2254(d)'s factual deference provision to state court's credibility determination rejecting post-trial recantation).

Here, Petitioner presents his case as one involving perjury simply because the victim gave a post-trial recantation. *See* Pet. 4-5, 33-34. But he omits any real discussion of why the victim's trial testimony should be viewed as perjury by a federal habeas court when the state district court found her post-trial recantation not credible. Petitioner simply describes the victim as having "explained that her testimony was false." Pet. 4. The recantation was "total" and "unequivocal," he emphasizes. Pet. 29, 33-34. That may all be true. The problem is, the only factfinder that matters found the recantation not credible.

The state district court's written order denying Petitioner's motion for a new trial was issued following multiple post-trial evidentiary hearings, and it illustrates precisely why courts of review—including

federal habeas courts—defer to a district court's credibility findings.

"This case is one of the more memorable criminal jury trials at which this Court has presided," it stated. Pet. App. 129a. The court had a "clear memory of [the victim]'s testimony at trial." *Id.* 130a. The victim had "testified in a straightforward, unemotional manner." *Id.* 135a. "There were no indicia of [the victim] offering knowingly false testimony," it found. *Id.*

The state court confirmed its close observation of the victim's "affect, demeanor and presentation," both at trial and at the post-trial hearings. *Id.* 133a. And the court noted that it had "carefully considered all of the testimony" at the recantation hearings along with its "recollection of the trial." *Id.*

The court then explained that it was denying a new trial, and the reason is fatal to his request for certiorari. The state court found the victim had "substantial credibility issues" with regard to her testimony, both at trial and in the post-conviction proceedings. *Id.* 74a-75a, 136a-137a. The court even went so far as to explicitly find *false* the victim's claim of a pretrial recantation and prosecutorial threats, stating "this testimony is not worthy of belief," and that the victim's "assertions about [the prosecutor] are without merit." *Id.* 135a. The recantation was simply not of such a character as would lead a second jury to acquit. *Id.* 75a-76a, 136a-137a.

In keeping with standard appellate and habeas jurisprudence, this credibility ruling has been acknowledged by every court to consider it since: the state intermediate appellate and supreme courts, and

the federal district and appellate courts. *Id.* 3a-4a & n.2, 22a, 83a-84a, 125a-126a.

Nevertheless, as he did in state court, Petitioner continues to attack the victim's trial testimony here by treating the claim of recantation as clear proof of perjury. But his attack fares even worse here, because § 2254(e)(1) applies. Petitioner's implicit request that this Court simply replace the state district court's findings with its own would not be appropriate even on direct review, where factual findings are controlling unless clearly erroneous. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 694 (1996). It is certainly not appropriate on federal habeas review, where such findings are "presumed correct," and require "clear and convincing evidence" to be set aside. *See* § 2254(e)(1).

To be clear, Petitioner does not even try to overcome the presumption of correctness by the statute's high standard of "clear and convincing evidence." His sole answer to § 2254(e)(1) appears in a footnote. He suggests the presumption of correctness does not apply to the state court's credibility findings, because the findings were "cabined to 'whether the newly discovered evidence would probably bring about an acquittal at a *new* trial.'" Pet. 29-30 n.12 (quoting district court's order, Pet. App. 132a, emphasis added by Petitioner). According to Petitioner, this means the state court never considered "the recantation on its own merit," or "whether the perjured testimony affected the outcome of the *original* trial." Pet. 29-30 n.12.

Both of these points fail. As for the first, the state court explicitly confirmed its careful observation of the

victim's recantation, found it unconvincing generally, and found significant portions were outright falsifications. Pet. App. 135a-137a. That was why the court denied a new trial. *Id.* It can hardly be said that the state court did not consider the recantation "on its own merit," Pet. 29-30 n.12.

As for Petitioner's second point, the question whether the victim's trial testimony affected the outcome of the trial is indeed undisputed, but that is irrelevant. Of course it did. What matters is that the state court's credibility finding means that that testimony cannot simply be treated here as "perjury" to begin with.

Petitioner is also incorrect to insist his case "presents an unusually clean vehicle for this Court to resolve this split" because of the fact that § 2254(d)(1), AEDPA's deferential standard of review on questions of law, does not apply. Pet. 4. True, the legal question here is subject to de novo review because § 2254(d)(1) does not apply. But the relevant factual determination is not reviewed de novo. It is presumed correct.

Finally, Petitioner's assertion that the question whether prosecutorial knowledge is required would be "outcome determinative," Pet. 4, is simply wrong. A grant of certiorari to announce Petitioner's proposed rule would amount to this Court answering a hypothetical: The Court would issue an opinion disapproving of the Tenth Circuit's rule requiring prosecutorial knowledge, then presumably remand for application of the opposite rule. But the Tenth Circuit would then, as required, defer to the state court's credibility determination, and conclude that this case presents no opportunity to apply the rule, because

there is no basis to treat the case as involving perjury. And so despite Petitioner having cried foul, the case would end with a whimper.

B. The circuit cases Petitioner cites on his side of the split illustrate why this case is not an appropriate vehicle to address his question presented.

The circuit court cases Petitioner cites on his side of the split have two important distinguishing features in common that illustrate why the instant case is not an appropriate vehicle for addressing his question presented: First, the holdings in those cases depended on a clear showing of perjury. Second, there was no state court credibility determination to which the courts could defer.

Petitioner first cites *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988), a pre-AEDPA case. Pet. 13. There, the Second Circuit found due process could require a new trial where perjury was established by a "credible" post-trial recantation of material testimony. *Sanders*, 863 F.2d at 222, 224-25. Because no court had ever made findings on that point, the court remanded for the district court to determine whether the witness, in fact, "did perjure himself at trial." *Id.* at 227.

Petitioner then points to the Second Circuit's opinion in *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003). Pet. 14. But in *Ortega*, the facts involved "significant evidence" of perjury by a material witness who had committed "substantiated perjury" in a related case. *Ortega*, 333 F.3d at 107-08.

Finally, Petitioner points to *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), where the court "assume[d]

without deciding that the prosecutor neither knew nor should have known of [the witness's] perjury." *Id.* at 1208. But similar to *Ortega*, the facts of *Killian* were such that "one cannot reasonably deny that [the witness] gave perjured testimony at Killian's trial"—perjury was established in that case by documentary evidence definitively disproving the key witness's trial testimony. *Id.*

The other important feature of these cases is that in none of them had the state court made a credibility determination to which the federal court could defer. *See Sanders*, 863 F.2d at 220 (noting state district court judge "considered it unnecessary to determine the credibility of [the witness's] recantation"); *Ortega*, 333 F.3d at 106 (noting the state court "explicitly refused to make any factual finding with respect to [the witness's] credibility," rendering the presumption of correctness inapplicable); *Killian*, 282 F.3d at 1208 (noting the state court "refused Killian an evidentiary hearing on the matter").

This case stands in stark contrast. The state court *did* make a credibility finding; it found the evidence of perjury *not* credible; and the presumption of correctness applies. The Second Circuit has itself rejected a perjury-based claim for the reason that the presumption of correctness applied to a state court's finding that a recantation was not credible. *Channer*, 320 F.3d at 194-96.

The instant case is, in fact, so unlike Petitioner's cited cases that it would stand in stark contrast even on federal direct appeal. Whereas Petitioner's cases raised legitimate due process concerns because their holdings were premised on a clear showing of perjury,

Petitioner's case involves nothing of the sort. It rests on little more than a child-victim's claims to distance herself from allegations of sexual abuse she adamantly maintained at trial, now that her father-figure has been imprisoned for the abuse. Such allegations are rightly viewed with suspicion. *See, e.g., Arnold v. Dittmann*, 901 F.3d 830, 839 (7th Cir. 2018) ("It is entirely possible that [the child sex-assault victim]'s recantation is the product of guilt and/or pressure from family members rather than a belated confession of what is true."). And recantations are, of course, viewed with suspicion generally, as they are inherently unreliable absent corroboration. *See, e.g., Sassounian v. Roe*, 230 F.3d 1097, 1107 (9th Cir. 2000) (noting witness "recanted his recantation and stated in another declaration that he had testified truthfully at trial).

In sum, even if Petitioner's question presented would merit this Court's consideration in the right case, the facts and state court findings here simply do not allow the case to be treated as involving the required factual premise of perjury.

II. The Tenth Circuit's opinion in this case had no effect on the split of authority, nor would this case resolve the split as cleanly as Petitioner claims.

Because the Tenth Circuit's position on the question presented has been well established for over sixty years, this case did not affect or create any urgency to address the split. Nor would answering the question resolve the split as significantly and cleanly as Petitioner suggests, because all but one of the state

courts he cites on his side of the split ground their position, in whole or in part, on state law.

A. This case had no effect on the split, because the Tenth Circuit's position has been established for more than sixty years.

According to Petitioner, it is important to address the question presented now because the Tenth Circuit here "joined" one side of the split over the question, and thereby "deepened" the split. Pet. 3-4, 12-13. But as the Tenth Circuit explicitly recognized in its opinion, its position is well established. The opinion cites eight previous circuit opinions stretching back more than sixty years to illustrate the long-standing nature of the court's position. Pet. App. 9a-10a & nn.7-8. Petitioner's insistence that the court misread its own precedent, Pet. 30, should be rejected. *See* Pet. App. 9a-10a & nn.7-8 and cases cited, *e.g.*, *Wild v. Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951) ("This court has consistently followed the rule that a writ of habeas corpus should not be granted upon the grounds that false and perjured testimony was used unless it is shown that it was knowingly used against the defendant by the prosecuting officers in the criminal case.").

Consequently, even if Petitioner's question presented is an important one, this case has created no urgency to address it.

B. Answering the question presented would not resolve the split as cleanly as Petitioner suggests, because all but one of the state courts he cites on his side of the split ground their position, in whole or in part, on state law.

In addition to the Second and Ninth Circuits, Petitioner cites four state high courts as taking his position. Pet. 3-4. And he insists this case "presents an unusually clean vehicle for this Court to resolve this split." Pet. 4. But to be clear, this Court's answering of his question presented would not necessarily alter the split as significantly as Petitioner suggests. Three of the four state high courts he cites as not requiring prosecutorial knowledge ground their position, in whole or in part, on state law.[3] *See id.*; *Case*, 183 P.3d at 910; *Commonwealth* v. *Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999); *Riley* v. *State*, 567 P.2d 475, 476 (Nev. 1977). And so, were the Court to agree with the circuits that require prosecutorial knowledge, the holding would have no effect on three of the four states that take the opposite approach.

In conclusion, the Tenth Circuit's opinion in this case created no urgency to address the question presented, and the Court's answering of the question would not necessarily alter the positions of the states as significantly or cleanly as Petitioner suggests.

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[3] The fourth such opinion Petitioner cites in this regard, *Ex Parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009), offers essentially no analysis, and simply cites a state case involving a parole revocation. *Id.* at 772.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

L. Andrew Cooper

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