No. _____

In The

Supreme Court of the United States

JOHN PINDER,

Petitioner,

vs.

SCOTT CROWTHER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, which has divided federal courts of appeals and state high courts, and on which petition for certiorari is pending before this Court in *Farrar v. Williams*, No. 19-953 is:

Whether Due Process is violated when a prosecutor relies on false testimony to secure a conviction but did not know that the testimony was false until after trial, as six courts have held, or whether Due Process is violated only where the prosecutor knows the testimony is false at the time of trial, as eight courts have held.

PARTIES TO THE PROCEEDINGS

Petitioner John Pinder was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondent Scott Crowther was the respondent in the district court proceedings and appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

State v. Pinder, No. 991500190 (Utah Dist. Ct. judgment entered, May 14, 2003), aff'd No. 20030484 (Utah Sup. Ct., March 4, 2005, reported at 114 P.3d 551, rehrg denied, June 1, 2005, unreported)

Pinder v. State, No. 060500155 (Utah Dist. Ct., judgment entered, October 30, 2012), aff'd No. 20121038 (Utah Supreme Court, July 21, 2015, reported at 367 P.3d 968, rehrg denied December 18, 2015, unreported)

Pinder v. Crowther, No. 16-cv-189-DN (D. Utah, judgement entered March 6, 2019), aff'd No. 19-4039, (10th Cir. February 11, 2020, unreported, rehrg denied April 6, 2020, unreported)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RELATED PROCEEDINGS	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
1. Factual Background	4
A. Introduction	5
B. Evidence The Jury Heard	6
C. Evidence The Jury Never Heard	8
1. Evidence regarding falsification of the 911 tapes	8
2. Evidence regarding the false confession	9
2. Procedural History	9
REASONS FOR GRANTING THE PETITION	10
I. THE DECISION BELOW REFLECTS A CLEAR SPLIT AMONG NUMEROUS FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS	10
II. THE DECISION BELOW WAS WRONG	13
CONCLUSION	15

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States Court of Appeals for the Tenth Circuit, Order Denying Certificate of Appealability, February 11, 2020 .....1a

United States District Court for the District of Utah, Memorandum Decision and Order, March 6, 2019 .....28a

United States District Court for the District of Utah, Judgement, March 6, 2019 .....53a

United States Court of Appeals for the Tenth Circuit, Order Denying Petition for Rehearing, April 6, 2020 .....54a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Blalock v. Wilson, 320 F. App'x 396 (6th Cir. 2009) 3, 12

Brady v. Maryland, 373 U.S. 83 (1963) 13, 14

Giglio v. United States, 405 U.S. 150 (1972) 13

Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) 12, 13

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002) 3, 11

Kutzner v. Cockrell, 303 F.3d 333 (5th Cir. 2002) 3

Mooney v. Holohan, 294 U.S. 103 (1935) 13

Ortega v. Duncan, 333 F.3d 102 (2d Cir. 2003) 2, 3

Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) 11

Shore v. Warden, Stateville Prison, 942 F.2d 1117 (7th Cir. 1991) 3, 12

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) 12

United States v. Agurs, 427 U.S. 97 (1976) 4, 14

United States v. Barham, 595 F.2d 231 (5th Cir. 1979) 12

United States v. Castano, 906 F.3d 458 (6th Cir. 2018) 12

United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956) 12

United States v. Michael, 17 F.3d 1383 (11th Cir. 1994) 3

United States v. Williams, 2012 WL 640020 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Young, 17 F.3d 1201 (9th Cir. 1994) 11

Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984) 12

STATE CASES

Case v. Hatch, 183 P.3d 905 (N.M. 2008).....3, 11

Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999).....3, 10, 11

Ex parte Chabot, 300 S.W.3d 768 (Tex. Crim. App. 2009).....3, 11

In re Pers. Restraint of Benn, 952 P.2d 116 (Wash. 1998).....12, 13

In re Pers. Restraint Petition of Rice, 828 P.2d 1086 (Wash. 1992).....3, 12

People v. Brown, 660 N.E.2d 964 (Ill. 1995).....3

Riley v. State, 567 P.2d 475 (Nev. 1977) 3, 11

State v. Lotter, 771 N.W.2d 551 (Neb. 2009).....3, 12, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 1

U.S. Const. amend. XIV 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365 (1987) 13, 14

PETITION FOR A WRIT OF CERTIORARI

John Pinder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit denying a certificate of appealability.

OPINIONS BELOW

The Tenth Circuit opinion denying a certificate of appealability is not reported. Pet. App. 1a. A Petition for Rehearing was denied on April 6, 2020. Pet. App. 54a. The District Court's Order Memorandum Decision and Judgment are not reported. Pet. App. 28a.

JURISDICTION

The Tenth Circuit entered judgment on April 6, 2020. This filing is made within 150 days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Fifth and Fourteenth Amendments to the United States Constitution.

INTRODUCTION

John Pinder is serving a life sentence for convictions based on two instances of false evidence. First, in order to defeat Petitioner's alibi, the prosecution used tape recordings of a 911 call which had been altered by law enforcement to date the crime on October 25 rather than October 24 (when Petitioner had an alibi). Second, the prosecution used perjured testimony from a jailhouse snitch who testified that Petitioner confessed, but later admitted that his testimony was false. Petitioner sought federal habeas relief on the grounds that the presentation of such false evidence denied him the Due Process of law.

The district court denied relief and denied a Certificate of Appealability. The Tenth Circuit also denied a Certificate of Appealability, holding that a conviction resting on perjured or false evidence does not violate Due Process unless the government knew at the time of trial that the evidence was false. This holding reflects a significant split among both federal and state courts. Certiorari should be granted to resolve this conflict and correct the crabbed view of Due Process adopted by the decision below.

The Tenth Circuit's decision deepened a recognized split across fourteen federal courts of appeals and state supreme courts. Six jurisdictions 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). In this case, the Tenth Circuit again aligned with courts in seven other jurisdictions 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 a proper vehicle for the Court to resolve this split. The Tenth Circuit denied a Certificate of Appealability as to Petitioner's false evidence claims based on its view that there could be no Due Process violation absent knowledge on the prosecutor's part. Thus, insofar as the decision to issue a Certificate of Appealability is concerned, the issue is outcome determinative.

On the merits of this question, Petitioner's position is simple: when the government relies on false evidence to secure a conviction, the question of whether relief is required depends on "the character of the

evidence, not the character of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1976). An inquiry into whether the prosecutor knew of the falsity has no place in such a calculus.

Petitioner's position as to whether certiorari is appropriate is even simpler. Regardless of the Court's ultimate decision on this question of constitutional law, all parties should agree that resolution of this recurring question in cases throughout the country should not depend on the fortuity of which jurisdiction a defendant happens to be in. Certiorari is appropriate.

STATEMENT OF THE CASE

1. Factual Background

Petitioner John Pinder was charged with the October 1998 murders of Rex Tanner and June Flood. The state's theory was that the murders occurred on the night of October 25. This was a critical part of the state's case because Pinder had an alibi for Saturday, October 24. At trial, jurors heard (1) evidence of 911 calls which showed the murders occurred on October 25 and (2) the testimony of co-defendants Filomino Ruiz and David Brunyer.

Because Ruiz had also been charged with the murder, and was testifying in exchange for a deal, the state sought other evidence which could tie Pinder to the crime itself. This was problematic – there was no physical evidence connecting Pinder to the murders.

There was no DNA evidence connecting him to the crime, no fingerprint evidence, no fiber or hair evidence, nor any blood typing evidence. To the contrary, the DNA from one of the victims was actually found on the clothes of prosecution witness Ruiz and explosives were found in his car. To remedy the absence of any such evidence, the state presented powerful evidence from jailhouse informant Newly Welch that Pinder confessed to the crime.

As post-trial investigation would show, however, the jury hearing all this evidence did not have the full story, or anything close. In post-conviction investigation, Petitioner uncovered evidence showing the state falsified the 911 call evidence used at trial to support its theory the murders occurred on October 25. Two experts have concluded that the 911 evidence was altered so that in all likelihood the relevant 911 calls had been made the day before. This evidence – which the state has never disputed – eviscerated the state's theory that the murders occurred on October 25.

But that is not all Petitioner uncovered. Newly Welch has come forward to recant his testimony that Petitioner confessed to him in jail. None of this evidence was disclosed to Petitioner prior to trial.

A. Introduction

The state called more than 25 witnesses in its case. There were three areas which stood out. First, the state presented a confession to the murders. But this was not a recorded confession to a law enforcement

officer. Instead, the state called jailhouse informant Newly Welch, who testified defendant confessed to the crime. Second, the state presented eyewitness testimony from former co-defendant Ruiz. Ruiz testified defendant said he was going to kill the victims weeks before the murders and then described the shootings in detail – according to Ruiz, he (Ruiz) killed no one, and defendant shot both victims and laughed about it afterwards. Third, when defendant presented an alibi for October 24, the state confronted him at trial with records from 911 dispatch tapes showing that the crime occurred on October 25, when defendant had no alibi.

As discussed below, it turns out that the jury evaluating these three parts of the state's case did not have the full story. This statement of facts will describe the evidence presented at trial, as well as the new evidence developed after trial.

B. Evidence The Jury Heard

In October 1998 Ruiz worked on John Pinder's ranch. (R1777:59-69.)[1] At the time, Ruiz's girlfriend was Mandy Harris. (R1777:64.)

In late October, Ruiz and Mandy got into a fight and he ended up calling 911. (R1777:78-79.) At trial, Ruiz told jurors that on the same night as his fight

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[1] R refers to the state record from the trial and motion for new trial. R2 refers to the state record from the post-conviction petition.

with Mandy (and the 911 call), he (Ruiz) saw Pinder shoot and kill Flood and Tanner. (R:1777:78.) Ruiz claimed no one else was involved in the murders and that he (Ruiz) had "never killed nobody." (R1777:78.) Ruiz testified that Pinder said "a couple of times, a few times" and then "over one hundred times" that he wanted to kill Flood and Tanner. (R1777:69-71.) Ruiz, Brunyer, and Pinder disposed of the remains thereafter. (R1778:27-30.)

The jury was later presented with logs from the 911 call regarding the fight between Ruiz and Mandy. (R1780:131.) According to these logs, the fight occurred on Sunday, October 25. (R1780:130-131.) Given Ruiz's testimony, of course, this meant the killings also occurred on October 25.

At trial, a number of witnesses said that Pinder and Ruiz were together on the evening of October 25. (R1775:54-55; R1781:72-73; R1780:80.) In addition, the state relied on Welch's testimony that while in custody awaiting trial, Pinder confessed. (R1780:8-9.) At the conclusion of his direct testimony, Welch testified he asked Pinder how it felt to kill and Pinder responded "there's no bigger rush, especially when you know you're going to get away with it." (R1780:15.)

The Sunday October 25 date was important for the prosecution because the defense had a completely different version of events. Petitioner waived his privilege against self-incrimination and told jurors that he did not kill Tanner or Flood. (R1784:105; R1785:60.) He admitted that after being told by Ruiz of their deaths, he helped Ruiz in disposing of the remains of the

bodies. (R1784:88-90.) Pinder helped Ruiz in the cleanup because he was threatened by Ruiz, who also made threats against Pinder's family, and he was afraid of Ruiz and his ties with the Mexican Mafia. (R1784:86, 92-93; R1785:45, 57.)

With respect to the date of the killing, Pinder had an alibi for the evening of Saturday, October 24 – he was with his girlfriend Barbara Dehart all night. (R1784:82-83.) Thus, if the fight between Ruiz and Mandy – which Ruiz himself admitted was the same day as the killings – had really occurred on October 24 rather than October 25, Pinder had a confirmed alibi.

C. Evidence The Jury Never Heard

1. Evidence regarding falsification of the 911 tapes

The jury never heard that the 911 tape evidence used to undermine Petitioner's Saturday night alibi was altered. A post-conviction expert's uncontested conclusion is that "the evidence presently indicates that the files on the subject dates and times of October 24, 1998, and October 25, 1998, have been altered. The evidence indicates that the recordings from both days were exported and re-recorded. Any logs of calls generated from the edited and exported files and used during trial would show information from the edited files and not the original unedited file." (R2:760-761; R2:732.) In other words, the 911 call regarding the Ruiz fight most likely was made on October 24, not October 25.

A second post-conviction expert reviewed the tapes and concluded that they had been altered at the exact time of the 911 call. (R2:661.) This expert also concluded that "[review of the hard drive] indicates an access of 12/16/1999, which occurred after the original DAT recording. . . . [T]he very basic fact that it was accessed indicated a potential modification of the DAT record recording on the hard drive." (R2:664.) In other words, the alterations likely occurred when the evidence was in the sole possession of law enforcement more than six months before trial.

The State has never contested or denied the validity of this expert evidence.

2. Evidence regarding the false confession

Years after Pinder's trial, Newly Welch admitted lying during his testimony. (R2:39.) Petitioner had never confessed to him. (R2:39.) Further, Welch said he would continue to lie in court until such time as he was released from his then current probationary sentence lest he be violated. (R2:39-40.)

2. Procedural History

After uncovering evidence to prove that the state relied on the introduction of false evidence to convict him, Petitioner filed a state post-conviction petition. The Utah Supreme Court held that Petitioner had

procedurally defaulted these claims and upheld the dismissal of the Petition.

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the District of Utah. The district court denied relief holding that the state procedural rule was adequate and independent and that there was no cause and prejudice to excuse the default. The district court denied a certificate of appealability.

Petitioner appealed to the Tenth Circuit. The Tenth Circuit denied a certificate of appealability ruling that "actual knowledge [on the part of the prosecutor] is an element" of a false evidence claim. Petitioner sought timely rehearing which was denied.

This petition follows.

REASONS FOR GRANTING THE PETITION

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

The decision below continues 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 Circuit Court of Appeals 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 Ninth Circuit in *Killian* agreed. "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness." 282 F.3d at 1209 (quoting *United States v. Young*, 17 F.3d 1201, 1203-1204 (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 1203-1204). State courts in Texas, Kentucky, Nevada and New Mexico have reached the same decision. *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 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. But even one district court in the Tenth Circuit in following this heightened test has recognized "[t]he Supreme Court has also held that it is a violation of due process to convict a defendant based upon false evidence, and the Government is also responsible for false testimony – even if the prosecution is unaware of the falsity." *United States v. Williams*, 2012 WL 640020 at 23, n. 3 (N.Dist. Oklahoma).

Most importantly, nearly every court on this side of the split has acknowledged the division in the case law. 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.").

II. THE DECISION BELOW WAS WRONG

In *Giglio v. United States*, 405 U.S. 150 (1972) this Court held that the line of cases beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935) and extending through *Brady v. Maryland*, 373 U.S. 83 (1963) rendered the trial prosecutor's lack of knowledge immaterial to the Due Process violation. "Suppression 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). And 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). As this Court has noted in a closely related area, when the government fails to disclose exculpatory evidence to the defense, the question of whether relief is required depends on "the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S. at 110. This is because the Due Process 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). In short, the remedy for a prosecutor's reliance on false evidence has nothing to do with prosecutorial misconduct and everything to do with ensuring that a defendant's trial was fair.

By denying a Certificate of Probable Cause because Petitioner did not establish the prosecutor had specific knowledge of the false evidence and testimony, the Tenth Circuit erred. Here, that error resulted in a refusal to grant a Certificate of Appealability permitting review of the false evidence claims. But for this unwarranted requirement that a defendant prove contemporaneous knowledge by the prosecutor, Petitioner would have received a Certificate of Appealability. Certiorari is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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