No. _____

In The
Supreme Court of the United States

KENT ERIC LEBERE,

Petitioner,

v.

TRAVIS TRANI, et al.,

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

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QUESTIONS PRESENTED

This case presents a serious claim that an innocent man was wrongly convicted of murder based on perjury. Petitioner Kent LeBere was convicted based on circumstantial evidence, plus his jail podmate's testimony that LeBere "confessed" to murder. But shortly after trial, the informant admitted he had lied; LeBere never confessed. Moreover, the lead detective on the case told the jury he corroborated the informant's story—but in discovery on Mr. LeBere's habeas petition, the detective admitted he actually had not investigated the story and never believed key parts of it.

On Mr. LeBere's *Brady* claim, the lower courts assumed the key testimony was false, and held that it was material. This left only the question whether the state *knew* it was false. But the lower courts denied habeas relief based solely on the district court's finding that the police did not actively assist in concocting the perjury. The Tenth Circuit said that the lead detective's admissions that he neither believed nor corroborated the "confession" story—despite telling the jury the opposite—were "new arguments" that would have required amending the habeas petition.

The questions presented therefore are:

1. Whether the lower courts should fully decide whether the state knew or should have known that the testimony about Mr. LeBere's "confession" was false.

QUESTIONS PRESENTED—Continued

2. In the alternative, whether the Tenth Circuit improperly denied a certificate of appealability by concluding that Mr. LeBere's appeal ultimately will fail, rather than considering—as this Court requires—whether it has at least debatable merit.

PARTIES TO THE PROCEEDING

Petitioner Kent Eric LeBere was the petitioner in the district court and in the court of appeals.

Respondent Travis Trani is the Deputy Executive Director of Prison Operations for the Colorado Department of Corrections, was previously the Department's Director of Prisons, and also served as a prison warden at various facilities. Respondent Philip J. Weiser is the Attorney General of the State of Colorado. Both Respondents were also respondents in the district court and in the court of appeals.

RELATED CASES

U.S. Court of Appeals for the Tenth Circuit, *LeBere* v. *Trani*, No. 20-1117, order of dismissal entered March 1, 2021, and amended April 2, 2021.

U.S. District Court for the District of Colorado, *LeBere* v. *Abbott*, No. 03-cv-1424, order denying habeas petition entered February 28, 2020.

U.S. Court of Appeals for the Tenth Circuit, *LeBere* v. *Trani*, No. 16-1499, judgment entered August 15, 2018.

U.S. Court of Appeals for the Tenth Circuit, *LeBere* v. *Abbott*, No. 11-1090, judgment entered October 18, 2013.

Colorado Supreme Court, *Colorado* v. *LeBere*, No. 08-SC-454, certiorari denied August 18, 2008.

Colorado Court of Appeals, *Colorado* v. *LeBere*, No. 05-CA-2489, opinion entered April 24, 2008.

RELATED CASES—Continued

Colorado Court of Appeals, *Colorado* v. *LeBere*, No. 99-CA-2088, opinion entered January 24, 2002.

Colorado District Court, County of El Paso, *Colorado* v. *LeBere*, No. 98-CR-4342, judgment of sentence entered October 12, 1999.

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PETITION FOR A WRIT OF CERTIORARI

At the murder trial of Petitioner Kent Eric LeBere, the evidence was circumstantial and ambiguous—except for the testimony of two key witnesses. Mr. LeBere's jail podmate dramatically told the jury that LeBere "confessed" to the crime in brutal terms. After that, the state's lead detective on the case told the jury that he had corroborated the informant's story and found it reliable.

But none of that testimony was true. Just months after trial, the informant spontaneously admitted that he fabricated the "confession," and he has now stood by his recantation for two decades and counting. Then, when the district court allowed discovery on this habeas petition, the lead detective admitted that—contrary to his trial testimony—he had disbelieved important elements of the informant's fabricated story, and, despite knowing that the informant was a habitual liar, he had not investigated basic facts to verify whether *any* of the story was true.

Mr. LeBere asserted a *Brady* claim, alleging that the police knew the key testimony against him was false but failed to disclose that crucial evidence. The lower courts assumed that the testimony about the confession was indeed perjured. And the Tenth Circuit held that the testimony was material. That left only one question on Mr. LeBere's *Brady* claim: whether the state knew or should have known of the perjury.

But for two decades, the lower courts have failed to squarely answer that question. Most recently, although

Mr. LeBere presented the admissions made by the lead detective in this very habeas case (along with substantial supporting evidence) showing that the detective knew or should have known that the confession story was false, the lower courts held that these were "new arguments" that could not be considered without an amendment to the habeas petition. That leaves it unclear whether there is any way for Mr. LeBere to obtain judicial review of this crucial evidence.

This is unjust. A serious claim of wrongful conviction should be promptly decided, one way or the other, on the merits—not put through a decades-long procedural runaround based on a supposed pleading defect. The proceedings below have "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The Court should summarily reverse, and remand with instructions that the courts below fully decide Mr. LeBere's claim that the state knew or should have known that the crucial testimony about his "confession" was false.

OPINIONS BELOW

The Tenth Circuit's order denying rehearing and the Tenth Circuit's order denying a certificate of appealability are reported at 850 F. App'x 593, and reproduced in the Appendix at App. 1 and App. 3, respectively. The district court's opinion denying a writ of habeas corpus is not reported but is reproduced in

the Appendix at App. 15. The magistrate judge's recommendation to deny habeas relief is not reported but is reproduced in the Appendix at App. 65.

JURISDICTION

The Tenth Circuit entered its order denying a certificate of appealability on March 1, 2021. The Tenth Circuit entered its order denying rehearing, and amending its certificate-of-appealability order, on April 2, 2021. Pursuant to this Court's orders of March 19, 2020 and July 19, 2021, the time in which to file a petition for a writ of certiorari was extended to 150 days from the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. 2254(a) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he

is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

This habeas petition has been ruled on by the district court and by the Tenth Circuit three times each—but never on the full merits of Mr. LeBere's *Brady* claim. Their opinions, however, have described in detail the evidence and procedural history. The following statement is derived from their opinions, and from the state's briefing below.

A. Kent LeBere Is Convicted Of Murder Based On His Jail Podmate's Testimony That He Confessed.

On October 16, 1998, the body of Linda Richards was found, strangled, in a burning minivan in a self-serve carwash bay in Colorado Springs, Colorado. App. 41, 114.

Ms. Richards had lived in Colorado Springs with her fiancé, Russell Herring. App. 72. As the Tenth Circuit put it, "the couple's relationship had been tumultuous, poisoned by infidelity and punctuated by bouts of violence" that had resulted in multiple police calls and sent Ms. Richards to the emergency room on at least one occasion. App. 88–89, 115. Around 7:00 PM on the night of her death, "[t]he couple argued," App. 72, 115, Herring told Richards "he was considering ending

their relationship," App. 115, and "Richards left in a hysterical manner." App. 41 (quotation marks omitted). Herring believed she was heading to a bar, and he became angry. App. 72–73. Around three hours after Ms. Richards' departure, Herring's neighbor thought he heard a pickup truck drive over the curb; the neighbor later called the police to report this. App. 79. (Herring denied that he had left the house that night. App. 115–116.)

After Richards left the house, she went to a bar that she frequented in Colorado Springs. There she began talking, drinking, and playing pool with Petitioner Kent Eric LeBere, App. 74, who had moved to Colorado Springs from Minnesota about 18 months before. App. 77. At about 12:30 AM, Richards and LeBere left the bar together. App. 75.

Police never discovered any witnesses or physical evidence of "what happened" to Ms. Richards between that time and when she was killed, or of where she was "in the ensuing 90 minutes." App. 16. At about 2 AM, Ms. Richards' minivan was found burning in a self-service carwash bay in Colorado Springs. App. 69–70. Her body was between the two front seats, strangled to death. App. 70. The fire was determined to have started at or shortly after 1:55 AM.[1]

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[1] Police who were on break near the carwash received an eyewitness report of the fire at 2:09 AM and immediately called for firefighters. D. Colo. ECF 169, at 7. The firefighters arrived within five minutes of dispatch and put out the fire. *Ibid.* A fire

"[T]he only witness who actually saw the van prior to the fire" was a passerby who, at about 1:55 AM, had seen another man—not LeBere—standing in the carwash immediately outside the minivan. App. 43–44, 78, 114–115. Mr. LeBere was seen walking a few blocks away from the carwash between 2:15 and 2:30 AM, App. 78–79, and he took a cab home from a nearby convenience store at 2:45. App. 55. The next day, "LeBere had his hair cut." App. 42–43.

Although police focused their ensuing investigation almost exclusively on Mr. LeBere, they uncovered "no physical evidence linking [him] to the murder." App. 114. Police found nothing associated with Ms. Richards or her minivan in Mr. LeBere's home. App. 77. Hair samples taken from Ms. Richards' body did not match LeBere and were not tested against any other suspect. App. 79–80. Laboratory tests did not identify any DNA other than Ms. Richards' own. App. 80. Police took fingerprints from the minivan but presented no fingerprint evidence at Mr. LeBere's trial. App. 81. They seized Mr. LeBere's clothes but found on them neither blood nor any of Ms. Richards' hair. App. 80. Footprints left in the carwash bay did not match Mr. LeBere's shoes, and police did not test the footprints against any other suspect's shoes. App. 81.

Mr. LeBere did "initially provide[] conflicting stories about" how he had gotten home in the early hours of October 16, first saying that he had walked from the

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investigator determined that "that the minivan burned for twenty minutes or less." *Id.*, at 8.

bar, then stating that Ms. Richards had given him a ride, and on another occasion explaining that she had dropped him off after he felt sick, whereupon he went to the convenience store and called a cab. App. 17, 114.

Thus, the Tenth Circuit summed up the circumstantial evidence in this way: "LeBere left a bar with Richards before the murder, was present in her van, and was near the scene of the crime shortly after her death. LeBere's story when interviewed by police was not entirely consistent. And he had a haircut the day after the murder." App. 50–51. On the other hand, "[a]n eyewitness saw a man standing near Richards' van just before the fire who did not match LeBere's description. And Herring, who admitted to abusing Richards, may have lied to police about staying home the night of the murder." App. 51.

At Mr. LeBere's murder trial, therefore, "[t]he State's only direct evidence was the testimony of Ronnie Archuleta," a prisoner who had been housed with Mr. LeBere after his arrest, and who the Tenth Circuit described as "a key witness." App. 112, 115. Archuleta told the jury that, when he and Mr. LeBere were incarcerated together, LeBere admitted to the rape and murder of Ms. Richards and the arson of her minivan. App. 115.

Archuleta described Mr. LeBere's supposed confession in graphic detail to the jury. He stated that LeBere confessed that he went with Ms. Richards to Cheyenne Canyon, near Colorado Springs. App. 85. Archuleta quoted LeBere to the jury, stating that "he said that—

excuse my language—he fucked the bitch ... That he fucked the bitch, and after that, he strangled her. He demonstrated right here on the neck with [ ]his hands." App. 85–86 (quoting trial transcript).

According to Archuleta, LeBere admitted "that the reason he killed her was ... that she could identify him because of a tattoo on his upper arm of a [p]hoenix." App. 86. LeBere then supposedly told Archuleta that, to destroy the evidence of his crimes, he started a fire in the minivan in the carwash bay. *Ibid.* Finally, said Archuleta, LeBere told him he rode a taxi home and was identified at his house the next day by police based on a composite drawing. *Ibid.* Archuleta's testimony was the only evidence that the prosecution presented to explain what it believed Mr. LeBere was doing in the 85 to 90 minutes between the time he left the bar and the time Ms. Richards' van was discovered burning.

The Colorado Springs detective who had led the investigation, J.D. Walker, vouched at trial for Archuleta's testimony. App. 71, 87. Walker told the jury that he knew "I had to corroborate" Archuleta's story, and that "I determined that [it] was reliable" because "Archuleta made some statements ... that only the killer ... would know," including "information that wasn't given to the media, that only other detectives knew ... that's what corroborated this information that I received from Ronnie Archuleta." App. 87–88 (quoting trial transcript).

The jury returned a verdict convicting Mr. LeBere of second-degree murder and second-degree arson.

App. 44–45. He was sentenced to sixty years' imprisonment. App. 45.

B. Archuleta Admits His "Confession" Testimony Was Perjured, Walker Admits He Did Not Believe Much Of It, And The Facts Reveal It Was Objectively Implausible.

In the year 2000, just months after Mr. LeBere's conviction, his trial attorney unexpectedly received a phone call from Ronnie Archuleta, the prosecution's star witness. App. 18, 89–90. As the Tenth Circuit later explained, Archuleta stated that his "whole story" at trial "was fabricated; LeBere had never confessed." App. 116. As recounted by the trial attorney, Archuleta stated that "his conscience was bothering him" because "he knew the case against Mr. LeBere was very weak ... and ... he didn't want an innocent man ... in prison based on false testimony." App. 89–90. He also "claimed that Walker had given him information about the murder and induced him to fabricate a confession." App. 45.

Archuleta has stood by his recantation for 21 years now. In a 2005 affidavit, Archuleta confirmed his recantation and stated that Mr. LeBere "never confessed anything to me." App. 90. Further, Archuleta said that Detective Walker had helped him fabricate the testimony by providing factual details from the police investigation. App. 117. When the district court allowed discovery on this habeas petition, in 2014, Archuleta again stood by his recantation. App. 91–93.

Archuleta's initial phone call touched off a flurry of post-trial and habeas proceedings. Between those proceedings and the original trial, the following evidence about Archuleta's testimony emerged.

At the time that Archuleta testified against Mr. LeBere, Detective Walker knew Archuleta to be "a 'chronic liar.'" App. 94 (quoting deposition transcript). When Archuleta encountered law enforcement, he habitually volunteered dubious "information" about other suspects. D. Colo. ECF 152 (state's brief), at 59. These reports by Archuleta were so regularly false that "a section of the police force that routinely dealt with informants" created "a memorandum ... that warned that Archuleta should not be used as an informant because he lied so often." App. 94. Detective Walker learned of this memorandum before Archuleta testified at trial. *Ibid.* He thus knew that (at the least) Archuleta's story could not be trusted unless there was some way to independently corroborate it. App. 87.

Moreover, Archuleta had an urgent incentive to testify against Mr. LeBere: improving Archuleta's plea deal to get out of jail. When Detective Walker visited Archuleta to discuss his testimony against Mr. LeBere, Walker twice violated instructions from prosecutors by discussing Archuleta's own pending plea bargain with him. App. 84. After Archuleta cooperated, Walker helped arrange a more favorable plea deal for him. *Ibid.*

As the magistrate found below, after the district court granted discovery on Mr. LeBere's habeas

petition, Detective Walker admitted in deposition that "even in that first meeting with Archuleta concerning the Linda Richards investigation," Walker did not believe "certain aspects of the supposed confession." App. 94. For instance, Detective Walker did not believe that Mr. LeBere went to Cheyenne Canyon, let alone committed any crime there, because Walker did not believe that Mr. LeBere "would have even known about the canyon, because [he] had only recently moved to the area." App. 96. And although Archuleta memorably told the jury (twice) that LeBere said he "fucked the bitch," Detective Walker never believed that LeBere said those words, stating that he understood they "came from Ronnie Archuleta, not Kent LeBere," as an "ad lib[]" embellishment to the story. App. 85, 94–95. (quoting Walker's deposition testimony).

Despite disbelieving these key parts of Archuleta's story, Detective Walker allowed Archuleta to testify at trial, and even told the jury that the testimony was believable because it included details that the police had discovered but that Archuleta could not have known unless the killer had told him. But habeas discovery revealed that to be patently false: Archuleta's story of the "confession" was made up entirely of facts that he easily could have learned otherwise, plus other statements that Walker never verified. Detective Walker "testified that he thought it important that Archuleta knew about [Mr. LeBere's] phoenix tattoo." App. 95. But of course Walker knew that Archuleta would have been able to see this tattoo on Mr. LeBere's upper arm when they were housed together in jail. *Ibid.* Similarly,

Walker placed weight on Archuleta's mention of the (true) detail that Mr. LeBere was "arrested after a police officer came to his door with a composite sketch"—but "the composite sketch story was in the media," and Walker knew that Archuleta "had seen the news related to the ... case." *Ibid.* And although Archuleta said that Mr. LeBere had confessed to killing Ms. Richards to cover up a rape, that was not a corroborating detail either: the police's sexual-assault investigation also had been in the news, and in any event Walker knew it had not yielded "anything that [suggested] she [actually] was sexually assaulted."[2] Finally, although Archuleta claimed that Mr. LeBere said the murder took place in Cheyenne Canyon, that could not corroborate his story because Walker knew that police "didn't have any evidence that she wasn't killed right there in the carwash." App. 100. And if Walker had investigated the Cheyenne Canyon allegation, he would have discovered it was unlikely at best: on the night of Ms. Richards' death, the main road access to the canyon was closed by a locked gate at 11 PM—well before she and Mr. LeBere left the bar.[3]

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[2] *Ibid.* (quoting deposition testimony). Although police found sperm in Ms. Richards' body, there was no physical injury that would indicate a non-consensual encounter, nor did testing reveal who they came from, or whether the encounter occurred on that last night of Ms. Richards' life. App. 16, 80–81.

[3] Appellant's CA10 App. Vol. 3, at 615 (Sept. 11, 2020) (Doc. No. 010110405453). This is the only point in this Statement that was not set forth in the lower courts' opinions or in the state's own briefing. But it was established by unrebutted testimony. *Ibid.*

Indeed, when Detective Walker asked Archuleta about a real fact that truly might have been known only to the killer and police—the position of Ms. Richard's body (which police knew was between the minivan's front seats)—Archuleta answered "I don't know." App. 96.

In sum, when Archuleta testified about Mr. LeBere's "confession," the state knew very well that Archuleta habitually lied about other suspects committing crimes. Moreover, Archuleta's story about Mr. LeBere had no intrinsic signs of reliability: all its distinguishing elements were either completely unverified, had been in public news reports, or would have been known to Archuleta simply from living with Mr. LeBere in jail. And indeed, Detective Walker disbelieved important parts of Archuleta's story as soon as he heard them, and did not try to corroborate the other parts. Nevertheless, the state presented Archuleta's testimony to the jury, and Detective Walker even told the jury that Archuleta's testimony was corroborated and reliable.

C. The Courts Decline To Consider The Central Issue In Mr. LeBere's Case.

Following Archuleta's recantation, Mr. LeBere asserted a claim that his prosecution violated *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), because the state knew or should have known that Archuleta's testimony—and Walker's testimony vouching for it—was false, and failed to disclose this crucial evidence to him. Mr. LeBere has spent two decades trying to get the

state and federal courts to consider that claim on the merits, only to be thwarted at every turn.

The state courts first failed to decide Mr. LeBere's *Brady* claim. On direct review of his conviction, Mr. LeBere moved for a new trial under Colorado law based on newly-discovered evidence. App. 117. The Colorado courts rejected that argument in 2002, holding with little explanation that "the jury did not believe Archuleta's testimony." App. 118. Mr. LeBere next advanced a *Brady* claim in collateral state-court proceedings, but the Colorado courts held that their denial of a new trial had disposed of *that* claim as well. App. 112–113, 119–120. As the Tenth Circuit later held, that conclusion was clearly wrong, since the standard for a federal *Brady* claim is different from—and lower than—the standard for granting a retrial based on new evidence under Colorado law. App. 131–132.

Mr. LeBere then filed this habeas case in the federal courts, asserting two *Brady* claims. For one, Mr. LeBere argued that the state should have disclosed that Walker helped fabricate Archuleta's testimony. For another, he claimed that the state should at least have disclosed that Archuleta's and Walker's testimony was not true. App. 234.

In 2011, the district court initially rejected Mr. LeBere's *Brady* claim as not procedurally exhausted in the state courts, App. 120–121, but in 2013 the Tenth Circuit reversed. App. 132.

On remand, in 2016, the district court held that Archuleta's recantation "was not material" under

Brady. App. 46. In 2018, the Tenth Circuit again reversed. The court of appeals expressly "reject[ed] the government's argument that ... the jury likely disbelieved Archuleta anyway," noting that "Archuleta's testimony was the only evidence directly indicating that LeBere was guilty." App. 50. The Tenth Circuit also noted that the appeal presented a question of law whether "[a] defendant [has] a *Brady* claim if the ... prosecution did not correct testimony that it should have known was false." App. 48. But the court of appeals held that it "d[id] not need to resolve" that question, because if "Walker induced Archuleta to concoct a false confession by providing him details about the crime," withholding *that* information was definitely material. App. 48–49.

That led to the proceedings immediately below. Mr. LeBere continued arguing two points: one, that the state should have disclosed that Walker helped fabricate Archuleta's testimony; and two, that the state should at least have disclosed that Archuleta's testimony was false, and that Walker neither corroborated it nor believed it. See D. Colo. ECF 150, at 33–34.

The district court, however, conducted only a partial analysis. The court "assume[d]" that "Mr. Archuleta fabricated the alleged confession" and "testified falsely" about it. App. 23. But in assessing whether the state knew or should have known that the testimony was false, the district court considered only whether "Detective Walker's *efforts to induce* Mr. Archuleta to fabricate a confession by Mr. LeBere constituted *Brady* material that the prosecution failed to disclose." App.

19 (emphasis added). The district court decided that it believed Detective Walker's testimony that he did not conspire with Archuleta, and on that basis rejected Mr. LeBere's *Brady* claim and denied the habeas petition. App. 32–39. The court refused to decide whether Archuleta's confession was "so transparently false that Detective Walker *should have* recognized that Mr. Archuleta had concocted it," stating (in a footnote) that "Mr. LeBere d[id] not clearly" present that argument. App. 23, at n.3. Although the district court purported to conclude that "Mr. LeBere has failed to show ... that Detective Walker knew (or even should have known) that Mr. Archuleta's [testimony] ... was false," it did so only in the context of deciding that Walker did not help create the perjured testimony. App. 39.

On the case's third trip to the court of appeals, the Tenth Circuit this time denied a certificate of appealability. Like the district court, the court of appeals said that it would not consider Mr. LeBere's arguments that (1) "Detective Walker suborned perjury and committed perjury himself, by allowing Archuleta to testify to details of LeBere's false 'confession' that Walker believed not to be true"; (2) "Detective Walker *failed to disclose* that he did not believe key aspects of Archuleta's testimony"; and (3) "the State ... *should have known*" that Archuleta's testimony "was false." App. 8–9. The Tenth Circuit described these as "new *Brady* arguments" that Mr. LeBere "did not raise ... before the district court." App. 8. Specifically, the panel said that if Mr. LeBere had wanted to argue "based on Detective Walker's testimony at his deposition in the habeas proceedings"

that "Detective Walker did not believe key aspects of Mr. Archuleta's testimony," then Mr. LeBere should have "amend[ed] his habeas petition to raise this new argument after the deposition." App. 11–12. Thus, because the panel concluded that Mr. LeBere "never raised the precise arguments he is now presenting," it held he had "waived" those arguments, and it therefore denied a certificate of appealability. App. 13–14.

REASONS FOR GRANTING THE WRIT

This case presents a serious risk that an innocent man has been wrongly convicted of and imprisoned for a murder he did not commit. Both justice and the law require the lower courts to decide Mr. LeBere's *Brady* claim, not avoid it.

From the very beginning, Mr. LeBere's *Brady* claim has been that Detective Walker knew that Archuleta's and his own crucial trial testimony was false, so the state was required to disclose that exceedingly important fact to Mr. LeBere. The lower courts assumed that the testimony was indeed perjured, but they avoided deciding most of the *Brady* claim by artificially focusing on one theory of *how* Walker knew the testimony was false. They held that Mr. LeBere argued only that Detective Walker knew Archuleta's testimony was false *because he helped concoct it*, and so the courts refused to decide whether Detective Walker knew or should have known of its falsity in any other way.

But that holding is mistaken. It is mistaken factually, because Mr. LeBere's habeas petition expressly asserted the claim that the lower courts said he has not pressed, and he spent many pages of his briefing below arguing other ways in which Walker knew that his and Archuleta's testimony was false. It is mistaken legally, because once Mr. LeBere squarely pleaded in his habeas petition that Walker knew the testimony was false, under well-settled principles he was free to present alternative arguments about *how* Walker knew it was false. And it is not defensible equitably, because it would be unfair to the courts and cruel to habeas petitioners if every piece of complementary evidence uncovered in habeas discovery generated a "new argument" that required starting the arduous, years-long habeas process all over again.

The Court should grant the writ, summarily reverse, and remand for a full consideration of Mr. LeBere's *Brady* claim.

I. The Risk Of A Wrongful Conviction Here Requires A Full And Fair Decision.

"[T]he suppression by the prosecution of evidence favorable to an accused ... violates due process." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). In addition, the Constitution's "'fair trial' guarantee" secures a defendant's "right to receive from prosecutors exculpatory impeachment material." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). And the Constitution also requires the state to refrain from "deliberate deception

of a court and jurors by the presentation of known false evidence." *Giglio* v. *United States*, 405 U.S. 150, 153 (1972). Thus, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks* v. *Dretke*, 540 U.S. 668, 675–676 (2004).

These concerns are at their height when a conviction results from perjured testimony about the defendant's confession. "A confession is like no other evidence," and "is probably the most probative and damaging evidence that can be admitted against" a defendant. *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991). Moreover, "[t]his Court has long recognized the serious questions of credibility informers pose." *Banks*, 540 U.S., at 701–702 (cleaned up).

Those points certainly were true here. As the Tenth Circuit recognized, Archuleta was "a key witness" whose testimony was "[t]he State's only direct evidence" against Mr. LeBere. App. 112, 115. The other evidence in the case was circumstantial and ambiguous. The most that could be said against Mr. LeBere was that he was last person seen with Ms. Richards, was in the general vicinity at the time her body was found, and gave an unclear account of his actions between those two times. But *no* physical evidence linked Mr. LeBere to the crime—not hair, not DNA, not footprints, not blood—and Mr. LeBere had no apparent motive to commit it (unlike Ms. Richards' fiancé), and a different, unidentified man was seen immediately

outside Ms. Richards' minivan just moments before the fire must have started.

Against that backdrop, the jury heard dramatic testimony from Archuleta that LeBere had confessed to the crime in graphic and callous terms. This was the prosecution's only evidence about what happened between 12:30 and 1:55 AM. On top of that, the jury heard testimony from the lead detective on the case that he had checked out Archuleta's story and found it reliable. It is obvious how this evidence likely made a deep impression on the jurors. Not for nothing did the Tenth Circuit find it material.

But there now is weighty evidence that this key testimony was perjured. Archuleta has expressly and repeatedly stated that his testimony about the conviction was false. Walker likewise has admitted to facts that are incompatible with his trial testimony.

This case, then, presents some of the gravest circumstances that can exist in the criminal justice system: a serious risk that an innocent man has been imprisoned for decades based on perjured testimony.

II. Mr. LeBere Argued Below That Walker Believed Or Should Have Known That Archuleta's Testimony Was False.

These most serious circumstances call for the courts to fully consider and decide Mr. LeBere's habeas petition. Unfortunately, the lower courts so far have repeatedly failed to do that. The district court assumed

that Archuleta indeed fabricated his story about Mr. LeBere's confession. Combined with the Tenth Circuit's earlier materiality holding, that left only one element of Mr. LeBere's *Brady* claim to consider: whether the state knew (or should have known) that Archuleta's testimony was false. But the lower courts failed to fully engage with that question. The district court found that Detective Walker did not *help to fabricate* Archuleta's testimony, and held solely on that basis that Walker could not have known it was false. The court refused to consider whether Walker knew or should have known in any other way that it was false. And the Tenth Circuit affirmed, holding that Walker's deposition testimony—in this very habeas case—that he had neither believed nor corroborated Archuleta's story generated "new arguments" that it would not consider.

That holding was mistaken on two levels: it overlooked Mr. LeBere's many pages of argument on this very topic in the district court, and it overlooked this Court's instruction that, once a litigant has fairly asserted a claim, he is free to raise alternative arguments supporting that claim. Any other result would add pointless and unjust complication to the already-arduous process of collateral review.

A. Mr. LeBere Extensively Argued That Archuleta's Testimony Was Implausible And Uncorroborated.

First, the Tenth Circuit's description of Mr. LeBere's arguments as "new" is belied by the record.

Even before Detective Walker testified in discovery in this case, Mr. LeBere's amended habeas petition expressly asserted "two separate *Brady* violations." App. 233. The petition's first *Brady* claim was that "the prosecution relied on Archuleta's and Walker's perjured testimony, even though Walker knew the testimony was false." App. 233–234. The second claim was that "the prosecution failed to disclose that Walker met with Archuleta and fed him information that enabled Archuleta to give false testimony against LeBere." App. 234. In other words, the petition asserted that the state improperly withheld two kinds of evidence: first, the fact that Archuleta's and Walker's testimony was false; and second, the fact that Walker had helped fabricate Archuleta's testimony. That second claim obviously did depend on Walker having conspired with Archuleta. But the first claim did not. Indeed, if Mr. LeBere had simply been alleging that Walker knew Archuleta's testimony was false because he helped make it up, this would have been duplicative of his other *Brady* claim. The only clear reason to plead Walker's knowledge as a separate *Brady* violation, as Mr. LeBere did, would be to present a claim that Walker learned of the falsity of Archuleta's testimony in some other way.

And of course, Walker's deposition testimony in this case supported exactly that claim. Once Mr. LeBere acquired that evidence, his district-court briefing discussed it at length. It offered many pages of argument that Walker recognized Archuleta's story was inherently implausible, but failed to investigate. Mr. LeBere contended that, "in violation of *Brady*, Walker allowed the State to present critical evidence at trial through Archuleta that Walker did not believe to be true and had done nothing to verify." D. Colo. ECF 168, at 16. Mr. LeBere argued this in his moving and reply briefs before the magistrate judge (D. Colo. ECF 150, at 19–21; D. Colo. ECF 157, at 19–23), in his proposed findings of fact and conclusions of law (D. Colo. ECF 161, at 28–31, 37–38), and in his objections to the magistrate's recommendation (D. Colo. ECF 168, at 15–16). If Mr. LeBere's only argument had been that Walker helped fabricate Archuleta's story, there again would have been no need to emphasize that Walker did not believe or verify the story that he himself made up.

The specifics of Mr. LeBere's briefing confirm this. He explained at length in the district court that Walker could not reasonably have believed Archuleta's story, because it *did not* contain any non-public information that the police knew to be true. Mr. LeBere's brief pointed out that "Walker regarded Archuleta as a 'chronic liar' " (D. Colo. ECF 150, at 19), and that although Walker admitted that "you have to ... test" things that Archuleta said, Walker never did that in this case. *Id.*, at 20. Further, Mr. LeBere explained how Walker could not reasonably have thought Archuleta's

story was corroborated by its details about LeBere's tattoo, or the composite sketch, or the sexual assault, or the Cheyenne Canyon location. Mr. LeBere argued that those factors were not "information that could only have come from LeBere himself," as Detective Walker had told the jury, but were "information [that] was either readily available to Archuleta from sources other than LeBere, or ... that to this day Walker does not know is true" and "did nothing to test." *Id.*, at 20, 21; see *id.*, at 22. Moreover, Mr. LeBere explained that the one "test" Detective Walker actually tried—asking Archuleta the position of Ms. Richards' body—yielded no result, but "the State still put Archuleta on the stand at LeBere's trial." *Id.*, at 22.

These arguments and evidence directly show that Walker knew or should have known that Archuleta's story was false—but they would make little sense if (as the lower courts said) Mr. LeBere's only claim was that Walker helped concoct the story. If Detective Walker had helped construct Archuleta's testimony, then one would expect the testimony *would* contain non-public details from the police investigation. Arguing that it *did not* contain such details—as Mr. LeBere did at length below—does not readily support such a theory, but instead shows that Archuleta's testimony simply was (or should have been) implausible to Walker.[4]

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[4] If there was a need to state any more explicitly the claim that all these arguments obviously were making, Mr. LeBere did so in a footnote in his principal brief before the magistrate judge: "even if Walker had not been directly informed by Archuleta that [LeBere had not confessed], the record amply demonstrates that

So the question that Mr. LeBere presented to the district court was not simply "did Walker help fabricate Archuleta's confession testimony," as the courts below concluded. Instead, the question Mr. LeBere presented was "*did Walker actually believe—or should he have known—that Archuleta's confession testimony was false.*" And there can be no dispute that the courts below failed to fully address that question.

B. Having Claimed That Walker Knew The Trial Testimony Was False, Mr. LeBere Could Present Alternative Arguments For *How* He Knew It Was False.

Second, even if Mr. LeBere had presented "new arguments" that were not expressly spelled out in his habeas petition, that would not require him to amend his petition, as the Tenth Circuit said. Mr. LeBere was not trying to present a new *Brady* claim. Throughout the habeas proceedings, he has contended that the prosecution unlawfully withheld from him the fact that Archuleta's and Walker's trial testimony was false. That position has never changed. Indeed, Mr. LeBere was not even trying to present a new theory of *why* the prosecution should have disclosed this fact to him. Throughout the habeas proceedings, his argument has been that Walker knew the testimony was false, and

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Walker knew, or should have known, that Archuleta was lying," because it showed an "utter failure to investigate" on Walker's part even though "Walker . . . was aware of the ample reasons not to trust Archuleta." *Id.*, at 35–36 n.5.

that this knowledge was imputed to the state. That argument has not changed, either.

Having squarely pleaded that claim, Mr. LeBere was not straitjacketed into any particular factual theory of *how* Walker knew the testimony was false. As this Court has long since settled, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534–535 (1992) (citations omitted). The courts apply this principle in habeas cases. See *Ellis* v. *Harrison*, 947 F.3d 555, 558 n.4 (9th Cir. 2020) (Nguyen, J., concurring); *McDowell* v. *Heath*, 2013 WL 2896992 (S.D.N.Y. June 13, 2013). Thus, once Mr. LeBere had asserted the claim that Detective Walker knew (or should have known) that Archuleta was not telling the truth, he was free to make alternative arguments about the route by which Walker came (or should have come) to that realization.

This is the only sensible conclusion. These habeas proceedings were instigated by Archuleta's admission that his trial testimony was false. Evidence and arguments that Archuleta's testimony was implausible and unverified directly support that central contention. To be sure, Archuleta himself did accuse Walker of helping construct the testimony. But if the Tenth Circuit were right, and Walker's admission that he neither believed nor corroborated Archuleta's testimony gave rise to "new" habeas claims that could not be considered without amending the petition, the results would be calamitous for both the courts and the parties. Under well-settled law, the state likely would argue that

any "new" habeas claim would face a long and labor-intensive procedural pathway to decision. For one thing, any federal habeas claim must first be presented to the state courts. 28 U.S.C. 2254(b)(1); *Davila* v. *Davis*, 137 S. Ct. 2058, 2064 (2017). Thus, the state likely would argue that the Tenth Circuit's conclusion would require Mr. LeBere to suspend the federal proceedings and go back to the Colorado courts to present the evidence obtained in federal discovery. For another thing, if Mr. LeBere ever got back to federal court and tried to amend his habeas petition (or file a new one) to add the "new" claim, he might well run into restrictions related to procedural default of his claims in the state courts, see *Davila*, 137 S.Ct., at 2064; *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000), or the federal statutory bar on "second or successive" habeas petitions, 28 U.S.C. 2244(b); see *Banister* v. *Davis*, 140 S.Ct. 1698, 1704 (2020), or the one-year limitations period for federal habeas claims. 28 U.S.C. 2244(d); see *McQuiggin* v. *Perkins*, 569 U.S. 383, 388–389 (2013).

That is not to say that these obstacles would necessarily prove fatal to Mr. LeBere's claims. He would have arguments to overcome each of them, and perhaps those arguments would succeed. But what is certain is that the Tenth Circuit's demand to amend the habeas petition would allow the state to argue for proceedings that would require—at the least—many more years of litigation, many more pages of briefing, and many more hours of attention from the courts, before the district court could even consider the "new" habeas claim. That might be warranted if habeas discovery

had uncovered facts supporting a genuinely new claim, unconnected to the one that Mr. LeBere has been pursuing for two decades now. But that is not remotely what happened. Mr. LeBere's claim has always been that Walker knew or should have known that Archuleta's story was false. When federal habeas discovery on that claim uncovered evidence directly supporting it, he should not be required to go back to square one in order to use that evidence.

III. At The Very Least, Mr. LeBere Was Entitled To A Certificate Of Appealability.

Finally, the Tenth Circuit's error was compounded by the procedural posture in which it arose: the court of appeals was not considering Mr. LeBere's full appeal on the merits, but merely considering whether to grant a certificate of appealability. This Court has emphasized that the standard a habeas petitioner must meet in that context is relatively low, and not the same as would apply on plenary review. In this case, however, the Tenth Circuit plainly failed to observe that admonition. Thus, although this Court can and should review the merits of the Tenth Circuit's ruling, it should at minimum reverse for a proper application of the low standard for a certificate of appealability.

A ruling on a habeas petition may not be appealed "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. 2253(c)(1). And "[a] certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. 2253(c)(2). This Court has instructed that "a COA determination is a separate proceeding, one distinct from the underlying merits," and "a COA does not require a showing that the appeal will succeed." *Miller-El* v. *Cockrell*, 537 U.S. 322, 337, 342 (2003) (citation omitted). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate," and so a petitioner seeking a COA need only "demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Ibid.* (citation omitted). The same standard applies when a habeas petitioner seeks a COA for review of "a procedural ruling barring relief": the petitioner "must [also] demonstrate that [the] procedural ruling ... is itself debatable among jurists of reason." *Buck* v. *Davis*, 137 S.Ct. 759, 777 (2017).

"Thus, when a reviewing court inverts the statutory order of operations and first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner at the COA stage." *Id.*, at 774 (cleaned up; parenthetical omitted).

But that is exactly what the Tenth Circuit did here. Its most recent ruling in this case denied Mr. LeBere a certificate of appealability—but although the Tenth Circuit recited the "reasonable jurists" standard, nowhere did it discuss or apply that standard. Instead the panel simply held that "our general rule against

considering issues for the first time on appeal" precluded "consider[ing] these arguments now as a ground for a COA." App. 13. It never even inquired, let alone decided, whether that conclusion was debatable.

"With respect to this Court's review," a COA denial "does not limit the scope of [the Court's] consideration." *Buck*, 137 S.Ct., at 774–775. The Court "may review the denial of a COA," and when it does so, it has discretion either to "reverse and remand so that the correct legal standard may be applied," or to go beyond deciding whether the district court's decision "was ... debatable," and consider also whether "it was erroneous." *Ayesta* v. *Davis*, 138 S.Ct. 1080, 1089 n.1 (2018). Here, as described above, the district court should have considered Mr. LeBere's full *Brady* claim on the merits, and so the Court should reverse and remand for that consideration.

But at the very least, reasonable jurists could debate whether Mr. LeBere fairly presented the claims that the lower courts refused to decide. For that reason, even if the Court does not rule on the merits of that issue, it should reverse and remand for the Tenth Circuit to consider it under the proper COA standard. This Court has not hesitated in the past to enforce that standard through summary reversal. See *Tharpe* v. *Sellers*, 138 S. Ct. 545 (2018). It should do at least that much here.

* * *

This is an extraordinary case. Mr. LeBere has very substantial evidence that he was wrongly convicted of

a crime he did not commit. That evidence can be fully considered, and the claim fully decided, on remand from this Court—or else they can be consigned to a long and doubtful litigation pathway that may never result in a merits decision. That first outcome is the just and legally correct one. The Court should exercise its supervisory authority to ensure it.

CONCLUSION

The Court should grant certiorari, summarily reverse, and remand for a full consideration of Mr. LeBere's *Brady* claim. In the alternative, the Court should grant certiorari and set the case for merits briefing and argument.

Respectfully submitted,

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