No. 19-953

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This petition presents a straightforward question of law: whether due process is violated where a conviction rests on material, perjured testimony, regardless of whether the government knowingly elicited that perjury. There is a clear, acknowledged split among both federal and state courts on that question, as Respondents concede. And this question is important: The criminal-justice system exists to test for the truth, and when it does not, the fundamental

fairness of trials and the integrity of courts are called into question. This Court should resolve the division on this important constitutional question.

Respondents cannot deny any of this, and so they attempt to feint. They argue that the decision below did not "deepen" a split because the Tenth Circuit relied on precedent to reach its ruling. But most of those prior cases did not implicate this question, and the one that did was decided several decades ago, and six years before this Court set out the governing due-process principles for perjured testimony. And, in any event, an existing split is still a split. Respondents suggest that overruling the decision below would not "cleanly" resolve the split. Their argument turns on guesses about how some courts might react to this Court's decision. Finally, Respondents claim that this case is not a good vehicle to resolve this question because the state court made a finding that the evidence of perjury was not credible. As their reliance on pieced-together portions of the state-court decision at issue shows, that is wrong.

This Court should grant the petition and reverse.

I. RESPONDENTS CONCEDE THE SPLIT.

Respondents acknowledge that the decision below implicates a split among at least five federal courts of appeals and multiple state high courts. *See* Br. in Opp. 1-2 n.1, 13-14, 17. The Second and Ninth Circuits, as well as the high courts of Texas, Kentucky, Nevada, and New Mexico, hold that the unknowing use of material, perjured testimony violates due process. *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). The Tenth Circuit joined the Fifth, Sixth, Seventh, and Eleventh Circuits, and the supreme courts of Illinois, Washington, and Nebraska, in holding that only the government's *knowing* use of perjury violates due process. *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).

Respondents argue (at 1-2 n.1) that the Third and Eighth Circuits require prosecutorial knowledge too. The Eighth Circuit has not addressed this question; the case Respondents cite was one where the defendant claimed only that the prosecution "*knowingly* used perjured testimony." *Lindhorst* v. *United States*, 658 F.2d 598, 601 (8th Cir. 1981) (emphasis added). And the Third Circuit decision on which Respondents rely turned on the undeveloped nature of the defendant's allegations. *See Smith* v. *United States*, 358 F.2d 683, 684 (3d Cir. 1966) ("The motion does not disclose what portion of the testimony was false, nor does it 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."). Even if the Third Circuit is properly counted among the courts making up the split, that only further strengthens the case for review.

Respondents nevertheless argue that this Court need not take this case because the Tenth Circuit did not "deepen[ ]" this split (at 16) and because the split is shallower than it seems. They are wrong on both counts.

1. Respondents claim the decision below did not deepen the acknowledged split because the Tenth Circuit cited circuit precedent when deciding the case.

But those prior opinions did not squarely address the issue presented here. *See* Pet. 30. All but one addressed a claim that the government had *knowingly* or *intentionally* suborned perjury. *See Graham* v. *Wilson*, 828 F.2d 656, 657 (10th Cir. 1987) (defendant "alleged that * * * the prosecution had knowingly introduced * * * perjured testimony"); *McBride* v. *United States*, 446 F.2d 229, 230 (10th Cir. 1971) (defendant "allege[d] that * * * the United States Attorney knowingly used perjured testimony * * * to obtain his conviction"); *Hinley* v. *Burford*, 183 F.2d 581, 581 (10th Cir. 1950) (per curiam) (defendant alleged that his "conviction was obtained through perjured testimony, knowingly used"); *Tilghman* v. *Hunter*, 167 F.2d 661, 662 (10th Cir. 1948) ("The further contention is that * * * perjured testimony was knowingly used in * * * the trial of the case."); *Romano* v. *Gibson*, 239 F.3d 1156, 1173, 1175 (10th Cir. 2001) (defendant alleged that the State failed to disclose a deal with a key witness who recanted his testimony); *United States* v. *Caballero*, 277 F.3d 1235, 1243-44 (10th Cir. 2002) (defendants "claim that the prosecutor knowingly sought and used perjured testimony from [a] government witness"); *United States* v. *Garcia*, 793 F.3d 1194, 1207 (10th

Cir. 2015) (alleging "that the government countenanced the false testimony of" two witnesses "when each omitted to mention meetings between" the witnesses "and the government"). And while the remaining case states that the court required prosecutorial knowledge, *see Wild* v. *Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951), it was decided sixty-nine years ago—six years before this Court used the fairness principle to expand due-process protections in *Alcorta* v. *Texas*, 355 U.S. 28 (1957) (per curiam), followed over the years by *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Brady* v. *Maryland*, 373 U.S. 83 (1963); and *Giglio* v. *United States*, 405 U.S. 150 (1972). *See* Pet. 26-29.

Thus, until the decision below, the court had not squarely ruled that, despite this Court's precedents, prosecutorial knowledge is required. The court below was directly confronted with the question whether a witness's "false testimony violate[s]" a defendant's "right to due process" regardless of the government's knowledge of that false testimony. *See* Pet. App. 5a, 8a. It broke new ground in squarely holding that "federal habeas relief cannot be based on perjured testimony unless the government knew that the testimony was false." *Id.* at 9a.

None of this, in any event, lessens the case for review. A split is a split. And this Court often grants review to resolve disagreement among courts where the decision below relied on existing circuit precedent. *See, e.g.*, *Borden* v. *United States*, 140 S. Ct. 1262 (2020) (mem.); *Rodriguez* v. *FDIC*, 140 S. Ct. 713 (2020); *Torres* v. *Madrid*, 140 S. Ct. 680 (2019) (mem.).

2. Respondents claim (at 17) that a decision in Farrar's favor would not "cleanly" resolve the split because three state courts implicated in the split ruled based "in whole or in part, on state law."

But none of these decisions based their holding that governmental knowledge is not required "in whole" on state law; all base this rule, at least in part, on federal law. *See Case*, 183 P.3d at 910 (citing two dissents from this Court in cases concerning the federal Due Process Clause; the Second Circuit case *Sanders* v. *Sullivan*, 863 F.2d 218, 222 (2d Cir. 1988), which applied the federal Due Process Clause; New Mexico's "interest in ensuring accuracy in criminal convictions"; and the New Mexico Constitution (internal quotation marks omitted)); *Spaulding*, 991 S.W.2d at 657 (rooting rule in "the right to due course of law and the right to due process of law as provided by the Kentucky and United States Constitutions"); *Riley*, 567 P.2d at 475-476 (citing both "[t]he Fifth Amendment to the Federal Constitution and art. 6, s 4 of our State Constitution"). Even if the basis for these decisions were unclear, that means they are federal due-process rulings. *See Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) ("when * * * a state court decision fairly appears * * * to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept * * * it believed that federal law required it").

Perhaps Respondents are suggesting these courts might revive the no-knowledge doctrine under their *own* due process clauses if this Court grants review and reverses. But that is always a possibility in our

federal system. A State's hypothetical interpretation of its own due process clause should not dissuade this Court from resolving an actual split as to the scope of the federal Due Process Clause.

II. THIS CASE IS A CLEAN VEHICLE.

Respondents' fallback argument is that *this* is not the case to resolve the split.

This is an unusually clean vehicle. The pure question of law raised here is dispositive of Farrar's claim. Pet. 33. The State itself has argued that its case against Farrar turned on S.B.'s testimony and credibility. *Id.* at 33-34. It has recognized that her perjured testimony was "material to relevant issues and is not merely cumulative or impeaching." Pet. App. 132a. Yet, that testimony was false, and S.B.'s recantation was unequivocal. *See* Pet. 6-8. And Respondents agree (at 12) that 28 U.S.C. § 2254(d)'s clearly-established standard does not apply.

Respondents now argue (at 7) that "this case does not present" the question "whether prosecutorial knowledge of perjury is required to state a due process violation" because under 28 U.S.C. § 2254(e)(1), federal courts must credit the state court's finding that the evidence of perjury here was not credible. But that statute applies only where the state court actually makes a finding. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct"); *Wiggins* v. *Smith*, 539 U.S. 510, 530 (2003) (declining to apply Section 2254(e)(1) because the record "speaks for itself" and "the state court made no such finding").

The state courts made no factual finding that the evidence of S.B.'s perjury was not credible. The trial

court held an evidentiary hearing to assess two general claims: that the prosecution failed to disclose that S.B. tried to recant her allegations before trial (the prosecutorial-misconduct claim), and that S.B. perjured herself at trial (the perjury claim). Pet. App. 128a-129a. Relief hinged on one question: "whether th[is] newly discovered evidence would probably bring about an acquittal at a new trial." *Id.* at 132a.

Answering that question meant considering whether a jury would believe S.B.'s recantation over her original testimony. *See id.* at 137a. As to the prosecutorial-misconduct claim—that S.B. tried to recant her allegations before trial—the trial court found that S.B.'s post-trial "testimony is not worthy of belief." *Id.* at 135a; *see also id.* (finding S.B.'s allegations about the State's lawyer "without merit.").[1]

The court did not make that same finding, however, as to the claim that even if the prosecution lacked foreknowledge, S.B. perjured herself at trial. Granted, the trial court noted that S.B. "has substantial credibility issues." *Id.* at 136a. It used that determination only to conclude that a jury would not "complete[ly] acquit[ ]" Farrar at a new trial—not to reject out of hand her recantation. *Id.* at 137a. Central to the trial court's analysis was that the jury did not convict Farrar on all counts; instead, it was able to "sift through" S.B.'s "testimony, accepting some of it and rejecting other parts." *Id.* at 136a-

[1] This is the reason Farrar's claim for a due-process violation flows from the prosecution's *unknowing* use of perjured testimony to obtain a conviction.

137a. The court then extrapolated from that "sift[ing]" to conclude that, at a *new* trial, a different jury would again accept some of S.B.'s contentions and reject others. *Id.* at 137a. It was thus S.B.'s "performance at trial," *id.* at 136a, that doomed Farrar, not a factual determination that S.B.'s recantation itself was unworthy of belief.

The Colorado Supreme Court confirmed as much. It recognized that the trial court *had* made an explicit credibility determination as to the prosecutorial-misconduct claim. *See id.* at 83a-84a. And it explained that the trial court had rejected the perjury claim for a more-nuanced reason: because "it was unable to conclude that the victim's recantation testimony was any more believable than her trial testimony." *Id.* at 84a. That is, it was not that the evidence of perjury was not credible; it was that the trial court could not determine *whether* the evidence was credible. To underscore this point, the court rejected Farrar's argument "that the district court had an obligation to actually decide whether the recantation was believable." *Id.*

Rather, according to the Colorado Supreme Court, because Farrar "bore the burden of demonstrating that" the recantation "would probably convince reasonable jurors to acquit him," his claim "*necessarily* requires a demonstration that the jury would probably believe the victim's recantation." *Id.* (emphasis added). Whatever the merits of this tortured logic, it does not amount to a finding under Section 2254(e)(1) that the evidence of perjury was not credible.

The cases Respondents cite in which federal courts have applied Section 2254(e)(1) to credibility deter-

minations rejecting post-trial recantations reveal what is missing here: an actual determination that the recantation *itself* was not credible. *See Kirkman* v. *Thompson*, 958 F.3d 663, 665 (7th Cir. 2020) (the "recanted testimony [was] not credible"); *Storey* v. *Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011) (the state "judge * * * found their recantations incredible"); *Kinsel* v. *Cain*, 647 F.3d 265, 270 (5th Cir. 2011) (recantation was "unreliable and inconsistent"); *Channer* v. *Brooks*, 320 F.3d 188, 192 (2d Cir. 2003) (per curiam) (witnesses' recantations "were not credible"). The trial court here instead couched its conclusions in an opaque prediction of what a hypothetical jury would do when faced with evidence of the trial testimony and subsequent recantation. That is not a credibility finding.

The record here "speaks for itself." *Wiggins*, 539 U.S. at 530. The trial court never made a factual determination that the evidence of perjury was not credible. Section 2254(e)(1) thus does not apply.[2]

2. In the absence of a clear factual finding, Respondents aggregate several statements in the state trial-court opinion and argue that, when combined,

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[2] Respondents' argument (at 13-14) that this case is a poor vehicle in comparison to *Sanders*, *Ortega*, and *Killian* fails for this reason as well. Respondents claim those cases differ from this one because those cases lacked a state-court credibility determination. *See supra* pp. 7-9 (discussing the findings in this case). Respondents also argue that "those cases depended on a clear showing of perjury." Br. in Opp. 13. But less than one year after trial, S.B. fully and unequivocally recanted her testimony, while represented by her own independent counsel, while under oath, and at separate court proceedings held months apart. *See* Pet. 6-8.

they essentially amount to a factual finding that S.B.'s original testimony was not perjured. *See* Br. in Opp. 10-12. But Section 2254(e)(1) deals with deference to an actual finding, not one that might have been made, but was not.

As explained, the court's statement as to S.B.'s "credibility issues" was made in the context of "determining whether the new evidence would likely bring about an acquittal at a retrial." Pet. App. 125a (internal quotation marks omitted). The finding that the prosecutorial-misconduct claim was "not worthy of belief," *id.* at 135a, stands in stark contrast to the lack of such a finding on the perjury claim. *See* Br. in Opp. 10 (acknowledging that the trial court "explicitly f[ou]nd *false* the victim's claim of a pretrial recantation and prosecutorial threats"). Finally, Respondents' argument that S.B.'s recantation was "simply not of such a character as would lead a second jury to acquit" is meaningless. *Id.* The vehicle question here is whether the state court found that S.B.'s recantation was not credible, not whether a reasonable jury would credit her recantation over her original testimony. *See supra* pp. 7-9.

There is no finding of fact as to perjury for this Court to presume correct. And should this Court reverse, there is nothing to which the Tenth Circuit would have to defer on remand. *See* Br. in Opp. 10. The legal issue is outcome determinative.

This case is thus a clean vehicle to resolve an important question implicating issues of fundamental fairness, truth, and the integrity of the criminal-justice system. *See* Pet. 31-34. This Court should do so.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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