UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT ERIC LEBERE, Petitioner - Appellant, v. TRAVIS TRANI, Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents - Appellees.	No. 20-1117 (D.C. No. 1:03-CV-01424-MSK-MEH) (D. Colo.)

ORDER

(Filed Apr. 2, 2021)

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

This matter is before the court on Appellant's Petition for Panel Rehearing and for Rehearing En Banc.

The petition for panel rehearing is denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

The panel has *sua sponte* revised the Order Denying Certificate of Appealability issued on March 1, 2021, to correct a clerical error. The Clerk of Court shall issue the attached revised Order Denying Certificate of Appealability, effective *nunc pro tunc* to the date the original Order Denying Certificate of Appealability was filed, March 1, 2021.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

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ORDER DENYING CERTIFICATE OF APPEALABILITY*

(Filed Mar. 1, 2021)

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

Kent Eric LeBere, a Colorado state prisoner, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition for habeas relief. We deny Mr. LeBere's request for a COA and dismiss this matter. *See* 28 U.S.C. § 2253(c)(1)(A).

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

The State of Colorado charged Mr. LeBere with murdering Linda Richards. At trial, the State offered testimony from Ronnie Archuleta, a jailhouse informant who was housed with Mr. LeBere prior to trial. Mr. Archuleta testified that Mr. LeBere confessed to killing Ms. Richards. A jury found Mr. LeBere not guilty of first degree murder, felony murder, and manslaughter, but convicted him of second degree murder and arson. He was sentenced to sixty years' imprisonment.

While Mr. LeBere's direct appeal was pending, Mr. Archuleta recanted his trial testimony. Mr. Archuleta claimed that the detective investigating the murder, J.D. Walker, had given him information about the murder and induced him to fabricate a confession. The state court denied Mr. LeBere's request for a new trial based on Mr. Archuleta's recantation. Mr. LeBere then filed his § 2254 habeas petition, raising a claim that the State improperly withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

This is the third time Mr. LeBere appears before this court seeking review of the district court's denial of his habeas petition. In his first appeal, we reversed the district court's denial of his *Brady* claim as procedurally barred. *See LeBere v. Abbott*, 732 F.3d 1224, 1225 (10th Cir. 2013). On remand, both Mr. Archuleta and Detective Walker were deposed. Mr. Archuleta testified that Mr. LeBere never confessed to him and that Detective Walker provided him information to concoct a false confession in exchange for lenient treatment in

his own case. According to Mr. Archuleta, Detective Walker instructed Mr. Archuleta to falsely testify that Mr. LeBere was the source of the information even though Detective Walker knew that he had provided the information to Mr. Archuleta. Contrary to Mr. Archuleta's testimony, Detective Walker testified that Mr. Archuleta had reported Mr. LeBere's confession to him.

A magistrate judge recommended denying Mr. LeBere's habeas petition on the ground that Detective Walker's testimony was more credible than Mr. Archuleta's, but the district court denied relief on a different ground. It determined that evidence that Detective Walker directed Mr. Archuleta to fabricate a confession by Mr. LeBere and fed him information to do so and then they both falsely testified about it, was immaterial to Mr. LeBere's conviction. The court therefore denied habeas relief on the *Brady* claim.

In his second appeal, we noted that Mr. LeBere framed his *Brady* claim "as two distinct subclaims related to Archuleta's recantation": (1) "that the government suppressed evidence that Walker and Archuleta conspired to manufacture a false confession"; and (2) "that Walker and Archuleta committed perjury by testifying to the contrary." *LeBere v. Trani*, 746 F. App'x 727, 731 (10th Cir. 2018). We determined "that the evidence allegedly not disclosed—that Walker induced Archuleta to concoct a false confession by providing him details about the crime—is material regardless of the subsequent perjury." *Id.* at 732. We therefore declined to address Mr. LeBere's second subclaim.

In addressing the materiality of the suppressed evidence identified in the first subclaim, we explained that:

> In addition to undermining Archuleta's credibility, the suppressed evidence would have strongly supported LeBere's theory that police had conducted an insufficient investigation. If Walker was willing to conspire with an inmate to procure a false confession, the jury might well conclude that the investigation was aimed at convicting LeBere rather than uncovering the truth.

Id. We further explained that "[s]howing that Walker encouraged an informant to lie would have had an impact on the case as a whole." *Id.* We ultimately "conclude[d] that the suppressed evidence [was] sufficient to undermine our confidence in the verdict." *Id.* at 733.

Although we noted that the State argued that the district court's decision could be affirmed on the alternative ground that Mr. Archuleta's recantation was not credible, we explained that "[w]e sit in review of the district court's decision, not the magistrate judge's recommendation." *Id.* We therefore "[left] it to the district court on remand to consider credibility in the first instance." *Id.*

On remand, the district court explained that "[a]s both the Magistrate Judge and the 10th Circuit recognized, the question comes down to one of credibility: whether Mr. Archuleta's testimony about having conspired with Detective Walker is more credible than

Detective Walker's testimony that Mr. Archuleta self-reported Mr. LeBere's alleged confession without any prompting." Aplt. App., Vol. 2 at 453. The court then focused on what it considered to be the specific factual dispute. It noted that even assuming that Mr. Archuleta fabricated the alleged confession, the "pertinent question" was "whether Mr. Archuleta fabricated the alleged confession at the direction of (or, at the very least, with the knowledge of) Detective Walker." *Id.* at 454. Stated another way, "if Mr. Archuleta decided to fabricate Mr. LeBere's alleged confession on his own initiative, without the knowledge of Detective Walker, then the prosecution's failure to disclose that fabrication to Mr. LeBere cannot be a *Brady* violation." *Id.*

The court acknowledged that "[a] *Brady* claim may arise where the prosecution [is] negligent in failing to prevent false testimony from being presented." *Id.* at 454 n.3. But the court explained that it did "not understand Mr. LeBere to contend that, if Mr. Archuleta fabricated the alleged confession of his own accord and never advised Detective Walker of that fact, that confession was nevertheless so transparently false that Detective Walker should have recognized that Mr. Archuleta had concocted it." *Id.* In other words, Mr. LeBere "[did] not clearly argue that Detective Walker's acceptance of Mr. Archuleta's story as presented constituted a degree of negligence sufficient to give rise to a *Brady* violation." *Id.*

The court ultimately found that, based upon its "review of the record as a whole, Detective Walker's version of events [was] more credible than Mr. Archuleta's,"

and that Mr. LeBere's *Brady* claim failed as a result. *Id.* at 466. The court therefore adopted the magistrate judge's recommendation and denied Mr. LeBere's habeas petition.

II. Discussion

"We may grant a COA only if the petitioner makes a substantial showing of the denial of a constitutional right." *Milton v. Miller*, 812 F.3d 1252, 1263 (10th Cir. 2016) (internal quotation marks omitted). To be entitled to a COA, Mr. LeBere must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks omitted).

The narrow question on remand from Mr. LeBere's second appeal related solely to the credibility of Detective Walker versus Mr. Archuleta. We explained that "the district court will either find that Archuleta's testimony is not credible (in which case both subclaims fail), or it will find that Archuleta is credible (in which case it will grant habeas relief)." *LeBere*, 746 F. App'x at 732 n.2. The district court ruled that Detective Walker was more credible and therefore denied Mr. LeBere's habeas petition.

Instead of challenging that ruling, Mr. LeBere now seeks to raise two new *Brady* arguments. First, he asserts that "[e]ven crediting Detective Walker's habeas testimony over Archuleta's, . . . 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 and that were in fact false." COA Mot. at 34-35. He further asserts that Detective Walker "*failed to disclose* that he did not believe key aspects of Archuleta's testimony." *Id.* at 35. Second, Mr. LeBere argues that "[e]ven if there was no overt conspiracy [between Detective Walker and Mr. Archuleta], [he] can still prove his *Brady* claim if he shows the State withheld evidence it *should have known* was false." *Id.* at 39.

We decline to grant Mr. LeBere a COA because he did not raise these particular *Brady* arguments before the district court and he cannot "stretch the canopy of his [original *Brady* claim] to cover" these new arguments. *Milton*, 812 F.3d at 1263. "We have long applied the rule that we do not consider issues not raised in the district court." *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015). If an "argument was not raised in [an appellant's] habeas petition, it is waived on appeal." *Id.* This waiver principle holds true even where, as is the case here, the prisoner is seeking relief under the same *type* of claim. Mr. LeBere cannot allege a *Brady* claim and "then usher in anything fitting under that broad category as the same claim." *Milton*, 812 F.3d at 1264.

Mr. LeBere cites extensively to Detective Walker's deposition from the habeas proceeding, *see* COA Mot. at 6-7; *id.* at 35-37, to support his argument that "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 and that were in fact false" in violation of *Brady, id.* at 34-35. He argues:

> [T]he District Court viewed this as an all-or-nothing question: either grant LeBere's petition if you believe Archuleta, or deny LeBere's petition if you believe Walker. Respectfully, there is a third option that LeBere *presented* and which requires habeas relief: even if Walker is believed, his own admissions in habeas proceedings show the State suppressed material exculpatory evidence at LeBere's trial by suborning Archuleta's perjury, vouching for that perjury, and withholding facts known to unmask the perjury. Even setting aside any credibility disputes, Walker's testimony shows that the State failed to disclose critical exculpatory information. This is a *Brady* violation that merits habeas relief.

Id. at 38 (emphasis added) (citations omitted).

But Mr. LeBere does not cite to where he *presented* this *Brady* argument to the district court. Mr. LeBere filed the operative pleading in this case—his amended habeas petition—on August 12, 2009. The *Brady* claim presented in the amended habeas petition is premised on allegations that Detective "Walker went about procuring a confession"; "Walker knew that LeBere never confessed to murdering Ms. Richards"; and "[Walker] knew that Archuleta's testimony about the confession was false, because Archuleta created the 'confession' with information that Walker supplied." Aplt. App., Vol. 1 at 35-36. The amended habeas petition explicitly

links the *Brady* claim to Detective Walker inducing Mr. Archuleta to concoct the false confession. *See id.* at 37 ("In this case, the prosecution committed two separate *Brady* violations, both of which stemmed from Walker's tampering with Archuleta."); *id.* at 38 ("Walker knew that LeBere never confessed, and Walker knew that Archuleta was able to offer his perjured testimony only thanks to information that Walker himself provided. This led to Walker's own perjury, through his testimony that Archuleta obtained the 'confession' from LeBere, rather than from information that Walker provided." (citation omitted)); *id.* at 39 ("Walker visited Archuleta several times in jail and gave Archuleta police reports to prepare for his testimony. These facts are exculpatory *Brady* material because it shows that LeBere's supposed confession was a lie concocted by Archuleta, and made possible and encouraged by Walker.").

Mr. LeBere's new *Brady* argument is based on the factual premise that he previously disputed—that Mr. Archuleta self-reported to Detective Walker that Mr. LeBere had confessed to him and Detective Walker played no role in inducing Mr. Archuleta to concoct the allegedly false confession. The new *Brady* argument is based on the theory that Detective Walker did not believe key aspects of Mr. Archuleta's testimony about Mr. LeBere's confession, but Detective Walker failed to disclose those beliefs to Mr. LeBere's defense lawyers, or tell the jury. Mr. LeBere asserts that "Walker affirmatively vouched for Archuleta and committed perjury himself when he told the jury he *had* corroborated those details and *did* believe Archuleta." COA

Mot. at 38. He contends that "[t]he failure to disclose Archuleta's perjury, the commission of the perjury by vouching for Archuleta's testimony, and concealing knowledge that an assault could not have been committed at Cheyenne Canyon as Archuleta testified, each constitute a *Brady* violation." *Id.* This new *Brady* argument is based on Detective Walker's testimony at his deposition in the habeas proceedings on remand after the first appeal, but Mr. LeBere never sought to further amend his habeas petition to raise this new argument after the deposition.

Mr. LeBere's second argument suffers from the same defect as his first. He argues that he can "prove his *Brady* claim even if there was no proven express agreement [between Detective Walker and Mr. Archuleta]" because of "Walker's *constructive* knowledge that Archuleta would testify falsely and his failure to disclose that information." COA Mot. at 41. He acknowledges the district court's conclusion that he did not present a constructive-knowledge theory, but he argues it is "plainly incorrect." *Id.* at 41 n.3. For support, he first cites to an argument in his COA motion in his second appeal to this court. *See id.* (citing Aplt. App., Vol. 2 at 406). But an argument in a motion to our court in a prior appeal does not show Mr. LeBere presented the issue to the district court. He next cites to a footnote in his habeas reply brief, which states "'[m]ost importantly, the State does not make any argument that in this case the misconduct of Walker and the perjured testimony of Archuleta and Walker were unknowable by the prosecutors or other state actors.'"

Id. (quoting Aplt. App., Vol. 1 at 249 n.2). But that statement relates to the State's alleged knowledge about Detective Walker's misconduct in feeding evidence to Mr. Archuleta and inducing him to concoct a false confession and then both of them presenting false testimony about Mr. LeBere's false confession. This reference does not show that Mr. LeBere presented an argument to the district court that Detective Walker had constructive knowledge that Mr. Archuleta would testify falsely about Mr. LeBere's confession. Finally, Mr. LeBere cites to his amended habeas petition where he outlined the factors for prevailing on a *Brady* claim and included a citation to a case with the parenthetical "that even negligent or inadvertent suppression is nevertheless suppression for *Brady* purposes." *Id.* (quoting Aplt. App., Vol. 1 at 34). But this citation to a general legal proposition without any accompanying factual development does not adequately present a constructive-knowledge argument to the district court. Mr. LeBere has failed to show that he presented a *Brady* argument in district court based on Detective Walker's constructive knowledge.

III. Conclusion

Although Mr. LeBere's amended habeas petition raised a *Brady* claim, he never raised the precise arguments he is now presenting in his COA request. In light of our general rule against considering issues for the first time on appeal, we will not consider these arguments now as a ground for a COA. *See Owens*, 792 F.3d at 1246 ("We have long applied the rule that we

do not consider issues not raised in the district court to bar not only a bald-faced new issue presented on appeal, but also situations where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented [below]. Because the argument was not raised in [the] habeas petition, it is waived on appeal." (citation and internal quotation marks omitted)).

Accordingly, we deny Mr. LeBere's request for a COA and dismiss this matter.

Entered for the Court

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Marcia S. Krieger

Civil Action No. 03-cv-01424-MSK-MEH

KENT ERIC LEBERE,

Applicant,

v.

TRAVIS TRANI, Warden, and
THE ATTORNEY GENERAL
OF COLORADO OF COLORADO,

Respondents.

ORDER ADOPTING RECOMMENDATION
AND DENYING PETITION

(Filed Feb. 28, 2020)

THIS MATTER comes before the Court pursuant to a remand from the 10th Circuit Court of Appeals **(# 177)**. This case presents a *habeas corpus* Petition by Mr. LeBere pursuant to 28 U.S.C. § 2254, and the 10th Circuit has directed the undersigned to "consider [the] credibility" of two witnesses who have given testimony regarding the issues raised in Mr. LeBere's Petition. The Court has considered the entirety of the record in this case.

FACTS

This case involves both extensive underlying facts and a complicated procedural history, but a full recitation regarding those issues is not necessary in order to resolve the matters before the Court.[1] It is sufficient to observe that on the evening of October 15, 1998, following a fight with her fiancée, Linda Richards went alone to a bar. There, she met Mr. LeBere, spent several hours drinking with him, and left the bar with Mr. LeBere around 12:30 a.m. Mr. LeBere told the bartender that Ms. Richards was giving him a ride home. What happened in the ensuing 90 minutes is unknown. But at about 2:00 a.m., a witness contacted Colorado Springs police to report a minivan on fire at a self-serve car wash. After the fire was extinguished, investigators discovered the partially-burned body of Ms. Richards inside the minivan. (The minivan was registered to Ms. Richards' father.) The medical examiner ultimately concluded that Ms. Richards had been strangled to death. There was also evidence that she had had recently had sexual intercourse, but there was insufficient DNA evidence to reach any conclusions as to with whom and under what circumstances.

Although police briefly considered alternative suspects, including two homeless men camping near the car wash and Ms. Richards' fiancée, suspicion quickly focused on Mr. LeBere, who had been seen by witnesses

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[1] Lengthy factual recitations can be found in the Magistrate Judge's Recommendation **(# 167)** and the 10th Circuit's decision. *LeBere v. Trani*, 746 Fed.Appx. 727 (10th Cir. 2018).

in a neighborhood in the vicinity of the car wash around 2:15 a.m., recorded on security cameras as visiting a 7-11 convenience store near the car wash at or about 2:35 a.m., and had taken a cab ride from the 7-11 to his residence at about 2:45 a.m. During questioning, Mr. LeBere initially gave false information to the police about his activities the evening before: he told police that he walked home alone from the bar, then later admitted to leaving the bar with Ms. Richards, but stated that she drove him home. (Following his arrest, Mr. LeBere related a third story to his aunt: that after leaving the bar with Ms. Richards, she drove them to another bar across town and near the car wash, but that Mr. LeBere had felt sick by that time and excused himself, walking to the 7-11 where he called for a cab.) Police arrested Mr. LeBere a few days later, and he was charged with three alternative counts of First-Degree Murder and one count of Second-Degree Arson.

The key issue presented here concerns an alleged confession that Mr. LeBere made during his pre-trial detention. Mr. LeBere was housed with several other detainees, including Ronnie Archuleta. Mr. Archuleta was known to serve as a confidential informant to police, both inside and outside jail. (As discussed below, he was also known by police to fabricate information.) Although the circumstances – and indeed, existence – of that confession are hotly disputed and discussed in greater detail below, it is sufficient at this point to observe that Mr. Archuleta told Colorado Springs Police Detective J.D. Walker that he would testify that Mr.

LeBere had confessed to having sex with Ms. Richards, strangling her, and then driving the minivan to the car wash and setting it on fire to conceal any physical evidence. In exchange for Mr. Archuleta's assistance, Detective Walker and Ann Joyce, a Colorado Springs District Attorney, allegedly offered Mr. Archuleta a favorable plea deal that allowed him to avoid additional jail time on the check fraud charges he was currently facing.

Mr. LeBere went to trial in 1999. Along with the various circumstantial evidence that was presented against him, the trial court allowed Mr. Archuleta to testify about Mr. LeBere's alleged confession. Mr. Archuleta's reputation for untruthfulness was also addressed in detail on both direct- and cross-examination. Mr. LeBere's defense focused on the fact that police had hastily decided to charge Mr. LeBere and had not materially investigated alternative suspects, such as the homeless men or Ms. Richards' fiancée. Ultimately, the jury acquitted Mr. LeBere of charges of First-Degree Murder and Felony Murder, but convicted him on charges of Second-Degree Murder and Second-Degree Arson. Mr. LeBere was then sentenced to 60 years in prison on the charges.

About six months after the trial had concluded, Mr. Archuleta reached out to Mr. LeBere's attorney, stating that "his conscience was bothering him" and admitting that he had testified falsely about Mr. LeBere's jailhouse confession. Mr. Archuleta claimed that Detective Walker had offered to give Mr. Archuleta favorable treatment on his own criminal charges if he

gave testimony that implicated Mr. LeBere. Mr. Archuleta stated that Mr. LeBere had not given out any information about the crime, and that Detective Walker stated that he "needed a confession." Mr. Archuleta stated that Detective Walker then provided key pieces of information to Mr. Archuleta to allow Mr. Archuleta to fabricate an alleged "confession" that was rendered more credible because it contained heretofore unreported details about the crime. Mr. Archuleta later signed an affidavit relating this version of events.

Based on these facts, Mr. LeBere filed this *habeas corpus* petition pursuant to 28 U.S.C. § 2254, seeking to set aside his conviction because (among other things) Detective Walker's efforts to induce Mr. Archuleta to fabricate a confession by Mr. LeBere constituted *Brady* material that the prosecution failed to disclose. After certain procedural developments that are not germane here, Mr. LeBere's present *habeas* Petition asserts that single *Brady* claim.[2] In conjunction with that petition, both Mr. Archuleta and Detective Walker gave video depositions **(# 151)**. This Court referred the matter to the Magistrate Judge for a

[2] The 10th Circuit describes that single claim as presenting "two distinct subclaims": that the District Attorney failed to disclose that Detective Walker and Mr. Archuleta "conspired to manufacture a false confession" and that Detective Walker and Mr. Archuleta "committed perjury by testifying to the contrary." *LeBere v. Trani*, 746 Fed.Appx. 727, 731 (10th Cir. 2018). But the 10th Circuit concluded that Mr. LeBere "cannot prevail on subclaim two without also prevailing on subclaim one," such that "in neither scenario would [ ] resolution of the second subclaim affect the ultimate outcome." *Id.* at 732 n. 2.

Recommendation, and the Magistrate Judge recommended **(#167)** that Mr. LeBere's Petition be denied. The Magistrate Judge found that Mr. Archuleta's version of events (that Detective Walker directed him to fabricate a confession by Mr. LeBere and the two men conspired to develop the details of the false confession) was less credible than Detective Walker's version of events (that Mr. Archuleta reported to Detective Walker, unprompted, that Mr. LeBere had confessed to the crime, and that Mr. Archuleta's testimony at Mr. LeBere's trial was not shaped in any way by Detective Walker). Thus, the Magistrate Judge concluded that Mr. LeBere had not carried his burden of demonstrating that the prosecution withheld impeaching *Brady* evidence relating to Detective Walker's interactions with Mr. Archuleta.

This Court adopted **(# 169)** the Recommendation that Mr. LeBere's Petition be denied, albeit on different grounds. The Court concluded that even if Mr. Archuleta's current version of events – that he fabricated Mr. LeBere's alleged confession – is true, evidence regarding that fabrication was not material because there was ample independent evidence demonstrating Mr. LeBere's guilt and because Mr. Archuleta's credibility was already thoroughly and effectively impeached during trial (particularly because the jury's rejection of the First-Degree Murder and Felony Murder charges suggested that the jury did not believe Mr. Archuleta's testimony that Mr. LeBere confessed to sexually assaulting Ms. Richards and then murdering her to conceal evidence of that assault).

On appeal, the 10th Circuit reversed. *LeBere v. Trani*, 746 Fed.Appx, 727 (10th Cir. 2018). It concluded that "the impact the suppressed evidence could have had" at trial was broader than simply impeaching Mr. Archuleta's testimony about Mr. LeBere's alleged confession; it could also have "strongly supported LeBere's theory that police had conducted an insufficient investigation." *Id.* at 732. The 10th Circuit focused on trial testimony by Detective Walker where he described himself as the "lead detective" and "pivot point" of the investigation. If the jury believed that Detective Walker had conspired with Mr. Archuleta to fabricate a confession, "the jury might well conclude that the [police] investigation was aimed at convicting LeBere rather than uncovering the truth." *Id.* Finding that this Court erred in rejecting Mr. Archuleta's recantation as immaterial, the 10th Circuit remanded the matter to this Court "to consider credibility in the first instance. On remand, the district court may adopt a magistrate judge's credibility finding, or if it concludes that an evidentiary hearing is appropriate, conduct a hearing and observe the witnesses independently." *Id.* at 733.

The Court, having reviewed all of the evidence in the record, is now prepared to make the credibility finding directed by the 10th Circuit.

ANALYSIS

A thorough recitation of the *Brady* analysis is unnecessary. As both the Magistrate Judge and 10th Circuit recognized, the question comes down to one of

credibility: whether Mr. Archuleta's testimony about having conspired with Detective Walker is more credible than Detective Walker's testimony that Mr. Archuleta self-reported Mr. LeBere's alleged confession without any prompting.

In considering this question, the Court begins with the choice framed by the 10th Circuit's instructions: the Court may adopt the Magistrate Judge's credibility findings (favoring Detective Walker's version of events), or the Court may elect to conduct a *de novo* evidentiary hearing to receive testimony from Mr. Archuleta and Detective Walker.

The Court finds that conducting an independent evidentiary hearing is unnecessary. Mr. LeBere appears to agree that the Court should resolve this matter on the current record, without conducting an evidentiary hearing. *Docket* # 150 at 24-25. In addition, the parties had a full opportunity to develop the testimony of both Mr. Archuleta and Detective Walker via their depositions, and it does not appear to this Court that productive areas of inquiry were left unexplored. And although evidentiary hearings often provide as an opportunity for the factfinder to observe a witness' demeanor, the Court has had an opportunity to view the witnesses' demeanor because both depositions were videotaped. For these reasons, the Court adopts the Magistrate Judge's credibility finding, but does so in light of the Court's independent review of the witness' deposition testimony.

Before beginning its analysis, it is helpful to focus on the specific factual dispute for which a credibility determination is required. The question is not whether Mr. Archuleta testified falsely that Mr. LeBere had confessed; the Court will assume that he did. The question is not even whether Mr. Archuleta fabricated the alleged confession; again, the Court can assume that he did. The pertinent question is whether Mr. Archuleta fabricated the alleged confession at the direction of (or, at the very least, with the knowledge of) Detective Walker. Put differently, if Mr. Archuleta decided to fabricate Mr. LeBere's alleged confession on his own initiative, without the knowledge of Detective Walker, then the prosecution's failure to disclose that fabrication to Mr. LeBere cannot be a *Brady* violation.[3] Thus, the

[3] A *Brady* claim may arise where the prosecution is negligent is failing to prevent false testimony from being presented. *See e.g. U.S. v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015) (claim may arise if "the prosecution did not correct testimony that it *should have known* was false") (emphasis in original). Here, the Court does not understand Mr. LeBere to contend that, if Mr. Archuleta fabricated the alleged confession of his own accord and never advised Detective Walker of that fact, that confession was nevertheless so transparently false that Detective Walker should have recognized that Mr. Archuleta had concocted it.

Mr. LeBere does argue that Detective Walker could have identified alternative explanations for Mr. Archuleta's claim that he derived knowledge of certain details of the case (*e.g.* a distinctive tattoo on Mr. LeBere that Mr. Archuleta could simply have observed in day-to-day interactions at the jail; the fact that police had previously shown a composite sketch of a suspect to Mr. LeBere himself while canvassing his neighborhood, as that fact had been reported in news coverage of the crime) from sources other than Mr. LeBere confessing. But Mr. LeBere does not clearly argue that Detective Walker's acceptance of Mr. Archuleta's story

credibility determination focuses on the conversations between Mr. Archuleta and Detective Walker.

Mr. Archuleta's testimony

Mr. Archuleta testified in his deposition that he could not recall "how [he] came to be speaking with [Detective] Walker about [Mr.] LeBere," explaining that it was "17 years ago, 18 years ago." *Docket* # 150-9 at p. 15-16.[4] Mr. Archuleta did not recite the specific words or instructions that Detective Walker gave him at that first meeting; he testified only to his "understanding[5] [ ] that [Detective] Walker wanted me to get information on [Mr.] LeBere . . . because of the fact that I had done it before in other cases, been able to talk to people." P. 16.

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as presented constituted a degree of negligence sufficient to give rise to a *Brady* violation.

[4] Hereafter, the Court will refer to Mr. Archuleta's deposition transcript solely by page number, in the format P. ___. For precision, the Court will use the page numbers in the transcript itself, as opposed to the pagination placed on that exhibit by the CM/ECF system.

[5] The specific question posed to Mr. Archuleta did not ask him to recall what Detective Walker said, but instead, what Detective Walker wanted. "When you and [Detective] Walker discussed [Mr.] LeBere, what did you understand about what [Detective] Walker wanted?" P. 16 (emphasis added). The breadth of the question is instructive – it left open the opportunity for Mr. Archuleta to respond with what he believed were instructions either as to the confession or as to his testimony at trial. But Mr. Archuleta's response does not indicate that he understood either type of instruction to have been given.

The critical moment was when Mr. Archuleta purportedly reported back to Detective Walker (on an unknown date) that he was unable to obtain information from Mr. LeBere. This is the moment when, presumably, Detective Walker would have instructed Mr. Archuleta to fabricate a confession. However, Mr. Archuleta testified that he was unable to recall what Detective Walker said at this time: "I don't remember how he – how he responded" to the news that, despite Mr. Archuleta's attempts, Mr. LeBere had not revealed any information. P. 17. Mr. Archuleta only remembered that Detective Walker " . . . had a binder" that contained police reports and other case-specific information and that "he show[ed]" the binder to Mr. Archuleta. P. 17-18. Ultimately, Mr. Archuleta testified that all of the specific factual details in the alleged confession were obtained from his conversations with Detective Walker or from reviewing the police reports. P. 20-22. But Mr. Archuleta does not relate the specific contents of any conversations he had with Detective Walker about these events, any instructions that Detective Walker gave him with regard to his testimony, or any specific discussions the men had about the contents of the binder.

The *quid pro quo* for Mr. Archuleta's alleged fabrication of the confession was an agreement by Detective Walker and Assistant District Attorney Ann Joyce that Ms. Joyce would not file habitual criminal charges against Mr. Archuleta, and would waive a condition that otherwise made Mr. Archuleta ineligible for probation on his pending charges. P. 18-19. In essence,

such agreement allowed Mr. Archuleta to be released from jail almost immediately (upon satisfaction of a restitution obligation), rather than face the possibility of 10 years of imprisonment on the habitual criminal charge. P. 19. As to the terms of the alleged agreement, Mr. Archuleta's testimony is also vague. He generally relates being "told by [Detective] Walker and [Ms.] Joyce" about this offer, but he offers no specific details about when the offer was made, how it was conveyed, and by whom, among other things. P. 19. Mr. Archuleta testified that, at some point thereafter, the District Attorney's office "didn't want to go through with" the deal he had made with Detective Walker and Ms. Joyce, and that the office was "dragging their feet on it." P. 19. Mr. Archuleta states that his attorney "called a hearing in front of [a judge] to force them to go through with the deal," and ultimately, the deal was enforced. P. 19.

Detective Walker's testimony

In his deposition, Detective Walker testified that his first contact with Mr. Archuleta regarding this case was on October 28, 1998. *Docket* # 151-7 at p. 27. Detective Walker had been told by jail staff that an inmate claimed to have information about Mr. LeBere's case P. 28. Detective Walker arranged to meet that inmate – Mr. Archuleta – at the jail. P. 28. At that meeting, Mr. Archuleta was brought into the room with Detective Walker and stated "I didn't know you were on this case." P. 34-35. Detective Walker testified that Mr. Archuleta then launched into an extensive narrative which Detective Walker describes in detail. P. 35,

37-43. Mr. Archuleta explained that he gathered information from Mr. LeBere over five days of discussions, beginning with a discussion about whether Mr. LeBere would be able to secure a bond (as Mr. Archuleta had previously worked for a bail bondsman) given the charges against him. P. 37-38. Mr. Archuleta told Detective Walker that Mr. LeBere confessed to him, detailing many specific facts (which the Court need not catalog).[6]

At the conclusion of Mr. Archuleta's story, Detective Walker asked "what do you want out of this What do you want for this information?" Mr. Archuleta responded "I don't want anything. I'm just tired of this shit," which Detective Walker understood to mean that Mr. Archuleta was offended by what Mr. LeBere had described and "wanted to do the right thing and tell some authority and that's what he was doing with me." P. 45. Detective Walker ended the interview at that time, telling Mr. Archuleta that "I won't be back" because "I don't want you to think that you're my police agent." P. 45. In response, Mr. Archuleta "br[ought] up Ann Joyce . . . and that he wanted a continuance from

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[6] At various points recounting this narrative, Detective Walker makes clear that he did not believe certain portions of what Mr. Archuleta was stating. Based on his prior experience with Mr. Archuleta, Detective Walker was aware that Mr. Archuleta "ad libs a lot of things" or sometimes fabricates certain details. P. 43. Overall, however, Detective Walker believed that Mr. Archuleta had actually secured a genuine confession from Mr. LeBere because many of the details provided by Mr. Archuleta matched evidence that the police had from their investigation. P. 53-54.

Ann Joyce" which would allow him enough time to make required restitution payments "so he could get out of jail." Detective Walker stated that he would "see what I can do regarding the restitution." P. 46. Detective Walker denied that there was ever a discussion of any *quid pro quo* for Mr. Archuleta's information or subsequent testimony against Mr. LeBere. P. 46.

Detective Walker had two further communications with Mr. Archuleta in the following days. At some point in late October or early November 1998, Mr. Archuleta asked jail staff to page Detective Walker, and they did so. Detective Walker then spoke on the phone to Mr. Archuleta, and Mr. Archuleta explained that he was in fear for his safety because Mr. LeBere (and perhaps other inmates in his unit) were threatening him. (Paradoxically, it appears that Mr. Archuleta may also have complained that he was being moved to protective isolation.) Detective Walker told Mr. Archuleta to let the deputies at the jail know about the threats. P. 64-66.

On November 6, 1998, Detective Walker met in person with Mr. Archuleta at the jail to "talk[] about the deal that Ann Joyce was going to make with him." P. 68-69. Detective Walker had contacted Ms. Joyce to inquire about the charges against Mr. Archuleta. Ms. Joyce advised that "he was in on a 90-day sentence" on a check fraud case, and that she had a standing plea offer on such cases – payment of restitution by a certain date, followed by a sentence of probation. P. 46-47. Detective Walker then contacted Mr. Archuleta's attorney, and his attorney advised Detective Walker that Mr. Archuleta was simultaneously serving a separate

90-day sentence of which Ms. Joyce was unaware. P. 71-72. When Detective Walker informed Ms. Joyce of the additional sentence, she indicated that "the deal was off" and that she could do nothing to help with the second sentence. P. 73. Detective Walker does not know what happened to Mr. Archuleta after that. P. 73.

Collateral evidence

At Mr. LeBere's trial, Deputy Brian Dey, an El Paso County Sheriff's Deputy who worked at the jail, testified about an encounter that he had with Mr. Archuleta on October 26, 1998, two days before Mr. Archuleta first met with Detective Walker. Deputy Dey testified that Mr. Archuleta approached him and stated "You need to keep an eye on inmate LeBere." According to Deputy Dey:

> Inmate Archuleta stated to me that Inmate LeBere was talking about his [crime] in the ward, and he said that – he said he did commit the crime, and the reason he burned the van was because that's where he had sex with her before she was killed. Those were his exact words. And he also indicated that – that if his case went to trial, that he was going to kill himself. (Testimony of Jan. 11, 1999, p. 58.)

Deputy Dey memorialized this incident in a written report that he provided to his supervisor. It is this report that was ultimately provided to Detective Walker and which induced Detective Walker to have his first meeting with Mr. Archuleta.

Mr. Archuleta was asked about Deputy Dey's written report during Mr. Archuleta's 2015 deposition. When shown Deputy Dey's report during the deposition, Mr. Archuleta stated that "it's a bullshit report." P 58. Mr. Archuleta never specifically disputed the substantive content of the report – *i.e.* he never expressly denied that he told Deputy Dey that Mr. LeBere had confessed to him. Instead, Mr. Archuleta took issue with the fact that Deputy Dey reported this conversation having occurred shortly after midnight, and Mr. Archuleta explained that "we're locked down" at that time of night, and thus, "there's no way I could have walked up to" Deputy Dey to convey that information. P 58-59. Asked point-blank if he was "claiming [he] never said those things," Mr. Archuleta seemingly deflected, answering "That is what I'm saying, ma'am. I'm saying there is no way I could have said that <u>at that time</u>." P. 61 (The Court's underlining is based on Mr. Archuleta's vocal emphasis on the highlighted words, audible on the video recording of his deposition at 1:08:55.) The attorney conducting the deposition returns to this issue again later, asking "So you did talk to Deputy Dey, didn't you?" Mr. Archuleta answers "I might have. I don't remember . . . All I'm saying is that this report, the time on it that says I talked to him, that couldn't have been." P. 69. Mr. Archuleta acknowledged that he knows of no reason why Deputy Dey would have lied about having had that conversation. P. 60-61.

Reputation for truthfulness

Detective Walker testified that he considered Mr. Archuleta to be a "chronic liar" who "ad libs a lot of things," attributing them to a third party when, Detective Walker believed, such statements were Mr. Archuleta's own creations. P. 43, 47-48. Detective Walker acknowledged that the Colorado Springs Police Department had once indicated that Mr. Archuleta "wasn't reliable" and wasn't to be used as a paid informant P. 58-59. And, by Mr. Archuleta's own admission, he knowingly and intentionally gave false testimony in Mr. LeBere's case, both at a preliminary hearing and again during trial.

The record does not reveal any evidence that Detective Walker has a reputation for untruthfulness. Mr. LeBere has adduced some evidence that Detective Walker has been disciplined by the Colorado Springs Police Department for failure to observe certain police procedures, but those disciplinary charges do not involve allegations of untruthfulness by Detective Walker. Mr. LeBere also seeks to impeach Detective Walker's testimony by pointing out that Detective Walker never followed up on some of the leads that Mr. Archuleta's information provided (*e.g.* by investigating whether there were security cameras in the area where Mr. Archuleta claimed Mr. LeBere confessed to taking Ms. Richards).

Findings

The Court finds that Detective Walker's testimony about his interactions with Mr. Archuleta are

substantially more credible that Mr. Archuleta's version of those interactions. Several observations support this conclusion.

First, Mr. Archuleta's testimony lacked meaningful details, providing only a skeletal description of key events and moments. In the undersigned's experience as a factfinder, a witness' ability to recall and convey details about an important event lends credibility to the witness' testimony about that event; similarly, a witness who cannot recall or does not convey details when one would expect the witness to recall those details is typically found to be less credible about that event. Even assuming that Mr. Archuleta's experiences with law enforcement are tempered with a healthy dose of cynicism, one would expect that the moment at which a law enforcement officer expressly[7] asked him to fabricate evidence to secure a murder conviction would have come as somewhat of a shock to Mr. Archuleta, and thus, one would expect that Mr. Archuleta would remember that moment with clarity and precision even many years later. (Similarly, to the extent that Mr. Archuleta's testimony is understood to

[7] Perhaps Detective Walker's request was not express at all. Perhaps, like a carefully-crafted film noir scene, Detective Walker responded to Mr. Archuleta's report that Mr. LeBere was remaining tight-lipped with a sarcastic "oh, that's too bad," conspicuously tapped his fingers on the binder of police reports a few times, and then abruptly announced that perhaps he would leave the room for ten or fifteen minutes to get a cup of coffee. Once again, the lack of any meaningful detail in Mr. Archuleta's description of events leaves the critical moment when he and Detective Walker reached their nefarious agreement entirely to the reader's imagination.

contend that he personally met with Ms. Joyce[8] to discuss a plea deal, Mr. Archuleta's inability to describe any details of a momentous meeting where he was told he would be rewarded for complying with a law enforcement's request to fabricate evidence further undercuts his credibility.)

One might also expect that Mr. Archuleta would have had some discussion with his attorney about the request because it impacted the disposition of his pending case. But there is no reference to Mr. Archuleta's attorney until Mr. Archuleta complains that the District Attorney was not moving swiftly enough.

One might expect that Mr. Archuleta would recall the process by which he acquired the relevant details of the crime – whether he read one or many police reports or whether Detective Walker largely instructed him orally, and whether Detective Walker guided him about which pieces of evidence in the police reports were critical and which could be ignored or whether Mr. Archuleta selected the key information. One would assume that Mr. Archuleta could remember and describe the amount of time he spent reading and discussing the contents of those reports with Detective Walker and the process (if any) by which they rehearsed and refined the details of the "confession." Yet

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[8] Mr. Archuleta's testimony is somewhat ambiguous as to whether he met in person with Ms. Joyce, talked on the phone with Ms. Joyce, or whether all of his communications with Ms. Joyce were exchanged through Detective Walker as an intermediary. Once again, that ambiguity and lack of detail weighs against Mr. Archuleta's credibility as a witness.

Mr. Archuleta's testimony elides any and all mention of such events, offering little more than the bare statement that "it happened."

In contrast, Detective Walker's testimony contains the sort of details – about dates, times, locations, events preceding and following – that lend credibility to his version of events. And his recollection that Mr. Archuleta initiated the process of offering information about the crime is buttressed by the fact that Mr. Archuleta engaged in similar behavior with jail staff.

The Court also agrees with the Magistrate Judge that Deputy Dey's report is unimpeached collateral evidence that strongly suggests that Detective Walker's version of events is more credible than Mr. Archuleta's. Deputy Dey's report fundamentally undercuts Mr. Archuleta's version of events: that he did not talk to Mr. LeBere about the crime until Detective Walker asked him to, and that Mr. LeBere was not forthcoming, forcing Detective Walker to demand a fabricated confession instead. Deputy Dey's report indicates that Mr. Archuleta was claiming to have received a substantial confession from Mr. LeBere two days before Mr. Archuleta first met with Detective Walker. Mr. LeBere has never suggested that Deputy Dey fabricated the report, and indeed, when pressed, Mr. Archuleta himself testified that it was possible that he spoke to Deputy Dey, albeit not at the time of day that Deputy Dey listed in the report. (Notably, Mr. Archuleta never specifically contended that Deputy Dey's report had to be fabricated because Mr. Archuleta never received any confession from Mr. LeBere.)

In his Objections **(# 168)** to the Magistrate Judge's Recommendation, Mr. LeBere argues that "the timing of the Deputy Dey report" actually supports Mr. Archuleta's contention that Detective Walker asked him to fabricate a confession and provided him with the information to do so. Mr. LeBere's Objections posit that "Archuleta's act of approaching Deputy Dey, Walker becoming aware that Archuleta was willing to inform on LeBere, and Walker helping Archuleta manufacture a confession" are a plausible sequence of events.

That may be, but it is not the sequence of events that Mr. Archuleta testified occurred, nor is it the series of events recited in Deputy Dey's report. Mr. Archuleta was unambiguous in his testimony that Mr. LeBere never made any confession to him and never spoke about the case, P. 14-15, yet Deputy Dey's report states that Mr. Archuleta reported just such a confession to Deputy Dey. And it is undisputed that Mr. Archuleta reported that confession to Deputy Dey days before Detective Walker could have provided Mr. Archuleta with the details necessary to fabricate that confession. Had Mr. Archuleta admitted that he fabricated a skeletal confession when speaking to Deputy Dey, and that he told Detective Walker that the confession was false and that Detective Walker nevertheless instructed him to just go with it, Mr. LeBere's argument might be persuasive.[9] But that is not what Mr.

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[9] Were this Court entitled to speculate, it might conclude that Mr. Archuleta, on his own initiative, approached Deputy Dey and lied about Mr. LeBere confessing to him, believing that he could exchange (false) testimony about that confession for more

Archuleta claims occurred, and Deputy Dey's report dramatically undercuts the credibility of Mr. Archuleta's stated version of events.

There are also internal inconsistencies in Mr. Archuleta's version of events. Mr. Archuleta makes clear that he acceded to Detective Walker's request for a fabricated confession because Ms. Joyce was willing to offer him a plea that would allow him to leave jail almost immediately. But Mr. Archuleta's own testimony is that Ms. Joyce thereafter "dragged her feet" and forced Mr. Archuleta to seek court intervention to enforce a plea offer. One might expect that Ms. Joyce not holding up her end of the bargain and securing Mr. Archuleta's prompt release would cause Mr. Archuleta to back out of the deal (particularly once a court had already ordered his release). But Mr. Archuleta thereafter

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favorable treatment on his existing charges. Deputy Dey reported that confession to Detective Walker, and Detective Walker agreed to meet Mr. Archuleta to discuss the purported confession. It may be that Mr. Archuleta knew of specific details about Mr. LeBere's case from recent news reports (as Mr. LeBere sometimes argues) and he simply repeated those facts to Detective Walker, couching them as Mr. LeBere's confession. It may be that Mr. Archuleta simply constructed the confession from several lucky guesses. Or it may be that Mr. Archuleta was able to manipulate Detective Walker into inadvertently revealing facts about the case that Mr. Archuleta was able to weave back into the false confession to make it appear more plausible (much like the "cold reading" techniques that "psychics" use to create the impression that they know hidden information about their customer). But the Court finds that the key component of Mr. Archuleta's version of events – that Detective Walker knew that the alleged confession Mr. Archuleta claimed to have received was false – is not credible given the record herein.

continued to cooperate with the prosecution after his release, giving testimony at Mr. LeBere's trial. Although this apparent inconsistency alone is of limited weight in the credibility analysis, it suggests that Detective Walker's version of events – Ms. Joyce offered a typical plea deal to Mr. Archuleta, but Mr. Archuleta's concurrent sentence on other charges prevented Ms. Joyce's offer from conveying any real benefit – more plausibly explains the delay in Mr. Archuleta's release and is therefore more credible.

Finally, the Court considers the parties' relative reputations for truthfulness. Mr. Archuleta is, by his own admission, a liar. He either gave false testimony at both the preliminary hearing and at the trial in Mr. LeBere's case, or he gave false testimony in an affidavit recanting his trial testimony; in either event, Mr. Archuleta's truthfulness is already suspect. His untrustworthiness is corroborated by evidence that the Colorado Springs Police Department also concluded that he is not reliable. Mr. LeBere's suggestion that Mr. Archuleta is telling the truth this time, unlike the many instances in the past when he has lied under oath, is one that the Court meets with considerable skepticism.

By contrast, nothing in the record suggests that Detective Walker has a record of untruthfulness. Whether Detective Walker executed his duties competently is a question that this Court need not explore, as it does not bear on the question of credibility. And although Mr. LeBere suggests that Detective Walker's version of events is incredible because Detective

Walker did not follow up on the additional information that Mr. Archuleta provided, this Court cannot conclude that Mr. Archuleta's "new" facts were the type of bombshells that, if investigated, were likely to lead to evidence that would substantially bolster the existing case against Mr. LeBere. The Court does not necessarily assume that, as a law enforcement officer, Detective Walker carries an inherent patina of truthfulness; once again, in its experience as a factfinder, the undersigned has found on several occasions that law enforcement officers' testimonies have been as incredible as ordinary witnesses. But Detective Walker's version of events starts with the benefit that it describes an unremarkable series of events (an informant reports that he has obtained information, and that information conforms to the known facts of the case) and that version of events fits neatly alongside all of the other evidence in this case. Mr. Archuleta's version of events, on the other hand, starts with a remarkable premise (that a police officer would, contrary to police procedure, societal expectations, and even criminal law, expressly ask another person to fabricate evidence), conflicts with other evidence in the case, and raises red flags about its truthfulness.

Accordingly, the Court finds that, upon review of the record as a whole, Detective Walker's version of events is more credible than Mr. Archuleta's. With that finding, Mr. LeBere's *Brady* claim collapses: Mr. LeBere has failed to show by a preponderance of the evidence that Detective Walker knew (or even should have known) that Mr. Archuleta's claim that Mr.

LeBere had confessed to him was false. Because the prosecution had no reason to believe that Mr. Archuleta's statements about Mr. LeBere confessing were false, *Brady* did not obligate the prosecution to reveal such non-existent concerns to Mr. LeBere. Thus, the Court adopts the Magistrate Judge's Recommendation and denies Mr. LeBere's petition.

CONCLUSION

For the foregoing reasons, the Court **OVERRULES** Mr. LeBere's Objection **(# 168)**, **ADOPTS** the Magistrates Judge's August 8, 2016 Recommendation **(# 167),** and **DENIES** Mr. LeBere's Amended Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 **(# 62)**. To the extent that the Court must consider whether to grant a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c), and considering the standards of *Slack v. McDaniel*, 529 U.S. 473 (2000), the Court finds that, given the factual findings contained herein, Mr. LeBere has not made a substantial showing of a denial of a constitutional right. Thus, the Court **DENIES** a Certificate of Appealability.

Dated this 28th day of February, 2020.

BY THE COURT:

/s/ Marcia S. Krieger
Marcia S. Krieger
Senior United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT ERIC LEBERE, Petitioner - Appellant, v. TRAVIS TRANI, Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents - Appellees.	No. 16-1499 (D.C. No. 1:03-CV-01424-MSK-MEH) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Aug. 15, 2018)

Before **BRISCOE, LUCERO**, and **BACHARACH**, Circuit Judges.

Kent LeBere appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. We conclude that the district court took an improperly narrow view of the evidence LeBere claims the government improperly withheld. See Brady v. Maryland, 373 U.S. 83

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

(1963). Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I

A

Around 2 a.m. on the morning of October 16, 1998, witnesses reported a burning van inside a self-serve carwash stall in Colorado Springs. Police and firefighters arrived on the scene within minutes. After extinguishing the blaze, they discovered a badly burned body between the front seats. A subsequent investigation revealed that the fire was intentionally set, and that the victim, Linda Richards, had been strangled before the fire began. Spermatozoa were discovered, but were not sufficient to conduct DNA testing.

Detective J.D. Walker was the lead detective for the Richards investigation. After identifying the body, investigators contacted her fiancé, Russell Herring. Herring told police that he had last seen Richards at approximately 7 p.m. the prior evening. The couple had an argument and Richards left "in a hysterical manner." Police learned that Richards spent much of the night at Crazy Mike's Bar.

A bartender reported that Richards was drinking and playing pool with a man later identified as LeBere at the bar for several hours. At one point, the bartender asked him if he was going to "get lucky," and LeBere responded that he and Richards "were talking about a one night stand," but "Richards did not believe in one

night stands." When the two left together at about 12:30 a.m., LeBere told a bartender that Richards was giving him a ride home. That bartender later assisted police in preparing a composite sketch.

Police also obtained a surveillance video from a convenience store near the crime scene. A bartender identified LeBere in the video at approximately 2:35 a.m. An employee of the convenience store recalled that he saw a cab in the parking lot shortly after LeBere left. Investigators learned from a cab company that LeBere had been picked up at 2:45 a.m. and dropped off a short distance from his residence. Officers canvassed that area with the composite sketch and eventually arrested LeBere.

When interviewed by police, LeBere admitted that he was with Richards at Crazy Mike's Bar. He initially claimed that he left the bar alone, but later stated that he left with Richards and that she gave him a ride home. LeBere was charged with first degree murder after deliberation and felony murder.

At trial, two employees of Crazy Mike's Bar identified LeBere. The convenience store video of LeBere was played for the jury. A woman who lived near the car wash testified that she saw LeBere walking past her house shortly after 2:00 a.m. A cab driver testified that he knew LeBere was the individual he picked up from the convenience store after he saw a photo of LeBere on television news. The government introduced testimony regarding LeBere's inconsistent statements to police, and LeBere's aunt testified that he told her

that Richards was driving him to another bar when he felt sick and took a cab home. LeBere had his hair cut the day after the murder.

The government also offered testimony from a jailhouse informant, Ronnie Archuleta. Archuleta was housed with LeBere prior to trial. On October 26, 1998, Archuleta reported to Deputy Brian Dey that LeBere had confessed to him Dey wrote a report indicating that LeBere told Archuleta he burned the van because he had sex with Richards in the vehicle before she was killed. Detective Walker, who knew Archuleta from previous encounters, met with Archuleta on October 28, 1998. Walker relayed Archuleta's account at trial, stating that LeBere confessed that he met Richards in a bar, she gave him a ride home, he had sex with her, then panicked and choked her before driving to the car wash and burning the vehicle to destroy any evidence. According to Walker, some of the information Archuleta reported would only be known to the killer. Archuleta's testimony at trial was consistent with that report. Archuleta also stated that Walker promised to talk to the district attorney about one of Archuleta's pending cases, and that he ultimately was given a deal, receiving probation on that case.

LeBere's primary defense theory was that law enforcement had prematurely narrowed its investigation. He noted that police interviewed two homeless men camping near the car wash on the night of the murder, but failed to investigate them as potential suspects. A woman contacted police because she saw a van at the carwash just before 2 a.m., with a man standing

nearby who did not match LeBere's description. She did not identify LeBere in a photo lineup or in the convenience store video.

LeBere argued that Richards' fiancé, Herring, should have been treated as a suspect. Herring admitted that police had been called to the home he and Richards shared, that their fights became "physical," that he slapped Richards on one occasion hard enough that she went to the emergency room, and that he once pushed her van out of the driveway with his vehicle after a fight. Herring told police that he had not left home on the night of the murder. But a neighbor reported to police that he thought he heard a pickup truck backing over a curb near Herring's house that night. Police never called back. Richards' father testified that he saw condensation or dew on Herring's truck at about 6:30 a.m. the morning after the murder. But an expert testified that meteorological conditions that morning could not have caused dew to form, and thus the moisture was likely caused by someone having been inside the vehicle.

The defense also sought to undermine Archuleta's credibility. Walker conceded that he previously described Archuleta as a chronic liar. The jury learned of Archuleta's three prior felony convictions. And Archuleta admitted that LeBere had been warned by another inmate not to talk to him because he was a "snitch."

A jury found LeBere not guilty of first degree murder, felony murder, and manslaughter, but convicted

him of second degree murder and arson. He was sentenced to sixty years' imprisonment.

B

While LeBere's direct appeal was pending, Archuleta contacted LeBere's attorney and recanted his trial testimony. He claimed that Walker had given him information about the murder and induced him to fabricate a confession. LeBere moved for a new trial based on the recantation. Archuleta refused to appear at a hearing on that motion because he believed he would be jailed on other charges. The state court denied a new trial.

LeBere then filed a § 2254 petition in federal court, but subsequently moved to stay the petition while he exhausted state court remedies. The state courts denied relief. As to his Brady claim relating to Walker and Archuleta, the state court concluded that it raised the same issue that was previously rejected in LeBere's motion for a new trial. LeBere then returned to federal district court, where the Brady claim was denied as procedurally barred. However, we reversed that determination on appeal, holding that if "a state court refuses to adjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted." LeBere v. Abbott, 732 F.3d 1224, 1230 (10th Cir. 2013) (quotation omitted).

On remand, both Archuleta and Walker were deposed. Archuleta testified that LeBere never made any

confession. Instead, Archuleta claimed that Walker wanted him to get information on LeBere's case, and after he was unsuccessful in doing so, Walker showed him LeBere's case file. With information provided by Walker, Archuleta concocted a false confession story in exchange for lenient treatment in his own case. According to Archuleta, Walker knew that the information provided came from police reports rather than LeBere, but Walker instructed him to testify that LeBere was the source. Walker again testified that Archuleta reported LeBere's confession to him.

A magistrate judge recommended denying LeBere's petition on the ground that Walker's testimony was more credible than Archuleta's. The district court denied relief on different grounds. It concluded that LeBere's claim based on perjured testimony failed because he had not shown that the prosecutor was aware of the alleged perjury. As to his Brady claim, the district court asked two questions: "1) was the verdict dependent upon Mr. Archuleta's testimony, and 2) was the impeachment evidence necessary to raise doubt as to the veracity of Mr. Archuleta's testimony?" Answering both questions in the negative, it concluded that the Brady evidence was not material. LeBere timely appealed, and we granted a certificate of appealability.

II

Because LeBere's Brady claim was not decided on the merits in state court, the government concedes that AEDPA deference does not apply. See Romano v.

Gibson, 239 F.3d 1156, 1171 (10th Cir. 2001). "[W]e review the district court's legal conclusions de novo and its factual findings, if any, for clear error." Mitchell v. Gibson, 262 F.3d 1036, 1045 (10th Cir. 2001).

To prevail on a Brady claim, a petitioner must show: "(1) the government suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material." United States v. Reese, 745 F.3d 1075, 1083 (10th Cir. 2014). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469 (2009). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). Instead, material evidence is that which "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. We evaluate materiality in the context of the entire record. Moore v. Gibson, 195 F.3d 1152, 1182 (10th Cir. 1999).

LeBere frames his challenge as two distinct subclaims related to Archuleta's recantation. First, he contends that the government suppressed evidence that Walker and Archuleta conspired to manufacture a false confession. Second, he argues that Walker and Archuleta committed perjury by testifying to the contrary.

As to the latter subclaim, LeBere argues that the district court mischaracterized his Brady argument as one arising under Napue v. Illinois, 360 U.S. 264 (1959). "A Napue violation occurs when (1) a government witness committed perjury, (2) the prosecution knew the testimony to be false, and (3) the testimony was material." United States v. Garcia, 793 F.3d 1194, 1207 (10th Cir. 2015).[1] LeBere has not advanced evidence suggesting that the prosecution was aware of the alleged perjury. But he argues that such evidence was unnecessary because he is seeking relief under Brady, not Napue. We have previously stated that "[a] defendant may have a Brady claim if the . . . prosecution did not correct testimony that it should have known was false." Garcia, 793 F.3d at 1207. And because Walker was a police officer, LeBere contends that Walker's knowledge of the claimed perjury is imputed to the prosecution under ordinary Brady principles. See Moore v. Gibson, 195 F.3d 1152, 1164 (10th Cir. 1999) ("Knowledge of police officers or investigators will be imputed to the prosecution.").

In this case, we do not need to resolve any tension between Napue and Brady, or determine whether police knowledge of perjury is imputed. See Briscoe v. LaRue, 460 U.S. 325, 327 (1983) (noting that a "prosecutor's knowing use of perjured testimony violates due process," but the Supreme Court "has not held that the

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[1] The standard for materiality under Napue differs from the standard under Brady. Perjured testimony is material under Napue "unless failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. 667, 680 (1985).

false testimony of a police officer in itself violates constitutional rights"). We conclude that the evidence allegedly not disclosed—that Walker induced Archuleta to concoct a false confession by providing him details about the crime—is material regardless of the subsequent perjury. Accordingly, we have no need to address LeBere's second subclaim.[2]

As noted above, the district court analyzed LeBere's claim by asking whether the verdict was dependent on Archuleta's testimony and whether the suppressed evidence was necessary to impeach Archuleta. But the Supreme Court has explained that "[o]ne does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 434-35. We agree with LeBere that the district court took an improperly narrow view of the impact the suppressed evidence could have had.

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[2] LeBere's two subclaims are necessarily linked. He contends: (1) Walker fed Archuleta information to concoct a false confession, and then (2) they lied about having done so. The second contention cannot be true unless the first is also true. Accordingly, at this point in the litigation, LeBere cannot prevail on subclaim two without also prevailing on subclaim one. That is, as described in Part III, infra, the district court will either find that Archuleta's testimony is not credible (in which case both subclaims fail), or it will find that Archuleta is credible (in which case it will grant habeas relief). In neither scenario would our resolution of the second subclaim effect the ultimate outcome.

In addition to undermining Archuleta's credibility, the suppressed evidence would have strongly supported LeBere's theory that police had conducted an insufficient investigation. If Walker was willing to conspire with an inmate to procure a false confession, the jury might well conclude that the investigation was aimed at convicting LeBere rather than uncovering the truth. It may have questioned what other evidence police ignored, or even whether investigators fabricated other evidence. The government responds that Walker did not conduct the entire investigation, so much of it remains untainted by his actions. But Walker testified that as the lead detective, "all leads" and "information [that] comes in" was referred to him. He described himself as the "pivot point" of the investigation. Showing that Walker encouraged an informant to lie would have had an impact on the case as a whole.

We similarly reject the government's argument that the suppressed evidence is immaterial because the jury likely disbelieved Archuleta anyway. The jury acquitted LeBere of felony murder and murder after deliberation. Archuleta's testimony was the only evidence directly indicating that LeBere was guilty of those charges. But even assuming that the jury did not believe Archuleta, the suppressed evidence would have done far more than impeach him: it could have caused the jury to question the entire investigation.

This is not to say that the undisputed evidence is insufficient to support the verdict. There appears to be no dispute that 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, which could indicate an attempt to evade identification. But the materiality inquiry must not be confused with a test of the sufficiency of the evidence. Kyles, 514 U.S. at 434.

Although there was substantial circumstantial evidence of guilt, other evidence in the record raises doubts. Two homeless men were also near the scene of the crime but were not investigated. An 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. The suppressed evidence fits neatly with LeBere's theory that law enforcement prematurely concluded that he was guilty rather than investigating other available leads. When coupled with the suppressed evidence, this information could have prompted the jury to reasonably doubt LeBere's guilt. We conclude that the suppressed evidence is sufficient to undermine our confidence in the verdict. See id.

III

The government spends most of its brief arguing that we should affirm on the alternative ground that Archuleta's recantation was not credible. We decline to do so. "The evaluation of credibility is not a function for the appellate court." United States v. Miller, 460 F.2d

582, 587 (10th Cir. 1972). Although the magistrate judge recommended that the district court reject Archuleta's recantation as not credible, the district court denied relief on different grounds. We sit in review of the district court's decision, not the magistrate judge's recommendation. See Colo. Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co., 879 F.2d 809, 811 (10th Cir. 1989).

Accordingly, we leave it to the district court on remand to consider credibility in the first instance. On remand, the district court may adopt a magistrate judge's credibility finding, or if it concludes that an evidentiary hearing is appropriate, conduct a hearing and observe the witnesses independently. See Wildermuth v. Furlong, 147 F.3d 1234, 1236 (10th Cir. 1998); United States v. Orrego-Fernandez, 78 F.3d 1497, 1501 (10th Cir. 1996).

IV

For the foregoing reasons, we **REVERSE** and **REMAND** for further proceedings.

Entered for the Court

Carlos F. Lucero
Circuit Judge

BRISCOE, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court correctly denied LeBere's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. I therefore vote to affirm.

I

A

On October 20, 1998, LeBere was charged by information in the District Court of El Paso County, Colorado, with three counts of murder in the first degree and one count of second degree arson. Count One charged him with deliberately and intentionally causing the death of Linda Richards, in violation of Colo. Rev. Stat. § 18-3-102(1)(a). Counts Two and Three charged LeBere with killing Richards in the course of committing arson and sexual assault, in violation of Colo. Rev. Stat. § 18-3-102(1)(b). Lastly, Count Four charged LeBere with second-degree arson in connection with the burning of Richard's van.

The case proceeded to trial in August 1999. The circumstantial evidence of LeBere's involvement in Richards' death and the burning of her van was substantial, if not overwhelming. Specifically, the circumstantial evidence established the following:

- at approximately 9:00 p.m. on the evening of October 15, 1998, Richards entered a bar named Crazy Mike's, located on the east side

of Colorado Springs, and proceeded to sit and drink;

- LeBere, who had been playing pool in the bar, approached Richards at the bar, sat down, and began talking to her;

- Richards and LeBere spent the next several hours drinking together at the bar;

- a bartender asked LeBere if he was "gonna get lucky," and LeBere responded that he and Richards had talked about a "one night stand," but that Richards did not believe in one night stands;

- Richards and LeBere left the bar together at approximately 12:30 a.m. on October 16, 1998;

- although LeBere had previously told the bartender that he was going to walk home, he told the bartender as he was leaving that Richards was going to give him a ride home;

- according to the pathologist who performed the autopsy, Richards was manually strangled at some point between 12:30 a.m. and 2:00 a.m. on October 16, 1998;

- at approximately 2:15 a.m. on October 16, 1998, a woman who lived on the west side of Colorado Springs heard a car horn steadily blaring from the direction of a nearby car wash; the woman then observed LeBere walking away from the car wash and towards a 7-Eleven convenience store;

- at approximately 2:30 a.m. on October 16, 1998, Richards' van was observed to be on fire at that same car wash;

- after firefighters extinguished the fire, they found Richards' partially-clothed body wedged between the two front seats of the van;

- at approximately 2:35 a.m. on October 16, 1998, LeBere was videotaped on a surveillance camera inside of the 7-Eleven store;

- between 2:45 a.m. and 3:00 a.m. on October 16, 1998, a cab driver picked LeBere up outside the 7-Eleven store;

- the cab driver described LeBere as "very nervous" and indecisive about where he wanted to be dropped off at;

- the cab driver ultimately dropped LeBere off a short distance from LeBere's residence;

- LeBere's aunt, with whom LeBere lived, observed LeBere arrive home shortly after 3:00 a.m. on October 16, 1998;

- LeBere told his aunt that he had been at Crazy Mike's with a woman, had left with the woman in her van to go to another bar, but became sick, decided he needed to go home, and then walked around until he found a 7-Eleven store and called a taxi for a ride home;

- midday on October 16, 1998, LeBere visited a barber and had his hair cut significantly shorter;

- when questioned by the police, LeBere first told them that he had walked home from Crazy Mike's alone; LeBere then changed his story and told the police that he left the bar with Richards at approximately 1:30 a.m. and that she drove him to his residence.

To prove that LeBere killed Richards intentionally or in the course of committing another felony (sexual assault or arson), the prosecution also presented testimony from Ronnie Archuleta, an inmate who had been housed with LeBere shortly after his arrest. Archuleta testified that LeBere admitted to him that he had raped Richards, strangled her to death, and burned her van to conceal the evidence. According to Archuleta, LeBere said he killed Richards so she would not be able to identify him from a phoenix tattoo on his arm.

LeBere's defense strategy focused, in part, on challenging Archuleta's credibility. As the district court noted, "[t]he jury learned that . . . Archuleta had been convicted of fraud, forgery, and criminal impersonation." Aplt. App. at 129. "He admitted that he was in danger of being prosecuted as a habitual offender, which would likely result in him spending up to eighteen years in prison, and that he was testifying against LeBere to avoid it and to receive favorable treatment from prosecutors." Id. "Witnesses testified that . . . Archuleta [wa]s a chronic liar." Id. In particular, "[a] former deputy police chief testified that after . . . Archuleta had worked as a confidential informant, the Colorado Springs vice and narcotics unit decided to stop using him because he made a false report, was

unreliable, and did not tell the truth." Id. "LeBere also showed that . . . Archuleta could have gleaned the information he testified to from local newspaper reports that predated . . . LeBere's alleged confession." Id.

LeBere's attacks on Archuleta's credibility proved successful. The jury convicted LeBere only of second-degree murder and second-degree arson, and acquitted him on the various first-degree murder counts.

B

LeBere exhausted his state court remedies and now seeks federal habeas relief from his convictions. At issue is LeBere's claim that the prosecutors in his case "relied on perjured testimony" from Archuleta "and withheld potentially exculpatory evidence material to his defense," i.e., evidence that lead detective J.D. Walker assisted Archuleta in concocting a false confession story, "in violation of Brady v. Maryland, 373 U.S. 83 (1963)." LeBere v. Abbott, 732 F.3d 1224, 1225 (10th Cir. 2013). LeBere's claim rests entirely on Archuleta's post-trial recantation of his trial testimony.

The magistrate judge issued a report and recommendation recommending that LeBere's petition be denied. In doing so, the magistrate judge made extensive findings of fact based on the evidence in the record, including videotaped depositions of Archuleta and Walker that were taken during discovery in the federal habeas proceedings. The magistrate judge noted "that the ultimate resolution of [LeBere's] Brady claim turn[ed] on the relative credibility of Archuleta and

Walker" because "[i]t [wa]s readily apparent based on their conflicting deposition testimony . . . that they [could not] both be telling the truth about [LeBere's] jailhouse confession and their own trial testimony." Aplt. App. at 86-87. The magistrate judge ultimately found "that the preponderance of the evidence demonstrate[d] Walker's testimony [wa]s credible and Archuleta's recantation [wa]s not." Id. at 92. For that reason, the magistrate judge "[wa]s not persuaded that the prosecution either relied on perjured testimony from Archuleta and Walker or that Walker met with Archuleta and provided him information enabling Archuleta to give false testimony." Id.

LeBere filed written objections to the report and recommendation. After considering his objections, the district court issued an order adopting the magistrate judge's recommendation to deny LeBere's petition for federal habeas relief. The district court did not resolve LeBere's Brady claim on the basis of the respective credibility of Walker and Archuleta. Aplt. App. at 122. Instead, the district court "assume[d] that Colorado suppressed the impeachment evidence," and in turn concluded that the jury's verdict was not dependent upon Archuleta's testimony and that the impeachment evidence was not necessary to raise doubt as to the veracity of Archuleta's testimony. Id. at 123. In other words, the district court concluded that "the verdict [wa]s sufficiently supported by evidence other than . . . Archuleta's testimony, and . . . that the jury [apparently] did not find his testimony to be credible in significant

respects."[1] Id. at 129. Accordingly, the district court concluded "that the suppression of the impeachment evidence did not result in a denial of due process to . . . LeBere." Id.

II

A

LeBere argues on appeal that "the District Court erred when it found that [he] could not maintain a Brady claim based on the State's presentation of perjured testimony and that any suppression of evidence by the State was not material to LeBere's conviction." Aplt. Br. at 35. Because LeBere's Brady claim was not decided on the merits in state court, we review the district court's legal conclusions de novo and its factual findings, if any, for clear error. Underwood v. Royal, 894 F.3d 1154, 1162 (10th Cir. 2018).

In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Evidence qualifies as material and must be disclosed by the prosecution under Brady when there is "any reasonable likelihood" it could have "affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v.

[1] Ironically, both the state trial court and the Colorado Court of Appeals reached the same conclusion when LeBere moved for a new trial on the basis of Archuleta's recantation.

Illinois, 360 U.S. 264, 271 (1959)). To prevail on a Brady claim, a petitioner need not show that it is "more likely than not" that he would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 73, 75 (2012) (internal quotation marks omitted). Instead, the petitioner must show only that the new evidence is sufficient to "undermine confidence" in the verdict. Id. (internal quotation marks and brackets omitted).

The rule announced in Brady applies to evidence that undermines the credibility of a witness. Giglio, 405 U.S. at 153-54. But, that said, "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." Smith, 565 U.S. at 76.

Finally, the Supreme Court has emphasized that "[r]ecantation testimony is properly viewed with great suspicion." Dobbert v. Wainwright, 468 U.S. 1231, 1233 (1984). "It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach the cumulative evidence rather than to undermine confidence in the accuracy of the conviction." Id. at 1233-34.

B

In addressing LeBere's Brady claim, the majority takes the same approach as the district court and assumes both that Archuleta's recantation is truthful, and that the prosecution in LeBere's case suppressed

impeaching evidence. But the majority disagrees with the district court regarding the merits of Archuleta's Brady claim and "conclude[s] that the suppressed evidence is sufficient to undermine [its] confidence in the verdict." O&J at 11. Although the majority concedes that "there was substantial circumstantial evidence of guilt," it concludes that "[t]he suppressed evidence fits neatly with LeBere's theory that law enforcement prematurely concluded that he was guilty rather than investigating other available leads." Id. On that point, the majority emphasizes that Walker was the lead detective and served as the self-described 'pivot point' of the investigation." Id. at 10. The majority further concludes that, "[w]hen coupled with the suppressed evidence," information presented by LeBere at trial regarding other possible suspects "could have prompted the jury to reasonably doubt LeBere's guilt." Id. at 11.

I strongly disagree. In my view, the majority's analysis overemphasizes both Walker's importance to the prosecution's case against LeBere and the strength of the "other possible suspect" information that LeBere presented. It is undisputed that Walker was the lead detective in the case. But Walker played a very minor role at trial. He testified about responding to the scene of the burning van, described the condition of Richards' body in the van, and explained how he learned about LeBere's confession to Archuleta. The majority makes much of the fact that Walker was the self-described "pivot point" in the investigation and all information supposedly "referred to" Walker. But there is no

evidence—nor even a suggestion—that Walker tampered with or altered the mountain of circumstantial evidence that the prosecution presented at trial. Indeed, much of that circumstantial evidence came from eyewitness testimony and was essentially undisputed.

Even if we assume that Walker persuaded Archuleta to testify falsely at trial regarding LeBere's purported confession, had that information been presented to the jury, it would not have altered the above-described circumstantial evidence. Moreover, even without the purported Brady evidence, it is apparent from the verdict that the jury rejected Archuleta's testimony regarding LeBere's alleged confession. Had the jury heard testimony from Archuleta that Walker persuaded him to lie about LeBere's alleged confession, the jury almost certainly would have also rejected that testimony as lacking credibility. In other words, there is no reasonable basis to conclude that the jury would have believed anything that Archuleta said, having heard all of the evidence undermining his credibility.

The majority asserts that "even assuming that the jury did not believe Archuleta, the suppressed evidence would have done far more than impeach him: it could have caused the jury to question the entire investigation." Id. at 10. There are two problems with that assertion. First, it assumes that the jury would have believed Archuleta's recantation testimony and his story about how Walker persuaded him to lie. As noted, that is a doubtful proposition. Second, the majority fails to identify which, if any, of the multiple items of circumstantial evidence it believes would reasonably

have been called into question by the purported impeachment evidence. As I have explained, none of that evidence would have reasonably been called into question.

The only other rationale offered by the majority for its conclusion is that the suppressed impeachment evidence might "have prompted the jury to reasonably doubt LeBere's guilt" when considered in light of LeBere's attempts to cast blame on other individuals. Id. at 11. But a review of the record reveals that, despite the best efforts of LeBere's trial counsel, there was scant evidence suggesting that anyone other than LeBere was involved in Richards' murder. Although LeBere's counsel attempted to cast blame on Richards' fiancé, Russell Herring, there was no direct or circumstantial evidence linking Herring to the murder or otherwise calling into question LeBere's involvement in the murder. Curiously, the majority states that Herring "may have lied to police about staying home the night of the murder." Id. Even if that dubious proposition were true, there was no other evidence even remotely linking him to Richards' murder. Likewise, the majority notes that "[t]wo homeless men were . . . near the scene of the crime but were not investigated," and lain eyewitness saw a man standing near Richards' van just before the fire who did not match LeBere's description." Id. Again, these minor pieces of evidence do little or nothing to undermine the overwhelming circumstantial evidence of LeBere's guilt.

For these reasons, I agree with the district court that LeBere's Brady claim—which is based exclusively

on the post-trial recantation of a witness whose trial testimony the jury rejected as lacking credibility—is meritless and does not justify the grant of federal habeas relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-cv-01424-MSK-MEH

KENT ERIC LEBERE,

Applicant,

v.

TRAVIS TRANI, Warden, and
THE ATTORNEY GENERAL
OF THE STATE OF COLORADO,

Respondents.

**RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

(Filed Aug. 8, 2016)

Michael E. Hegarty, United States Magistrate Judge.

This matter is before the Court on the Amended Application for Writ of Habeas Corpus [filed August 12, 2009; docket #62; the "Amended Application"]. The case has been referred to this Court for recommendation, docket #91, and the Court finds that oral argument will not assist in the adjudication of the Amended Application. Applicant contends the Court can make credibility determinations based on the existing record and he

does not request an evidentiary hearing. Docket #150 at 24-25. The Court agrees. Therefore, based on the record herein and for the reasons that follow, the Court recommends that the Amended Application be denied.[1]

BACKGROUND

Applicant, Kent Eric LeBere, is challenging the validity of his convictions in El Paso County District Court case number 98CR4342. After trial and while Applicant's direct appeal was pending, Ronnie Archuleta, a key witness at Applicant's trial, recanted his testimony regarding Applicant's jailhouse confession and stated that his testimony was based solely on information provided to him by J.D. Walker, the lead detective in the investigation. Archuleta executed an

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[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the legal and factual findings of the Magistrate Judge that are accepted or adopted by the District Court. **Error! Main Document** *Only.Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir.1991)).

affidavit attesting to these facts and further stating that Walker knew Archuleta's testimony was not based on any personal knowledge, but rather solely on the information provided by Walker.

I. Procedural History

Applicant moved for a new trial based on Archuleta's statement recanting his testimony. On May 5, 2000, the Colorado Court of Appeals ("CCA") granted Applicant a limited remand to allow the trial court to consider the motion for a new trial. After a hearing the trial court denied the motion for a new trial, concluding that the absence of Archuleta's testimony would not have affected the jury's verdict. The CCA affirmed. *See People v. LeBere*, No. 99CA2088 (Colo. App. Jan. 24, 2002) (Docket #62-6).

On October 16, 2002, Applicant challenged his sentence in the trial court pursuant to Rule 35(b) of the Colorado Rules of Criminal Procedure. On May 20, 2003, the Rule 35(b) motion was denied.

On June 23, 2003, Applicant initiated this federal action by filing *a pro se* application for a writ of habeas corpus. After obtaining counsel, Applicant sought and obtained a stay of the federal court proceedings while he returned to state court to exhaust state remedies for various claims in a postconviction Rule 35(c) motion. On October 7, 2005, the trial court denied the Rule 35(c) motion. Docket #62-10. The CCA affirmed the trial court's order denying the Rule 35(c) motion. *See People v. LeBere*, No. 05CA2489 (Colo. App. Apr. 24,

2008) (docket #62-14). On August 18, 2008, the Colorado Supreme Court denied Applicant's petition for writ of certiorari in the postconviction Rule 35(c) proceedings.

On February 24, 2006, while the postconviction Rule 35(c) proceedings were pending in state court, the Honorable Walker D. Miller entered an order administratively closing this case, subject to reopening for good cause. Docket #48. On July 13, 2009, after the Rule 35(c) proceedings concluded, Judge Miller granted Applicant's motion to reopen the case and granted in part Applicant's motion to amend the original habeas corpus petition. Docket #61. On August 12, 2009, Applicant filed the Amended Application.

Applicant asserts two claims in the Amended Application. He contends in the first claim that he was denied due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, he alleges that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), by (a) relying on perjured testimony from Archuleta and Walker even though Walker knew the testimony was false, and (b) failing to disclose to the defense that Walker met with Archuleta and provided him information that enabled Archuleta to give false testimony. Applicant asserts in his second claim that his Sixth Amendment right to counsel was violated when the trial court instructed the jury to return to the jury room for further deliberations to complete the verdict forms without informing counsel of the problem with the verdict forms or asking counsel to consult on the issue.

On February 2, 2011, Judge Miller entered an order denying the Amended Application with prejudice. Docket #77. Judge Miller dismissed the *Brady* claim as unexhausted and procedurally barred and he dismissed the right to counsel claim on the merits. Applicant appealed and the United States Court of Appeals for the Tenth Circuit granted Applicant a certificate of appealability to determine whether the federal courts may consider the merits of his *Brady* claim, but denied a certificate of appealability with respect to Applicant's right to counsel claim. *See LeBere v. Abbott*, 732 F.3d 1224, 1225 (10th Cir. 2013). Ultimately, the Tenth Circuit concluded that the *Brady* claim was not procedurally barred and, thus, the court reversed Judge Miller's order dismissing the Amended Application and remanded the matter for further proceedings. Because the Tenth Circuit did not grant a certificate of appealability with respect to the right to counsel claim, the only claim before the Court is the *Brady* claim.

Following requested discovery on the *Brady* claim, the parties submitted proposed findings of fact and conclusions of law.

II. Findings of Fact

The Court makes the following findings of fact.

A. The Crime Scene

1. On October 16, 1998, at around 2:00 a.m., witnesses saw a white minivan burning in a self-serve car

wash bay on the west side of Colorado Springs and alerted police, who arrived at the scene minutes later. Trial Tr. 8/4/99 at 26-31, 37-41, 47-49, 54-57, 63-68, 73, 81-83; Trial Tr. 8/5/99 at 23-27.

2. Shortly after police arrived at the scene, the fire department also arrived and put out the fire. Trial Tr. 8/4/99 at 42, 50, 66, 93, 106-07.

3. After the fire was extinguished firemen discovered the partially burned body of a female in the van between the front seats. Trial Tr. 8/4/99 at 69-70, 93, 104, 111, 142-43.

4. Although some of the clothing on the victim had sustained extensive fire damage, the body was partially clothed in a dress, a slip, and was wearing underwear. Other clothing had been displaced, exposing the body's breasts. Trial Tr. 8/4/99 at 148, 169-70, 182-84, 197; Trial Tr. 8/5/99 at 41-43.

5. Medical examiners determined the cause of death was strangulation that occurred before the fire started and that the time of death was between 12:30 a.m. and 2:00 a.m. on October 16, 1998. Trial Tr. 8/5/99 at 105, 111-112.

6. Investigators at the scene observed the gas cap from the van lying on the ground about twenty feet away from the van. Investigators also saw some sort of partially burned paper material on the ground near the van and hanging out of the filler tube of the gas tank. These facts caused investigators to suspect that

the van had been set on fire intentionally. Trial Tr. 8/4/99 at 85-89, 98, 131, 133-34; Trial Tr. 8/5/99 at 29.

7. Fire investigation experts ultimately determined that the fire had originated inside the vehicle directly behind the driver's seat by the application of open flame to a box of paperwork and that accelerants had not been used in starting the fire. The experts also concluded that the fire started approximately ten to twenty minutes before it was extinguished by the fire department. Trial Tr. 8/4/99 at 131-46, 167, 177-80.

B. The Investigation and Identification of Applicant as a Suspect

8. The investigation of the victim's death was assigned to Colorado Springs Police Detective J.D. Walker. Trial Tr. 8/4/99 at 188-89. He was "in charge of the case in respect to gathering it all together, putting it in a book, making sure things are done." *Id.* at 213.

9. Investigators found a purse in the van and located a driver's license that they used to identify the body as that of Linda Richards. Trial Tr. 8/4/99 at 144, 198, 203-05, 208.

10. Investigators ran the license plate from the van to identify the vehicle's owner and found that the van was registered to a company owned by George Richards. Trial Tr. 8/5/99 at 30, 33-34, 81.

11. A detective went to the home of George Richards at approximately 5:45 a.m. on October 16, 1998, a few hours after Linda Richards' body was found, and spoke

with Richards and his wife. Richards indicated that he was Linda's father and told police that Linda worked for his Tupperware business and lived in Colorado Springs with her fiancé Russell Herring and her two children. Trial Tr. 8/5/99 at 34, 80-81.

12. Police went to the home of Russell Herring around 6:30 a.m. the same morning. Herring told police that he had last seen Linda Richards at 7:00 p.m. the previous evening when she left the couple's home to facilitate a Tupperware party. Trial Tr. 8/5/99 at 54-56.

13. Herring told police that he and Linda had been having problems, including financial trouble, that the couple had been in an argument the previous night about whether their relationship was going to work out, and that Linda had left the house in a hysterical manner Trial Tr. 8/5/99 at 56-57.

14. Herring admitted to the police that he and Linda once had a physical fight and that they argued "verbally quite a bit." Trial Tr. 8/5/99 at 58-59.

15. Herring told police he had not left the house on the evening of October 15 and that he had gone to bed around 12:30 a.m. on October 16. Police asked Herring whether he was concerned that Linda had not come home by the time he went to bed, and he told police he planned to call Linda's parents in the morning if she still had not returned home because she may have spent the night with her parents. Trial Tr. 8/5/99 at 60-61. Herring also told police that he eventually became angry when Linda had not returned later in the

evening, because he suspected she had gone to a bar by herself. Trial Tr. 8/10/99 at 36.

16. Herring provided police with the location of two bars Linda typically frequented: Kelly O'Brien's and Crazy Mike's. Trial Tr. 8/5/99 at 61.

17. After speaking with Herring at his home investigators took him to the police station for further questioning, because they "wanted to get him locked into a statement in case he may be a possible suspect." Trial Tr. 8/5/99 at 62.

18. Herring was never re-interviewed by the police after giving his initial statement at the police station. Trial Tr. 8/5/99 at 63; Trial Tr. 8/11/99 at 79.

19. Police did not check Herring for injuries when they spoke to him on October 16, 1998, and they did not search his home or vehicle. Trial Tr. 8/5/99 at 63-64; Trial Tr. 8/9/99 at 94-95; Trial Tr. 8/10/99 at 45.

20. While investigators were speaking with Linda Richards' family and Herring, other investigators were working the scene of the crime.

21. Investigators took statements from the four witnesses who initially alerted police to the burning van, but none of those witnesses had seen anyone around the van or walking away from the van. Trial Tr. 8/4/99 at 36, 43-44, 51.

22. Investigators also interviewed two homeless men who were sleeping in tents located in a field near the car wash. Trial Tr. 8/4/99 at 224-26. One of the men

indicated he had heard sounds coming from the car wash, including a car horn honking, an explosion, and two people talking. *Id.* at 232-33; Trial Tr. 8/9/99 at 225. The other man indicated he had been sleeping through the night and had not heard anything. Trial Tr. 8/9/99 at 225. Police searched the tents and did not find "anything suspicious or contraband." *Id.* at 218. Police did not remember what types of clothing or other items were found in the tents or whether they saw lighters or matches when searching the tents. *Id.* at 223, 226.

23. Investigators visited a total of six bars, several in close proximity to the car wash. When canvassing these bars investigators brought a picture of Linda Richards and asked employees of those bars whether they had seen her. Trial Tr. 8/6/99 at 157-60; Trial Tr. 8/9/99 at 95.

24. Investigators did not find anyone at five of the six bars who could identify Linda Richards as being present on the night of October 15-16, 1998. Trial Tr. 8/6/99 at 158-61; Trial Tr. 8/9/99 at 96-100, 142-43.

25. Employees at Crazy Mike's bar stated that Linda Richards regularly frequented Crazy Mike's and had arrived between 8:00 and 9:00 p.m. on the evening of October 15, 1998. Trial Tr. 8/6/99 at 17-19, 28-29. Employees indicated that Linda spent time with a man named Kent at the bar and, throughout the course of the evening, he and Linda talked, played pool, and drank together. *Id.* at 20-25, 30-35, 52. One employee stated that she had asked the man, "Are you gonna get lucky?" and the man responded, "no, that Miss

Richards said that she had a fiancé, and they were talking about a one-night stand, and Miss Richards did not believe in one-night stands." *Id.* at 34.

26. Police created a composite sketch based on the bartender's description of the man who was seen with Linda Richards at Crazy Mike's. Trial Tr. 8/6/99 at 40-43. The bartender indicated that the man was wearing a dark blue shirt, blue jeans, and tennis shoes, and had a tattoo of a phoenix with flames. *Id.* at 31-32, 47. The bartender ultimately identified Applicant from a police photo lineup as the person who was with Linda Richards. *Id.* at 46-47.

27. Linda Richards and Applicant were seen leaving the bar together around 12:30 a.m., and Applicant told the bartender that Linda was going to give him a ride home. Trial Tr. 8/6/99 at 35-36, 38.

28. Police also interviewed employees at a 7-Eleven gas station located close to the car wash and obtained video surveillance tapes showing customers. The bartender viewed the videotape surveillance from the 7-Eleven and identified Applicant, wearing a baseball hat, as the man in the tape. Trial Tr. 8/6/99 at 44-45. Applicant appeared on the surveillance camera at 2:35 a.m. on October 16, 1998. Trial Tr. 8/10/99 at 14.

29. The 7-Eleven gas station attendant testified that the person on the surveillance tape who police pointed out to him purchased a sandwich. Trial Tr. 8/9/99 at 152-53. The attendant explained that he did not remember anything in particular about how the person acted and everything seemed "pretty normal." *Id.* at

153. The attendant also remembered seeing a Yellow Cab taxi in the parking lot after the man left the gas station. *Id.*

30. Investigators contacted the Yellow Cab company and learned that a cab driver had picked up a fare around 2:45 a.m. on October 16, 1998, at the 7-Eleven located at 21st and Cimarron on the west side of Colorado Springs near the car wash. Trial Tr. 8/9/99 at 173, 181-2. The cab driver drove the fare to Keith Drive and Webb Drive and dropped the man off a short distance away from Applicant's residence. *Id.* at 185; Trial Tr. 8/10/99 at 26. Police later followed the cab driver to learn the route he had taken with the fare. Trial Tr. 8/9/99 at 185-86.

31. The cab driver identified Applicant in a photo lineup as a person who looked somewhat like the man he had driven from the 7-Eleven to the area of Keith Drive and Webb Drive. Trial Tr. 8/9/99 at 189-190, 207-08; Trial Tr. 8/10/99 at 27. After seeing a photo of Applicant in the news following his arrest the cab driver contacted Colorado Springs detectives and stated he was positive that the man on television was the person he had driven from the 7-Eleven to Keith Drive. Trial Tr. 8/9/99 at 190-91, 209.

32. Beginning from the location where the cab driver stated he had taken his 2:45 a.m. fare, police canvassed the neighborhood around Keith Drive with the composite drawing. Trial Tr. 8/10/99 at 20; Trial Tr. 8/5/99 at 67. Police knocked at the door of 4735 Keith Court, which was located less than a mile from Crazy Mike's,

and showed Applicant the composite drawing when he answered the door. Trial Tr. 8/10/99 at 22. Applicant had been living with his aunt at 4735 Keith Court for several months after having moved from Minnesota to Colorado Springs about a year and a half earlier. *Id.* at 22-23. Applicant told police he did not know anyone who resembled the composite drawing and that the composite drawing did not look familiar to him. Trial Tr. 8/10/99 at 22. Applicant also provided police with his name and date of birth. *Id.*

33. Police doubled back to 4735 Keith Court after determining the composite sketch resembled Applicant and asked Applicant to undergo a videotaped interview at the police station, after which Applicant was arrested. Trial Tr. 8/5/99 at 45; Trial Tr. 8/6/99at 133; Trial Tr. 8/10/99 at 22-24.

34. Investigators searched Applicant's residence. Trial Tr. 8/6/99 at 138. They found and seized several pairs of jeans, a dark blue pullover shirt, and tennis shoes that matched the clothing descriptions provided by the Crazy Mike's bartender. *Id.* at 139-41.

35. No items associated with the van or Linda Richards were found in the search of Applicant's home. Trial Tr. 8/9/99 at 91.

36. When Applicant was interviewed at the police station he admitted he was at Crazy Mike's bar for several hours on the evening of October 15, 1998, with Linda Richards. Applicant initially stated he had walked home from the bar alone, but later told the police that he left the bar with Linda Richards at about

1:30 a.m. on October 16, 1998, and that she drove him home. Mot. Hr'g Tr. 11/17/98 at 132-36.

C. Further Witness Investigation

37. In addition to the statements taken at the scene of the crime, police were contacted by a number of third parties with information regarding the crime.

38. A woman contacted police on October 16, 1998, because she had seen someone at the car wash. Trial Tr. 8/6/99 at 61. As she was driving past the car wash at approximately 1:55 a.m. on October 16, 1998, she noticed a light colored van in the last stall of the car wash. *Id.* at 62-63. As she passed she saw a man standing toward the rear of the van. *Id.* at 64. She noticed he was wearing a fisherman's style hat with a brim all the way around it. *Id.* at 64, 79-80. She described the person as an "older gentleman," maybe around 40 years old, with a beard, and wearing "light colored clothing." *Id.* at 75, 78. The woman did not recognize Applicant or anyone else in the photo line-up or 7-Eleven surveillance videotape police showed her. *Id.* at 68, 80-82.

39. Another woman who lived near the car wash also contacted police regarding a man she had seen walking on the morning Linda Richards' body was found. She testified that she arrived at her townhome, which was two blocks east and two blocks south of the carwash around 2:05 a.m. on October 16, 1998. Trial Tr. 8/6/99 at 90, 94. When she took her dog out to the front yard she heard the sound of a car horn honking coming from the direction of the car wash. *Id.* at 95-96. Later, while

she was out with her dog, she saw a man walk past coming from the south. *Id.* at 101-03. She testified that he was wearing a hat, navy blue shirt, dark pants, and sneakers. *Id.* at 109. She identified Applicant as the person she had seen from a photo lineup and identified the man she saw on the surveillance tape from the 7-Eleven as the person she saw walking past in the early morning. *Id.* at 113-116. The woman told police that he walked by around 2:15 or maybe as late as 2:30 a.m. Trial Tr. 8/9/99 at 77.

40. Neighbors across the road from Herring and Linda Richards' home also called police to inform them that the neighbors had heard an unusual noise on the evening of October 15, 1998, around 10:00 p.m. that sounded like a pickup truck driving over a curb and the load bouncing in the back of the truck. Trial Tr. 8/11/99 at 113-14.

D. Investigation of Physical Evidence

41. Investigators never discovered any physical evidence linking Applicant to the crime.

42. The Colorado Springs crime lab received for testing blood samples from Linda Richards, shirts, jeans, a watch, tennis shoes, mats, body bags, panties, portions of a dress, a slip, a bra, samples from the vehicles, samples from Linda Richards' head hair, pubic hair, pubic combing, eyebrow hair, swabs, fingernail scrapings, a jacket, and samples from Applicant and Herring. Trial Tr. 8/5/99 at 140-41. Walker, as the lead investigator, only requested that the samples and items taken from

Linda Richards be compared against DNA from Applicant, as he was the only suspect being considered by police. Docket #150-7 (Walker Dep.) 132:12-24.

43. None of the hairs found on Linda Richards were consistent with Applicant's hair samples. Trial Tr. 8/5/99 at 141-42, 153-54.

44. Spermatozoa was found in Linda Richard's anal cavity but not in her vagina. Trial Tr. 8/5/99 at 108-09, 160. The medical examiner testified the sperm had been present in the body for somewhere between 24 and 72 hours. *Id.* at 113-14. There was an insufficient quantity of sperm to allow for DNA testing. *Id.* at 161-62. The only match for DNA on any of the swabs taken from Linda Richards' body was her own. *Id.* at 161.

45. The laboratory technicians found no seminal stains on Linda Richards' clothing. Trial Tr. 8/5/99 at 142-43. Although some items of clothing indicated the presence of blood, the blood stains were not subject to further examination. *Id.* at 142.

46. Fingernail scrapings from Linda Richards did not contain any blood. Trial Tr. 8/5/99 at 144.

47. Laboratory technicians also examined clothing of Applicant's, including three pairs of jeans, two shirts, and a pair of tennis shoes seized from Applicant's home. No blood was found on any of these items and none of the hairs collected were consistent with Linda Richards' hair. Trial Tr. 8/5/99 at 145-48.

48. The medical examiner did not find any evidence of sexual assault, such as bruising or tearing, and could

not opine as to whether a sexual assault occurred. Trial Tr. 8/5/99 at 113.

49. With respect to the arson charges, the fire investigator in charge of collecting evidence from the scene searched the area for items related "to the starting of the vehicle fire." Trial Tr. 8/4/99 at 177. In addition to samples collected from the van itself, the only evidence he located was the paper material found in the filler tube of the gas tank. *Id.* at 177-78.

50. A lab technician was directed to take fingerprints on the van, the hatch area, the cigarette box, and any flat surfaces on collected evidence. Trial Tr. 8/4/99 at 214-15. No fingerprint evidence was presented at trial.

51. After arresting Applicant, Walker and a fellow detective took a photograph of the bottom of Applicant's shoes and looked for matching footprints around the car wash. Trial Tr. 8/6/99 at 161-63; Trial Tr. 8/9/99 at 91-93. The detectives "didn't find anything that we could specifically say were footprints" from Applicant's shoes. Trial Tr. 8/6/99 at 162. The detectives did find numerous footprints but did not do anything with them because they did not match Applicant's shoes. *Id.* at 161-63. The detectives did not photograph or take casts of the footprints, never obtained shoes from Herring, and never compared the prints found to any shoe other than that of Applicant. *Id.* at 164; Trial Tr. 8/9/99 at 92-93.

E. The Confession

52. After he was arrested, Applicant was held in the El Paso County Jail in a pod with Ronnie Archuleta and three other inmates.

53. When Applicant first arrived at the jail other inmates warned him not to speak with Archuleta because Archuleta was a well-known "snitch." Docket #150-7 (Walker Dep.) 57:22-58:4; Trial Tr. 8/9/99 at 33. Archuleta was also a bounty hunter for a bondsman. Trial Tr. 8/9/99 at 5.

54. On October 26, 1998, Archuleta approached a guard in the Jail, Deputy Dey, and reported that Applicant had confessed to the crime. Trial Tr. 8/9/99 at 9-10. Deputy Dey wrote a report of his conversation with Archuleta, which stated:

> Inmate Archuleta stated the following: Apparently Inmate LeBere was talking about his incident in the quad. Inmate [L]ebere told Inmate Archuleta that he did commit the crime. The reason that he burned the van was because that was where he had sex with her before she was killed. Inmate Lebere's advisement is scheduled for tomorrow. Inmate Lebere stated to Inmate Archuleta that if his case goes to trial he is going to kill himself.
>
> Inmate Archuleta revealed this information willingly and did not ask for anything in return.

Docket #157-1 at 2.

55. Walker, as the lead investigator, was informed that an inmate had information about Linda Richards' murder. Trial Tr. 8/9/99 at 66-67. Walker received Deputy Dey's report on October 26 and went to visit Archuleta on October 28, 1998 to "do a more extensive interview." Mot. Hr'g Tr. 1/11/99 at 38-41.

56. Walker and Archuleta have very different accounts of what happened when they met on October 28.

57. According to Walker, Archuleta said that Applicant had approached Archuleta in jail to ask about how he could obtain a bond. Docket #150-7 (Walker Dep.) 37:21-38:1. Archuleta said that Applicant then confessed to the murder so that Archuleta could determine if Applicant would qualify for a bond. *Id.* at 38:7-39:20.

58. According to Archuleta, Walker met with him several times, all with the intent of tying Applicant to Linda Richards' murder. Docket #150-9 (Archuleta Dep.) 15:9-20. Archuleta cooperated based on the promise of favorable treatment from prosecutors in his own case. Trial Tr. 8/9/99 at 40. Walker at first asked Archuleta to try getting Applicant to confess to the crime. Docket #150-9 (Archuleta Dep.) 16:2-24. But once it became clear that Applicant would say nothing to Archuleta about his case, Walker began feeding Archuleta information including police reports about the murder so that he and Archuleta could manufacture a confession. *Id.* at 16:19-18:15.

F. The Plea Deal

59. After Walker identified Archuleta as a possible witness against Applicant, Walker told the prosecutor on Applicant's case, Assistant District Attorney Kim Kitchen, that he intended to speak with Archuleta. Trial Tr. 8/9/99 at 116-18. Kitchen told Walker not to talk to Archuleta about Archuleta's own pending case. Trial Tr. 8/9/99 at 118.

60. Walker spoke with Archuleta twice about the criminal charges pending against Archuleta and about Archuleta's plea deal. Docket #150-7 (Walker Dep.) 46:1-47:19; 68:19-69:2.

61. Ann Joyce, the Deputy District Attorney responsible for Archuleta's case, testified that Walker told her that he had agreed to put in a good word for Archuleta. Joyce also testified that she offered Archuleta a more favorable plea deal in part because of Walker's encouragement. Trial Tr. 8/11/99 at 54-59.

62. In 1999, shortly before Applicant's trial, the trial court heard evidence regarding the circumstances surrounding Archuleta's plea deal and concluded that

> [t]he testimony of Ronnie Archuleta is that [LeBere] confessed to the . . . crimes charged. Prior to Mr. Archuleta's cooperation, he had a certain plea agreement. Subsequent to his cooperation, he had a different plea agreement.

Mot. Hr'g Tr. 5/3/99 at 26.

63. The trial court held that this interaction and its related dealings – which stemmed from Walker's

asking Joyce to help Archuleta – converted the prosecutor and her team into witnesses and required the Colorado Springs District Attorney's Office to be disqualified from prosecuting Applicant. Docket #150-12. Applicant's trial was handled by special prosecutors.

G. Trial

64. At trial the jury heard testimony regarding the crime and investigation described above.

65. The jury also heard testimony from Archuleta regarding Applicant's confession.

66. Archuleta testified that he met Applicant when Applicant was placed in the same pod with Archuleta. Trial Tr. 8/9/99 at 7.

67. Archuleta testified that he and Applicant spoke about the charges against Applicant several times. Trial Tr. 8/9/99 at 8. Archuleta indicated that Applicant initially spoke with him about his case in the context of the possibility of obtaining a bond. *Id.* at 9.

68. Archuleta testified that Applicant "stated that he had met this lady at the bar, and that they were [talking] to one another, you know." Trial Tr. 8/9/99 at 16-17. Applicant told Archuleta that he was "buzzed." *Id.* at 17. Archuleta then testified that Applicant stated

> he asked her for a ride, they went up around Cheyenne Canyon near the amphitheater up there. At that time he said that – excuse my language – he fucked the bitch. . . . That he fucked the bitch, and after that, that he

> strangled her. He demonstrated right here on the neck with this hands. There's, I guess, some pressure points there where you can – a person will pass out real quick.
>
> After that, he stated he drove down to the car wash and torched the van because there could have been evidence of the fact from body fluids and that. He stated that the reason he killed her was, one, that she could identify him because of a tattoo on his upper arm of a Phoenix.

Id. at 17.

69. Archuleta further testified that Applicant told Archuleta he had called a cab and the cab picked him up and took him home. Trial Tr. 8/9/99 at 18. Archuleta also testified that Applicant told him police came to his door with a composite drawing, did not initially recognize Applicant as the individual in the drawing, but later came back and brought him to the police station. *Id.*

70. Archuleta explained to the jury that he had known Walker for many years and first talked to him about Applicant's case around October 28. Trial Tr. 8/9/99 at 10. Archuleta also testified that he had multiple conversations with Walker about the facts of Applicant's case. *Id.* at 10, 44.

71. Archuleta testified that at that initial meeting Walker offered to talk to the District Attorney on Archuleta's pending case. Trial Tr. 8/9/99 at 10-11. Archuleta testified that he did eventually receive a deal,

which included that he would be released from jail immediately upon paying restitution. *Id.* at 12. Archuleta also explained that he tried to use Applicant's case to "get out of jail" on the sentence he was serving. *Id.*

72. Walker testified at trial that Archuleta told Walker that Applicant had made statements to Archuleta that Applicant "had been in the bar, that he had been drinking with this female, that he needed a ride home, that she gave him a ride home, that they parked, they had sex, he panicked, he choked her, that she was dead prior to going to the car wash." Trial Tr. 8/9/99 at 68.

73. Walker testified that Archuleta was a chronic liar and that "I've found with Ronnie Archuleta, anything that he says, you have to corroborate with something else in order to determine that to be the truth." Trial Tr. 8/9/99 at 72. Walker testified that he considered Archuleta's testimony to be usable in Applicant's case because

> First off, I listened to it. Second off, I had to corroborate that information because of whom Ronnie Archuleta is. When I did that, I determined that that information Ronnie Archuleta gave to me was reliable. . . . Ronnie Archuleta made some statements in reference to this case that only the killer and the snitch would know. Because of that information that wasn't given to the media, that only other detectives knew that information, that's what

> corroborated this information that I received from Ronnie Archuleta.

Id. at 73-74.

74. The State also presented testimony from another detective that Archuleta had been truthful in prior dealings with that detective. Trial Tr. 8/9/99 at 165.

75. The jury also heard testimony that Archuleta had three felony convictions for forgery, criminal impersonation, and "something to do with bad checks." Trial Tr. 8/9/99 at 6.

76. The jury also heard testimony from another police officer employed in the Metro Vice and Narcotics Unit that, in 1990, Archuleta had provided information to detectives that ultimately proved to be false. Trial Tr. 8/11/99 at 49-51.

77. The jury also heard information about and testimony from Herring that the couple had a "normal" sex life and did not practice anal sex. Trial Tr. 8/5/99 at 169. The jury heard testimony that the couple argued about whether they should get married, had sought counseling, and that Herring was thinking about ending the relationship. *Id.* at 173, 175, 181. The jury also heard testimony that Herring suffered from depression and had a drinking problem. *Id.* at 85, 174-75, 195. The jury also heard testimony that the couple had arguments that involved pushing and shoving, that the police were called on at least two occasions, and that Herring once slapped Linda Richards. *Id.* at 169-70. The jury heard testimony that Linda Richards went to

the emergency room to address a jaw injury that occurred as a result of the slap. Trial Tr. 8/11/99 at 95-96. The jury also heard testimony from neighbors that Herring once used his van to push Linda Richards' vehicle out of his way following an argument. Trial Tr. 8/5/99 at 171-72; Trial Tr. 8/11/99 at 101.

78. George Richards testified that when he arrived at Herring's home on the morning of October 16, 1998, at around 6:30 a.m., he observed moisture on the outside of the truck Herring drove. Trial Tr. 8/11/99 at 186-87.

79. An expert testified that there were no meteorological conditions that could explain the moisture George Richards observed on the truck on the morning of October 16, 1998. Trial Tr. 8/11/99 at 164-65.

80. On August 13, 1999, the jury found Applicant guilty of second-degree murder and second-degree arson. The jury acquitted Applicant on the charges of first-degree murder, first-degree felony murder arising from the commission of a sexual assault, and manslaughter.

81. On October 12, 1999, the state trial court sentenced Applicant to a total of 60 years in prison: 48 years on the murder conviction and 12 years on the arson conviction, to be served consecutively. Sentencing Hr'g Tr. 10/12/99 at 58.

H. Archuleta's Recantation

82. In February 2000 Archuleta placed a telephone call to Applicant's trial counsel, Bobby Lane Daniel. In

that call Archuleta recanted his incriminating testimony. Archuleta told Daniel that "his conscience was bothering him, and that he knew the case against Mr. LeBere was very weak, that he felt badly he had given false testimony and that he didn't want an innocent man convicted or in prison based on false testimony." Docket #150-16 ("Daniel Aff.") ¶ 4.

83. On July 7, 2004, Archuleta signed an affidavit confirming his February 2000 recantation and again admitting that his testimony at Applicant's trial was false. Docket #150-17 ("Archuleta Aff.") ¶¶ 3-4. In the affidavit Archuleta explained that Applicant "never confessed anything to me" and that all of the information Archuleta testified about at trial "was provided to me by Detective J.D. Walker, not by Kent LeBere." *Id.* ¶ 4. Archuleta explained that Walker said that he "needed a confession" from Applicant. *Id.* ¶ 5. In the affidavit, Archuleta stated that, when he told Walker that Applicant had never spoken to Archuleta about Linda Richards or the murder, "Walker suggested to me that I could receive preferential treatment and less jail time if I testified to the information that he provided me about Kent LeBere." *Id.* ¶¶ 6-7. Archuleta disclosed that Walker had provided Archuleta with police reports about Applicant's case so that Archuleta could testify convincingly. *Id.* ¶ 8. Archuleta confirmed that Walker knew that Applicant had never confessed and that Archuleta's testimony about the "confession" was false. *Id.* ¶ 9.

I. Habeas Discovery

84. The parties have deposed the two key witnesses who testified against Applicant at trial, Archuleta and Walker, and the record before the Court includes both the video depositions and transcripts of the depositions. Docket Nos. 150-7 (transcript of Walker Dep.), 150-9 (transcript of Archuleta Dep.), 151 (2 CDs with video depositions). Walker was deposed on May 14, 2015 and Archuleta was deposed on September 15, 2015.

1. Archuleta's Deposition Testimony

85. Archuleta's deposition testimony is consistent with the information he provided in his recantation to Bobby Lane Daniel and in the affidavit he executed several years later.

86. Archuleta testified he understood that "J.D. Walker wanted me to get information on Kent LeBere in regards to his murder case because of the fact that I had done it before in other cases. . . ." Docket #150-9 (Archuleta Dep.) at 16:5. Archuleta testified that he tried but was unable to get any information from Applicant about his case. *Id.* 16:19-17:1. He also testified that he "told J.D. Walker that Kent would not talk about his case" and had not confessed to him. *Id.* 17:6-15; 21:23-22:3. Although ultimately conceding that he might have talked to Deputy Dey prior to meeting with Walker, Archuleta initially denied reporting Applicant's confession to Deputy Dey and described Deputy Dey's report as a "bullshit report" that may have been

fabricated by the district attorney's office and Walker. *Id.* 54:19-61:17; 68:18-69:12.

87. Archuleta testified that, because Applicant would not confess to Archuleta, Walker and Archuleta "went through a case file" that contained "police reports about the incident . . . about how the body was found, how it was positioned, what happened . . . what bar they were at, where [Applicant] was arrested," giving Archuleta "the basic information on the case." *Id.* 16:23, 18:2-10.

88. Archuleta testified that "Detective Walker [told me] that when I am testifying, that I am to testify that that is what Kent told me; that I had conversations with Kent." *Id.* 46:5-8; *see also id.* 47:14-16. In sum, Archuleta testified in his deposition that the content of his trial testimony came not from Applicant but from Walker. *Id.* 20:1-22, 21:9-19.

89. Archuleta also provided testimony regarding his motivation to testify falsely at Applicant's trial. Archuleta testified that he was told by Walker and Deputy District Attorney Ann Joyce that, although "they were looking at hitting me with a habitual criminal charge" because of his criminal record, "in return for me testifying against Mr. LeBere, I would be allowed to leave jail, pay . . . restitution, leave jail, and . . . I'd get probation, I'd get to go home." *Id.* 18:16-19:4. Archuleta explained: "I was promised that if I came through for this, basically, that I was going home; I wasn't going to prison." *Id.* 35:20-24.

90. When confronted at his deposition with the fact that he lied under oath, Archuleta admitted that he did so:

> Q: So it appears that the oath doesn't mean anything to you.
>
> A: At the time it didn't. . . . At the time I was saving my butt.

Id. 73:9-13.

91. Archuleta also testified about the rationale behind his recantation, explaining that he called Applicant's lawyer because "my conscience was eating at me" and felt that "I lied on someone and basically took their life away from them, or I feel I did." *Id.* 23:15-21. Archuleta stated that he had not been in touch with Applicant, Applicant's counsel, Applicant's family, or anyone acting on Applicant's behalf when he called Applicant's attorney to recant. *Id.* 22:4-23:5.

92. Archuleta also testified that his initial recantation in 2000 occurred at a time when he knew he was going to prison, he knew there were threats against him from other inmates because he was a snitch, and he knew that he could be incarcerated with friends of Applicant. *Id.* 49:7-50:18.

2. Walker's Deposition Testimony

93. Walker testified that his relationship with Ronnie Archuleta began in the 1980s. Docket #150-7 (Walker Dep.) 21:21-22:6. By the time Walker was investigating the Richards murder in 1998, Walker and Archuleta

were "on a first name basis." *Id.* 24:13-15. By October 1998, Walker regarded Archuleta as a "chronic liar." *Id.* 27:11-22.

94. Walker testified that he knew Archuleta had a criminal record and a history of giving questionable information to police. *Id.* 21:21-25:1.

95. Before Applicant's trial Walker learned of a memorandum from a section of the police force that routinely dealt with informants that warned that Archuleta should not be used as an informant because he lied so often. *Id.* 58:18-61:12. Local prosecutors also "already knew" Archuleta was a chronic liar at the time of Applicant's trial. *Id.* 62:18-23; 172:13-173:6.

96. Walker also testified that he believed that jail officials arranged Archuleta's housing to maximize his opportunity to "snitch." For example, Walker noted that Applicant's jail pod housed "four homicide suspects . . . and one guy [Archuleta] that had property crime convictions." *Id.* 25:22-26:12. Archuleta was placed in the pod as "an informant on a high profile case." *Id.* 26:5-12. Archuleta also told Walker that one of the other inmates in the pod had warned Applicant that Archuleta was "a snitch." *Id.* 57:22-58:11.

97. At his deposition Walker admitted that certain aspects of the supposed confession seemed untrue. Walker testified that, even in that first meeting with Archuleta concerning the Linda Richards investigation, he believed that some of the "confession" may not have come from Applicant. For example, the coarse language Archuleta ascribed to Applicant probably "came

from Ronnie Archuleta, not Kent LeBere." *Id.* 39:39:3-8. Walker found it likely that those comments were from Archuleta rather than Applicant because, among other reasons, Archuleta "ad libs a lot of things and you have to continue to test him." *Id.* 43:11-24.

98. Walker testified about a variety of the tests he subjected Archuleta to in satisfying himself that the information Archuleta provided was reliable. For example, Walker testified that he thought it important that Archuleta knew about Applicant's phoenix tattoo. *Id.* 40:13-22. Walker did not rule out the possibility that Archuleta could have seen Applicant's tattoo since the tattoo was on his shoulder and they were housed in the same pod. *Id.* 48:9-49:3.

99. Additionally, Walker testified he believed Archuleta's story because Archuleta said Applicant had been arrested after a police officer came to his door with a composite sketch depicting Applicant. *Id.* 42:10-18. Walker admitted that the composite sketch story was in the media and that Archuleta told Walker that he had seen the news related to the Applicant case. *Id.* 49:4-18.

100. Finally, Walker testified that Archuleta told him that Applicant had confessed to sexually assaulting Linda Richards at the amphitheater in Cheyenne Canyon, but the police "didn't have anything that [suggested] she was sexually assaulted and we didn't have any evidence that she wasn't killed right there in the carwash." *Id.* 43:2-44:11.

101. Walker testified that he did not try to corroborate the alleged facts about the location of the murder. *Id.* 50:3-8. He also testified that he thought it was unlikely Applicant would have even known about the canyon, because Applicant had only recently moved to the area. *Id.* 44:23-45:5.

102. Walker testified that he was "testing" Archuleta's knowledge when he asked whether he knew the position of Linda Richards' body in the van, but Archuleta "didn't bite on it" and instead "just passed it over," saying "I don't know the position of the body." *Id.* 43:11-24.

103. Walker testified that Applicant was the only "bona fide" suspect in the Linda Richards case. *Id.* 87:23-88:15.

104. Walker had been a police officer for many years before he was assigned to be the lead investigator on Linda Richards' death, and Walker received various commendations throughout his years as an officer. Docket #150-7 (Walker Dep.) 13:2-15:12, 186:16-194:11.

105. In 1999 Walker was faced with two back-to-back record years for homicides in Colorado Springs, which made it more difficult for him to do his job. Docket #150-7 (Walker Dep.) 17:25-18:4, 112:12-113:2. Additionally, Walker and his wife purchased a business in 1999, and he found that running the business interfered with his ability to work in the homicide division. Docket #150-7 (Walker Dep.) 134:9-135:6.

106. Around the same time period as the investigation of Linda Richards' death, Walker was disciplined for his failure in a number of first-degree murder investigations to timely submit supplemental investigative reports. Docket #150-6 at 2; Docket #150-7 (Walker Dep.) 134:3-8.

107. Walker's failure to file a timely supplemental report in one murder investigation, the Beatty case, was deemed by the trial court to be a suppression of evidence and sloppy police work but was found not to violate *Brady*, because the evidence was not exculpatory. Docket No. 150-4.

LEGAL STANDARDS

A writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). However, the deferential standards of § 2254(d) are not applicable if the claim was not adjudicated on the merits in state court. If a claim was not adjudicated on the merits in state court, and if the

claim also is not procedurally barred, the Court must review the claim de novo. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits – but that presumption can in some limited circumstances be rebutted." *Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088, 1096 (2013). One circumstance in which the presumption may be rebutted is if "the state standard is quite different from the federal standard." *Id.*

The Tenth Circuit determined that Applicant's *Brady* claim is not procedurally barred. *See LeBere*, 732 F.3d at 1233. The Tenth Circuit also noted that the *Brady* claim apparently was not adjudicated on the merits in state court, because the state court's adjudication of Applicant's motion for a new trial predicated on newly-discovered evidence applied different standards than are applicable to a *Brady* claim. *See id.* at 1233-34. As the Tenth Circuit noted, these circumstances "would, seemingly, trigger de novo review by the federal courts." *See id.* at 1233 n.12. Respondents concede that the Colorado Court of Appeals did not adjudicate the merits of the *Brady* claim. Docket #70 at 52. Therefore, the Court will consider the *Brady* claim de novo.

ANALYSIS

Suppression "of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "Prejudice satisfying the third element exists 'when the suppressed evidence is material for *Brady* puiposes.'" *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (per curiam) (quoting *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). Generally, "[f]lavorable evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)). A "reasonable probability" of a different result exists "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles* 514 U.S. at 434 (citation omitted). The Court must evaluate whether undisclosed evidence is material in the context of the entire record. *See United States v. Agurs*, 427 U.S. 97, 112 (1976). The burden is on Applicant to demonstrate the existence of a *Brady* violation by a preponderance of the evidence. *See United States v. Garcia*, 793 F.3d 1194, 1205 (10th Cir. 2015).

Similarly, the knowing use of perjured testimony violates due process and can be categorized as a *Brady* violation. *See Douglas*, 560 F.3d at 1172-74 & n.13; *see also Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." (internal quotation marks omitted)). Although the materiality standard for perjury claims arguably is less demanding than the materiality standard under *Kyles* for suppression claims, "for all practical purposes the two standards ultimately mandate the same inquiry" because a petitioner who succeeds under the materiality standard for perjury claims "will still have to meet the harmless error standard *of Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993), which the Supreme Court has held is met by the *Kyles* test." *Douglas*, 560 F.3d at 1173 n.12.

Applicant argues as follows with respect to the perjured testimony component of his *Brady* claim:

> 48. In this case, the prosecutors committed irreparable misconduct by allowing two key witnesses – Archuleta and Walker – to commit perjury. Archuleta falsely testified that Kent LeBere confessed to the murder. Walker knew that LeBere never confessed, and Walker knew that Archuleta was able to offer his perjured testimony only thanks to the information that Walker himself provided. This led to Walker's own perjury, through his testimony that Archuleta obtained the "confession" from LeBere, rather than from information that

> Walker provided. Walker's knowledge can be directly imputed to the prosecution, which had a duty to know all of the facts surrounding LeBere's supposed confession.
>
> 49. At trial, Archuleta testified that LeBere confessed to murdering Linda Richards, and the jury later convicted LeBere of killing her. This false testimony was corroborated by further perjury from Detective Walker. Given these facts, there is at least a reasonable likelihood that Archuleta's false testimony affected the jury's ultimate judgment that LeBere killed Ms. Richards. Given the paltry evidence against LeBere – circumstantial evidence, lack of motive, and unreliable witnesses – it is unreasonable to conclude that Archuleta's false testimony about a non-existent confession was harmless beyond a reasonable doubt. To the contrary, an examination of the false evidence raises grave doubts about the fairness of LeBere's trial. Accordingly, because the prosecution knowingly used Archuleta's perjured testimony, LeBere was denied his right to due process as articulated by *Brady* and is entitled to a new trial.

Docket #62 at 21-22 (citations omitted).

The other component of Applicant's *Brady* claim is that the prosecution failed to disclose to the defense that Walker met with Archuleta and provided him information that enabled Archuleta to give false testimony. Applicant argues as follows with respect to the alleged failure to disclose:

> 50. Walker visited Archuleta several times in jail and gave Archuleta police reports to prepare for his testimony. These facts are exculpatory *Brady* material because it shows that LeBere's supposed confession was a lie concocted by Archuleta, and made possible and encouraged by Walker. The prosecution should have disclosed the evidence on this basis alone. The evidence should also have been disclosed because it could have been used to impeach the testimony of both Archuleta and Walker.
>
> . . .
>
> 52. Walker's visits with and feeding of information to Archuleta are material pieces of evidence. Walker and Archuleta were key prosecution witnesses, both at trial and at the preliminary hearing. There was no physical evidence linking LeBere to the murder. However, there was the testimony of investigating detective Walker, which linked LeBere to the murder, and testimony – later recanted – by Archuleta that LeBere confessed to killing Richards. Information that Walker, seeking to manufacture a confession, visited Archuleta in jail and fed him information puts this case in an entirely different light. It reveals witness tampering, perjury, and prosecutorial misconduct of which the jury was wholly unaware and which, now revealed, undermines confidence in the jury's verdict.

Docket #62 at 22-23 (citations omitted).

Applicant acknowledges that the ultimate resolution of his *Brady* claim turns on the relative credibility of Archuleta and Walker. It is readily apparent based on their conflicting deposition testimony and the Court's factual findings above that they cannot both be telling the truth about Applicant's jailhouse confession and their own trial testimony. The Court resolves the credibility issue based on a review of the entire record. Furthermore, in considering the evidence in the record, the Court notes that Archuleta's recantation must be viewed with skepticism. "[R]ecanted testimony is notoriously unreliable, easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial." *Case v. Hatch*, 731 F.3d 1015, 1044 (10th Cir. 2013) (internal quotation marks omitted). Thus, "[r]ecantation of testimony given under oath at trial is not looked upon with favor." *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980). Instead, the Court must view recantation of trial testimony with "downright suspicion," *id.*, because:

> [t]he trial is the main event in the criminal process. The witnesses are there, they are sworn, they are subject to cross-examination, and the jury determines whether to believe them. The stability and finality of verdicts would be greatly disturbed if courts were too ready to entertain testimony from witnesses who have changed their minds, or who claim to have lied at trial.

United States v. Gray Bear, 116 F.3d 349, 350 (8th Cir. 1997).

Applicant argues that Walker's testimony is not credible because the objective facts do not support his version of events and he had, and continues to have, a strong motive to lie about his true conduct in obtaining a confession from Applicant. In particular, Applicant contends Walker is not credible because Walker relied on Archuleta's story about Applicant's confession even though Walker knew Archuleta was a chronic liar; Walker failed to corroborate Archuleta's story about Applicant's confession; Walker was involved in helping Archuleta obtain a favorable plea deal in his own case; Walker has a history of similar misconduct; Walker focused on Applicant as the only viable suspect despite evidence or evidentiary leads pointing to the possibility of another suspect; and the need to secure a confession was critically important in order to successfully prosecute Applicant since the other evidence against him was not sufficient to find guilt beyond a reasonable doubt.

With respect to Archuleta, Applicant argues his recantation and deposition testimony, rather than his trial testimony, is credible because the evidence at trial did not corroborate the critical elements of Archuleta's trial testimony regarding Applicant's purported motive, and the location of the crime and the information he provided that was corroborated could have been gleaned from police files or the newspaper. Applicant also argues that Archuleta's recantation is credible because he was specifically warned by other jail inmates not to speak with Archuleta since Archuleta was a well-known snitch; the recantation was not prompted

or coerced by Applicant or anyone else; and the recantation has remained consistent for more than sixteen years.

The Court is not persuaded by Applicant's arguments that Archuleta is credible and Walker is not. The most important evidence supporting the Court's conclusion is the fact that Archuleta initially reported Applicant's confession to Deputy Dey on October 26, 2008, which was two days before Archuleta met with Walker regarding Applicant's case. This fact alone significantly undermines Applicant's assertions that Walker knew Applicant never confessed, that Walker knew Archuleta was able to offer his allegedly perjured trial testimony only thanks to the information that Walker himself provided, and that Applicant's confession was a lie concocted by Archuleta and made possible and encouraged by Walker. While Archuleta's trial testimony regarding Applicant's jailhouse confession included details that were not set forth in Deputy Dey's report, it cannot be disputed that there is evidence of a jailhouse confession by Applicant that has no connection to Walker.

Applicant seeks to diminish the importance of Deputy Dey's report and the fact that Archuleta reported Applicant's confession to Deputy Dey prior to meeting with Walker by arguing that Walker saw an opportunity to bolster a weak case and provided information that helped Archuleta manufacture a confession. The Court is not persuaded, because this bolstering argument is not consistent with Applicant's assertions that Walker knew Applicant never confessed, that Walker

was the sole source for Archuleta's testimony, and that Applicant's confession was a lie made possible by Walker.

The Court also is not persuaded that Archuleta's history of dishonesty and lying somehow diminishes Walker's credibility. Walker readily admitted at Applicant's trial that he knew Archuleta was a chronic liar, an admission that would seem unlikely if Walker was involved in manufacturing the confession in order to bolster the case against Applicant.

Moreover, the Court is not convinced that the consistency of Archuleta's recantation for sixteen years demonstrates he is credible, because an important part of his deposition testimony offered in support of his recantation is inconsistent with the record before the Court and his own prior testimony at Applicant's trial. As noted above, the record demonstrates that Archuleta reported a confession by Applicant to Deputy Dey on October 26, 1998, and he testified to that fact at Applicant's trial. However, at his deposition Archuleta described Deputy Dey's report as a "bullshit report" and insinuated the report had been fabricated by the district attorney's office and Walker. Although Archuleta ultimately conceded at his deposition that he may have spoken to Deputy Dey on October 26, 1998, the Court finds that his attempt to deny the veracity of Deputy Dey's report diminishes his credibility.

The Court also is not persuaded that Walker's agreement to "put in a good word" for Archuleta in connection with Archuleta's own case, which contributed

to Archuleta receiving a favorable plea deal in his own case, demonstrates Walker is not credible. The prosecutor in Archuleta's case testified that Walker's "good word" for Archuleta was only part of the basis on which Archuleta received a favorable plea deal. The Court recognizes that Walker's "good word" for Archuleta provides some support for Applicant's arguments, but the significance of this fact does not outweigh the other factors supporting the Court's conclusion that Walker is more credible than Archuleta. In particular, the fact that Applicant confessed to Archuleta, as evidenced in Deputy Dey's report, before ever meeting with Walker undermines the plausibility of Applicant's argument that Walker arranged a favorable plea deal for Archuleta in exchange for false testimony. Furthermore, the fact that a criminal defendant receives a benefit for assisting the police in another investigation is not an unusual occurrence.

Similarly, the Court places little weight on evidence of Walker's "sloppy" police work and administrative failures in other investigations, including the Beatty case, during the relevant time period. This evidence, which involves a number of failures to file timely supplemental reports in other investigations, does not demonstrate that Walker has a history of manufacturing confessions or suppressing exculpatory evidence. In addition, given the circumstances surrounding Walker's failure to file timely supplemental reports during the relevant time period, including a record number of homicides in Colorado Springs and the demands of running a business with his wife, the

Court is not persuaded that Walker's alleged sloppiness diminishes his credibility with respect to Applicant's jailhouse confession.

The Court also finds some evidence to support Respondents' contention that Archuleta's recantation was not motivated by his desire to clear his conscience, as he asserts. The record reflects that Archuleta's initial recantation in 2000 occurred at a time when he knew (1) he was going to prison, (2) there were threats against him from other inmates because he was a snitch, and (3) he could be incarcerated with friends of Applicant. The Court finds that these circumstances provide an equally plausible alternative explanation for Archuleta's recantation.

Finally, although Applicant places great weight on asserted deficiencies regarding the scope of the police investigation in Applicant's case and, in particular, on the investigation of Herring as a possible suspect, the Court is not persuaded that these circumstances demonstrate Walker is not credible. For example, Applicant has not shown what evidence additional investigation would have uncovered. Furthermore, although Walker was the lead detective, he was not the only police officer involved in the investigation of Applicant's case. Finally, it is not accurate to assert that Herring was never investigated as a potential suspect in connection with the death of Linda Richards. In fact, the police spoke with Herring in his home and formally interviewed him at the police station within a few hours after the crime was committed and before Applicant was identified as a suspect.

The Court also is not persuaded that Walker's focus on Applicant as the only viable suspect demonstrates Walker is not credible. The police investigation uncovered a substantial amount of circumstantial evidence pointing to Applicant as the perpetrator, including the following: Applicant was with Linda Richards at Crazy Mike's bar on the east side of Colorado Springs on the evening of October 15, 1998; Applicant and Linda Richards left Crazy Mike's bar together between 12:30 a.m. and 1:30 a.m. on October 16, 1998; a van driven by Linda Richards was found burning in a carwash on the west side of Colorado Springs around 2:00 a.m. on October 16, 1998; Linda Richards was killed sometime between 12:30 a.m. and 2:00 a.m. on October 16, 1998; a woman who lived near the car wash where the van was discovered identified Applicant as the man who walked past her, away from the carwash and toward a nearby 7-Eleven, at around 2:15 or 2:30 a.m. on October 16, 1998; Applicant was identified on the 7-Eleven surveillance tape at 2:35 a.m.; Applicant also was identified by a cab driver as the fare he picked up at the 7-Eleven at 2:45 a.m. and dropped off a short distance from Applicant's residence; and Applicant provided inconsistent stories to the police regarding what happened when he left the bar with Linda Richards. In light of this evidence, Walker's focus on Applicant as the only viable suspect was neither irrational nor unreasonable. The fact that another witness, who saw a man near the burning van in the car wash, did not identify Applicant as the man she saw does not significantly diminish the weight of the circumstantial

evidence that points to Applicant as the perpetrator of the crime.

CONCLUSION

For the foregoing reasons, the Court concludes the Applicant is not entitled to relief based on his *Brady* claim. The Court is not persuaded that the prosecution either relied on perjured testimony from Archuleta and Walker or that Walker met with Archuleta and provided him information enabling Archuleta to give false testimony. In short, based on a review of the entire record, and viewing Archuleta's recanted testimony with appropriate suspicion, the Court concludes that the preponderance of evidence demonstrates Walker's testimony is credible and Archuleta's recantation is not. Therefore, the Court finds that Applicant fails to demonstrate the prosecution suppressed favorable evidence. Accordingly, based upon the foregoing and the entire record herein, the Court respectfully RECOMMENDS that the Amended Application [filed August 12, 2009; docket #621 be DENIED.

Respectfully submitted and dated at Denver, Colorado, this 8th day of August, 2016.

BY THE COURT:

/s/ Michael E. Hegarty
Michael E. Hegarty
United States
Magistrate Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KENT ERIC LEBERE, Petitioner – Appellant, v. JAMES ABBOTT, Warden; JOHN W. SUTHERS, the Attorney General of the State of Colorado, Respondents – Appellees.	No. 11-1090

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:03-CV-01424-WDM)

(Filed Oct. 18, 2013)

James L. Volling, Faegre & Benson LLP, Minneapolis, Minnesota, (Jesseca R.F. Cockson, Martin S. Chester, Christina C. Semmer, and Daniel G. Prokott, Faegre & Benson LLP, Minneapolis, Minnesota; Laurence W. DeMuth, III, Faegre & Benson LLP, Boulder, Colorado; and Jennifer K. Harrison, Faegre & Benson LLP, Denver, Colorado, with him on the briefs), for Petitioner – Appellant.

John D. Seidel, Senior Assistant Attorney General, (John W. Suthers, Attorney General, with him on the brief), State of Colorado, Denver, Colorado, for Respondents – Appellees.

Before **KELLY, O'BRIEN**, and **MATHESON**, Circuit Judges.

O'BRIEN, Circuit Judge.

Kent LeBere is serving a 60-year term of imprisonment imposed by a Colorado court as a result of his conviction for second-degree murder and second-degree arson. In his 28 U.S.C. § 2254 petition for habeas relief, he contends the State relied on perjured testimony and withheld potentially exculpatory evidence material to his defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The only question presented is whether federal courts may consider his claim.[1] It involves the interplay between state and federal procedural rules.

The procedural history of this case is somewhat convoluted (as we will detail) but it can be succinctly summarized. After LeBere began serving his sentence and while his direct appeal was pending, Ronnie Archuleta, a key witness against him, recanted his testimony. LeBere promptly moved for a new trial based upon that newly discovered evidence. His new trial

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[1] We granted a certificate of appealability on this issue.

motion became a collateral part of his direct appeal and, after a hearing, it was denied. LeBere then brought this habeas petition expressly claiming, for the first time, a *Brady* violation based on the undisclosed acts of a detective who allegedly encouraged Archuleta to lie at the trial. The district judge abated these habeas proceedings to permit LeBere to exhaust his newly minted claim in the state courts. He then filed a petition for post-conviction relief with the Colorado trial court asserting the *Brady* claim. The petition was not decided on the merits; post-conviction relief was denied because the *Brady* claim was, *sub silento*, part and parcel of his newly discovered evidence claim, which was addressed and decided on direct appeal. Importantly, the *Brady* issue was not considered to have been procedurally barred because it was not timely raised (waiver or forfeiture); it was considered to have been subsumed in the new trial motion and, in effect, decided when the new trial motion was denied. And since it had been decided on direct appeal, under Colorado procedures it could not be revisited in post-conviction proceedings (successive bar). LeBere returned to federal court with the *Brady* claim front and center. The district judge concluded it was procedurally barred by Colorado's successive bar rule.

LeBere contends Colorado's successive bar has no effect on the availability of habeas review of his particular claims. He is correct. We reverse.

FACTUAL BACKGROUND

On October 16, 1998, Linda Richards's van was set ablaze from the inside and abandoned at a car wash on the west side of Colorado Springs, Colorado. Her partially clothed remains were found wedged between the two front seats of the van. An autopsy confirmed she had died from strangulation before the fire was set.

The State of Colorado charged LeBere with Richards's murder. He pled not guilty and the case went to trial.

The prosecution's case was primarily circumstantial. LeBere was observed leaving a bar on the east side of town with Richards hours before her death. Later, he was viewed on the store's security camera as he caught a cab ride home from a convenience store located several blocks from the car wash. The cab driver identified him as the man he picked up at the convenience store at 2:45 a.m., less than an hour after witnesses spotted the burning van. Although LeBere admitted to leaving the bar with Richards, he initially provided conflicting stories about what happened next. He told the police two stories (he walked home from the bar and Richards drove him home) and told his aunt a third (Richards had driven him across town to go to another bar, he became sick, left her car, walked around until he found the convenience store, got something to eat and called a cab).

There was no physical evidence linking LeBere to the murder. In addition, Yvonne Castro, the only witness who actually saw the van prior to the fire, testified

to observing a man standing next to it. She described the man as wearing light clothing and a fishing hat. LeBere, however, was wearing dark clothing and no hat. Tellingly, Castro viewed the convenience store's surveillance footage of LeBere on the night of the murder and did not identify LeBere as the man she saw at the car wash.

The State's only direct evidence was the testimony of Ronnie Archuleta, an inmate who had been housed with LeBere shortly after his arrest. Archuleta's testimony included a story LeBere had related to him. In that story, LeBere admitted to raping Richards, strangling her to death, and burning her van to conceal the evidence. According to Archuleta, LeBere said he killed Richards so she would not be able to identify him from a distinctive tattoo on his arm.

As part of his defense, LeBere presented evidence about another person—Richards's fiancé, Russell Herring. In his testimony, Herring admitted the couple's relationship had been tumultuous, poisoned by infidelity and punctuated by bouts of violence, and he confessed to having physically assaulted Richards in the past. He also testified as follows: The couple argued the evening of Richards's death resulting in Herring telling Richards he was considering ending their relationship. When Richards left the house Herring figured, correctly, she was headed for a bar. He stayed home that night.

Herring's testimony about staying home was challenged. The defense presented evidence of his car

having been driven the night of the murder. Specifically, a neighbor heard a noise which sounded like a truck leaving the house. Moreover, Richards's father saw the vehicle the following morning and noticed an accumulation of water on the windshield. He described it as dew, but a meteorologist testified the weather conditions made it scientifically impossible for dew to have formed. According to the meteorologist, there could be only two explanations for the water: either someone had placed it on the windshield or someone had been breathing inside the car.

The jury convicted LeBere of second-degree murder and second-degree arson, but acquitted him of the remaining counts: first-degree murder committed after deliberation, felony murder arising from sexual assault, and manslaughter.[2] The trial court sentenced him to 48 years imprisonment on the murder conviction and 12 years on the arson conviction, to be served consecutively.

PROCEDURAL BACKGROUND

In February 2000, while LeBere's case was pending on direct appeal, Archuleta contacted LeBere's attorney and recanted his trial testimony. He said the whole story was fabricated; LeBere had never confessed. Worse, he said his false testimony had been induced by the lead detective on the case, J.D. Walker,

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[2] LeBere tells us he was also acquitted of sexual assault, but his statement is not supported by the state court filings. It is irrelevant to our decision in any event.

who visited him in jail and promised to push for favorable treatment in his pending criminal case if he would implicate LeBere in the Richards murder. According to Archuleta, Walker knew the testimony Archuleta gave at trial was false—LeBere had never confessed. Moreover, Walker furnished Archuleta with a copy of the police reports, presumably so he could come up with a plausible confession story.

Relying on the recantation, LeBere moved for a new trial based on newly discovered evidence. *See* Colo. R. Crim. P. 33(c). The Colorado Court of Appeals abated the appeal and remanded the case to the trial court to resolve issues regarding the newly discovered evidence. The trial judge held an evidentiary hearing. Archuleta did not appear, fearing arrest on outstanding warrants.[3] The judge concluded the new evidence would not have changed the outcome of the trial and denied the motion.[4] Significant, in his view, was

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[3] The record is unclear as to how Archuleta's recantation was presented at the hearing. He did not produce an affidavit attesting to the information he provided to LeBere's attorney until June 2004. The affidavit appears to have been first presented to any court as an attachment to LeBere's amended § 2254 petition, filed in August 2009.

[4] To receive a new trial based on newly discovered evidence, the defendant must show: (1) the new evidence was unknown to the defendant prior to trial; (2) the defense must have exercised due diligence in finding favorable evidence prior to trial; (3) the newly discovered evidence is material to the issues and not cumulative or impeaching; and (4) on retrial the newly discovered evidence would probably result in an acquittal. *People v. Gutierrez*, 622 P.2d 547, 559-60 (Colo. 1981). The trial judge determined the first two factors had been satisfied. He was less clear as to the third factor—first suggesting Archuleta's recantation was merely

LeBere's acquittal on the counts of first-degree murder with deliberation and felony murder arising from sexual assault, the two charges for which Archuleta's testimony provided direct support. This indicated the jury did not believe Archuleta's testimony. He also concluded there was substantial other evidence of guilt. The appellate court upheld the decision and affirmed the conviction. The Colorado Supreme Court declined review. He did not seek review from the United States Supreme Court, thus ending his direct appeal.

LeBere initiated pro se federal habeas proceedings in July 2003. He raised, *inter alia*, error in the state courts' denial of his motion for new trial based on newly discovered evidence. The State responded, claiming dismissal was appropriate for failure to allege a violation of federal law, *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), and even assuming such a federal claim could be divined from his petition, it was unexhausted.[5] Counsel for LeBere entered their appearance and moved to stay the federal proceedings to allow LeBere to return to state court and exhaust his claims. The district judge granted the motion.[6]

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impeachment evidence but then indicating it was material to the defense theory of police misconduct. In any event, he was clear the fourth factor had not been met.

[5] LeBere's pro se habeas petition included three claims, including error regarding the denial of his motion for new evidence. The State argued all three claims were unexhausted.

[6] When counsel made their appearance for LeBere, they sought a stay of the habeas proceedings to allow LeBere to exhaust his claims in state court. However, when LeBere returned to state court, he did not seek to exhaust any of the legal theories

With the assistance of new counsel, LeBere filed a motion for post-conviction relief in state court pursuant to Colo. R. Crim. P. 35(c). This time, and for the first time, LeBere couched his claim regarding Archuleta's recantation and Walker's misconduct as a federal *Brady* claim. "A review of the Motion," the judge stated, "leads to the conclusion that the basis of the Motion involves the purported recanted testimony of Ronnie Archuleta. . . . [T]he grounds of this Motion [are] the same as those previously raised and determined on appeal." (App'x Vol. 2 at 351-52.) The Colorado Court of Appeals affirmed, relying on Colo. R. Crim. P. 35(c)(3)(VI), which requires dismissal of any claim that was raised previously (absent two circumstances not present here).[7] While recognizing the legal basis for the claim was "superficially different," it decided the factual basis for the *Brady* claim duplicated the factual

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raised in his pro se habeas petition; he instead raised new legal theories, including *Brady*. When LeBere sought to amend his habeas petition, the State opposed the amendment. It argued that while it had not opposed a stay to allow exhaustion of the claims raised in the pro se petition, it did oppose a stay for exhausting new claims. *See infra* n.8.

[7] LeBere's Rule 35(c) post-conviction motion was filed April 21, 2004. Rule 35(c)(3)(VI), which imposes a mandatory bar for claims "raised and resolved" in a prior appeal or post-conviction proceeding, became effective July 1, 2004, and governs only petitions filed after that date. *See People v. Versteeg*, 165 P.3d 760, 763 (Colo. App. 2006) (noting that the amended version of Rule 35 applies only to motions filed after the amendment's effective date—July 1, 2004); *People v. Wenzinger*, 155 P.3d 415, 418-19 (Colo. App. 2006) (discussing amendments to Rule 35 and applying Rule 35(c)(3)(VI) to a petition filed after July 1, 2004). Nevertheless, the Colorado Court of Appeals applied the new rule to LeBere's motion. In light of our disposition it makes no difference.

basis supporting the motion for new trial. (*Id.* at 358.) Thus, the *Brady* claim was "merely a rephrasing of the motion for new trial," and it would "not revisit what is essentially the same issue in a second appeal." (*Id.*) To no avail, LeBere petitioned for review by the Colorado Supreme Court.

LeBere then returned to federal court with an amended 28 U.S.C. § 2254 petition. For the first time in the federal proceedings, LeBere raised a *Brady* claim.[8] The district judge traced the history. LeBere's newly discovered evidence claim was presented and decided as part of his direct appeal. But the judge correctly concluded that claim sounded exclusively in state law; it was insufficient to give notice of the federal claim—a *Brady* violation. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts. . . ."). In short, LeBere failed to exhaust his *Brady* claim on direct appeal. He did, however, raise it to the Colorado courts on collateral review. The judge nevertheless decided it was not fairly presented because the post-conviction court concluded it was an

[8] The State opposed the amendment, claiming the *Brady* claim was untimely because the district court had only stayed the action to allow LeBere to return to state court to exhaust those claims raised in his initial pro se § 2254 petition and the *Brady* claim was not a claim in that petition and did not relate back to that petition under Fed. R. Civ. P. 15. The district judge saw it differently. He decided the *Brady* claim related back to the newly discovered evidence claim in the original petition and allowed amendment of the § 2254 petition to include the *Brady* claim. The State does not appeal from that decision.

impermissible, successive claim (one that had already been decided). Thus, it was not exhausted. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (exhaustion requirement requires the federal claim to have been "*fairly presented*" to the state courts). In that regard he erred; if the claim had been earlier decided by the Colorado court it was, necessarily, exhausted.

DISCUSSION

We review a state court's decision under appropriate habeas standards. If the state court, in fact, reached the merits our review is deferential; otherwise it is de novo. *See Mitchell v. Gibson*, 262 F.3d 1036, 1045 (10th Cir. 2001). However, "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone v. Bell*, 556 U.S. 449, 466 (2009).

In his Rule 35(c) post-conviction proceedings, LeBere presented his *Brady* claim to the state courts. But the post-conviction court did not resolve the *Brady* claim on the merits. Instead, it declined review under a Colorado rule barring post-conviction review of a claim raised and resolved in a previous proceeding. *See* Colo. R. Crim. P. 35(c)(3)(VI). Generally, when a state court dismisses a federal claim on an "independent and adequate" procedural ground, the doctrine of procedural default forecloses federal review. *Coleman*, 501 U.S. at 729-32. The question, then, is whether the

application of the state's successive bar presents a barrier to federal review. Not necessarily.

In *Cone*, the Supreme Court decided a state court's refusal to consider the merits of a claim because the claim was previously determined is not a proper basis for denying federal habeas review. *Cone*, 556 U.S. at 466. This is not a novel proposition. We are among several circuits to have previously reached the same conclusion, *Page v. Frank*, 343 F.3d 901, 907 (7th Cir. 2003); *Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994); *Bennett v. Whitley*, 41 F.3d 1581, 1582-83 (5th Cir. 1994); *Silverstein v. Henderson*, 706 F.2d 361, 368 (2d Cir. 1983), and the Supreme Court had implied as much nearly two decades earlier in *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991). *Cone's* contribution was to confirm that the principle applies with equal force where a state court refuses to consider a federal claim on the erroneous premise that it had already been adjudicated. *Cone*, 556 U.S. at 466-67.

The facts in *Cone* are on all fours with this case. After he was convicted and sentenced to death, Gary Cone appealed his conviction, arguing prosecutors had violated state law by failing to disclose evidence strengthening his defense—he committed the murders while in the throes of a drug-induced psychosis. *Id.* at 454, 457. His appeal was unsuccessful, and the Tennessee courts denied post-conviction relief. *Id.* at 457. Later, Cone filed a second petition for post-conviction relief in which he argued the prosecution had violated *Brady* by failing to disclose evidence bolstering his

insanity defense and mitigating the prosecution's case for the death penalty. *Id.* at 457-60.

The post-conviction court denied review because, it concluded, the *Brady* claim had been previously determined on direct appeal; the appellate court affirmed and the state supreme court and United States Supreme Court denied review. *Id.* at 460-61. Cone then raised his *Brady* claim in a § 2254 petition in federal court. *Id.* at 461. The district judge denied relief, concluding the *Brady* claim had been waived (not timely presented in state court) and was therefore procedurally defaulted. *Id.* The Sixth Circuit affirmed on a slightly different ground, explaining it was barred from reaching the merits of the claim because the state post-conviction courts had deemed the claim "previously determined or waived" under Tennessee law. *Id.* at 462 (quotations omitted).

The Supreme Court vacated the Sixth Circuit's decision and remanded to the district court. *Id.* at 452. While there was some confusion as to whether the state appellate court had refused to reach the merits of the *Brady* claim because it had been previously determined or because it had been waived, the Supreme Court concluded the basis for the decision was the former—it had been previously determined. *Id.* at 467-68. The state court's decision rested on a "false premise," the Supreme Court explained, because the claim Cone raised on direct appeal arose under state law, not *Brady*. *Id.* at 466. In any event, the application of Tennessee's successive bar did not preclude federal review: "When a state court refuses to adjudicate a claim on

the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication." *Id.* at 467.

The Court's decision in *Cone* controls the outcome of this case. As in *Cone*, LeBere raised a state-law nondisclosure claim on direct appeal and, based on the same facts, a *Brady* claim on post-conviction review. And, as in *Cone*, the post-conviction court applied the state bar on successive claims in declining to reach the merits. If the application of the successive bar in *Cone* did not affect the availability of federal review, the same should be true for a nearly identical rule here.

We can discern only one potentially material distinction between the two cases, and it relates to the scope of the applicable successive bars. *In Cone*, hearings on petitions for post-conviction relief could not be based on claims "previously determined," meaning a court had "ruled on the merits of the claim after a full and fair hearing." *Id.* at 458 n.8 (quotations omitted). The Colorado successive bar appears to sweep more broadly, if only slightly. The rule limits review to claims not "raised and resolved" in a prior proceeding. *See Colo.* R. Crim. P. 35(c)(3)(VI). Colorado courts have provided clarification—the rule prohibits not only claims previously decided on the merits, but also claims where review "would be nothing more than a second appeal addressing the same issues on some recently contrived constitutional theory." *People v. Rodriguez*, 914 P.2d

230, 249 (Colo. 1996) (quotations omitted). In other words, it precludes claims raising new legal theories based on old facts. *Id.* (citing *Sanders v. United States*, 373 U.S. 1, 16 (1963)); *see also People v. McDowell*, 219 P.3d 332, 336-37 (Colo. Ct. App. 2009) (Rule 35 prevented defendant's outrageous governmental conduct claim based on police officers' and the district attorney's interrogation because it was previously decided on direct appeal although couched in terms of a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

The apparent distinction disappears upon closer examination of the two rules. Like Colorado's Rule 35, Tennessee's successive bar rule was designed in the mold of its federal counterpart concerning successive § 2255 motions. *See* 28 U.S.C. § 2255(h); *People ex. rel. Wyse v. Dist. Court In and For Twentieth Judicial Dist.*, 503 P.2d 154, 156 (Colo. 1972); *People v. Sherman*, 172 P.3d 911, 915 (Colo. Ct. App. 2006); *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483, at *13 & n.4 (Tenn. Crim. App. Mar. 23, 1994) (unpublished); Gary L. Anderson, *Post-Conviction Relief in Tennessee—Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act, 48* Tenn. L. Rev. 605, 609-610, 659 (1981). And like the Colorado rule, the Tennessee provision has been interpreted to cover claims that couch old facts under new legal principles. *Aaron v. State*, No. M2006-01983-CCA-R3-PC, 2008 WL 203394, at *4-5 (Tenn. Ct. App. Jan. 22, 2008) (unpublished) (finding claim based on sufficiency of the evidence was previously determined on direct appeal despite petitioner's attempt to couch it in different

legal terms); *Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670, at *10 (Tenn. Crim. App. Jan. 15, 1998) (unpublished) (claims were previously determined even though not previously addressed in terms of ineffective assistance of counsel); *Bates v. State*, No. 03C01-9208-CR-00279, 1993 WL 144618, at *5 (Tenn. Crim. App. May 6, 1993) (unpublished) ("[F]acts which are presented and ruled upon on the merits . . . are . . . 'previously determined."). Notwithstanding some minor textual differences, then, the two rules are coextensive.

More than that, they are cut from the same cloth. Both rules represent legislative tweaks on the common law doctrine of res judicata, both are modeled on the Supreme Court's decision in *Sanders v. United States*, 373 U.S. 1 (1963), and both were created to serve the same principle—finality. *Rodriguez*, 914 P.2d at 249; *Sherman*, 172 P.3d at 916; *Bledsoe v. State*, No. W2000-02701-CCA-R3-PC, 2001 WL 1078269, at *3-4 (Tenn. Crim. App. Sep. 14, 2001) (unpublished); *Johnson*, 1994 WL 90483, at *13; *Bates*, 1993 WL 144618 at *5; Anderson, *supra*, 48 Tenn. L. Rev. at 607 n.3, 611, 626, 659. Much like the doctrine of res judicata, their application goes to a previous determination of the merits of a case, which is what the Court was driving at in *Cone* when it said a procedural bar covers claims that have not been fairly presented, not claims that have been presented more than once. *See Cone*, 556 U.S. at 467.

The State's attempt to limit *Cone* to its facts is misguided. In several places it simply misreads the decision. Elsewhere it conjures up distinctions either not there or otherwise having no bearing on the

application of *Cone* to this case. For instance, it stakes its argument on the incorrect premise that *Cone* "assumed the very fact in dispute here," namely, "the claims presented each of two times to state courts were *federal in nature* and *identical*." (Respondent's Supp. Br. at 7, 9.) This could not be further from the truth. Far from assuming the two claims were identical, the Supreme Court concluded Cone did not present a *Brady* claim on direct appeal, and even faulted the State for "conflating" *Brady* with the state-law nondisclosure claim. 556 U.S. at 459, 466. The State tries to cherry-pick excerpts from *Cone* that purportedly shore up its interpretation, but the passages it cites are out of context. The argument is impossible to reconcile with the unambiguous language of the Court: "The Tennessee post-conviction court denied Cone's *Brady* claim after concluding it had been previously determined following a full and fair hearing in state court. That conclusion rested on a false premise: Contrary to the state courts' finding, Cone had not presented his *Brady* claim in earlier proceedings and, consequently, the state courts had not passed on it." *Id.* at 466 (citation omitted).

The State tries to distinguish *Cone* by pointing to uncertainty as to which procedural bar—the waiver rule or the bar on successive claims—had been invoked by the Tennessee courts. While initially there may have been some uncertainty in this regard, in reaching its decision the Supreme Court concluded the Tennessee appellate court had applied the successive bar, not the waiver rule, in declining to reach the merits of the

Brady claim. *Id.* at 467-69. It was by way of this conclusion that the Court arrived at its broader holding—a state court's determination that a claim has already been adjudicated does not preclude federal habeas review.

The State makes much of the fact that Colorado's successive bar mirrors the one applied by federal courts under former Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts, which allowed dismissal of a second or successive § 2254 petition if it failed to allege new or different grounds for relief and the prior determination was on the merits.[9] Under the Supreme Court's decision in

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[9] The State cites Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts. That rule was amended in 2004. Prior to 2004, subsection (b) allowed dismissal of a second or successive petition "if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits. . . ." The 2004 amendments changed subsection (b) to reflect provisions in 28 U.S.C. § 2244 which require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition. *See* Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts advisory committee's notes to 2004 amendments.

Under § 2244 a court of appeals may authorize the filing of a second or successive application only if the applicant shows (1) "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) "the factual predicate for the claim could not have been previously discovered through the exercise of due diligence" and "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2),(3)(C).

Sanders, the Rule encompassed new legal theories based on previously asserted facts.[10] 373 U.S. at 16. It is "inconceivable," the State contends, that *Cone* "intended to tell states that their version of the *Sanders* rule is inadequate to prevent habeas review, when federal courts use it every day for that precise purpose." (Respondent's Supp. Br. at 13.)

There is, admittedly, a shallow logic at work here: if federal law precluded review of federal claims arising from facts determined in earlier federal habeas proceedings, should not an identical state bar operate to a similar effect? The wisps of logic dissolve when one considers the contours of the procedural default doctrine; the federal habeas rules do not inform a debate animated by an entirely different set of principles. When a district court invoked the successive bar in Rule 9(b) and declined to entertain a federal prisoner's request for habeas relief, it did so knowing the prisoner had a fair opportunity to present his claim in federal court. But no such assurance attends a decision declining review of a state prisoner's request for habeas relief on the ground that a *state* court decided it was

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[10] *Sanders* involved the interpretation of 28 U.S.C. § 2255 and its bar on second or successive § 2255 motions. 373 U.S. at 3-4, 12. Nevertheless, Rule 9(b) of the Rules Governing § 2254 Cases appears to have been modeled after *Sanders*. *See* Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts advisory committee's notes to 1976 adoption. And we have applied *Sanders* when applying Rule 9(b) of the Rules Governing § 2254 Cases. *See*, *e.g.*, *Parks v. Reynolds*, 958 F.2d 989, 994 (10th Cir. 1992); *Robison v. Maynard*, 958 F.2d 1013, 1015-16 (10th Cir. 1992); *Truitt v. Hargett*, 986 F.2d 1430, No. 92-6329, 1993 WL 53577, *2 (10th Cir. Feb. 16, 1993) (unpublished).

previously determined. Whether the federal claim was previously decided, as opposed to being waived, must ultimately be determined by a federal court. The federal court must determine whether the state court's refusal to revisit the claim excuses its obligation under § 2254(a) to decide whether the petitioner is in lawful custody.[11] *See Cone*, 556 U.S. at 465.

Given the posture of this case there is no procedural bar to habeas review. The irony has not escaped us.[12] Had the Colorado courts decided LeBere's *Brady* claim was waived or forfeited because it could have been but was not raised on direct appeal (as is clearly the case—he was aware of the pertinent facts but neither made mention of *Brady* nor fairly alluded to it),

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[11] If there are lessons to be drawn from the federal successive bar, they support LeBere's position on procedural default, not the State's. The federal rule is a doctrinal relative of common law res judicata, the application of which rests on the premise that the prior determination was a decision on the merits. *Sanders*, 373 U.S. at 16. As the Supreme Court suggested in *Cone*, a successive bar does not sound in procedure the way claim-processing rules do. In the Court's words, "[a] claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once." *Cone*, 556 U.S. at 467.

[12] And the supreme irony may be yet to come. If the *Brady* claim had, in fact, been previously determined, explicitly or implicitly, federal habeas review would not be foreclosed if timely requested. But it would be deferential review. *See Mitchell*, 262 F.3d at 1045. On the other hand, if the Colorado Court of Appeals was incorrect in equating the test for newly discovered evidence with the test for a *Brady* violation (as appears to be the case) then the state courts failed to address the merits of the *Brady* claim. That would, seemingly, trigger de novo review by the federal courts. *Mitchell*, 262 F.3d at 1045.

see Colo. R. Crim. P. 35(c)(3)(VII), federal courts would be bound to honor its procedural default holding, absent a showing of cause for the default and actual prejudice or that failure to consider the claim will result in a fundamental miscarriage of justice.[13] *See Coleman*, 501 U.S. at 750.

Instead, the Colorado Court of Appeals concluded the *Brady* claim had been decided because it was necessarily included in the new trial motion. However, while the new trial motion was based on the same facts as the later-raised *Brady* claim, *Brady* was not raised in the new trial motion. For starters, a *Brady* claim is grounded in the constitutional principle of due process, which is not true of a motion based on newly discovered evidence. *Compare Brady*, 373 U.S. at 87, *with Farrar v. People*, 208 P.3d 702, 706 (Colo. 2009). Additionally, impeachment evidence falls within the *Brady* rule; on the other hand, for newly discovered evidence to constitute grounds for a new trial, it must be more than impeaching. *Compare United States v. Bagley*, 473 U.S. 667, 676 (1985) *with Farrar*, 208 P.3d at 707, and *People v. Gutierrez*, 622 P.2d 547, 559-60 (Colo. 1981). Moreover, the materiality standard is

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[13] We have yet to decide in a published case whether Colorado's rule barring claims that could have been but were not previously raised is an independent and adequate state ground precluding federal habeas review. We have, however, indicated as much in several unpublished cases. *See*, *e.g.*, *Rea v. Suthers*, 402 F. App'x 329, 331 (10th Cir. 2010) (unpublished); *Burton v. Zavaras*, 340 F. App'x 453, 454 (10th Cir. 2009) (unpublished); *Williams v. Broaddus*, 331 F. App'x 560, 563 (10th Cir. 2009) (unpublished).

comparatively more stringent under Colorado's newly discovered evidence law, especially as it relates to recantations. *Compare Bagley*, 473 U.S. at 682, *with Farrar*, 208 P.3d at 706.

REVERSED and REMANDED.

ORAL ARGUMENT REQUESTED

No. 20-1117

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENT ERIC LEBERE,

Appellant/Petitioner,

v.

TRAVIS TRANI, Warden, and PHILIP J. WEISER, The Attorney General of the State of Colorado,

Appellees/Respondents.

ON APPEAL FROM THE ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Marcia S. Krieger
District Court Civil Action No. 03-cv-01424-MSK-MEH

APPELLANT'S COMBINED OPENING BRIEF AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY

(Filed Sep. 11, 2020)

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STATEMENT OF PRIOR OR RELATED APPEALS

This is the third time LeBere's habeas petition has come before this Court. On two prior occasions, this Court reversed the District Court's rulings. *See LeBere v. Abbott*, No. 11-1090, 732 F.3d 1224 (10th Cir. 2013) (District Court incorrectly held that LeBere's *Brady* claim was not exhausted); *LeBere v. Trani*, No. 16-1499, 746 F. App'x 727 (10th Cir. 2018) (unpublished) (District Court incorrectly held that evidence of a falsified

and later recanted "confession" was immaterial to LeBere's conviction).

STATEMENT OF JURISDICTION

Appellant Kent LeBere appeals from the Order Adopting Recommendation and Denying Petition for Writ of Habeas Corpus entered on February 28, 2020, by the United States District Court for the District of Colorado, the Hon. Marcia S. Krieger. (Appellant's Appendix V2.App.448.)[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 2254. In its Order, the District Court denied a certificate of appealability. (V2.App.466-67.) The District Court did not enter a final judgment on a "separate document" as required by Federal Rule of Civil Procedure 58(a), so judgment was "deemed" entered and final 150 days from the date of its February 28, 2020 Order—which occurred on July 27, 2020. *See* Fed. R. App. P. 4(a)(7)(A)(ii). LeBere filed his notice of appeal on March 24, 2020. (V2.App.468.) Even though his notice of appeal falls before the date final judgment was deemed to have been entered, his appeal is timely because such a notice of appeal "is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2).

This Court has appellate jurisdiction because the District Court's Order was a final judgment disposing of all of LeBere's claims under 28 U.S.C. § 1291.

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[1] LeBere's Appendix is in three volumes. Citations to the first volume are to "V1.App," citations to the second volume are to "V2.App," and so forth.

(V2.App.350.) *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-88 (1978) (per curiam) (so holding under analogous facts). LeBere has requested that this Court issue a certificate of appealability under 28 U.S.C. § 2253(c). (V2.App.353-54.)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

This third habeas appeal presents a pure legal question: whether Kent LeBere received a fair trial where the State undisputedly withheld evidence that its key witnesses committed and suborned perjury in testifying about and vouching for a "confession" LeBere never gave and that was later recanted. Under *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant does not receive a fair trial where he does not obtain all available exculpatory information. But that is precisely what the State's own testimony has shown. The jury convicted LeBere almost entirely on the basis of a jailhouse snitch's admittedly false, and now recanted, testimony that LeBere had confessed. The State's lead investigator did not believe key details of the "confession" and had not done the basic investigative work necessary to verify critical details. Still, the investigator told the jury that he *believed* the informant, and *had* verified details of the confession, thus falsely vouching for its reliability.

Considering LeBere's Habeas Petition for a third time, the District Court persisted in framing this case as dependent solely on the relative credibility of the

investigator and the jailhouse informant, and only on the narrow topic of whether they *conspired* to fabricate the confession. That misses the mark. The issue on appeal remains simpler and broader: whether, "in the context of the entire record," LeBere received a fair trial. *LeBere v. Trani*, 746 F. App'x 727, 731 (10th Cir. 2018). Even under the testimony of the State's own witnesses, he did not.

STATEMENT OF THE CASE

"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). Because of their unique qualities, "confessions have profound impact on the jury." *Id.*; *see United States v. Perdue*, 8 F.3d 1455, 1469 (10th Cir. 1993) (same). This case turns on a "confession" that all agree was fabricated and later recanted. It was the most important piece of evidence in convicting LeBere. The State's lead investigator did not believe important details about it, but vouched for its reliability in front of the jury, lying as he did so. In presenting such testimony, the State denied LeBere a fair trial.

The facts of this case date back over two decades to October 1998, when someone strangled Linda Richards and left her body in a van, which was then set on fire in a car-wash bay. That someone was not LeBere. He has maintained his innocence for the 22 years since. Only two circumstantial facts connect him to the

crime: he was seen leaving a bar with Richards, and he was later seen in the general vicinity of where her body was discovered. No physical evidence and no eyewitness testimony linked LeBere to her murder, because he did not commit it.

Given the dearth of evidence, the State's case turned on the testimony of two witnesses. First was the jail-house informant, Ronnie Archuleta, who testified that, shortly after becoming his podmate in jail, LeBere openly volunteered (for no plausible reason) that he had murdered Richards and set her vehicle on fire. Archuleta later recanted this testimony. Second was the lead detective, J.D. Walker, who allowed Archuleta to present the "confession" to the jury, and who—as LeBere uncovered in habeas discovery—lied himself in attempting to bolster it.

After hearing this evidence, the trial jury acquitted LeBere on charges of first-degree murder, first-degree felony murder arising from the commission of a sexual assault, and manslaughter. But in light of the "confession," the jury convicted LeBere of second-degree murder and second-degree arson.

LeBere presented all of this evidence (and much more, as described below) in habeas proceedings, but the District Court has nevertheless concluded, for three different reasons on three separate occasions, that LeBere should not receive a new trial. It first held that LeBere had not exhausted his *Brady* claim in state postconviction proceedings. That was wrong, so

this Court reversed. *See LeBere v. Abbott*, 732 F.3d 1224, 1229-34 (10th Cir. 2013).

On remand, the District Court held that the recanted confession was immaterial to LeBere's conviction. (*See* V2.App.349-50.) That was wrong too, so this Court reversed again, *LeBere v. Trani*, 746 F. App'x 727, 732 (10th Cir. 2018), as significant evidence in the record "raise[d] doubts" about LeBere's conviction. This included other suspects who were not investigated, such as the victim's anger-prone fiancé. *Id.* at 733. "When coupled with the suppressed evidence [that LeBere's "confession" was untrue], this information could have prompted the jury to reasonably doubt LeBere's guilt." This Court therefore concluded **"that the suppressed evidence is sufficient to undermine our confidence in the verdict."** *Id.* at 733 (emphasis added). Indeed, the evidence withheld under *Brady*—that LeBere's "confession" was falsified—"would have done far more than impeach him: it could have caused the jury to question the entire investigation." *Id.* at 732.

On remand yet again, the District Court assumed Archuleta testified falsely at LeBere's trial and assumed LeBere did not confess to murdering Ms. Richards, but remarkably, still denied LeBere's habeas petition. (V2.App.454, 466-67.) Its analysis rested almost entirely on the conclusion that Archuleta had fabricated LeBere's confession "on his own initiative," and thus that the State had no knowledge of any exculpatory information under *Brady*. (V2.App.454.)

The District Court did not consider critical parts of the record showing that—even when the evidence is viewed in the State's favor—the State *did know* of exculpatory information it *did not* disclose to LeBere. This information is central to LeBere's appeal, so he summarizes it in the following chart, which will be cross-referenced throughout (the "*Brady* Chart"). The middle column reflects Walker's under-oath testimony at LeBere's trial (or his silence in the face of testimony he thought false at the trial); and the right column reflects Walker's contrary, sworn testimony *in habeas proceedings*, none of which was disclosed:

Subject of Undisclosed Testimony	**Walker's Sworn Trial Testimony**	**Walker's Undisclosed Testimony As Revealed In Habeas Proceedings**
Motive for the murder	Walker: LeBere confessed to murdering Richards to cover up the fact that he had sex with her (V3.App.582-83, p. 68:22-69:11), which the State later equated with sexual assault (V3. App.632, p. 56:2-8.)	Walker: "I don't know if she was ever sexually assaulted. That was never determined to be." (V1. App.175, p. 43:2-6.) Walker: "I could not [corroborate an assault]. There was never any physical evidence." (V1. App.178, p. 53:12-15.)

Location of the murder	Walker: "I had to corroborate that information because of whom Ronnie Archuleta is. When I did that, I determined that that information Ronnie Archuleta gave to me was reliable." (V3.App.584, p. 73:25-74:4.) The information that Archuleta gave to Walker included the location of the murder in Cheyenne Canyon. (V3.App. 591, p. 116:19-117:7.)	Walker did not corroborate Archuleta's story about the location of the murder: Q: "What did you do to check that out? Walker: Nothing." (V1.App.177, p. 50:3-8)[2]
		Walker: "Now, Ronnie Archuleta had been around here since he was a kid. Would he know where Cheyenne Canyon was? Sure, he would. Would he know where the old amphitheater was that's not there no more? Sure, he would. But would Kent LeBere know that? Kent LeBere has only been, from the time of the murder, here two years. I don't know. I'd have to question that." (V1.App.175-76, p. 44:23-45:5.)

[2] A park ranger testified, unrebutted, that Cheyenne Canyon was closed and the gate locked at the time of the murder (V3. App.615, p. 21:10-22:21); thus, the murder could not have taken place as Archuleta said, and as Walker said he corroborated.

		Q: "So sitting here today, you have no idea whether Archuleta was telling the truth about them going to Cheyenne Canyon and her being murdered in Cheyenne Canyon, correct? Walker: I do not have any truth, no." (V1. App.178,p. 53:6-11.)
Archuleta's knowledge of details of the crime	Walker: Archuleta knew details about the crime that only the killer and the snitch would know (V3.App.584, p. 73:22-74:11.)	Walker: Archuleta might have known those details from the news: Q: "So Mr. Archuleta might have known [those details] from the news, correct? Walker: He might have." (V1.App. 177, p. 49:4-50:2.)

Archuleta's knowledge of LeBere's tattoo	Walker allowed Archuleta to testify about the significance of LeBere's tattoo as an identifying feature of LeBere (V3.App. 577, p. 17:17-25), which the State later argued was a reason LeBere killed Richards. (V3.App.631, p. 51:24-52:9.)	Walker did not know whether LeBere's tattoo had any significance: Q: "Did you ask [Archuleta] whether he had ever seen it? Walker: I did not." (V1. App.177, p. 49:1-3.)
The callous and graphic language attributed to LeBere	Walker allowed Archuleta to testify that LeBere's "confession" included Archuleta's testimony that LeBere made the callous, graphic statement that he "fucked the bitch" (V3.App.577, p. 16:23-17:19), which the State later argued was an admission of sexual assault. (V3.App.632, p. 56:2-8.)	Walker knew LeBere never said these words, and that Archuleta made it up. Walker: "Because you have to understand Ronnie Archuleta. He ad libs a lot of things and you have to continue to test him. So when he said I—that LeBere told him that he fucked the bitch and she was a fine bitch, I felt that was his comment, not LeBere's comment." (V1. App.175, p. 43:11-16.)

The District Court's Order is no more defensible than the two decisions this Court reversed. It ignores the *Brady* Chart's evidence of Walker's subornation of perjury and of Walker's own perjury. No fair trial could have occurred on this record. The Court should reverse again, and grant LeBere's Habeas Petition once and for all.

STATEMENT OF THE FACTS

The following facts are taken from the voluminous trial and habeas record. Most facts are undisputed and are described in the Court's prior opinions. *See LeBere v. Abbott*, 732 F.3d 1224, 1226-27 (10th Cir. 2013); *LeBere v. Trani*, 746 F. App'x 727, 729-32 (10th Cir. 2018) (unpublished). Where there are fact or credibility disputes, they are described in the light most favorable to the District Court's Order. *See* 746 F. App'x at 731 (standard of review).

I. The Crime Scene Investigation Identifies No Evidence Linking LeBere To The Crime.

On October 16, 1998, at around 2:00 a.m., witnesses saw a minivan burning in a car-wash bay in Colorado Springs. (V3.App.489-95.) After the fire was extinguished, firemen discovered a body in the van. (V3.App.498, 500-504.) Some of the clothing on the victim was burned, but the body was partially clothed in a dress, a slip, and was wearing underwear. (V3. App.516, 528.) Other clothing had been displaced,

exposing the body's breasts. (V3.App.507.) Medical examiners determined the cause of death was strangulation that occurred before the fire started, and that the time of death was between 12:30 a.m. and 2:00 a.m. on October 16, 1998. (V3.App.525-27.) A fire investigation expert concluded that the fire had been started intentionally 20 minutes before it was extinguished. (V3.App.505-506.)

The investigation was assigned to Detective J.D. Walker. (V3.App.508-510.) Under his supervision, investigators identified the body as that of Linda Richards. (V3.App.509.) Investigators ran the license plate and found that the van was registered to a company owned by George Richards, Linda Richards's father. (V3.App.514-15, 523.) George Richards told police that Richards worked for his Tupperware business, and lived in Colorado Springs with her fiancé, Russell Herring. (V3.App.523-24.) Herring also worked for the business and used the van.

As the investigation proceeded, the Colorado Springs crime lab received significant amounts of evidence for testing. *None of the physical evidence was ever linked to LeBere.* Among the items the crime lab tested were: blood samples from Richards, shirts, jeans, a watch, tennis shoes, mats, a body bag, panties, portions of a dress, a slip, a bra, samples from the vehicle, samples from Richards's head hair, pubic hair, pubic combing, eyebrow hair, swabs, fingernail scrapings, a jacket, and samples from LeBere and Herring. (V3.App.531-33.) Notably, Walker requested that the DNA samples be compared *only* against LeBere, as he

was the only suspect being considered. (V1.App.184-85.) None of the hairs found on Richards were consistent with LeBere's hair. (V3.App.531, 534.)

There was no evidence that Richards's sexual activity involved LeBere. Spermatozoa was found in Richards's anal cavity. (V3.App.526, 535.) The medical examiner testified the sperm had been present in the body for 24 to 72 hours. (V3.App.527.) The only match for DNA on any of the swabs taken from Richards's body was her own. (V3.App.535.)

The crime lab also examined Richards's and LeBere's clothing, but it too lacked any evidence connecting LeBere to Richards's death. The laboratory technicians found no seminal stains on Richards's clothing. (V3.App.531-32.) Although they found blood on her dress, bra, and slip, those blood stains were not examined further. (V3.App.532.) Laboratory technicians examined LeBere's clothing, but no blood was found on any of LeBere's items, and none of the hairs collected were consistent with Richards's hair. (V3.App.532-33.)

The crime scene was also searched for fingerprints, but none were LeBere's. Police did not test for fingerprints on the gas cap, and were unable to get any fingerprints off of the van. (V3.App.509.) Walker directed a lab technician to take fingerprints from the van, the hatch area, and any flat surfaces on collected evidence. (V3.App.510.) No fingerprint evidence was presented at trial.

Nor were there any foot- or shoeprints connecting LeBere to the crime. Detectives took a photograph of the bottom of LeBere's shoes, and looked for footprints around the car wash "that might have matched those tennis shoes." (V3.App.571, 588.) But they "didn't find anything that we could specifically say were footprints" from LeBere's shoes. (V3.App.571.) The detectives did find footprints, but did not do anything with them. (V3.App.571-72, 588.)

II. The Investigation Quickly Focuses On LeBere And Ignores Other Evidence And Suspects.

Although there was no physical evidence linking LeBere to the crime, Walker's investigation quickly focused on him and ignored other leads or suspects.

A. The Police Dismiss Richards's Fiancé As A Suspect.

Herring told police he had last seen Richards at 7:00 p.m. the previous evening, when she left the couple's home. (V3.App.519, 538.) Herring said that he and Richards argued that night about whether their relationship was going to "work out," as he was thinking about breaking off their engagement. (V3.App.519, 538, 540.)

Herring revealed that he and Richards had physical fights and argued "quite a bit." (V3.App.519.) Herring admitted he slapped Richards at least once. (V3.App.538, 542.) Richards went to the emergency

room as a result of the "slap." (V3.App.618-19.) The couple's arguments involved pushing, shoving, screaming, and the police were called on at least two occasions. (V3.App.537-38, 541-42.) Herring suffered from depression and had anger and drinking problems. (V3.App.524, 539, 543.) Neighbors told investigators about an incident where Herring used his van to push Richards's vehicle out of his way following an argument. (V3.App.538, 619.)

Herring told police he had not left the house on the evening of October 15. (V3.App.520.) Herring eventually became angry when Richards did not come home, because he suspected she had gone to a bar, despite having recently promised not to go to bars alone. (V3.App.539, 544.)

Investigators took Herring to the police station for further questioning. (V3.App.520.) But after Herring's initial statement that he never left his home that evening, police never re-interviewed him (V3.App.520-21, 617.) Police never checked Herring for injuries. (V3.App.521, 613.) Nor did police ever search Herring's home or vehicle. (V3.App.521, 588, 613.)

Neighbors across the road from Herring's and Richards's home called police because they heard an unusual noise on the evening of October 15 that sounded like a truck driving over a curb and a load bouncing in the back of the truck. (V3.App.621.) Investigators never called the neighbors back. (V3.App.622.)

An expert later testified at trial regarding the veracity of Herring's statement that he had not left his

home the night Richards was killed. Richards's father testified that when he arrived at Herring's home the morning after the murder, around 6:30 a.m., he saw condensation or dew on the truck Herring drove. (V3.App.626.) The expert testified that the condensation was consistent with the vehicle having been driven the night before, and there were no meteorological conditions that could explain that moisture if the truck had not been driven. (V3.App.625.) The police, however, did not investigate those facts.

B. The Police Do Not Follow Up On Other Potential Suspects.

Police at the scene of the crime interviewed two homeless men who were sleeping in tents located in a field near the car wash. (V3.App.511.) The men indicated that they had heard sounds coming from the car wash, including a car horn, an explosion, people talking, and a suspicious noise. (V3.App.512.) Police did not record what the men were wearing or what items were found. (V3.App.603.)

Police investigators canvassed six bars, including several near the car wash. Investigators brought a picture of Richards and asked bar employees whether they had seen her (V3.App.570, 588-89), but they did not follow up to find other bar patrons to determine whether they had seen Herring, LeBere, or any other suspects. (V3.App.570-71, 589-90.) At the time Walker was canvassing the bars, he was unaware that Herring and Richards argued the night she was killed.

(V3.App.594.) As a result, Walker did not think it important whether Herring was seen with or without Richards, and thus never asked anyone those questions. (*Id.*) Police were also contacted by a number of third parties with information regarding the crime, but they never investigated anyone but LeBere.

A woman contacted police on October 16, 1998, because she had seen someone at the car wash. (V3.App.556.) As she was driving past the car wash at 1:55 a.m. on October 16, she noticed a van in the last stall. (V3.App.557.) As she passed, she saw a man standing toward the rear of the van. (*Id*.) He was wearing a fisherman's style hat, with a brim all the way around it. (V3.App.557, 560.) She described him as an "older gentleman," maybe around 40 years old, with a beard, and wearing "light colored clothing." (V3.App.559-60.) None of these details were consistent with LeBere's appearance or his clothing The woman did not recognize LeBere (or anyone else) in the photo line-up or 7-Eleven surveillance tape. (V3.App.558, 560-61.)

Another woman who lived near the car wash also contacted police. She testified that she arrived home, two blocks east and two blocks south of the car wash, around 2:05 a.m. on October 16, 1998. (V3.App.562-63.) While she was out with her dog, she saw a man walk past around 2:15 or 2:30 a.m. (V3.App.564, 585.) She testified he was wearing a hat, navy blue shirt, dark pants, and sneakers. (V3.App.565.) She identified LeBere from a photo lineup and the surveillance tape from the 7-Eleven as the person she saw walking past.

(V3.App.566.) The woman testified that, although she was talking loudly to her dog, the man walked right past her and did not speed up or look away. (*Id.*)

C. The Police Focus Their Investigation On LeBere.

Investigators learned that Richards frequented Crazy Mike's Bar and had arrived there around 9:00 p.m. on October 15. (V3.App.540, 548.) Richards had spent time with a man at the bar, and throughout the course of the evening he and Richards talked, played pool, and drank together. (V3.App.547-50, 554.) Police created a composite sketch based on the bartender's description of the man who was seen with Richards. (V3.App.551.) The bartender indicated the man was wearing a dark blue shirt, blue jeans, and tennis shoes, and had a tattoo of a phoenix with flames. (V3.App.549, 553.) The bartender later identified LeBere from a photo lineup as the person who was with Richards. (V3.App.552-53.) The bartender testified that Richards and LeBere left the bar together at around 12:30 a.m. (V3.App.550.) LeBere told the bartender that Richards was giving him a ride home. (V3.App.551.)

Police also interviewed employees at the 7-Eleven located near the car wash and obtained video surveillance. LeBere appeared on the tape at 2:35 a.m. (V3.App.606-607.) The 7-Eleven attendant testified that the person on the surveillance tape bought a sandwich. (V3.App.595.) The attendant did not remember

anything about how the person acted, and everything seemed "pretty normal." (*Id*.)

Investigators contacted a cab company and learned that a driver had picked up a fare around 2:45 a.m. at the 7-Eleven. (V3.App.598-99.) The driver drove the fare to Keith Drive, dropping the man off a short distance from LeBere's residence. (V3.App.599, 609.) The driver identified LeBere in a lineup, and later contacted detectives and stated he was positive LeBere was the person he had driven. (V3.App.600-601.)

Starting where the cab driver said he had taken his 2:45 a.m. fare, police canvassed the neighborhood with the composite drawing. (V3.App.522, 608.) Police knocked at the door of 4735 Keith Court, and showed LeBere the composite drawing when he answered the door. (V3.App.608.) LeBere had been living with his aunt at 4735 Keith Court, after moving from Minnesota to Colorado Springs 18 months earlier. (V3.App. 568, 609.) After determining that the drawing resembled LeBere, police arrested him. (V3.App.517.) Investigators searched LeBere's residence and seized jeans, a dark blue shirt, and tennis shoes that matched the clothing descriptions provided by the bartender. (V3.App.568-69.) No forensic evidence from the crime scene, or any other items associated with the van or Richards, were found. (V3.App.588.)

III. Walker Knowingly Takes Advantage Of A Fabricated Confession.

At the time he was arrested, LeBere was the only suspect under investigation. But, as noted above, there was no direct evidence connecting him to the crime and a significant time gap that no evidence could explain: a witness said LeBere had left a bar with Richards around midnight, and approximately two hours later he was at a 7-Eleven in the vicinity of the car wash where her body was found. Investigators surely knew that without further explanation for what happened during this period, it would be difficult to secure a conviction.

That is where Ronnie Archuleta came in. After LeBere was arrested, LeBere was placed in the El Paso County Jail in a pod with Archuleta and three other inmates. When LeBere arrived, other inmates warned him not to talk to Archuleta, who was a well-known "snitch." (V3.App.578; V1.App.179.)

On October 26, 1998, Archuleta approached a guard in the jail, Deputy Dey, and said LeBere had confessed to Richards's murder. (V3.App.575.) Deputy Dey wrote a report of his conversation:

> Inmate Archuleta stated the following: Apparently Inmate LeBere was talking about his incident in the quad. Inmate [L]ebere told Inmate Archuleta that he did commit the crime. The reason that he burned the van was because that was where he had sex with her before she was killed. Inmate LeBere's advisement is scheduled for tomorrow. Inmate

> LeBere stated to Inmate Archuleta that if his case goes to trial he is going to kill himself.

(V2.App.278.)

Walker, as the lead investigator, took the bait. He received the report and visited Archuleta on October 28 to "do a more extensive interview." (V3.App.481-82.)

A. Walker And Archuleta Discuss Procuring A More Detailed Confession.

According to Walker, Archuleta said that LeBere approached Archuleta in jail to ask how he could obtain a bond. (V1.App.174.) According to Walker, Archuleta said that LeBere then voluntarily and openly confessed to the murder, so that Archuleta could determine if LeBere would qualify for a bond. (*Id.*) Archuleta never explained how an admission of guilt would be relevant or helpful to obtaining a bond; nor did Walker explain why he would believe this implausible basis for a confession.

Archuleta disputes Walker's story. Archuleta testified that Walker met with him several times, with the intent of tying LeBere to Richards's murder. (V1.App.192.) Archuleta cooperated based on the promise of favorable treatment from prosecutors in his own case. (V3.App.579-80.) Walker wanted Archuleta to try getting LeBere to confess. (V1.App.192.) But once it became clear that LeBere would say nothing to Archuleta about his case, Walker began feeding Archuleta information about the murder—so he and

Archuleta could manufacture a false confession. (V1.App.192-93.) Walker gave Archuleta police reports and information about the crime for Archuleta to use in inventing testimony that LeBere confessed. (*Id.*)

Walker had been a police officer for many years before he was assigned as the lead investigator on Richards's death. In 1999, Walker was faced with two back-to-back record years for homicides in Colorado Springs. Around that same time, Walker was investigating another homicide in which a court later concluded he had improperly suppressed evidence favorable to the defense. (V1.App.121-22.) Walker was also disciplined for his conduct on a variety of cases, including his failure in at least seven first-degree murder investigations to timely submit investigative reports. (V1.App.166-67, 185.)

B. Walker Gives Archuleta An Incentive To Testify Falsely About LeBere's "Confession."

Although Walker and Archuleta dispute where Archuleta got the details for the fabricated confession, there is no dispute about Archuleta's incentive for providing false testimony: Walker arranged to obtain a plea deal for Archuleta in exchange for Archuleta's testimony against LeBere.

Walker told the prosecutor on LeBere's case, Assistant District Attorney Kim Kitchen, that he intended to speak with Archuleta. (V3.App.591.) Kitchen told Walker not to talk to Archuleta about Archuleta's own

case. (*Id.*) But Walker did anyway. (V1.App.218.) Walker went so far as to offer Archuleta an unauthorized plea deal, offering guaranteed probation, which was more favorable than the deal the prosecutor, Ann Joyce, was prepared to offer. (V1.App.218-19.)

The Colorado trial court recognized Walker's intervention to seek favorable treatment for Archuleta. Shortly before LeBere's trial, the court heard evidence regarding Archuleta's plea deal, including evidence that: (1) Walker intervened on behalf of Archuleta; (2) Walker asked Joyce to help Archuleta; (3) Walker spoke with Archuleta about Archuleta's pending case despite Kitchen's instructions to the contrary; and (4) Joyce ultimately agreed to give Archuleta a better deal. In light of this evidence, the trial court noted that: "prior to Mr. Archuleta's cooperation, he had a certain plea agreement. Subsequent to his cooperation, he had a different plea agreement." (V3.App.487.) That is an understatement: in exchange for his testimony against LeBere, Archuleta pleaded guilty to a lesser charge, received probation and time served, and was released in a matter of days. (V3.App.479, 485.)

The trial court held that this remarkable interaction converted LeBere's prosecutor and her team into witnesses, requiring the Colorado Springs District Attorney's Office to be disqualified from prosecuting LeBere. (V1.App.234.) Because of this conflict, LeBere's trial was ultimately handled by special prosecutors.

C. Archuleta And Walker Give Perjured Testimony At Trial About The Alleged Confession.

At trial, the jury heard testimony regarding the crime and investigation described above. The jury also heard from Archuleta regarding LeBere's alleged "confession," which testimony was later recanted.

1. Archuleta's False Testimony About the Confession.

At trial, Archuleta testified that he and LeBere spoke about the charges against LeBere several times, initially in the context of LeBere trying to obtain a bond. (V3.App.575.) Archuleta testified that later, LeBere confessed to the crime, using callous language no one thinks LeBere would ever use:

> he asked her for a ride, they went up around Cheyenne Canyon near the amphitheater up there. At that time he said that—excuse my language—he fucked the bitch. . . . That he fucked the bitch, and after that, that he strangled her. . . .
>
> After that, he stated he drove down to the car wash and torched the van because there could have been evidence of the fact from body fluids and that. He stated that the reason he killed her was, one, that she could identify him because of a tattoo on his upper arm of a Phoenix.

(V3.App.577.)

Archuleta explained that he had known Walker for many years, and first talked to him about LeBere's case around October 28, 1998. (V3.App.575.) Archuleta testified that, at that initial meeting, Walker offered to talk to the prosecutor on Archuleta's pending case. (V3.App.575-76.) Archuleta admitted that he received a deal, which included his release from jail immediately upon paying restitution. (V3.App.576.) Archuleta also explained that he tried to use LeBere's case to "get out of jail." (*Id.*)

2. Walker's False Testimony Vouching for Archuleta.

At trial, Walker gave critical testimony to the jury that helped convict LeBere, which Walker later contradicted in habeas proceedings. (*See generally* the *Brady* Chart, *supra* at 6-7.) Walker testified that Archuleta said LeBere had confessed that he "had been in the bar, that he had been drinking with this female, that he needed a ride home, that she gave him a ride home, that they parked, they had sex, he panicked, he choked her, that she was dead prior to going to the car wash." (V3.App.583.) Although Walker testified that Archuleta was a chronic liar, he also testified that he could believe Archuleta if he "corroborate[d]" what Archuleta told him: "I've found with Ronnie Archuleta, anything that he says, you have to corroborate with something else in order to determine that to be the truth." (V3.App.584.) At trial, Walker told the jury that he did just that:

> First off, I listened to it. Second off, **I had to corroborate that information because of whom Ronnie Archuleta is. When I did that, I determined that that information Ronnie Archuleta gave to me was reliable**. . . . Ronnie Archuleta made some statements in reference to this case that only the killer and the snitch would know. Because of that information that wasn't given to the media, that only other detectives knew that information, that's what corroborated this information that I received from Ronnie Archuleta.

(*Id.* (emphasis added).) Later, in habeas proceedings, Walker admitted that he did not, in fact, corroborate Archuleta's story. (V1.App.177-78.)

Other witnesses for the State testified that Archuleta had a reputation for truthfulness (*see*, e.g., V3.App.597), even though a police department memorandum specifically identified Archuleta as an unreliable informant because he lied so often. (V1.App.179.) The jury also heard testimony that Archuleta had three felony convictions for forgery, criminal impersonation, and "something to do with bad checks." (V3.App.574.) The jury also heard from other law enforcement personnel that, in the past, Archuleta had provided false information to detectives. (V3.App.616.)

IV. After The State Emphasizes In Closing Arguments Perjured Testimony About The Only Direct Evidence Linking LeBere To The Crime, The Jury Returns A Guilty Verdict.

Despite all of the information undercutting Archuleta's veracity, the State affirmatively emphasized his veracity and reliability in closing arguments. It stated that the information he gave was "largely corroborated" by other evidence, that other officers "admit that he has often given them good information," and the State highlighted "the confession of Mr. LeBere to Ron Archuleta." (V3.App.629, 631.) It emphasized as "fact" things Walker later admitted he did not believe to be true, including that Ms. Richards was "sexually assault[ed]," and that LeBere confessed to Archuleta, verbatim, that he "fucked the bitch." (V3.App.632.)

On August 13, 1999, the jury found LeBere guilty of second-degree murder and second-degree arson. Notably, the jury *acquitted* LeBere of the most serious charges: first-degree murder and first-degree felony murder arising from the commission of a sexual assault, as well as manslaughter. The trial court sentenced LeBere, then in his early twenties, to 60 years in prison.

V. Archuleta Voluntarily Recants His Testimony.

In February 2000, Archuleta—without any solicitation—called LeBere's trial counsel, Bobby Lane

Daniel, and recanted his incriminating testimony—including his testimony about the "confession." Archuleta told Daniel that "his conscience was bothering him, and that he knew the case against LeBere was very weak, that he felt badly he had given false testimony and that he didn't want an innocent man convicted or in prison based on false testimony." (V1.App.237.)

On July 7, 2004, Archuleta signed an affidavit confirming his recantation, and again admitting that his testimony at LeBere's trial was false. (V1.App.238.) Archuleta explained that LeBere "never confessed anything to me" and that the information Archuleta testified about at trial "was provided to me by Detective J.D. Walker, not by Kent LeBere." (*Id.*) In this habeas proceeding, Archuleta gave similar testimony. (V1.App.195.)

Archuleta also acknowledged his motivation to testify falsely at LeBere's trial. Archuleta was told by Walker that, although "they were looking at hitting me with a habitual criminal charge" because of his criminal record, "in return for me testifying against LeBere, I would be allowed to leave jail, pay . . . restitution, leave jail, and . . . I'd go home." (V1.App.193.) Archuleta explained: "I was promised that if I came through for this, basically, that I was going home; I wasn't going to prison." (V1.App.197.) Archuleta succinctly summarized his perjury, noting: "[alt the time I was saving my butt." (V1.App.202.)

VI. Walker Testifies That He Did Not Believe Key Aspects Of The Confession.

In this habeas proceeding, Walker gave sworn testimony that, for the first time, informed LeBere that key parts of Walker's trial testimony were false.

A. Walker Knew That Archuleta Was An Inveterate Liar.

Walker testified in deposition that his relationship with Archuleta began in the 1980s. (V1.App.171.) By the time Walker was investigating the Richards murder, Walker and Archuleta were "on a first name basis." (*Id*.) And by October of 1998, Walker regarded Archuleta as a "chronic liar." (V1.App.172.)

Before LeBere's trial, Walker learned of a memorandum from a section of the police department that routinely dealt with informants, which warned that Archuleta should not be used as an informant because he lied so often. (V1.App.179-80.) Local prosecutors "already kn[e]w" Archuleta was a chronic liar at the time of LeBere's trial. (V1.App.180, 187.) Still, Walker and the State disregarded the memorandum and decided to use Archuleta's testimony against LeBere.

Walker also testified he believed that prison officials arranged Archuleta's housing to maximize his opportunity to "snitch." For example, Walker noted that LeBere's prison pod housed "four homicide suspects . . . and one guy [Archuleta] that had property crime convictions." (V1.App.172.) Archuleta was placed in the

pod as "an informant . . . on a high profile case"—or potentially as an informant on "all of [the four homicide suspects in the pod]." (V1.App.172; V3.App.576 (noting Archuleta was also informing on another suspect in the pod).) Archuleta also told Walker that one of the other inmates had warned LeBere that Archuleta was "a snitch." (V1.App.179.)

B. Walker Did Not Believe Several Key Aspects Of The "Confession."

Walker acknowledged under oath in deposition that several aspects of the supposed confession seemed untrue, and that at least some of the "confession" may not have come from LeBere—but came from the mind of Ronnie Archuleta.

For example, Walker admitted that the coarse language Archuleta ascribed to LeBere—stating that he "fucked the bitch"—"came from Ronnie Archuleta, not Kent LeBere." (V1.App.174.) Walker found it likely that those comments were from Archuleta, and not from LeBere, because among other reasons, Archuleta "ad libs a lot of things and you have to continue to test him." (V1.App.175.) Despite Walker's disbelief, the State made a deliberate decision to present that dramatic, prejudicial, and false testimony—that LeBere said he "fucked the bitch"—to the jury.

That was just the beginning of Walker's false and misleading testimony at trial. It is summarized in the *Brady* Chart, *supra* at 6-7, and is also discussed in depth below, *infra* at 35-37. That information proves

that Walker has *admitted* that key aspects of his *own* trial testimony were false, that he knew it at the time, and that he did not disclose it to LeBere. This includes details Walker did not believe, and "corroboration" that he never performed. Meanwhile, if there is a credibility dispute, it is between what Walker testified under oath at LeBere's trial and what Walker subsequently testified under oath in habeas proceedings.

VII. This Court Directs The Lower Courts To Evaluate All The Evidence In Considering LeBere's *Brady Claim.*

Based on all of this evidence, LeBere moved the District Court to grant his Amended Habeas Petition. (V1.App.18.) Upon referral, the Magistrate Judge recommended that LeBere's petition be denied based solely on his determination that Detective Walker was more credible than Archuleta regarding Archuleta's recantation. (V2.App.312.) The Magistrate Judge viewed the matter as simply a credibility contest between Walker and Archuleta regarding whether Archuleta had presented a false confession by LeBere. The Magistrate Judge concluded that Walker was more credible; that Archuleta's recantation could not be believed; and thus he recommended denying LeBere's habeas petition. (*Id.*)

The District Court affirmed the denial, but for different reasons. (*See* V2.App.349-50.) Those reasons were no better, so this Court again reversed, *LeBere*, 746 F. App'x at 732, concluding "that the suppressed

evidence is sufficient to undermine our confidence in the verdict." *Id.* at 733. Indeed, the evidence withheld under *Brady*—that LeBere's "confession" was falsified—"would have done far more than impeach him: it could have caused the jury to question the entire investigation." *Id.* at 732.

On remand again, the District Court adopted the Magistrate Judge's recommendation, but with another key difference. *Even assuming that Archuleta fabricated the confession, and thus that there was no direct evidence of LeBere's guilt*, it found that Archuleta was not credible solely on the narrow issue that Walker directed him to fabricate the confession. That finding led the District Court to conclude that the State did not knowingly withhold exculpatory information. This conclusion was wrong, for two reasons, which are addressed below.

SUMMARY OF THE ARGUMENT

On remand from this Court for a second time, the District Court again denied LeBere's habeas petition. It concluded that jailhouse informant Ronnie Archuleta was less credible than lead investigator J.D. Walker on the narrow issue of whether the two had conspired to fabricate a confession, and for that reason alone, denied LeBere habeas relief. Once again, the District Court committed reversible error, in two ways.

First, the District Court simply did not address that, even giving the State the benefit of every doubt, the undisputed evidence is that Walker suborned

perjury when he allowed Archuleta to testify to things Walker himself did not believe to be true. The State did not disclose that Walker, its lead investigator, did not believe the State's key witness, jailhouse informant Archuleta, about key details of LeBere's "confession." Instead, Walker falsely vouched for Archuleta, an acknowledged liar, by testifying that (1) Archuleta knew details known by police investigators that Archuleta could only have learned from the killer, which was demonstrably untrue; and (2) he believed Archuleta's testimony because he had corroborated it, when in fact he had not. The State never disclosed these facts to LeBere. Failing to disclose perjury and subornation of perjury is a core violation of due process, and under *Brady*, requires a new trial. *See United States v. Agurs*, 427 U.S. 97, 103 nn. 8-9 (1976) (collecting cases).

Second, the District Court answered the wrong question on remand. Rather than looking at the totality of the objective evidence to determine if LeBere had received a fair trial, it answered the much narrower question of whether Archuleta or Walker was more credible on one discrete factual issue: whether there was an express agreement to offer false testimony. That question was too restricted because even if there was *no* evidence of such an *overt conspiracy*, LeBere still presented overwhelming objective evidence that Walker (and thus the State) knew *or should have known* that Archuleta's trial testimony was false. And if the Court had correctly looked at the *entire* picture, it necessarily would have concluded that the State violated *Brady* by withholding evidence that LeBere had

the right to see. Apart from any credibility issue about an express agreement, there still exists more than sufficient evidence that LeBere has satisfied his habeas burden.

ARGUMENT

I. LeBere Is Entitled To A Certificate Of Appealability.

When the District Court denied LeBere's Amended Habeas Petition, it denied a certificate of appealability ("COA"). (V2.App.466-67.) LeBere therefore requests that this Court grant him a COA, pursuant to 28 U.S.C. § 2253(c)(1), Fed. R. App. P. 22(b)(2), and 10th Cir. R. 22.1, so that, for the third time, he may appeal the District Court's erroneous denial of his habeas application.

This Court should issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Omar-Muhammad v. Williams*, 484 F.3d 1262, 1264 (10th Cir. 2007). In other words, a court must grant a COA if it finds the petitioner has demonstrated the issues raised are debatable among jurists of reason, a court could resolve the issues differently, or the questions presented are deserving of further proceedings. *Banks v. Dretke*, 540

U.S. 668, 705 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

LeBere readily meets the standard for a COA, for the reasons that follow in the two argument sections below.

II. The District Court Erred By Failing To Address The Undisputed Evidence That The State Failed To Disclose It Suborned Perjury When It Allowed Archuleta To Testify To Details Of LeBere's "Confession" That Walker Did Not Believe To Be True And That Were False.

The District Court's Order should be reversed, first, because it fails to address undisputed evidence the State did not disclose to LeBere that Detective Walker suborned perjury, and committed perjury himself, when he allowed Archuleta to testify to details of LeBere's "confession" that Walker did not believe to be true, and which Walker falsely vouched for.

A. Failure To Disclose Suborned Perjury Is A *Brady* Violation.

"[C]riminal convictions obtained by presentation of known false evidence or by suppression of exculpatory or impeaching evidence violate[] the due process guarantees of the Fourteenth Amendment." *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009); *see Brady v. Maryland*, 373 U.S. 83, 86 (1963). Accordingly, the Constitution's 'fair trial' guarantee," *United States*

v. Ruiz, 536 U.S. 622, 628 (2002), requires the prosecution to timely turn over any information in the government's possession that is materially favorable to a criminal defendant. *Brady*, 373 U.S. at 86. The Constitution also requires the State to refrain from engaging in "deliberate deception of a court and jurors by the presentation of known false evidence." *Giglio v. United States*, 405 U.S. 150, 153 (1972).

Brady, which is "grounded in notions of fundamental fairness" and "a practical recognition of the imbalances inherent in our adversarial system of criminal justice," imposes broad obligations on the State. *See Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995). The State's duty to disclose evidence under *Brady* encompasses all evidence favorable to the accused, including impeachment evidence. *Giglio*, 405 U.S. at 154; *Douglas*, 560 F.3d at 1172-73. In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf," including the police. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (citation omitted). The State violates *Brady* when it fails to disclose evidence "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *see Moore v. Gibson*, 195 F.3d 1152, 1164 (10th Cir. 1999) ("Knowledge of police officers or investigators will be imputed to the prosecution.").

Importantly, LeBere's *Brady* claim does not depend on whether the *prosecutors themselves* knowingly failed to disclose perjured testimony. That is a claim

that would arise under *Napue v. Illinois*, 360 U.S. 264 (1959), but as this Court explained in LeBere's prior appeal, there is a difference between *Napue* and *Brady* claims. The Court's prior opinion did not need to "determine whether police knowledge of perjury is imputed," *LeBere v. Trani*, 746 F. App'x 727, 732 (10th Cir. 2018) (unpublished), but that issue is central to this appeal. And there can be no doubt that it should be.

Numerous courts, including this Circuit, have specifically imputed the knowledge of police investigators to prosecutors. *See United States v. Ford*, 550 F.3d 975, 981 (10th Cir. 2008) (*Brady's* duty "extends to investigators assisting the prosecution"); *United States v. Velarde*, 485 F.3d 553, 559 (10th Cir. 2007) (same); *Smith*, 50 F.3d at 825, 830-31 (similar). This includes imputation of an investigator's knowledge *about perjured testimony. See, e.g.*, *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1349 (11th Cir. 2011); *Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958); *United States v. Sanchez*, 813 F. Supp. 241, 247-48 (S.D.N.Y. 1993), *aff'd* 35 F.3d 673 (2d Cir. 1994).

These courts have emphasized that the rationale for imputing knowledge to a prosecutor is even stronger in the perjury context, which necessarily involves intentional misconduct. As the court explained in *Sanchez*:

> [T]he argument to charge the prosecution with knowledge of a government agent's perjury is even stronger than the argument to impute knowledge of *Brady* material. While the prosecution's failure to disclose relevant information might be due to a negligent lack

> of communication, perjury by a government agent can only be a knowing, intentional decision to lie by a member of the institution which is charged to uphold the law and seek just convictions. Therefore, it is a short step indeed to apply case law regarding *Brady* obligations to instances of perjury.

813 F. Supp. at 248; *see also Lisker v. Knowles*, 651 F. Supp. 2d 1097, 1139 (C.D. Cal. 2009) ("Where the prosecutor's investigator has the responsibility for the integrity of the State's evidence, it cannot be the case that the prosecutor's technical ignorance of the falsity of that evidence insulates the proceedings against a due process claim. The accused is still convicted on the basis of false evidence purposely introduced by the State.").

Applying these authorities, all LeBere must show is that (1) the State (including Detective Walker) suppressed evidence of Archuleta's perjury (or its own perjury); (2) that evidence was favorable to LeBere; and (3) the evidence was material. *LeBere*, 746 F. App'x at 731; *see Moore*, 195 F.3d at 1164.

This Court already reversed the District Court's conclusion about materiality, because the perjured testimony is "sufficient to undermine our confidence in the verdict" and therefore is material. *See LeBere*, 746 F. App'x at 732-33. The State cannot now dispute materiality. This appeal turns, therefore, on whether the State—in particular, through Detective Walker—suppressed evidence that was favorable to LeBere. Even

crediting Detective Walker's habeas testimony over Archuleta's, the answer is clearly and undisputedly yes.

B. The State Presented Testimony From Archuleta That Detective Walker Knew Was False.

Here, the undisputed evidence is that 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 and that were in fact false. This is plainly a *Brady* violation.

At LeBere's trial, the State's crucial testimony was that of Archuleta, who testified that LeBere voluntarily confessed to murdering Linda Richards. As this Court noted previously, Archuleta provided the **"only direct evidence"** of LeBere's involvement in the crime. *LeBere v. Abbott*, 732 F.3d 1224, 1226 (10th Cir. 2013) (emphasis added).

But as it turns out, habeas discovery revealed that even *Walker* did not believe the most powerful and damaging parts of that testimony. He knew Archuleta was an inveterate liar, because of his own experience and because there was a police department memorandum specifically warning that Archuleta was not to be used as an informant because he lied so often. (V1.App.179.) Walker disobeyed this memorandum and still used Archuleta, with the concurrence of the prosecutors. And he *failed to disclose* that he did not

believe key aspects of Archuleta's testimony. (*See Brady* Chart, *supra* at 6-7.) For example:

- Walker testified at LeBere's trial that he believed Archuleta because Archuleta told him LeBere had confessed to having sex with Richards at the amphitheater in Cheyenne Canyon. The State emphasized this point in closing argument. (V3.App.632.) Later, however, Walker testified that he "didn't have anything that [suggested] she was sexually assaulted and we didn't have any evidence that she wasn't killed right there in the car wash." (V1.App.175.)

- Walker testified at LeBere's trial that he believed Archuleta because he had "corroborated" aspects of the "confession." Later, however, Walker admitted that *he did nothing to try to corroborate what* Archuleta told him about the location of the murder. (V1.App.175-78.) Walker never investigated for surveillance videos or witnesses along the route, nor did he place a story with the media to see if anyone would come forward with corroborating information. These typical investigative techniques were simply not pursued. (V1.App.177-78.) Walker flatly admitted that he did "not have any truth" about whether Archuleta's testimony about Cheyenne Canyon was credible. (V1.App.178.) The entrance to Cheyenne Canyon would have been locked by 11:00 p.m. on the evening of October 15, 1998 (V3.App.615), *meaning that the facts could not be as the "confession" supposedly gave them.* And Walker conceded that it was unlikely LeBere would have even known about the canyon and amphitheater,

having only recently moved to the area. (V1.App.175-76.) He told none of this to the jury.

- Walker testified at LeBere's trial that he believed Archuleta's recitation of the "confession" because it included details (known to police investigators) that "only the killer and the snitch would know." (V3.App. 584.) Later, however, he admitted that all of these details either had been publicly reported or were not "facts" known by the police (such as the Cheyenne Canyon information). For example, the media had reported that Richards's body was being tested for evidence of sexual assault, giving a strong indication to any would-be snitch that the crime may have involved sexual assault. (V3.App.478, 591-93.) Walker separately admitted that *Archuleta had told Walker that he had seen news reports related to the LeBere case.* (V1.App.177.) But he never disclosed that to LeBere or the jury.

- Walker allowed Archuleta to testify that LeBere had murdered Richards because she could identify him by his tattoo. (V3.App.577, 631.) Later, however, he admitted that, because the tattoo was on LeBere's shoulder, and because LeBere and Archuleta were housed in the same pod (V1.App.176), Archuleta could have simply seen LeBere's tattoo. (V1.App.176.) He did not disclose this to the jury.

- Walker allowed Archuleta to testify at trial that LeBere stated he "flicked the bitch" before killing her. The State highlighted this callousness in closing arguments. (V3.App.632.) Later, however, Walker admitted that he thought that this callous and graphic

language did not come from LeBere, but that Archuleta made that language up. (V1.App.174, 178.)

In short, Walker—and thus the State—knew that Archuleta was lying, and did not believe much of his critical trial testimony. But rather than disclose that to LeBere's defense lawyers, or tell the jury, Walker affirmatively vouched for Archuleta and committed perjury himself when he told the jury he *had* corroborated those details and *did* believe Archuleta. The failure to disclose Archuleta's perjury, the commission of perjury by vouching for Archuleta's testimony, and concealing knowledge that an assault could not have been committed at Cheyenne Canyon as Archuleta testified, each constitute a *Brady* violation. *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *Guzman*, 663 F.3d at 1349-56; *Curran*, 259 F.2d at 713; *Sanchez*, 813 F. Supp. at 247-48.

In spite of this undisputed evidence, the District Court viewed this as an allor-nothing question: either grant LeBere's Petition if you believe Archuleta, or deny LeBere's Petition if you believe Walker. (*See* V2.App.454.) Respectfully, there is a third option that LeBere presented and which requires habeas relief: even if Walker is believed, his *own* admissions in habeas proceedings show the State suppressed material exculpatory evidence at LeBere's trial by suborning Archuleta's perjury, vouching for that perjury, and withholding facts known to unmask the perjury. *See* Part II.A, *supra*, and cases cited. Even setting aside any credibility disputes, Walker's testimony shows that the State failed to disclose critical exculpatory

information. This is a *Brady* violation that merits habeas relief.

III. The District Court Answered The Wrong Question And Failed To Address Objective Evidence That The State Knew Or Should Have Known Archuleta's Trial Testimony Was False.

In addition to not addressing Detective Walker's undisputed subornation of perjury and perjury himself, the District Court further erred by answering the wrong question on remand. This Court remanded so the District Court could find facts, make credibility determinations, and determine if LeBere had received a fair trial based on the "context of the entire record." *LeBere*, 746 F. App'x at 731. But instead of doing that, it denied relief simply because it found Walker more credible on the narrow issue of whether there was an express agreement to offer perjured testimony. Even if there were no overt conspiracy, LeBere can still prove his *Brady* claim if he shows the State withheld evidence it *should have known* was false. *Agurs*, 427 U.S. at 103. Considering the objective evidence as a whole, he did.

A. This Court Remanded For A Review Of The Record As A Whole.

In its prior decision, this Court held that the District Court erred by limiting its analysis of LeBere's claims to consideration of "whether the suppressed

evidence was necessary to impeach Archuleta." *LeBere*, 746 F. App'x at 732. As the Court explained, *Brady* requires a more searching exploration into whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (quoting *Kyles*, 514 U.S. at 434-35).

Reviewing the evidence "in the context of the entire record," *id.* at 731, this Court previously held that the suppressed evidence could undermine confidence in the verdict, because, in addition to undermining Archuleta's credibility at trial, that evidence "would have strongly supported LeBere's theory that police had conducted an insufficient investigation." *LeBere*, 746 F. App'x at 732. Because "Archuleta's testimony was the only evidence directly indicating that LeBere was guilty of those charges . . . even assuming that the jury did not believe Archuleta, the suppressed evidence would have done far more than impeach him: it could have caused the jury to question the entire investigation." *Id.* While the Court acknowledged that there was "substantial circumstantial evidence of guilt, other evidence in the record raises doubts." *Id.* at 733. After discussing some of that evidence, the Court noted that "[w]hen coupled with the suppressed evidence, this information could have prompted the jury to reasonably doubt LeBere's guilt. ***We conclude that the suppressed evidence is sufficient to undermine our confidence in the verdict."*** *Id.* (emphasis added).

The Court remanded so that the District Court could make factual findings and address credibility of

Walker and Archuleta and determine, on the record as a whole, whether LeBere had received a fair trial and had met his habeas burden.

B. The District Court Did Not Answer The Right Question On Remand.

On remand, however, the District Court did not answer the question left open in this Court's prior decision.

Instead, the District Court came up with its own route to denying LeBere's Petition. Notably, this approach *assumed that Archuleta testified falsely at trial and fabricated the alleged confession.* (V2.App.454.) The District Court limited its credibility review—which included a de novo review of the videos of the two witnesses' depositions—to determining whether Archuleta or Walker was more credible *with respect to only one factual issue*: whether Walker directed Archuleta to fabricate the confession, *i.e.*, whether there had been an overt conspiracy. (*Id.*)

This framing was far too narrow, because it fails to address another way LeBere could prove his *Brady* claim even if there was no proven express agreement: Walker's *constructive* knowledge that Archuleta would testify falsely and his failure to disclose that information.[3]

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[3] The District Court concluded that LeBere did not present a constructive-knowledge theory (*see* V2.App.454 n.3), but that is plainly incorrect. *See* V2.App.406 ("But the District Court ignored

C. Evidence The State Withheld Shows That LeBere's "Confession" Was False And The State Should Have Known It Was False When It Presented That Testimony.

There is substantial evidence in the record establishing that Walker should have known that Archuleta's story about LeBere's "confession" was plainly fabricated. This is sufficient to establish a *Brady* violation.

1. The State Violates *Brady* When it Fails to Disclose Information it Should Have Known Was Perjured.

It is axiomatic that a state violates *Brady* if it fails to disclose exculpatory information it is actually aware of, ***and*** *if it fails to disclose information it* ***should have known*** to disclose. *See, e.g.*, *Smith*, 50 F.3d at 831-32 (so holding, ordering new trial in habeas case).

This commonsense rule extends to perjury. *See, e.g.*, *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015) ("A defendant may have a *Brady* claim if the

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the *Garcia* court's explicit statement that "[a] defendant **may have a *Brady* claim** if the . . . prosecution did not correct testimony that it *should have known* was false."); V2.App.249 n.2 ("Most importantly, the State does not make any argument that in this case the misconduct of Walker and the perjured testimony of Archuleta and Walker were unknowable by the prosecutors or other state actors."); V1.App.34 (citing cases that note "that even negligent or inadvertent suppression is nevertheless suppression for *Brady* purposes").

witness *unintentionally* gave false testimony or the prosecution did not correct testimony that it *should have known* was false."). Indeed, cases are legion holding that constructive knowledge of perjured testimony (*i.e.*, a state "should have known" testimony was perjured) is enough to constitute a *Brady* violation. *See, e.g.*, *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003); *Lambert v. Blackwell*, 387 F.3d 210, 251-252 (3rd Cir. 2004); *United States v. Thompson*, 117 F.3d 1033, 1035 (7th Cir. 1997); *United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995); *Evans v. McDaniel*, 74 Fed. App'x 775, 776 (9th Cir. 2003); *Trepal v. Sec., Fla. Dep't of Corr.*, 684 F.3d 1088, 1104 (11th Cir. 2012).

On this point, *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991), is instructive. It held that in light of a witness's past history, the government ***"should have been on notice that [the witness] was perjuring himself"*** (emphasis added). Yet, instead of proceeding with great caution, the government attempted to rehabilitate the witness, ignoring "powerful evidence" that the witness was lying. *Id.* Given the importance of the witness's testimony to the case, the court concluded that the government "may have consciously avoided recognizing the obvious—that is, that [the witness] was not telling the truth." *Id.* Because the court was ***"convinced that the government should have known that [the witness] was committing perjury, all the convictions must be reversed."*** *Id.* (emphasis added).

There are sound reasons for holding as much here. A prosecutor who does not appreciate the perils of

using perjurious criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. "Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem. **Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by *Giglio* to turn over to the defense in discovery *all* material information casting a shadow on a government witness's credibility.**" *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993) (emphasis added) (vacating conviction).

2. The State Should Have Known that Archuleta's Trial Testimony Was Perjured.

Applying this standard, the objective record evidence establishes at least that Walker should have known that Archuleta's trial testimony was false. *See Agurs*, 427 U.S. at 103; *Smith*, 50 F.3d at 831-32; *Garcia*, 793 F.3d at 1207. Indeed, as explained in the *Brady* Chart above, *supra* at 6-7, Walker testified at trial in numerous ways that contradict what he actually believed and what he actually did. Even crediting the District Court's finding that Walker did not *actually supply* Archuleta with a fabricated confession, he at least *should have known* that Archuleta was providing

false testimony to the jury. His failure to disclose the *constructive knowledge* of perjury is likewise a *Brady* violation. *See supra*, Part III.C.1, and cases cited.

3. The District Court Applied the Wrong Standard in Concluding that Archuleta's Recantation Was Not Reliable.

The District Court never applied the constructive-knowledge standard that LeBere had previously pressed (*see supra* at note 3), which is another reason to reverse. But it committed an additional error in the evidence it *did* review: rather than review the objective record evidence *as a whole*, it denied LeBere's habeas claim because it concluded that Walker was more credible than Archuleta on one discrete issue. That is the wrong standard.

To assess the reliability of a post-trial recantation, courts look to any objective facts or evidence that support the finding that the original testimony was perjured. *Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir. 2003). "In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what it is about that recantation that warrants a conclusion that it is not credible evidence." *Dobbert v. Wainwright*, 468 U.S. 1231, 1235-36 (1984). The District Court never applied this standard.

Notably, the circumstantial evidence recited by the District Court (*see* V2.App.448-49) does not tie LeBere to any criminal conduct. Most of the evidence

addresses LeBere as the individual who was seen at Crazy Mike's Bar with Richards, a fact he does not dispute. (V2.App.343-44.) Other facts place LeBere at the 7-Eleven. (V2.App.345.) Still other facts demonstrate only that Richards was killed, but bear absolutely no relevance to LeBere as a suspect. (V2.App.344-45.)

Had the District Court examined the objective evidence in the record as a whole, it would necessarily have concluded that Archuleta's recantation was reliable and that his *trial* testimony was false. There was no physical evidence linking LeBere to the crime. (V3.App.531-36.) LeBere had no prior record of violence against anyone. (V3.App.634.) And only one witness saw Richards's van in the car wash before the fire, and she described a suspect that was wearing different clothing than LeBere. (V3.App.559-61.) The witness also did not identify LeBere as the man she saw standing next to the van before the fire. (V3.App.561.)

The District Court did not consider those portions of the evidentiary record supporting the conclusion that Archuleta's trial testimony was false or that the State should have known it was false. The District Court did not mention the critical evidence that Walker's investigation was shoddy at best and focused solely on LeBere to the exclusion of other suspects. The District Court did not acknowledge Walker's admission that there were never "any other bona fide suspects in the case." (V1.App.181.) The District Court did not consider Walker's failure to follow-up on footprint evidence because they did not match LeBere's shoes. (V3.App.477.) It did not address Walker's failure to

compare DNA samples against suspects other than LeBere. (V1.App.184; V3.App.641.) It did not consider that the alleged place of the murder was closed to the public, and thus could not have occurred as Archuleta said. (V3.App.615, p. 21:6-22:21.) This objective evidence of Walker's restricted focus and desire to secure an expeditious arrest and conviction supports Archuleta's recantation: Walker had to have a confession in a case where no physical evidence tied LeBere to Richards's death and the only eyewitness did not identify LeBere. Yet, the District Court did not meaningfully confront or analyze any of these facts.

4. There Is No Credible Evidence that LeBere Confessed to Archuleta Before Meeting Detective Walker.

Instead of evaluating the objective evidence as a whole, the District Court simply evaluated whether it thought Walker's or Archuleta's testimony was more credible about how the purported confession came about. The only evidence that the District Court considered in this regard was Archuleta's report to Deputy Dey. (V2.App.462-64.) But nothing in the Deputy Dey report undermines the other objective evidence that Archuleta's initial story about LeBere's "confession" is false.

a. The vague initial "confession" described in Deputy Dey's report is significantly different than the confession Archuleta described to the jury.

The District Court's analysis reaches the incorrect conclusion that, because Deputy Dey reported a confession before Walker got involved, then Archuleta must be incredible in his recantation. That is incorrect as a matter of logic.

There is no dispute that Deputy Dey reported that Archuleta told him LeBere had made a confession. There is no dispute that the Deputy Dey report instigated Archuleta's initial meeting with Walker. But the District Court misconstrued these undisputed facts as somehow supporting the occurrence of a *later, much different* confession that Archuleta testified to at trial. That is illogical: the fact that Archuleta reported a sparse confession to Deputy Dey does not make it any less likely that Archuleta made up a confession to Walker.

In fact, the content of Deputy Dey's report *bolsters* the conclusion that Archuleta made it up. As the Magistrate Judge found, Archuleta's *trial* testimony "included details that were not set forth in Deputy Dey's report." (V2.App.308.) Archuleta's initial report to Deputy Dey stated that LeBere "told Inmate Archuleta that he did commit the crime. The reason that he burned the van was because that was where he had sex with her before she was killed." (V2.App.292.) In

contrast, at trial, Archuleta added critical details to his testimony including that LeBere told him he had asked Linda Richards for a ride, "they went up around Cheyenne Canyon," "he fucked the bitch, and after that . . . he strangled her." (V2.App.294.) Archuleta also elaborated at trial that LeBere told him "[Oster that, he stated he drove down to the car wash and torched the van because there could have been evidence of the fact from body fluids. . . . He stated that the reason he killed her was, one, that she could identify him because of a tattoo on his upper arm of a Phoenix." (V2.App.295.) The difference between the two confessions? In between the first and the second, Archuleta had significant interactions with Walker. Neither the Magistrate Judge nor the District Court meaningfully confronted this fact.

It was not until **after** Archuleta met with Walker that his story about the "confession" included details such as the motive for the crime (because LeBere feared the victim could identify him by his tattoo) and the location of the crime (in Cheyenne Canyon). There is nothing inconsistent between Archuleta's report to Deputy Dey and the conclusion that Walker took advantage of Archuleta's known willingness to lie to create testimony that bolstered the weak case against LeBere.

b. The timing of the Deputy Dey report does not bear on Archuleta's credibility.

Next, the District Court imposed an unnecessary burden on LeBere's *Brady* claim by stating that Archuleta's recantation would be credible *only* if "Archuleta admitted that he fabricated a skeletal confession when speaking to Deputy Dey, and that he told Detective Walker that the confession was false and that Detective Walker nevertheless instructed him to just go with it. . . ." (V2.App.463.) This again reveals a false premise. LeBere need *not* prove that Archuleta and Walker *expressly agreed* to manufacture a confession for LeBere to establish his *Brady* claim; Walker's *constructive knowledge* that Archuleta was testifying falsely is enough. *Garcia*, 793 F.3d at 1207; *see also Agurs*, 427 U.S. at 103 (one class of *Brady* cases involves government failure to disclose it "knew, or should have known, of the perjury"; in these cases, the Court "has consistently held" that a conviction obtained with the "use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury") (cleaned up); *Green v. Addison*, 500 F. App'x 712, 719-20 (10th Cir. 2012) (unpublished) (a claim based on perjured testimony is "one specific application" of *Brady* and only requires a defendant to show the prosecution " 'knew, or should have known, of the perjury' ") (citation omitted).

Simply put, there is nothing inconsistent between LeBere's *Brady* claim—which is premised upon the

State's failure to disclose that details of the "confession" were uncorroborated and that Walker did not believe them and at least should have known they were false—and Archuleta's act of approaching Deputy Dey, Walker becoming aware that Archuleta was willing to inform on LeBere, and Walker helping Archuleta manufacture a "confession."

5. The District Court Did Not Consider the Record Evidence Regarding the Benefits Archuleta Received From Testifying Against LeBere or the Lack of Any Benefit to Recanting.

Finally, the District Court also improperly failed to consider all of the objective record evidence establishing that Archuleta had everything to gain from reporting a false confession at trial, and nothing to gain from later recanting.

In dismissing Archuleta's recantation as incredible, the District Court found that Walker's version of events regarding the plea deal offered to Archuleta was more plausible, because Archuleta did not get any real benefit from that plea deal. (V2.App.464.) This finding simply misses the substantial, undisputed evidence of misconduct by Walker in offering any deal. There is no dispute that Walker made an unauthorized plea offer to Archuleta. (V1.App.218-19; V3.App.591.) The District Court did not even acknowledge that Archuleta got a better deal after meeting with Walker. (V3.App.479, 485, 487.) This remarkable interaction converted the

prosecution team into witnesses, requiring all of them to be disqualified from prosecuting LeBere. (V1.App.234-36.) Because of this conflict, LeBere's trial was handled by special prosecutors.

Moreover, the District Court did not consider the fact that Archuleta's recantation has been consistent, despite his receiving no personal benefit from it.[4] Following his release from prison in 2005 and his completion of parole in 2009, Archuleta has continued to affirm his recantation, even though it has resulted in a destroyed relationship with law enforcement and numerous inconveniences, including subpoenas to testify and being branded a known perjurer. For 20 years, Archuleta has consistently stood by the recantation, even when there has been no beneficial reason to do so. Unlike the trial testimony that earned Archuleta a favorable deal, there was no gain to Archuleta from his 2000 recantation.

All these facts point to the conclusion that LeBere's "confession" never took place. And Walker knew it, or at least should have known it, because he was directly involved with preparing Archuleta's testimony. Thus, even accepting Walker's testimony that he

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[4] The Magistrate Judge suggested that Archuleta may have recanted to avoid being imprisoned with LeBere or his friends (V2.App.300), but there is simply no basis for this speculation. LeBere was new to Colorado, and there is no evidence in the record that he had friends in prison, that Archuleta was afraid of them, or that they posed any threat to Archuleta. Moreover, Archuleta testified to the contrary: he knows how to stay safe in prison and had no fear of LeBere. (V1.App.192, 200, 203.)

did not expressly direct Archuleta to fabricate the details of the "confession," it is undisputed that he knew key details of it were false and should have known the rest was, and never bothered to corroborate those details at risk of losing the confession he needed to secure a conviction.

CONCLUSION

The question here is, at its core, whether LeBere received a fair trial. There was no direct evidence of his involvement in the crime, except the "confession" that made no sense initially, was later recanted, and that even the District Court now assumes to be false. The District Court denied LeBere's Petition because it not find the recanter, Archuleta, to be reliable, but he was the same witness who testified to the confession in the first place. What made his testimony credible at LeBere's trial was Detective Walker, who testified falsely that he had corroborated parts of the confession when in fact he had not, and who failed to correct other statements he believed were false at the time. The State chose to put on this false evidence, and emphasized it repeatedly in closing arguments. As other courts have recently concluded, that irrevocably taints a defendant's right to a fair trial. *See Long v. Hooks*, ___ F.3d ___, No. 18-6980, 2020 WL 5014875, at *1748 (4th Cir. Aug. 24, 2020, amended Aug. 26, 2020) (en banc) (vacating dismissal of habeas petition in part because police officers lied, withheld evidence under *Brady*, and the State emphasized the effect of the lies in closing arguments).

This Court has twice reversed denials of LeBere's habeas Petition, only for the District Court to find new and creative ways to deny it. Even crediting the District Court's most recent findings, there is still undisputed evidence that the State suborned Archuleta's perjury, and that Walker committed perjury himself. Because the incontrovertible evidence is that the State withheld material exculpatory evidence under *Brady*, LeBere has satisfied all elements of his habeas claim. The Court should grant a certificate of appealability, reverse, and remand with instructions for the District Court to grant LeBere's petition and order a new trial or, if the State has not decided to retry LeBere within 90 days of the entry of the order, to order his permanent release. *See Smith*, 50 F.3d at 835.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the complexity of the underlying facts and the significance of the legal arguments involved.

Appellant submits that oral argument will assist the Court in the disposition of this appeal, as it has in LeBere's two prior appeals.

Respectfully submitted this 11th day of September 2020.

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No. 20-1117

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENT ERIC LEBERE,

Appellant/Petitioner,

v.

TRAVIS TRANI, Warden, and PHILIP J. WEISER, Attorney General of the State of Colorado,

Appellees/Respondents.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
The Honorable Marcia S. Krieger
District Court Civil Action No. 03-cv-01424-MSK-MEH

APPELLANT'S PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

(Filed Mar. 15, 2021)

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STATEMENT OF BASIS FOR REHEARING EN BANC

The panel decision here conflicts with precedent from the United States Supreme Court and this Court by imposing too narrow a standard on whether an issue has been preserved for appellate review. The precedential rule is that the *claims* in a habeas petition are preserved for review and that those claims are not limited to the specific facts set forth in the petition. *Jackson v. Utah*, 782 F. App'x 690 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 2781 (2020); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716 (10th Cir. 1993). The Supreme Court has also held that arguments raised to the district court, even if not in formal amendments, are sufficient to preserve an issue. *Banks v. Dretke*, 540 U.S. 668 (2004). The panel's decision conflicts with these principles by limiting a habeas petitioner to the narrowly tailored factual assertions in his petition and requiring an amendment if discovery reveals additional facts consistent with those theories but with a change

in emphasis. Petitioner Kent Eric LeBere respectfully requests that, if the panel does not grant rehearing, the Court grant rehearing en banc to secure and maintain uniformity of this Court's decisions and consistency with Supreme Court precedent.

INTRODUCTION

Unless the Court grants rehearing, a man proclaiming his innocence will serve the remainder of his 60-year sentence for second-degree murder and arson even though his conviction was based on *undisputedly false* testimony from a jailhouse informant and a police detective regarding his "confession" to the crimes. This will occur even though this Court previously acknowledged that LeBere's habeas claim, if true, is "sufficient to undermine our confidence in the verdict." (V2.App.434.)[1] On remand, the District Court *assumed* that the testimony that LeBere had confessed to the crime was false. Even so, the District Court denied his habeas petition.

The panel did not reach the merits of this decision, because it denied LeBere a certificate of appealability ("COA") under 28 U.S.C. § 2253(c)(1), concluding that he had not raised his "particular *Brady* arguments" in his habeas petition. (Order at 6.) That conclusion was mistaken in two ways.

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[1] LeBere's three-volume Appendix is cited as "V1.App.", "V2.App.", and "V3.App." Citations to LeBere's initial brief on this appeal are to "COA Mot."

First, the panel misread the record, which shows that LeBere raised his current legal theories and the factual support for them in the District Court. LeBere's *Brady* claim has always been that the State presented perjured testimony from a jailhouse informant, Ronnie Archueta, that the State knew or should have known was false, and that the State's lead investigator, Detective J.D. Walker, perjuriously vouched for that false testimony. LeBere's habeas petition stated: "[T]he prosecution relied on Archuleta's and Walker's perjured testimony, even though Walker knew the testimony was false," (V1.App.37, ¶46), and again, Archuleta's "false testimony was corroborated by further perjury from Walker." (V1.App.38, ¶49.)

Second, the panel faulted LeBere for not alleging specific facts in his 2009 habeas petition that he learned in 2015. The panel acknowledged that LeBere's argument includes facts learned during Walker's 2015 deposition, which confirmed that both Archuleta and Walker testified falsely at trial about the purported confession. (Order at 7.) The panel's solution to this problem—further amending his petition—was unnecessary, because LeBere had already raised a *Brady* claim based on this perjury and had presented the 2015 testimony to the District Court as support for that theory. Moreover, seeking amendment would have only resulted in another improper dismissal for failure to exhaust this supposed "new" claim.

While LeBere may not raise an entirely new *claim* on appeal, he may address *facts* fleshed out in habeas discovery if they support pre-existing legal theories in

his petition—just as other civil or criminal litigants may raise facts learned in discovery not expressly set forth in pleadings. This is particularly true where those facts and related arguments were presented to the District Court, as they were here.

BACKGROUND

The panel described the purported "new *Brady* arguments" as follows:[2] First, "[e]ven crediting Detective Walker's habeas testimony over Archuleta's . . . 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 and were in fact false." (Order at 6 (quoting COA Mot. at 34-35).) Second, "[e]ven if there was no overt conspiracy [between Detective Walker and Mr. Archuleta], [he] can still prove his *Brady* claim if he shows the State withheld evidence it *should have known* was false." (*Id.* (quoting COA Mot. at 39).)

The panel's conclusion that these arguments were not raised before the District Court was based on its view that "the amended habeas petition explicitly links the *Brady claim* to Detective Walker inducing Mr. Archuleta to concoct the false confession." (*Id.* at 7-8.) The

[2] Contrary to the panel's conclusion that LeBere is not challenging the District Court's ruling on credibility (made without ever holding a hearing), LeBere expressly argued that the District Court applied the wrong standard in evaluating credibility and misapplied the record evidence. (COA Mot. at 44-52.)

panel viewed this as the only basis for the *Brady* claim in LeBere's petition. (*Id.*)

But this conclusion was incorrect. LeBere's petition presented two *Brady* claims: for reliance on perjury and for suppressing evidence that Walker induced Archuleta's false testimony. The facts learned in discovery supported the first claim by revealing that Walker did not believe Archuleta's testimony, but let him go forward with false testimony and in fact vouched for its reliability. Not only are these facts consistent with LeBere's original theory, they also were presented to the District Court as part of LeBere's argument for granting his petition.

1. LeBere's Operative Habeas Petition

In his petition, LeBere expressly alleged that "the prosecution committed **two separate** *Brady* violations, both of which stemmed from Walker's tampering with Archuleta. **First, the prosecution relied on Archuleta's and Walker's perjured testimony, even though Walker knew the testimony was false.** Second, the prosecution failed to disclose that Walker met with Archuleta and fed him information that enabled Archuleta to give false testimony against LeBere." (V1.App.37, ¶46 (emphasis added).)

On the first claim, which is the claim at issue here, LeBere alleged that the State "allow[ed] two key witnesses—Archuleta and Walker—to commit perjury" and that Archuleta's "false testimony was corroborated by further perjury from Detective Walker." (V1.App.38,

¶¶48-49.) Although the factual allegations then underpinning these claims were based largely on information supplied by Archuleta, (V1.App.28-29), the averred legal theories for relief were not so limited. As the petition stated, "the prosecution relied on Archuleta's and Walker's perjured testimony, even though Walker knew the testimony was false." (V1.App.37, ¶46.) This tracks the panel's description of the allegedly "new" *Brady* claim of "allowing Archuleta to testify to details of LeBere's false 'confession' that Walker believed not to be true and were in fact false." (Order at 6 (quoting COA Mot. at 34-35).)

As the habeas proceeding progressed, LeBere requested and was granted discovery "relevant to specific allegations of fact that support his *Brady* claim." (V1.App.97.) The discovery included a deposition of Walker to ask about, among other things, "all the circumstances related to Archuleta's testimony against LeBere . . . why [Walker] would use Archuleta as an informant if he believed Archuleta to be a liar . . . [; and] Walker's ordinary investigative procedures and whether he followed them in investigating LeBere and interviewing Archuleta." (V1.App.116.) The purpose of this discovery was to uncover information "to prove or strengthen his case." (V1.App.107 (quoting *Post v. Bradshaw*, 621 F.3d 406, 425 (6th Cir. 2010).)

2. LeBere's Brief In Support Of Granting His Petition

At his deposition, Walker made several statements under oath demonstrating that he knew key aspects of Archuleta's testimony were false, ***contrary to Walker's own trial testimony***. LeBere promptly presented these facts to the District Court in his brief asking that his petition be granted. He thus expressly made the same arguments he makes in his current appeal: that either Walker directed Archuleta to fabricate the confession or, alternatively, Walker knew or should have known that the confession was false. As Walker testified, he knew that:

- Archuleta was an inveterate liar and police warned he should not be used as an informant. (V1.App.140-141; COA Mot. at 24-25.)
- LeBere had been warned that Archuleta was "a snitch" and thus unlikely to receive a supposed confession. (V1.App.141; COA Mot. at 25.)
- Archuleta had "probably" "ad lib[bed]" the most emotionally powerful and specific part of the alleged confession – that LeBere told Archuleta that he had "fucked the bitch" before killing her. (V1.App.141-142; COA Mot. at 25-26.)
- This alleged confession of sexual assault was not credible, because there was no physical evidence of sexual assault. (V1.App.143; COA Mot. at 35-36.)

- Archuleta's knowledge of LeBere's distinctive tattoo as described in the "confession" could have come from simply seeing it on his shoulder. (V1.App.142-43; COA Mot. at 37.)
- Archuleta's statement that LeBere confessed to committing the crime in Cheyenne Canyon was unbelievable, because LeBere likely did not even know about that canyon and its entrance would have been closed at the time of the crime. (V1.App.143-144; COA Mot. at 36.)

Based on these and other facts, LeBere argued that "even if Walker had not been directly informed by Archuleta that Archuleta's testimony about LeBere's confession was false, the record amply demonstrates that Walker knew, or should have known, that Archuleta was lying." (V1.App.157.)[3] LeBere pointed out that there was "objective evidence to support a conclusion that Archuleta was lying." (V1.App.158.) He asserted that the State did not do "any independent investigation of Archuleta's story" and that, contrary to Walker's claim that he "had implemented safeguard procedures to ensure the veracity of Archuleta's story about a 'confession,'" "in reality, the prosecution did nothing to check Archuleta's story, even the easiest parts to objectively verify." (V1.App.158.) LeBere contended that these facts were "more than sufficient to

[3] The District Court was therefore incorrect to contend that LeBere had not raised a claim that the "confession was nevertheless so transparently false that Detective Walker should have recognized that Mr. Archuleta had concocted it" and therefore "constituted a degree of negligence sufficient to give rise to a *Brady* violation." (Order at 5.) LeBere argued exactly that.

demonstrate that the prosecution knew or should have known that both Archuleta and Walker committed perjury at LeBere's trial" and thus violated *Brady*. (V1.App.158.)

The government argued in response that LeBere had presented only a suppression of evidence claim, and not a claim for suborning perjury. In reply, LeBere explained that in fact he had "presented evidence to support both a suppression claim and a perjury claim," again explaining that Walker knew that Archuleta was a liar and had not corroborated his statements. (V2.App.245, 26165.)

3. The Magistrate Judge's Recommendation And LeBere's Objection

The Magistrate Judge then recommended that LeBere's petition be denied. (V2.App.279.) The Magistrate Judge listed the facts described above regarding Walker's deposition testimony, and acknowledged those facts as the basis for LeBere's claims. (V2.App.300-02, 307-08.) And he acknowledged that LeBere had two separate claims: "that the prosecution either relied on perjured testimony from Archuleta and Walker **or** that Walker met with Archuleta and provided him information enabling Archuleta to give false testimony." (V2.App.312 (emphasis added).)

In his Objection to this recommendation, LeBere argued, among other things, that the Magistrate Judge "ignored the critical fact that Walker did not believe Archuleta's testimony" and did not corroborate it,

contrary to Walker's trial testimony. (V2.App.325-26.) Instead, "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." (V2.App.329.)

4. The Appellate History

The District Court then dismissed LeBere's petition, acknowledging that LeBere brought a claim based on the State's use of perjured testimony, but determining that the withheld information was immaterial. (V2.App.341-42.)

LeBere appealed, again emphasizing the facts described above, (V2.App.383-84, 389-92), and stating that the proper standard to be applied to those facts was that "a defendant may state a *Brady* claim where the prosecution knew or *should have* known of the perjury." (V2.App.398 (emphasis in original).)

This Court reversed and remanded. In doing so, the Court stated that LeBere's *Brady* claim included two "necessarily linked" subclaims: that "(1) Walker fed Archuleta information to concoct a false confession, and then (2) they lied about having done so" and that "[t]he second contention cannot be true unless the first is also true." (V2.App.432.) This description did not account for the theory that LeBere had also presented to the District Court that, even if he had not overtly participated in the fabrication, Walker knew or should have known that Archuleta was lying. (*See supra at*

10)[4] This unduly restricted description of LeBere's claim may have led the panel here to the erroneous conclusion that he is now raising that theory for the first time.

This was compounded because, on remand, the District Court issued a decision without holding any further proceedings or accepting any further submissions from the parties, so LeBere had no additional opportunity to amplify and explain the scope of his *Brady* claim.

REASONS FOR GRANTING REHEARING

This Court should issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Supreme Court has held that a COA should issue where a party has raised issues sufficiently before the District Court through submissions, even if not in the formal habeas petition. *Banks*, 540 U.S. at 703-04.

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[4] Because the District Court had denied LeBere's *Brady* claim based on immateriality of the suppressed evidence, the prior briefing focused on that question and not the underlying merits. Even so, on the prior appeal, LeBere raised his alternative argument that the prosecution should have known of the perjury. (V2.App.406.)

As described above, the panel denied the COA based on concluding not that LeBere's *Brady* claim failed this standard, but that it was not first presented to the District Court. This conclusion was incorrect because LeBere did directly challenge the District Court's credibility ruling. (*See supra* 4 n.2.) And as to the allegedly new *Brady* claim, the panel's conclusion misreads the record and is inconsistent with the applicable case law.

The panel's decision was based on the "long applied rule that [the Court does] not consider issues not raised in the district court" and that if an "argument was not raised in [an appellant's] habeas petition, it is waived on appeal." (Order at 6 (quoting *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015)).) In *Owens*, this Court stated that both "a bald-faced new issue," and "a new theory on appeal that falls under the same general category as an argument presented [below]" are barred. 792 F.3d at 1246 (citation omitted).

But this Court has also recognized that an argument is preserved even where the "emphasis of [the] claim has shifted somewhat." *Jackson*, 782 F. App'x at 700. This rule is grounded in the Supreme Court's recognition that "[o]bviously there are instances in which the ultimate question for disposition will be the same despite variations in the legal theory or factual allegations urged in its support." *Picard v. Connor*, 404 U.S. 270, 277-78 (1971) (internal citation omitted). And other circuits recognize a similar rule that "[w]hen applying these standards, federal courts should avoid hypertechnicality . . . and [a] petitioner may reformulate

his claims as long as the substance of the argument remains the same." *Chambers v. McCaughtry*, 264 F.3d 732, 738 (7th Cir. 2001) (internal citation omitted).

The question, therefore, is what constitutes a new argument or legal theory? Here, while citing the applicable rule, the panel applied it far too narrowly, and in effect created a new rule that inappropriately ties legal ***claims*** to the specific ***facts*** set forth in a habeas petition. But this new rule conflicts with applicable precedent.

This Court summarized the boundaries of the applicable rule in *Lyons v. Jefferson Bank & Trust* (on which *Owens* in turn relied). *Lyons* explained that, when applying this rule, it is appropriate to give "a liberal reading to pleadings and motions in the trial court." 994 F.2d at 721; *accord Jackson*, 782 F. App'x at 700; *see also Sindi v. El-Moslimany*, 896 F.3d 1, 27 (1st Cir. 2018) ("raise-or-waive" rule is founded on important considerations, but does not always apply because "Mules of practice and procedure are devised to promote the ends of justice, not to defeat them" (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941))).

With this in mind, *Lyons* held that the "touchstone" for the "kind of specificity" required to preserve an issue for appeal "is that 'vague, arguable references to [a] point in the district court proceedings' are insufficient. 994 F.2d at 721 (citation omitted). *Lyons* then collected cases to demonstrate the application of this principle. So, for example, bringing one legal theory, such as negligent failure to warn or breach of contract,

does not preserve related claims, such as negligent design or tortious conversion. *Id.* at 722. As another example, an issue "raised but not pursued in the trial court" is not preserved, such as where a defense is raised in an answer but never mentioned during the trial. *Id.*

In habeas proceedings, courts apply these rules to require petitioners to present the same ***theories***. In *Owens*, for example, the petitioner raised a collateral estoppel argument supporting a double jeopardy claim in both his petition and a brief. 792 F.3d at 1246. Then on appeal he shifted to a new theory that he had not previously raised that the two prior verdicts were "truly inconsistent." *Id.* The Court held that the fact that both theories could have preclusive effect for double jeopardy purposes meant only that these theories were in the same "general category" but remained separate issues. *Id.*

Similarly, in *Milton v. Miller*, 812 F.3d 1252 (10th Cir. 2016), a case heavily relied on by the panel, the petitioner attempted to "stretch the canopy" of his original claim to cover an admittedly new ***claim*** that ***trial*** counsel was ineffective, when the prior claim was that ***appellate*** counsel was ineffective ***on a different ground***. *Id.* at 1263. This was a shift in theories and not merely an attempt to "clarify or amplify" the original claim. *Id.* at 1264 & n.18. Other cases are similar. *See United States v. Ramsey*, 830 F. App'x 584, 586 (10th Cir. 2020) (general claims of ineffective assistance of counsel insufficient to preserve new alleged improper or ineffective actions by counsel); *Vaughn v.*

Woody, No. CIV-17-269-C, 2018 WL 4345283, at *2 (W.D. Okla. July 17, 2018) (petitioner waived competency claim by failing to raise it in request for COA).

In contrast, precedent requires that claims that are consistent with the as-pled legal theories are preserved, even if the evidentiary support is not exactly the same. In *Jackson*, for example, this Court held that a petitioner preserved all his ineffective assistance claims related to his counsel's responses to an evidentiary order in the trial court related to prior bad acts. *Jackson*, 782 F. App'x at 700. In the habeas proceedings, the "emphasis of this claim shifted somewhat from" being based on the failure to object to the ruling to giving improper advice about whether to testify as a result of that ruling. *Id.* Even so, this Court stated that it would "construe petitioner's] arguments liberally," and that "all of [petitioner's] appellate-ineffectiveness arguments concerning trial counsel's alleged responses to the prior-bad-acts ruling (i.e., whether failure to object or advising [petitioner] not to testify) are of one piece" and were therefore preserved. *Id.*

The issues presented by LeBere here are ***at most*** a "shift in emphasis," and not a wholesale change in his *Brady* ***theory or claim***. As set forth above, the petition stated that the State violated *Brady* by allowing Archuleta and Walker to offer perjured testimony themselves, that Walker knew or should have known that Archuleta's testimony was false, and that nevertheless Walker vouched for Archuleta's testimony. (V1.App.37-38, ¶¶ 46, 48-49.) The only change to that theory was to identify additional evidence LeBere learned in

discovery that confirmed that Walker had indeed committed perjury. That is, not only was there evidence that Walker may have known the testimony was false because he was involved in the fabrication (which is what Archuleta claimed), but also that ***Walker himself admitted that both Archuleta's and his own testimony were materially false***.

Moreover, LeBere did raise these facts and arguments in the District Court, describing them at length in his Memorandum asking the District Court to grant his petition, which is also sufficient to preserve the issue for appeal. *See Banks*, 540 U.S. at 703. Neither the Magistrate Judge nor the District Court denied that these claims were made, but denied the petition on other grounds. The Magistrate Judge concluded that Archuleta's recantation was not credible (and thus the confession likely occurred), whereas the District Court first decided that the alleged perjury was immaterial, and next, while assuming that the "confession" never occurred, that Walker had not conspired with Archuleta to fabricate it. But the lower Court's choice to not expressly address the perjury theory—that Walker did not believe the confession but falsely vouched for it anyway—does not mean it was not raised.

For similar reasons, the panel's suggestion that LeBere should have amended his petition to include the additional facts learned in discovery is not reasonable. A request to amend the petition could effectively be seen as an admission that the additional factual material created a "new" claim that would independently have to be exhausted in the state courts. *See*

Zuniga v. Falk, 618 F. App'x 407, 410 (10th Cir. 2015) ("Fair presentation means that the substance of the claim must be raised in state court."). The panel's view effectively reads the case law as requiring any habeas petitioner who uncovers additional factual support for a previously asserted theory to first seek amendment before those new facts can be considered. That is not the purpose for discovery or for the preservation rules.

CONCLUSION

The core question on LeBere's appeal is whether he received a fair trial. There was no direct evidence of his involvement in the crime, except testimony of a "confession" by a jailhouse snitch that there is now no dispute was false. Nor has any court denied that the State's key witness, a police detective, has admitted that at the time of trial he did not believe key aspects of the "confession" and did not verify it, but falsely vouched for it anyway. At this point, therefore, there is undisputed evidence that the State suborned Archuleta's perjury and that Walker committed perjury himself.

LeBere raised this in his petition, citing all the relevant facts available to him at the time, and in the District Court, including the additional facts uncovered in discovery. Accordingly, either the panel should grant rehearing and issue a certificate of appealability so the merits of LeBere's *Brady* claim can be fully briefed and argued, or the en banc Court should grant

rehearing to correct the panel's misapplication of the standard for when a claim is properly preserved.

Respectfully submitted this 15th day of March 2021.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 03-cv-01424-WDM-MEH

KENT ERIC LeBERE,

Applicant,

v.

JAMES ABBOTT, Warden, and
JOHN W. SUTHERS, the Attorney General
of the State of Colorado,

Respondents.

AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

(Filed Aug. 12, 2009)

1. Applicant Kent Eric LeBere was convicted of second-degree murder and second-degree arson in the absence of any physical or direct evidence against him. Instead, the State relied heavily on the testimony of two key witnesses: a jail-house informant and the lead detective who enticed the informant to testify against LeBere. We now have concrete evidence that the informant lied in order to gain favorable treatment in his own case, that the detective suborned perjury by coercing the informant to lie under oath and providing him with the facts necessary to do so convincingly, and that the detective himself lied under oath.

2. Despite the gravity and authenticity of LeBere's claims, they were virtually ignored by the Colorado state courts. Although it took more than three years to exhaust state remedies, the extended time frame is not indicative of fair or complete treatment by the state courts. Indeed, the trial court—without an evidentiary hearing—issued a meager three-page order denying LeBere's comprehensive state habeas petition, and the Colorado Court of Appeals—without oral argument—affirmed the trial court with only superficial analysis. The Colorado Supreme Court quickly denied review. Given the state courts' token treatment of LeBere's serious constitutional claims, this Amended Application represents his only opportunity to seek meaningful review of his trial and conviction.

3. Applicant Kent Eric LeBere's trial and conviction are unconstitutional, having been obtained in violation of his right to due process, his right to a fair trial, and his right to be present at critical stages of trial. *See* United States Const. Amends. V, VI, and XIV; Colo. Const. Art. II, § 16, 25. These violations, whether considered individually or together, were sufficient to have a reasonable probability of adversely influencing the outcome of the verdict. The Colorado state courts erred in determining that these violations were insufficient to warrant a new trial and erred in rejecting LeBere's request for an evidentiary hearing. Through this Amended Application, LeBere seeks nothing more than a new and fair trial. At a minimum, LeBere

respectfully requests an evidentiary hearing on the issues raised in this Amended Application.[1]

FACTUAL BACKGROUND

The Charges Against LeBere

4. On October 20, 1998, LeBere was arrested and charged with first-degree murder, felony murder, second-degree murder, first-degree sexual assault, manslaughter, and second-degree arson relating to the death of Linda Richards. LeBere was observed leaving a bar with Ms. Richards on the night of her death and was later observed in the vicinity where her body and burning van were discovered. Aside from that circumstantial evidence, no physical evidence directly linked LeBere to the crime. The only witness who observed the van before the fire, Yvonne Castro, described a suspect near the van who does not match LeBere's appearance. Ms. Castro could not identify LeBere from a police photo-lineup nor from the surveillance tape from a convenience store where LeBere had been observed on the evening of the crime. LeBere entered pleas of not guilty on November 18, 1998.

The Trial

5. LeBere has consistently denied any involvement in the crime. In his defense, LeBere offered a

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[1] In a separate motion, LeBere will also request discovery on the claims presently before the Court under 28 U.S.C. § 2254, Rule 6.

much more plausible theory of who may have harmed Ms. Richards: her fiancé, Russell Herring. LeBere presented evidence at trial that Herring had threatened to break off his engagement with Ms. Richards during a fight earlier in the evening of her death. (Ex. A at 174-76, 182-83.) Herring admitted that he had been violent and abusive to Ms. Richards several times in the past, and that the police had been called to their home more than once. (*Id.* at 170-73, 183-91.) Most notably, LeBere introduced the tape of a 911 call in which Ms. Richards sought police assistance during an altercation in which Herring was particularly violent and abusive. (*Id.* at 188.) Herring also testified that he and Ms. Richards fought on the evening of her death, and he knew that Ms. Richards had likely gone to a particular bar after their fight, and that he was often jealous and concerned that Ms. Richards might have an affair. (*Id.* at 194-207.) In other words, Herring had motive and opportunity to commit the crime. Herring was interviewed by police in connection with her death. The interview was videotaped and shown to the jury during the trial.

6. Given the lack of evidence tying LeBere to the crime, the State's case rested heavily on the testimony of a jail-house informant, Ronnie Archuleta, who had been housed with LeBere in the El Paso County Jail while LeBere awaited trial. As discussed in detail below, we now know that Archuleta's testimony was fabricated at the behest of the lead detective on the case, J.D. Walker. At trial, Archuleta falsely testified that LeBere had admitted to sexually assaulting and

strangling the victim, and setting the van on fire to conceal the evidence. (Ex. B at 16-18.) Archuleta further testified that he had decided to tell J.D. Walker, the lead detective investigating the homicide, of LeBere's alleged confession. (*Id.*) Archuleta admitted that no one else was present during Walker's and Archuleta's alleged conversation. (*Id.*)

The Jury's Deliberations

7. After the defense rested its case, which included evidence pointing away from LeBere and directly to Herring, the jury was excused and the trial court and counsel addressed several legal issues, including the issue of what type of evidence the jury would be permitted to bring to the jury room, where jurors would have unfettered access to the evidence. Over defense counsel's objections, the trial court, Judge Timothy J. Simmons, determined that the jury would not have unfettered access to (1) the police interview videotapes of LeBere and Herring and (2) the audio tapes of Ms. Richards calling 911 to report the violent and abusive conduct of Herring. (Ex. C at 19-24.) Defense counsel argued, to no avail, that the trial court's decision was directly contrary to clear legal authority. (*Id.* at 18.)

8. During the jury deliberations on August 12, 1999, the jury asked the trial court's permission to view the LeBere and Herring interview videotapes that had been introduced at trial. Defense counsel objected to the request on the grounds that allowing the

jury to review these tapes during deliberations would improperly highlight certain pieces of evidence at a critical stage of the trial. (*Id.* at 119-120.) The trial court overruled the objection. (*Id.*) The trial court noted on the record that both tapes would be viewed in their entireties. (*Id.* at 123.)

9. Both prosecution and defense counsel (without consulting LeBere) believed that, since it was the "deliberation stage," their presence was not needed, particularly given the trial court's assurances that both tapes would be viewed from start to finish. (*Id.* at 120.) Judge Simmons agreed with the lawyers and decided that he alone would preside over this part of the jury deliberations. (*Id.* at 121.)

10. In discussing the matter with counsel, the trial court was clear that it would preside over the jury deliberations without the presence of counsel. (Ex. C at 121.) The clerk confirmed that, not only was LeBere absent from these proceedings, he had not been consulted about this approach: "Excuse me, Judge, you don't need Mr. LeBere?" (*Id.* at 122.) Without consulting his client, defense counsel summarily indicated that, "on his behalf, . . . this is deliberation[], and there's no reason." (*Id.*) In response, the court indicated his thanks for not having to contact LeBere, inform him of his rights, and solicit his input for the trial court's intention to preside over purported jury deliberations: "Thank you. That simplifies things quite a bit. We're going to lock that door, so . . . [g]et out of here." (*Id.*) The record is therefore clear that LeBere was

given no opportunity to assert or waive his constitutional right to be present for a critical stage of his trial.

The Jury Was Told To Watch Both Videos "From Start To Finish."

11. Once the trial court excluded counsel from the courtroom and the jury was brought in, the trial court confirmed that it would preside over the deliberations. (*Id.*) The trial court also stated that the jury would review both videotapes in their entirety: "This is your deliberation, . . . what you get to do is observe . . . these videos *from start to finish. . . . There's no pieces and parts, all right?*" (*Id.* at 122-123) (emphasis added.)

12. Apparently concerned about presiding over the purported jury deliberations, the trial court tried to explain its presence: "I will stay and monitor. I won't listen to your deliberations, but my job is to make sure that you're not bothered." (*Id.* at 124.) There is no record of what occurred during the jury's viewing of the videotapes. There is no record of whether the trial court listened to the jury's deliberations. There is no record of what the jurors said. There is no record of whether the jury asked the trial court questions. There is no record of whether the trial court and clerk had any discussions among themselves or with the jury. There is no record of the effect the trial court's presence had on the jury deliberations.

The Jury Viewed Only A Portion Of The Videotapes.

13. Although the transcript is silent once the trial court and the jury were off the record, the time frame is clear. The proceedings began at 3:30 p.m., at which time the trial court informed counsel of the jury's request to view the two tapes. Counsel and the trial court engaged in significant discussion regarding the trial court's decision to grant the request. Defense counsel objected to the trial court's decision, but were overruled. The jury was then brought back into the courtroom. Counsel were excused, and the trial court instructed the jury about the procedure for this phase of deliberations in the trial court's presence but without counsel or LeBere in attendance.

14. After the videotapes were shown, the trial court went back on the record outside the presence of counsel and LeBere to confirm that the jury reviewed the videotaped interviews of LeBere and Russell Herring in their entirety: "We're in the courtroom with the jury. They've just completed reviewing two videotapes under supervision of myself and a clerk. We had the door of the courtroom locked. The clerk monitored to make sure no one was making eye contact with the jury through the windows." (*Id.* at 124.) The record reflects that the entirety of these proceedings terminated at 4:48 p.m. that same day. (*Id.* at 125.)

15. The trial court's statement that the jury watched both interviews in their entirety is demonstrably incorrect. Although there is no record of what

occurred during the viewing of the videotapes, the trial transcript establishes that the jury could not have watched both videotapes in their entireties. The record shows that one hour and eighteen minutes elapsed during which four things *purportedly* occurred: (1) counsel and the trial court discussed having the trial court preside over the purported jury deliberations outside the presence of counsel and LeBere; (2) the jury was brought into the courtroom; (3) the jurors and the trial court discussed having the trial court preside over the purported jury deliberations outside the presence of counsel and LeBere; and (4) the jurors watched both videotapes in their entireties. (*Id.* at 119-125.)

16. The trial court indicated that the videotapes would take at least two full hours to watch. (*Id.* at 123.) Although it is difficult to gauge how long it may have taken for the discussions between the trial court and counsel and the trial court and the jury, the period of time from 3:30 p.m. until 4:48 p.m. was clearly insufficient for the jury to watch almost two hours of interviews—much less for the trial court to also have substantive discussions with both counsel and the jury. (*Id.* at 119-125.)

17. Thus, neither defense counsel nor LeBere participated in or attended the jury deliberations where these two videotapes supposedly were viewed. Yet, the trial transcript reflects that LeBere was not consulted by the trial court or even his own counsel regarding the proposal that the trial court preside over this stage of the jury deliberations without counsel present. (*Id.* at 122.) In fact, the record reflects that

defense counsel, without consulting LeBere, actually indicated that LeBere's presence was not necessary. (*Id.*) Judge Simmons agreed. (*Id.*)

18. Counsel then departed from the courtroom and Judge Simmons informed the jury that he would preside over that part of their deliberations. (*Id.* at 122.) Judge Simmons further explained that the jurors could deliberate off the record during the playing of the tapes and—despite the trial court's presence in the room—that the court would not listen to those deliberations. (*Id.* at 122-24.) There is no record of what occurred during the jury's viewing of the videotapes and there is no record of whether Judge Simmons listened to the jury's deliberations or otherwise interacted with the jury during this stage of its deliberations.

19. After the videotapes were apparently shown, Judge Simmons went back on the record outside the presence of counsel or LeBere and indicated that the jurors had watched both interview tapes in their entireties. (*Id.* at 124.) However, Judge Simmons' statement on the record cannot be correct, as it does not accurately correspond to the length of the tapes themselves. Before excusing counsel, Judge Simmons indicated that the videotapes would take at least two full hours to watch. (*Id.* at 123.) But the record reflects that only one hour and eighteen minutes elapsed during the entire time in which (1) counsel and Judge Simmons discussed having the court preside over the jury deliberations outside the presence of counsel or LeBere, (2) the jurors and Judge Simmons discussed having the court preside over the jury deliberations outside the

presence of counsel or LeBere, and (3) the jurors watched videotape and deliberated in the presence of Judge Simmons. (*Id.* at 119-125.)

The Judge Instructs The Jury Regarding The Verdict Form Without Consulting Counsel.

20. On the second day of deliberations, the jury returned its verdict. However, the jury failed to sign all of the verdict forms. Without consulting with counsel, or even explaining the problem to counsel, the trial court then instructed the jury to return to deliberations to complete the verdict forms. The trial court did not engage counsel in discussion on the topic, nor did it request input from counsel about how to handle the incomplete verdict forms. The jury subsequently returned a guilty verdict as to second-degree murder, but an acquittal as to manslaughter, a lesser included offense. The two verdicts are necessarily inconsistent, as a defendant would logically have to be guilty of a lesser included offense if found guilty of the greater offense. This inconsistency demonstrates jury confusion over the verdict forms.

21. The verdict form issue, and the circumstances surrounding the videotape replay during deliberations, show a pattern of improper contact by the trial court with the jury that clearly tainted LeBere's trial and conviction.

The Verdict

22. On August 13, 1999, the jury acquitted LeBere on the first-degree murder, felony murder, manslaughter, and sexual-assault charges, but found him guilty of second-degree murder and second-degree arson. On October 12, 1999, Judge Simmons sentenced LeBere to 48 years' imprisonment on the murder conviction and 12 years' imprisonment on the arson conviction, to be served consecutively.

Archuleta Recants

23. In February 2000, after the trial, Archuleta recanted his incriminating testimony. In a telephone call to LeBere's counsel, Bobby Lane Daniel, Archuleta told Daniel that "his conscience was bothering him, that he knew the case against Mr. LeBere was very weak, that he felt badly he had given false testimony and that he didn't want an innocent man convicted or in prison based on false testimony." (Ex. D ¶ 4.) According to Daniel, Archuleta also stated that the police detective investigating the matter, J. D. Walker, "visited him several times at the jail, indicated that he needed a confession from Kent LeBere, provided police reports to read and review and that those reports formed the basis for his knowledge about the charges against Mr. LeBere." (*Id.* ¶ 7.) Archuleta further admitted to Daniel that Walker "was aware that no confession was ever given and the testimony about it was untruthful." (*Id.* ¶ 10.)

The Archuleta Affidavit

24. On June 7, 2004, Archuleta submitted an affidavit that undermines the entire process under which LeBere was tried and convicted. Specifically, Archuleta admitted that the testimony he gave at LeBere's trial was "false" and that LeBere "never confessed anything" to him. (Ex. E ¶ 4.) Archuleta further admitted that his testimony was driven solely by the information provided to him by Detective Walker: "All of the information in my testimony was provided to me by Detective J.D. Walker, not by Kent LeBere." (*Id.*) Archuleta explained that Walker told Archuleta that he needed a confession from LeBere. (*Id.* ¶ 5.) When Archuleta informed Walker that LeBere had never spoken to him about the charges against him, Walker told Archuleta that he would receive preferential treatment and a reduced sentence if he falsely testified that LeBere had confessed to him. (*Id.* ¶ 7.) Walker then provided Archuleta with police reports relating to LeBere's case in order to enable him to testify convincingly. (*Id.* ¶ 8.) In other words, Walker secured LeBere's conviction by falsifying evidence and suborning perjury. Defense counsel submitted the Archuleta Affidavit to the trial court during the hearing on LeBere's Rule 35(c) motion. Notwithstanding this critical development, which shatters the prosecution's only direct evidence against LeBere, the trial court denied the motion in its entirety without an evidentiary hearing and the Colorado Court of Appeals affirmed without oral argument. The Colorado Supreme Court declined to review the case.

PROCEDURAL HISTORY

The Conviction And Sentence

25. On August 13, 1999, a jury in Colorado Springs, Colorado acquitted the Applicant, Kent Eric LeBere, of first-degree murder, felony murder, manslaughter, and sexual-assault, but found him guilty of second-degree murder and second-degree arson. On October 12, 1999, LeBere was sentenced to 48 years' imprisonment on the murder conviction and 12 years' imprisonment on the arson conviction, to be served consecutively.

State-Court Challenges To The Conviction And Sentence: All of LeBere's Claims Have Been Fairly Presented.

26. On November 1, 1999, LeBere filed a notice of appeal with the Colorado Court of Appeals, arguing that his conviction should be reversed based, in part, on Archuleta's recantation. On May 5, 2000, the Colorado Court of Appeals granted LeBere a limited remand as to the new evidence relating to Archuleta. Judge Simmons held a hearing on October 2, 2000, and the trial court denied LeBere relief on that issue in an order dated October 13, 2000, concluding that while the new evidence supported LeBere's theory, it would not have changed the jury's verdict. On January 24, 2002, the Colorado Court of Appeals issued an unpublished opinion, affirming the trial court's denial of a new trial. *See People v. LeBere*, 99 CA2088, at 6-7 (Colo. Ct. App. Jan. 24, 2002), attached as Ex. F. LeBere

subsequently petitioned the Colorado Supreme Court for a writ of certiorari, which was denied.

27. LeBere filed two collateral challenges to his conviction and sentence in state court. The first, filed on October 16, 2002, challenged his sentence under Rule 35(b) of the Colorado Rules of Criminal Procedure. It was denied on May 20, 2003. On April 20, 2004, LeBere filed a second collateral challenge, this time under Rule 35(c) of the Colorado Rules of Criminal Procedure. In that motion, LeBere argued that he was entitled to a new trial, and at least an evidentiary hearing, based on several constitutional violations.[2]

28. The State filed a cursory three-page response to LeBere's 35(c) motion. On August 30, 2005, the trial court issued a three-sentence order stating that it would hold oral argument on only two of the several significant issues raised in the Rule 35(c) motion. (Ex. I.) During that hearing on September 23, 2005, the trial court granted LeBere's request to file a supplemental brief on sentencing issues in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its rapidly emerging progeny.

29. On October 7, 2005, even though LeBere had not yet submitted his supplemental brief, the trial court summarily denied LeBere's Rule 35(c) motion. (Ex. J.) In his three-page order, Judge Simmons

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[2] LeBere also filed a motion requesting that the trial court recuse itself from deciding the Rule 35(c) motion, given its involvement in jury deliberations, among other things. (Ex. G.) The trial court summarily denied that motion. (Ex. H.)

provided only cursory explanations for his denial of each of the complex and important constitutional issues raised in LeBere's motion. (*See id.*) Thereafter, LeBere filed his Supplemental Memorandum of Law addressing the sentencing issues.

30. Out of an abundance of caution, LeBere filed a notice of appeal with the Colorado Court of Appeals on November 18, 2005, challenging the October 7, 2005 order, even though the sentencing issues were still under advisement. On December 1, 2005, the trial court denied relief regarding the-sentencing issues without providing any reasoned basis for its decision. (Ex. K.) LeBere appealed that decision on January 13, 2006.

31. On January 19, 2006, the Colorado Court of Appeals issued an order stating that the trial court had been without jurisdiction to enter the December 1, 2005 order because the November 18, 2005 appeal was already pending. In an order dated February 13, 2006, the court issued a remand and directed the trial court to re-enter the orders "with all due speed." (Ex. L.) Despite the Colorado Court of Appeals' directive to handle the matter expeditiously, the trial court did not re-enter the orders until October 11, 2006, nearly eight months later. (Ex. M.)

32. The long-awaited appeal was fully briefed on October 10, 2007. Despite the many troubling facts and important issues raised, the Colorado Court of Appeals declined to hold oral argument and; on April 24, 2008, issued an order affirming the trial court in all respects. (Ex. N.) LeBere petitioned the Colorado Supreme

Court for a writ of certiorari, which was denied on August 18, 2009. (Ex. O.) The Colorado Court of Appeals issued a final mandate on September 9, 2008. (Ex. P.)

LeBere's Federal Habeas Corpus Proceedings

33. On July 30, 2003, LeBere filed a *pro se* Application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Court Docket No. 2.) The State filed an answer on September 15, 2003. (*Id.*, No. 7.) On November 26, 2003, the undersigned law firm made its first appearance on behalf of LeBere. (*Id.*, No. 8.) Thereafter, counsel assessed LeBere's file, trial record, and § 2254 application, and determined that several of the grounds in his application were not exhausted as required by law.

34. On April 20, 2004, the same day he filed the Rule 35(c) motion in state court, LeBere filed a motion to stay his habeas application, pending exhaustion of his state remedies. (Court Docket No. 12.) This Court granted the stay motion on May 5, 2004, concluding that doing so was necessary to avoid "jeopardizing the timeliness of Applicant's action." (*Id.*, No. 16 at 4.)

35. Consistent with the stay order, LeBere filed regular status reports with the Court. (*See generally* Court Docket.) On February 24, 2006, this Court issued an Order for Administrative Closure, because the state proceedings were still pending. (Court Docket No. 48.) The closure order was extended on two subsequent occasions, resulting in a final order extending the closure until February 23, 2009. (*Id.*, No. 52.)

36. On February 20, 2009, LeBere filed a Motion to Reopen the Habeas case (Court Docket No. 56) and Motion for Leave to File Amended Application for Writ of Habeas Corpus (Court Docket No. 57). On July 13, 2009, this Court granted the Motion to Reopen and granted in part the Motion for Leave to File Amended Application for Writ of Habeas Corpus. (Court Docket No. 61.) Without waiving any appeal with respect to the July 13, 2009 Order, this Amended Application is submitted consistent with that Order.

CLAIMS

37. LeBere's conviction was unconstitutional, as it was obtained in violation of his right to due process, his right to a fair trial, and his right to be present at critical stages of trial. *See* United States Const. Amends. V, VI, and XIV; Colo. Const. Art. II, § 16, 25. LeBere respectfully asks the Court to grant an evidentiary hearing at which to present evidence demonstrating that his trial was unconstitutional. *See Townsend v. Sain*, 372 U.S. 29 (1963), *overruled on other grounds by Kenney v. Tamayo-Reyes*, 504 U.S. 1 (1992) ("When an application by a state prisoner to a Federal Court for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the Federal Court to which the application is made has the power to receive evidence and try the facts anew."). LeBere will also file a motion for discovery under 28 U.S.C. § 2254, Rule 6, so that he may fully explore and uncover the facts underlying his claims.

I. LEBERE WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER *BRADY v. MARYLAND*.

38. LeBere seeks relief under 28 U.S.C. § 2254 based, in part, on the State's violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The trial court improperly denied this requested relief, holding that the *Brady* issues were duplicative of the issues raised in LeBere's 2000 motion for a new trial based on newly discovered evidence. (Ex. J ¶ 3.) This was the sole basis articulated by the trial court in denying Lebere's Rule 35(c) Motion. (*Id.*) Importantly, the trial court applied the wrong legal standard. The *Brady* standard for a new trial is different than the "newly discovered evidence" standard applied in LeBere's Motion for a New Trial in 2000. Had the trial court analyzed this issue under the proper standard, it should have concluded that LeBere is entitled to a new trial. Indeed, because the State violated *Brady* by failing to disclose material information in its possession, LeBere is entitled to a new trial. At a minimum, LeBere requests an evidentiary hearing.

A. The Correct *Brady* Standard

39. In order to establish a *Brady* violation, LeBere must show that (1) the State suppressed evidence; (2) the evidence was favorable to LeBere; and (3) the evidence was material to LeBere's defense. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Fero v. Kerby*, 39 F.3d 1462, 1472 (10th Cir. 1994) (noting that

even negligent or inadvertent suppression is nevertheless suppression for *Brady* purposes). The Colorado courts should have applied this standard.

B. Relevant Factual Background: Witness Tampering And Perjured Testimony

40. While Detective Walker was investigating the murder of Linda Richards, he paid several visits to Archuleta in the El Paso County Jail. Given the dearth of physical evidence linking LeBere to the crime and the fact that LeBere had no apparent motive, Walker went about procuring a "confession." Archuleta, a known jail-house snitch (Ex. B. at 32-34, 49-50, 72-73, 143), had been housed with LeBere, so Walker went to Archuleta looking for a "confession" by LeBere to the murder of Linda Richards. (Ex. E ¶¶ 4-9.)

41. Walker did more than simply interview Archuleta during these visits with Archuleta. Walker "indicated he needed a confession from Kent LeBere, [and] provided police reports to read and review. . . ." (Ex. D ¶ 7; Ex. E ¶ 8.) Further, Walker "hand delivered" police reports for Archuleta to read and review. (Ex. D ¶ 6; Ex. E ¶ 8.) These reports "formed the basis for [Archuleta's] knowledge about the charges against Mr. LeBere," and for LeBere's supposed "confession," which Archuleta later invented. (Ex. D ¶ 7; Ex. E ¶ 8.)

42. In fact, LeBere never made any confession to Archuleta. (Ex. E ¶¶ 6, 9, 10.) Rather, the details of this supposed confession came from the police reports that Walker gave to Archuleta. (*Id.* ¶ 8.) Archuleta was

eager to help Walker get his confession, because he knew that Walker would help him get favorable treatment from the District Attorney. (*Id.* ¶ 7.) In the end, Archuleta did receive such favorable treatment. (Ex. B. at 11-12, 16, 40.)

43. Walker knew that LeBere never confessed to murdering Ms. Richards. (Ex. E ¶ 9.) He knew that Archuleta's testimony about the confession was false, because Archuleta created the "confession" with information that Walker supplied. (Ex. D ¶ 7 ("J.D. Walker was aware that no confession was ever given and [Archuleta's] testimony about it was untruthful."); Ex. E ¶ 9.)

C. The State Violated *Brady* And Its Progeny.

44. Walker's conduct deprived LeBere of due process under the Fifth and Fourteenth Amendments, and therefore deprived LeBere of a fair trial. The United States Supreme Court long ago established that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Court thereafter held that the prosecution must turn over favorable evidence even when the defense does not request it, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985).

45. The *Brady* rule also encompasses evidence "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Therefore, a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf . . . , including the police." *Id.* at 437; *see also Strickler*, 527 U.S. at 280-81 ("[T]he rule encompasses evidence 'known only to police investigators and not to the prosecutor."); *United States v. LaVallee*, 439 F.3d 670, 698 n.19 (10th Cir. 2006) ("The 'prosecution' for *Brady* purposes encompasses not only the prosecutors handling the case, but also extends to law enforcement personnel. . . ."); *Smith v. Sec'y of New Mexico Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("For purposes of *Brady*, 'knowledge by police or investigators is . . . imputed to the prosecution.'"); *see also* Colo. R. Crim. P. 16(1)(a)(2) (requiring prosecutor to "disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.")

46. There are three components of a *Brady* violation, and all have been met in this case: (1) the prosecution suppressed evidence; (2) the evidence was favorable to LeBere; and (3) the evidence was material to LeBere's defense. *Strickler*, 527 U.S. at 281-82; *Fero*, 39 F.3d at 1472. In this case, the prosecution committed two separate *Brady* violations, both of which stemmed from Walker's tampering with Archuleta. First, the prosecution relied on Archuleta's and

Walker's perjured testimony, even though Walker knew the testimony was false. Second, the prosecution failed to disclose that Walker met with Archuleta and fed him information that enabled Archuleta to give false testimony against LeBere. For both of these violations, it is clear that the prosecution suppressed evidence, and that the evidence was favorable to LeBere. Each violation has a different standard that must be used to determine whether the withheld evidence was "material." Under each relevant standard, the evidence was material, and the prosecution's withholding of that evidence deprived LeBere of a fair trial.

D. The State Relied On Perjured Testimony.

47. The most severe type of *Brady* violation involves reliance on testimony that the prosecution knows or should know is perjured. *See Agurs*, 427 U.S. at 103. A "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* Under this standard, "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680. The United States Supreme Court has justified this stringent standard because "the knowing use of perjured testimony involves prosecutorial misconduct." *Id.* Even more important, such misconduct involves "a corruption of the truth-seeking function of the trial process." *Id.* (quoting *Agurs*, 427 U.S. at 104).

48. In this case, the prosecutors committed irreparable misconduct by allowing two key witnesses—Archuleta and Walker—to commit perjury. Archuleta falsely testified that Kent LeBere confessed to the murder. Walker knew that LeBere never confessed, and Walker knew that Archuleta was able to offer his perjured testimony only thanks to the information that Walker himself provided. (Ex. D ¶¶ 7, 9.) This led to Walker's own perjury, through his testimony that Archuleta obtained the "confession" from LeBere, rather than from information that Walker provided. Walker's knowledge can be directly imputed to the prosecution, which had a duty to know all of the facts surrounding LeBere's supposed confession. *Kyles*, 514 U.S. at 437.

49. At trial, Archuleta testified that LeBere confessed to murdering Linda Richards, and the jury later convicted LeBere of killing her. (Ex. B at 17.) This false testimony was corroborated by further perjury from Detective Walker. (*Id.* at 69, 72, 74, 134.) Given these facts, there is at least a reasonable likelihood that Archuleta's false testimony affected the jury's ultimate judgment that LeBere killed Ms. Richards. Given the paltry evidence against LeBere—circumstantial evidence, lack of motive, and unreliable witnesses—it is unreasonable to conclude that Archuleta's false testimony about a nonexistent confession was harmless beyond a reasonable doubt. *See Bagley*, 473 U.S. at 680. To the contrary, an examination of the false evidence raises grave doubts about the fairness of LeBere's trial. Accordingly, because the prosecution knowingly used Archuleta's perjured testimony, LeBere was denied his

right to due process as articulated by *Brady* and is entitled to a new trial.

E. The State Suppressed Evidence Favorable To LeBere.

50. Walker visited Archuleta several times in jail and gave Archuleta police reports to prepare for his testimony. These facts are exculpatory *Brady* material because it shows that LeBere's supposed confession was a lie concocted by Archuleta, and made possible and encouraged by Walker. The prosecution should have disclosed the evidence on this basis alone. The evidence should also have been disclosed because it could have been used to impeach the testimony of both Archuleta and Walker. *See Bagley*, 473 U.S. at 676 (holding that impeachment evidence must be disclosed under *Brady); Smith*, 50 F.3d at 825 (same).

51. This suppressed evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" means a probability sufficient to "undermine confidence in the outcome." *Id.* Put another way, the Court should find a *Brady* violation if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435; *Engberg v. Wyoming*, 265 F.3d 1109, 1118 (10th Cir. 2001).

52. Walker's visits with and feeding of information to Archuleta are material pieces of evidence. Walker and Archuleta were key prosecution witnesses, both at trial and at the preliminary hearing. There was no physical evidence linking LeBere to the murder. However, there was the testimony of investigating detective Walker, which linked LeBere to the murder, and testimony—later recanted—by Archuleta that LeBere confessed to killing Richards. Information that Walker, seeking to manufacture a confession, visited Archuleta in jail and fed him information puts this case in an entirely different light. It reveals witness tampering, perjury, and prosecutorial misconduct of which the jury was wholly unaware and which, now revealed, undermines confidence in the jury's verdict.

53. The prosecution's withholding of this evidence is an independent constitutional violation and another basis on which to grant LeBere a new trial.

II. LEBERE WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL WHEN HIS LAWYERS WERE NOT CONSULTED REGARDING VERDICT FORM ISSUES.

54. The trial court denied LeBere his right to counsel when, on the second day of deliberations, it instructed the jury to return to the jury room for further deliberations to complete the verdict forms. (*See* Ex. Q.) The trial court did so without informing counsel of the problem with the verdict forms or asking counsel to consult on the issue. A defendant in a criminal case

has the right to counsel during any instructions that the court gives to the jury or when the trial court responds to a jury question. *See Siverson v. O'Leary*, 764 F.2d 1208, 1214 (7th Cir. 1985) (holding that "jury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment"). The trial court effectively denied LeBere that right when he failed to discuss the issue with counsel, even though counsel was present in the courtroom at the time.

55. Simply put, the trial court did not even attempt to ensure that LeBere was given the opportunity to weigh in on one of the most critical stage of his trial, the jury's completion of the verdict form. The failure to do so renders the process unfair and unconstitutional. When considered with the many other constitutional errors LeBere encountered during his trial, the issue takes on great significance and supports LeBere's right to a new trial.

PRAYER FOR RELIEF

WHEREFORE, the Applicant, Kent Eric LeBere, prays that this Court:

A. Issue a writ of habeas corpus to have the Applicant brought before it, to the end that he might be discharged from his unconstitutional confinement and restraint;

B. Direct the State to file an answer admitting or denying each and every factual allegation made herein and stating why the Applicant is not entitled to relief;

C. Permit Applicant to undertake discovery;

D. Order an evidentiary hearing at which Applicant may offer proof to support the allegations contained in this Amended Application and to rebut any procedural or substantive defenses asserted by the State;

E. Order the Office of the El Paso County District Attorney, the prosecuting deputy district attorney, and the Colorado Attorney General to turn over to counsel for Applicant all exculpatory evidence in their possession;

F. After full consideration of the issues raised in this Amended Application, vacate and set aside the judgment of conviction and sentence or grant a new trial; and

G. Grant such other and further relief as this Court deems just and appropriate and as justice may require.

Respectfully submitted this 12th day of August, 2009.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-cv-1424-MSK-MEH

KENT ERIC LeBERE,

Petitioner,

v.

JAMES ABBOTT, Warden, and
THE ATTORNEY GENERAL OF
THE STATE OF COLORADO,

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONER'S REQUEST TO GRANT AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

INTRODUCTION

(Filed Dec. 30, 2015)

When the State of Colorado prosecuted Kent LeBere, it withheld key evidence from him. The prosecution did not disclose that its lead investigator fed evidence to the State's key witness, jailhouse informant Ronnie Archuleta. This allowed Archuleta to falsely testify about a jailhouse "confession" that LeBere never gave, and allowed the investigator (Detective J.D. Walker) to falsely testify about his interactions with Archuleta.

Because the State never disclosed that Walker fed information to Archuleta, LeBere could not cross-examine Walker about his conduct, nor cross-examine Archuleta about the basis for his testimony regarding LeBere's supposed "confession."

This material exculpatory evidence came to light only after Archuleta voluntarily recanted his testimony, and revealed Walker's misconduct. Archuleta has stood by his recantation for fifteen years: in admissions to LeBere's trial counsel in 2000, in a sworn affidavit in 2004, and in his recent deposition in 2015. Archuleta's admission—that Walker suborned Archueta's perjury and that Walker himself lied at trial—undermines confidence in the verdict against LeBere. More than four decades ago, the United States Supreme Court held in *Brady v. Maryland* that when prosecutors fail to disclose evidence favorable to an accused, and when they rely on false testimony, they violate the accused's constitutional right to due process.

The State of Colorado's failure to disclose its detective's misconduct, and its reliance on perjured testimony, violated LeBere's constitutional rights under *Brady*. The writ of habeas corpus exists to correct fundamental miscarriages of justice like this one. Kent LeBere, who is serving a sixty-year sentence for a crime he did not commit, respectfully asks this Court to grant his Amended Application for Writ of Habeas Corpus under 28 U.S.C. § 2254.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Charges Against LeBere

On October 20, 1998, someone murdered Linda Richards and left her body in her van, which had been set on fire and left in a carwash. Earlier that night, Kent LeBere was seen leaving a bar with Richards, and he was later seen in the vicinity of where her body was eventually discovered. LeBere was arrested and charged with first-degree murder, first-degree felony murder arising from the commission of a sexual assault, second-degree murder, manslaughter, and second-degree arson.

No physical evidence linked LeBere to the crime. The only eye-witness at the scene of the crime described a person who did not look like LeBere. (Ex. 1, 08/06/1999 Trial Tr. at 68, 80-83). The same eye-witness did not identify LeBere from either a police photo-lineup or surveillance tape from a convenience store that LeBere visited on the night of the crime. (*Id.* at 68.) LeBere pled not guilty to all charges.

B. Before Trial: Walker And Archuleta Manufacture A Confession

The investigation of Richards' murder was assigned to Colorado Springs Detective J.D. Walker, a police officer who has a history of unscrupulous investigatory tactics similar to those he employed in this case against Kent LeBere.

In 2000, the El Paso County District Court found that Walker suppressed evidence favorable to a criminal defendant. *See People v. Beatty*, Case No. 99-CR-1145 (El Paso Cnty. Dist. Ct.). In that case, Walker was investigating a murder for which Elijah Beatty had been charged. (Ex. 2, *People v. Beatty*, 05/02/2000 Hrg. Tr. at 6, 34, 43-44.) A source told Walker that several individuals—including another alternate suspect as well as Beatty—might have been involved in the crime. (*Id.* at 9-12, 22-23.) Even though that information, which implicated an alternative suspect, would have been favorable to the defendant Beatty, Walker did not put that information in a police report, and the exculpatory information was not disclosed to Beatty's attorneys. (*Id.* at 10-11, 15, 50.) Beatty was eventually tried and convicted. In a later sanctions hearing regarding Walker's conduct, two of Walker's fellow detectives testified that Walker should have reported the information implicating the alternative suspect. (*Id.* at 32, 50-53, 57.) The court concluded that Walker improperly suppressed this evidence. (Ex. 3, *People v. Beatty*, 06/20/2000 Hrg. Tr. at 15-16.) Walker has also been disciplined for his conduct on a variety of cases while assigned to the homicide unit. (Ex. 4, City Discipline Report.) This included Walker's failure, in at least seven first-degree murder investigations, to submit supplemental investigative reports timely. (*Id.*; *see also* Ex. 5, Disciplinary Action Form; Ex. 6, Deposition of J.D. Walker ("Walker Dep.") 134:3-7[1].)

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[1] Written transcripts of the deposition testimony of both J.D. Walker and Ronnie Archuleta are included as exhibits to this

Walker's unscrupulous investigative tactics and willingness to flout the rules were at their height in the investigation of Richards' murder. Only six days after the murder, Walker had already decided for himself that LeBere was the only possible suspect. (Walker Dep. 88:10-12.) Walker focused exclusively on LeBere, even though Richards had a violent fiancé named Russell Herring who on the very night of Richards' death—had a fight with Richards and threatened to break off their engagement. (Ex. 7, 08/05/1999 Trial Tr. at 172-83.) Walker knew that Herring was violent and abusive in the past, and police had been repeatedly called to their home. (*Id.* at 168-74, 180-91; *see also* Walker Dep. 91:23-92:10.) On October 22, 1998, Walker asked the Colorado Bureau of Investigation to test fingernail-scrapings taken from the victim. But he asked only that LeBere's DNA be compared, ignoring any other possible suspects. (Walker Dep. 132:12-133:12.)

Meanwhile, LeBere was in the El Paso County Jail, awaiting trial. There, he was housed in the same "pod" as Ronnie Archuleta. Archuleta had a long history—since his teenage years—of working as a police informant. (Ex. 8, Deposition of Ronald Archuleta "Archuleta Dep.") 10:25-11:6.) Archuleta was so well

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memorandum. Additionally, pursuant to Section 4.8(f) of the Electronic Case Filing Procedures for the District of Colorado, Petitioner is conventionally submitting discs containing J.D. Walker's and Ronnie Archuleta's videotaped depositions referenced in this Memorandum. In accordance with Section 4.8(f), a cover page is attached to this Memorandum, identifying the conventionally submitted materials, which materials will be hand-delivered to the Clerk's office and to opposing counsel.

known as a "snitch" that when LeBere first arrived at the jail, other inmates warned him not to speak with Archuleta. (Walker Dep. 57: 22-58:4.)

Soon after LeBere arrived in jail, Detective Walker received word that an inmate had information about Richards' murder. (*Id.* 28:2-20.) On October 28, 1998, Walker met with Archuleta about the Richards murder. (*Id.* 28:23-25.) Walker and Archuleta have very different accounts of that meeting. According to Walker, Archuleta said that LeBere approached him in jail to ask about how he could obtain a bond (since Archuleta once worked for a bail bondsman). (*Id.* 37:21-24). According to Walker, Archuleta said that LeBere then confessed to the murder—even though LeBere had been warned that Archuleta was a "snitch"so that Archuleta could determine if LeBere would qualify for a bond. (*Id.* 38:7 to 39:20.)

Archuleta disputes Walker's story. Archuleta testified in his deposition that Walker met with him several times, all with the intent of tying Kent LeBere to Richards' murder. (Archuleta Dep. 15:9-20.) Archuleta cooperated, based on the promise of favorable treatment from prosecutors in his own case. (Ex. 9, 08/09/1999 Trial Tr. at 11-12, 40.)[2] At first, Walker asked Archuleta

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[2] Ann Joyce, the Deputy District Attorney responsible for Archuleta's case testified under oath that Walker told her that Walker had agreed to put in a good word for Archuleta, and that he did ask her to help Archuleta. (Ex. 10, 11/23/1998 Hr'g Tr. at 12-14, 26-27.) She also admitted that she offered Archuleta a more favorable plea deal because of Walker's encouragement. (*Id.* at 14-15, 27.)

to try getting LeBere to confess to the crime. (Archuleta Dep. 16:2-24.) But once it became clear that LeBere would say nothing to Archuleta about his case, Walker began feeding Archuleta information about the Richards murder—so that he and Archuleta could manufacture a confession. (*Id.* 16:19- 18:15.) Walker gave Archuleta police reports and other information about the crime, and made it clear to Archuleta that he should use the information to invent testimony that LeBere confessed. (*See id.* 14:19-15:5; 21:20-22; *see also infra* Section III.A.)

C. Walker Procures Archuleta's Plea Deal Through Improper Means

Before LeBere's trial, Walker went to great lengths to obtain a plea deal for Archuleta in exchange for Archuleta's false testimony against LeBere. This shows Walker's willingness to disregard a defendant's constitutional rights, to employ unethical tactics to obtain evidence favorable to the State's case, and to disregard the authority of officers of the court.

After Walker identified Archuleta as a possible witness against LeBere, Walker told the prosecutor on LeBere's case, Assistant District Attorney Kim Kitchen,[3] that he intended to speak with Archuleta. (Ex. 9 at 116-18.) Kitchen explicitly told Walker not to

[3] Kim Kitchen and her office were later disqualified from prosecuting LeBere because she became a material witness to Walker's unauthorized procurement of Archuleta's testimony. (Ex. 11, 04/30/1999 Motion for Disqualification.)

talk to Archuleta about Archuleta's own pending case. (*Id.* at 118; Ex. 12, 11/17/1998 Hr'g Tr. at 167.) But Walker disregarded the prosecutor's instructions and spoke with Archuleta at least twice about the criminal charges then pending against Archuleta, and about getting Archuleta a plea deal. (Ex. 10 at 79-80, 83.)

Archuleta told Walker that he wanted a continuance in his case, a check fraud matter being prosecuted by Deputy District Attorney Ann Joyce. (*Id.* at 69-70.) Archuleta wanted a continuance so he could have time to get money for restitution, which would allow him to get a plea deal. (*Id.* at 69.) Walker spoke with Joyce and asked her to give Archuleta the continuance. (*Id.* at 69; Ex. 9 at 122-23.) Walker did even more to help Archuleta get a plea deal, including speaking with Archuleta's public defender about a plea deal, and contacting Archuleta's employer and Archuleta's mother to ask for help in getting money for Archuleta's restitution. (Ex. 10 at 77, 98-99; Ex. 13, 11/18/1998 Hr'g Tr. at 260, 298, 304.)

Even worse, Walker communicated an unauthorized plea deal to Archuleta—even though prosecutor Kim Kitchen expressly told Walker not to speak with Archuleta about his pending case, and despite the fact that Archuleta's counsel was not present. This deal, which Walker was not authorized to offer (and which presumably was contingent on Archuleta's cooperation in the LeBere case) was even more favorable than the one that Archuleta's prosecutor Ann Joyce was prepared to offer. Based on Walker's "good word" to Joyce about Archuleta, Joyce told Walker that she would

reduce the charges against Archuleta, Archuleta would pay restitution, and Joyce would waive probation ineligibility (meaning that Archuleta could be sentenced to prison or probation). (Ex. 10 at 13-15, 26-28.) But Walker, outside of the presence of Archuleta's counsel, communicated a different—and better—deal directly to Archuleta. On November 9, 1998, Walker told Archuleta that if Archuleta paid restitution on November 13 he could plead guilty to the reduced charge, get out of jail the same day, and receive probation. (*Id.* at 46, 74.) Unlike the authorized plea deal, Walker's unauthorized deal to Archuleta guaranteed probation, promising that prison was not an option. (*Id.* at 46, 74.) Prosecutor Joyce had not offered guaranteed probation. (*Id.* at 13-15, 26-28.) Walker's unauthorized offer of this plea deal eventually came to light, but the court granted Archuleta's motion to enforce the deal, allowing the State to secure the perjured testimony that was instrumental in LeBere's conviction.

D. The Trial: Walker And Archuleta Lie

At trial, the prosecution presented no direct evidence and no physical evidence linking LeBere to the crime. LeBere presented substantial evidence that pointed away from him as the murderer, and toward a more likely perpetrator: the victim's abusive and anger-prone fiancé, Russell Herring, with whom the victim had a heated argument on the night she died. The State's case relied on testimony from witnesses that we now know—through information that the State should

have disclosed under *Brady—were* lying: Archuleta and Walker.

LeBere presented evidence that on the night of Richards' death, Herring fought with Richards and threatened to break off their engagement. (Ex. 7 at 172-83.) Herring admitted that he had been violent and abusive to Richards in the past and that the police had been called to their home more than once. (*Id.* at 168-75, 180-91.) LeBere also introduced the tape of a 911 call in which Richards sought police assistance during an altercation in which Herring was particularly violent and abusive. (*Id.* at 188-91.) Herring admitted that he and Richards fought on the evening of her death, that he knew Richards had likely gone to a particular bar after their fight, and that he was often jealous that Richards might have an affair. (*Id.* at 192-205.) LeBere also introduced expert evidence rebutting Herring's claim that he did not leave home the entire night of Richards' death. (*Id.* at 177-78; Ex. 14, 08/11/1999 Trial Tr. at 164-65, 171-72, 186-87.) In sum, LeBere's evidence showed that Herring had both the motive and the opportunity to kill Richards.

Given the lack of evidence tying LeBere to the crime, and the significant exculpatory evidence, the State's case hinged on two key witnesses: Archuleta and Walker. Archuleta testified that LeBere confessed to raping and murdering Richards, then setting her vehicle on fire to destroy any evidence. The State presented no evidence corroborating the facts in Archuleta's testimony. Detective Walker testified about his investigation and interactions with Archuleta, but did not tell

the jury about his role in manufacturing LeBere's "confession."

On August 13, 1999, the jury found LeBere guilty of second-degree murder and second-degree arson. The jury acquitted LeBere on the charges of first-degree murder, first-degree felony murder arising from the commission of a sexual assault, and manslaughter. On October 12, 1999, the state trial court sentenced LeBere to a total of 60 years in prison: 48 years on the murder conviction and 12 years on the arson conviction, to be served consecutively.

E. After Trial: Archuleta Recants

In February 2000, Archuleta placed a phone call to LeBere's trial counsel, Bobby Lane Daniel. In that call, Archuleta recanted his incriminating trial testimony. Archuleta told Daniel that "his conscience was bothering him, that he knew the case against Mr. LeBere was very weak, that he felt badly he had given false testimony and that he didn't want an innocent man convicted or in prison based on false testimony." (Ex. 15, Affidavit of Bobby Lane Daniel ¶ 4.) Archuleta also stated that Walker "visited him several times at the jail, indicated he needed a confession from Kent LeBere, provided police reports to read and review and that those reports formed the basis for his knowledge about the charges against Mr. LeBere." (*Id.* ¶ 7.) Archuleta also told Daniel that Walker "was aware that no confession was ever given and the testimony about it was untruthful." (*Id.* ¶ 10.)

F. Archuleta's Affidavit

On June 7, 2004, Archuleta submitted an affidavit that undermines the entire process under which LeBere was investigated, tried, and convicted. In the affidavit, Archuleta confirmed his February 2000 recantation, and again admitted that his testimony at LeBere's trial was false. (Ex. 16, Affidavit of Ronnie Archuleta ¶¶ 4.) Archuleta explained that LeBere "never confessed anything to me" and that all of the information Archuleta testified about at trial "was provided to me by Detective J.D. Walker, not by Kent LeBere." (*Id.* ¶ 4.) Archuleta explained that Walker said that he "needed a confession" from LeBere. (*Id.* ¶ 5.) When Archuleta told Walker that LeBere had never spoken to him about Richards or the murder, "J.D. Walker suggested to me that I could receive preferential treatment and less jail time if I testified to the information that he provided me about Kent LeBere." (*Id.* ¶¶ 6-7). Archuleta disclosed that Walker provided Archuleta with police reports about LeBere's case so that Archuleta could testify convincingly. (*Id.* ¶ 8.) Archuleta confirmed that Walker knew that LeBere had never confessed, and that Archuleta's testimony about the "confession" was false. (*Id.* ¶ 9.) Archuleta's affidavit confirmed that the State secured LeBere's conviction by falsifying evidence and suborning perjury.

II. POST-CONVICTION PROCEDURAL HISTORY

A. State Court Post-Conviction Proceedings

1. Direct Appeal

On November 1, 1999, LeBere filed a timely notice of appeal with the Colorado Court of Appeals. (Ex. 17, Notice of Appeal.) On February 29, 2000, Archuleta unexpectedly contacted LeBere's trial counsel and recanted his testimony about LeBere's "confession." (Exs. 15-16.) On May 5, 2000, the Colorado Court of Appeals granted LeBere a limited remand to move for a new trial based on the newly-discovered evidence of Archuleta's perjury. (Ex. 18, 05/11/2000 Order.) The state trial court denied LeBere's motion, the Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied LeBere's petition for a writ of certiorari. (Ex. 19, 10/13/2000 Order; Ex. 20, 01/24/2002 Opinion.) LeBere's *Brady* claim was never raised or considered as part of his direct appeal.

2. Collateral Attack In State Court

On April 20, 2004, LeBere filed a collateral challenge to the fairness and constitutionality of his trial under Rule 35(c) of the Colorado Rules of Criminal Procedure. (Ex. 21, Rule 35(c) Motion.) LeBere argued that he was entitled to a new trial based on several constitutional violations, including the *Brady* violations relating to Archuleta's and Walker's perjury. (*Id.* ¶¶ 17-31.) The state trial court refused to hear oral argument

on the *Brady* issue and summarily denied LeBere's Rule 35(c) motion without an evidentiary hearing. (Ex. 22, 10/07/2005 Order.) The Colorado Court of Appeals affirmed without hearing oral argument. (Ex. 23, 04/24/2008 Opinion.) LeBere petitioned the Colorado Supreme Court for a writ of certiorari, which was denied on August 18, 2008. (Ex. 24, 08/18/2008 Order.)

B. Federal Habeas Corpus Proceedings

1. Original Application

On July 30, 2003, LeBere filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) The State answered on September 15, 2003. (Dkt. No. 7.) On November 26, 2003, the undersigned law firm made its first appearance on LeBere's behalf. (Dkt. No. 8.) Counsel then determined that several of the grounds in his original application were not exhausted as required by law.

2. Amended Application

On April 20, 2004, the same day that he filed the Rule 35(c) motion in state court, LeBere filed a motion to stay his federal habeas application, pending exhaustion of his state remedies. (Dkt. No. 12) This Court (Daniel, J.) granted the stay, and LeBere proceeded with his state court remedies. (Dkt. No. 16.)

On February 20, 2009, after exhaustion of all state remedies regarding his *Brady* claim, LeBere moved to reopen his federal habeas case and for leave to file an

amended application that would include the *Brady* claim. (Dkt. No. 56.) On July 13, 2009, the Court granted LeBere's motion, (Dkt. No. 61), and LeBere filed his Amended Application on August 12, 2009, (Dkt. No. 62). The Court later *sua sponte* dismissed LeBere's amended petition concluding (incorrectly, the Tenth Circuit held) that the *Brady* claim was procedurally defaulted. (Dkt. No. 77.)

3. Tenth Circuit Appeal

LeBere appealed the dismissal of his Amended Application, and the Tenth Circuit reversed and remanded. (Ex. 25, Tenth Circuit Opinion.) The Court of Appeals held that the District Court erred in dismissing LeBere's petition on the basis of procedural default, because no Colorado state court had ever addressed the merits of LeBere's *Brady* claim. The Court of Appeals remanded the case to this Court for further proceedings.

4. Motion For Discovery Upon Remand

On remand, LeBere moved to conduct discovery in support of his *Brady* claim. (Dkt. No. 92.) LeBere sought information regarding Walker's investigatory practices and job history, as well as regarding Archuleta's relationship with agents of the State, and he requested the opportunity to depose Walker. (*Id.* at 15-20.) Over the State's objections, the Court allowed LeBere to conduct discovery. (Dkt. No. 117.)

III. RESULTS OF DISCOVERY

The parties have now deposed the two key witnesses who testified against LeBere: Walker and (at the State's request) Ronnie Archuleta. In Archuleta's deposition, Archuleta testified that he lied at trial when he said that LeBere confessed. Walker's deposition testimony reveals that Walker knew Archuleta was a "chronic liar," but that he still put Archuleta forth as the key witness against LeBere.

A. Archuleta Confirms That His Trial Testimony Was False, And Done At Walker's Behest

Archuleta's deposition testimony affirmed what he has been saying for the last fifteen years:

- LeBere never confessed;
- LeBere never told Archuleta anything about Linda Richards or his case;
- Archuleta's trial testimony about a confession was false;
- Archuleta received the information for his trial testimony from Walker; and
- Walker knew that his and Archuleta's testimony was false when they testified.

(*See* Archuleta Dep. 14:19-15:5; 21:20-22.)

Archuleta testified that he understood that "J.D. Walker wanted me to get information on Kent LeBere in regards to his murder case because of the fact that I

had done it before in other cases. . . .” (*Id.* 16:5-18.) Archuleta tried, but was unable to get any information from LeBere about his case. (*Id.* 16:19-17:1.) Archuleta testified in deposition that he “told J.D. Walker that Kent would not talk about his case” and had not confessed to him. (*Id.* 17:6-15; 21:23-22:3.)

So instead, Walker and Archuleta “went through a case file” that contained “police reports about the incident . . . about how the body was found, how it was positioned, what happened . . . what bar they were at, where [LeBere] was arrested,” giving Archuleta “the basic information on the case.” (*Id.* 16:23, 18:2-10.)

Archuleta testified that Walker clearly asked him to lie at trial: “Detective Walker [told me] that when I am testifying, that I am to testify that that is what Kent told me; that I had conversations with Kent.” (*Id.* 46:5-8; *see also id.* 47:14-16.) In sum, Archuleta testified in his deposition that the content of his trial testimony came not from Kent LeBere, but from Walker. (*Id.* 20:1-18, 21:9-19.)

Archuleta’s motivation for testifying falsely at LeBere’s trial is clear—avoiding more jail time himself. In his deposition, Archuleta testified that he was told by Walker and Deputy District Attorney Ann Joyce that although “they were looking at hitting me with a habitual criminal charge” because of his criminal record, “in return for me testifying against Mr. LeBere, I would be allowed to leave jail, pay . . . restitution, leave jail, and . . . I’d get to go home.” (*Id.* 18:16-19:4.) Archuleta explained his incentive to do what Walker

asked, and to testify falsely against LeBere: "I was promised that if I came through for this, basically, that I was going home; I wasn't going to prison." (*Id.* 35:20-24.) As we now know, the offer for Archuleta to avoid prison entirely was not even authorized by the prosecutor and was instead improperly offered by Walker, bypassing both the District Attorney and Archuleta's own lawyer. (Ex. 10 at 13-15, 2628, 46, 74.) Archuleta accepted Walker's offer. And, after holding up his end of the deal with Walker, Archuleta received the favorable treatment he wanted, and was able to leave jail. (Archuleta Dep. 19:18-22.)

When confronted at his deposition with the fact that he lied under oath, Archuleta admitted that he did so:

> Q: So it appears that the oath doesn't mean anything to you.
>
> A. At the time it didn't. Okay. At the time I was saving my butt.

(*Id.* 73:9-13.)

In contrast to Archuleta's strong incentive to lie at trial, Archuleta had no comparable incentive to voluntarily place a phone call to LeBere's trial attorney a few months after LeBere was sentenced, and to recant his testimony. At his deposition, Archuleta testified that he called LeBere's lawyer because "my conscience was eating at me" and felt that "I lied on someone and basically took their life away from them, or I feel I did." (Archuleta Dep. 23:15-21.) Archuleta also confirmed

that he had not been in touch with LeBere, LeBere's counsel, LeBere's family, or anyone acting on LeBere's behalf when he called LeBere's attorney to recant. (*Id.* 22:4-23:5.)

For the last fifteen years, Archuleta has had no incentive—other than a clean conscience—to set the record straight. (*Id.* 29:4-21.) Discovery confirms that Archuleta lied at trial at the behest of Detective J.D. Walker, that Walker elicited and knew about Archuleta's perjury, and that Walker himself testified falsely about his interactions with Archuleta. The State's failure to disclose this information violated LeBere's constitutional rights under *Brady v. Maryland.*

B. Walker Testifies That He Knew Archuleta Was An Inveterate Liar

Walker's testimony at his deposition provides further support for LeBere's *Brady* claim. Walker knew, from his long history with Archuleta, that Archuleta was an inveterate liar. Based on this knowledge, when Walker found himself with insufficient evidence to solve Richards' murder, he knew that Archuleta would be amenable to and capable of providing perjured testimony against LeBere.

Detective Walker's relationship with Ronnie Archuleta began in the 1980s. (Walker Dep. 21:21-22:6.) By the time Walker was investigating the Richards murder in 1998, Walker and Archuleta were "on a first name basis." (*Id.* 24:13-15.) And by that time—October

of 1998—Walker regarded Archuleta as a "chronic liar." (*Id.* 27:11-22.)

Long before the investigation in 1998, Walker knew that Archuleta had a criminal record and a history of giving questionable information to police. (*Id.* 21:21-25:1.) Others in the Colorado Springs' law enforcement community agreed that Archuleta was a "chronic liar." Before LeBere's trial, Walker learned of a memorandum from a section of the police force that routinely dealt with informants, which warned that Archuleta should not be used as an informant because he lied so often. (*Id.* 58:18-63:8.) Local prosecutors also "already knew" Archuleta was a chronic liar at the time of LeBere's trial. (*Id.* 62:1823; 172:13-173:6.)

Walker also believed that prison officials arranged Archuleta's housing to maximize his opportunity to "snitch." For example, Walker noted that LeBere's prison pod housed "four homicide suspects . . . and one guy [Archuleta] that had property crime convictions." (*Id.* 25:22-26:12.) Unsurprisingly, Archuleta was placed in the pod as "an informant on a high profile case"—or potentially as an informant on "all of [the four homicide suspects in the pod]." (*Id.* 26:5-12.) The other inmates also knew that speaking to Archuleta was a risky proposition. Archuleta told Walker that one of the other inmates in the pod had warned LeBere that Archuleta was "a snitch." (*Id.* 57:22-58:11.)

Although Walker allowed Archuleta to take the stand and testify to a confession that Walker knew was false, at Walker's deposition he admitted that several

aspects of the supposed confession seemed untrue. Walker testified that, even in that first meeting with Archuleta concerning the Richards investigation, he believed that some of the "confession" may not have come from LeBere. For example, the coarse language Archuleta ascribed to LeBere probably "came from Ronnie Archuleta, not Kent LeBere." (*Id.* 39:39:3-8.) Walker found it likely that those comments were from Archuleta rather than LeBere because, among other reasons, Archuleta "ad libs a lot of things and you have to continue to test him." (*Id.* 43:11-24.)

But Archuleta's alleged story of a confession from LeBere never passed any such tests. The aspects of Archuleta's story that Walker now seizes on as reasons to credit the alleged confession—and thereby discredit Archuleta's recantation—do not hold up. Contrary to Walker's contention, none of the aspects of the confession Walker cites contain information that could only have come from LeBere himself. Instead, the information identified was either readily available to Archuleta from sources other than LeBere, or is information that to this day Walker does not know is true. Walker seizes on this information to defend Archuleta's trial testimony against LeBere, even though the information plainly does not support the credibility of Archuleta's testimony. This demonstrates Walker's own lack of credibility.

For example, Walker claimed to be impressed that Archuleta knew about LeBere's phoenix tattoo, but the tattoo was on LeBere's shoulder, and LeBere and Archuleta were housed in the same jailhouse pod. (*Id.*

40:13-22.) Walker did nothing to rule out the distinct possibility that Archuleta could have simply seen LeBere's tattoo. (*Id.* 40:13-22, 48:9-49:3.) Additionally, Walker testified he believed Archuleta because Archuleta said LeBere had been arrested after a police officer came to his door with a composite sketch depicting LeBere. (*Id.* 42:10-18.) But Walker later admitted that the composite sketch story was in the media, and that Archuleta told Walker that he had seen the news related to the LeBere case. (*Id.* 49:4-18.) Finally, Walker testified that Archuleta told him that LeBere had confessed to sexually assaulting Richards at the amphitheater in Cheyenne Canyon, but the police "didn't have anything that [suggested] she was sexually assaulted and we didn't have any evidence that she wasn't killed right there in the carwash." (*Id.* 43:2-44:11.) Moreover, Walker admits that he had then—and has now—reason to doubt the information came from LeBere because LeBere was not familiar with the area. (*Id.* 44:23-45:5.)

Walker's story that Archuleta testified about a real confession is further undermined by the fact that, although Walker was an experienced detective, he admits that he did nothing to test the assertions from Archuleta that Walker says he found questionable. This makes perfect sense. Why would Walker test the assertions of a story he knew to be false? For example, having heard Archuleta's allegations about Cheyenne Canyon, Walker says that he did *nothing* to try to corroborate those alleged critical facts. (*Id.* 43:2-44:11, 44:18-45:5, 50:3-8.) In fact, the only information in the

record suggests that LeBere would not have taken Richards to Cheyenne Canyon[4] and that Walker thought it unlikely LeBere would have even known about the canyon. (*Id.* 44:23-45:5.) And the result is that, even today, unsurprisingly given the circumstances under which Archuleta's testimony was manufactured, Walker admits he cannot corroborate the story that Richards was murdered in Cheyenne Canyon or that there was any sexual assault. (*Id.* 53:6-15.)

Walker suggests that he was "testing" Archuleta's knowledge when he asked whether he knew the position of Richards' body in the van. (*Id.* 43:11-24.) But if that is the case, then Archuleta failed the test. Archuleta "didn't bite on it" and instead "just passed it over," saying "I don't know the position of the body." (*Id.* 43:11-24.) Even though he failed the test, the State still put Archuleta on the stand at LeBere's trial.

Despite all of the red flags concerning the alleged "confession" by LeBere, Walker admits that he fixated on LeBere and never investigated any other "bona fide" suspect in the Richards case. (*Id.* 88:10-12, 91:23-92:10.) Instead, Walker—knowing he had a liar who was willing, and had every incentive to lie—did everything he

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[4] The main entrance to the canyon would have been closed with an electric gate during the time of day when LeBere and Richards allegedly would have driven into the canyon according to the alleged "confession." *(See* Ex. 26, Investigative Report (noting that park ranger stated that gates close at 11:00 pm and open at 5:00 am during the relevant time period).) Moreover, Walker testified that an ex-girlfriend of LeBere's who was interviewed "did not indicate that they ever went to Cheyenne Canyon." (Walker Dep. 90:20-25.)

could to secure Archuleta's perjured testimony to obtain a conviction of Walker's chosen suspect, including personally intervening on Archuleta's behalf and arranging the deal that got Archuleta out of jail in exchange for his false testimony about LeBere. (*Id.* 46:16-47:21; 69:20-74:15.)

ARGUMENT

I. STANDARD OF REVIEW

A. This Court Reviews LeBere's Petition *De Novo*

LeBere's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). "Under AEDPA, the standard of review applicable to a particular claim depends upon how that claim was resolved by the state courts." *Milton v. Miller*, 744 F.3d 660, 668 (10th Cir. 2014). AEDPA provides for deferential review of claims that were adjudicated on the merits by a state court. *See Williams v. Taylor*, 529 U.S. 420, 429 (2000). But for claims—like LeBere's *Brady* claim—that were not decided on the merits by the state court, or where the state court "employed the wrong legal standard in deciding the merits of the federal issue," a federal court must review the claim *de novo. Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013); *Douglas v. Workman*, 560 F.3d 1156, 1170 (10th Cir. 2009); *Cummings v. Sirmons*, 506 F.3d 1211, 1221-22 (10th Cir. 2007). Here, the Tenth Circuit found that the Colorado courts did not decide LeBere's *Brady* claim on the merits or under the proper standard. *See*

LeBere v. Abbott, 732 F.3d 1224, 1233 n.12 (10th Cir. 2013). Accordingly, this Court reviews LeBere's habeas corpus petition *de novo.*

B. The Court Is Authorized To Make Credibility Determinations Based On The Record In Lieu Of Conducting An Evidentiary Hearing

Rule 7 of the Rules Governing Habeas Corpus Cases expressly allows "expansion of the record to include any appropriate materials that enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977) (holding that district courts may "employ a variety of measures in an effort to avoid the need for an evidentiary hearing" so long as the measures provide "careful consideration and plenary processing of [petitioner's claim] including full opportunity for presentation of the relevant facts").

Here, the record is complete and contains all of the evidence necessary for the Court to grant LeBere's petition. The record is so clear and the objective facts supporting the credibility of Archuleta's recantation—and fifteen subsequent years of affirming that recantation including a sworn affidavit and deposition testimony—are so strong, that LeBere does not believe an evidentiary hearing is necessary for the Court to resolve the issues, make credibility determinations, and grant his habeas petition. *See United States v. Jones*, 315 F.

App'x 714, 716 (10th Cir. 2009) ("In cases where the written record allows a district court judge to make credibility findings (and for us to evaluate such findings), no evidentiary hearing is necessary."); *United States v. Pearson*, 203 F.3d 1243, 1274-75 (10th Cir. 2000).

The evidence relevant to the issues before the Court is contained in the current record, which includes lengthy video depositions of the only witnesses that bear upon LeBere's *Brady* claim, at which both LeBere and the State were provided ample opportunity to examine the witnesses. Therefore, the Court has before it all of the resources necessary to make the types of factual and credibility determinations usually made at an evidentiary hearing, making such a proceeding unnecessary. *See United States v. Laymon*, 127 F.R.D. 534, 535 (D. Colo. 1989) (noting that video depositions allow the court, as trier of fact "to evaluate the witnesses' credibility"); *see also Davis v. Puritan-Bennett Corp.*, 923 F. Supp. 179, 180 (D. Kan. 1996) (noting that a factfinder can "assess credibility" from videotaped depositions).

Although LeBere believes that an evidentiary hearing is not necessary to grant his petition, should the Court disagree that the record is sufficient, LeBere has—at a minimum—satisfied the standard for obtaining an evidentiary hearing and should be allowed to present the evidence supporting his claim at such a hearing. *See, e.g.*, *Milton v. Miller*, 744 F.3d 660 (10th Cir. 2014); *Green v. Addison*, 500 F. App'x 712, 720-21

(10th Cir. 2012); *United States v. Velarde*, 485 F.3d 553 (10th Cir. 2007).

II. LEBERE'S HABEAS PETITION MUST BE GRANTED BECAUSE HE WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER *BRADY v. MARYLAND*

"Criminal convictions obtained by presentation of known false evidence or by suppression of exculpatory or impeaching evidence violate[] the due process guarantees of the Fourteenth Amendment." *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009); *see Brady v. Maryland*, 373 U.S. 83, 86 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972); *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). Accordingly, the Constitution's "fair trial guarantee," *United States v. Ruiz*, 536 U.S. 622, 628 (2002), and the "concept of ordered liberty" require the prosecution to timely turn over any information in the government's possession that is materially favorable to a criminal defendant. *Brady*, 373 U.S. at 87. The government also violates *Brady* when it engages in "deliberate deception of a court and jurors by the presentation of known false evidence," *Giglio*, 405 U.S. at 153, or allows false evidence, even if unsolicited, "to go uncorrected when it appears," *Napue*, 360 U.S. at 269; *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) (holding that *Brady* violations include situations where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury"). "*Brady*

and its progeny are thus grounded in notions of fundamental fairness and they embody a practical recognition of the imbalances inherent in our adversarial system of criminal justice." *Smith v. Secy of N.M. Dep't of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995). *Brady* also acknowledges 'that the prosecutor's role transcends that of an adversary' because the prosecutor, acting as the representative of the sovereign, has an obligation to ensure 'not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Bagley*, 473 U.S. at 675 n. 6).

A. Scope Of *Brady*

The State's duty to disclose under *Brady* encompasses all evidence favorable to an accused, including evidence that is useful in impeaching government witnesses. *See Giglio*, 405 U.S. at 154 ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." (internal quotation marks omitted)); *Douglas*, 560 F.3d at 117273. The government must turn over exculpatory or impeaching evidence even if the defense does not request it. *See Agurs*, 427 U.S. at 107; *United States v. Summers*, 414 F.3d 1287, 1304 (10th Cir. 2005).

To comply with *Brady,* "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf," including the police. *Stickler v. Greene*, 527 U.S. 263, 281 (1999); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Brady thus requires disclosure of evidence "known only to police investigators and not to the prosecutor." *Kyles*, 514 U.S. at 438; *see also United States v. Smith*, 534 F.3d 1211, 1221 (10th Cir. 2008) ("This duty to disclose applies not only to prosecutors, but also to police and other government investigators."); *Smith*, 50 F.3d at 824 ("[B]ecause investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure." (quotations omitted)).

To establish a *Brady* claim, "the defendant must prove by a preponderance of the evidence that: (1) the government suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material." *United States v. Garcia*, 793 F.3d 1194, 1205 (10th Cir. 2015). Here, the State of Colorado violated *Brady* when it failed to disclose Walker's tampering with Archuleta to manufacture a "confession" by LeBere and, as a result, the State was able to rely on Archuleta's and Walker's perjured testimony at trial.

B. The State Failed To Disclose Evidence Favorable To LeBere And Relied On Periured Testimony To Obtain A Conviction

Evidence is "favorable" to a defendant if it "may make the difference between conviction and acquittal" had it been "disclosed and used effectively." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Here, the

evidence shows that the State suppressed evidence favorable to LeBere. Specifically:

- While J.D. Walker was investigating the murder of Linda Richards, he paid several visits to known snitch Ronnie Archuleta in an attempt to secure a "confession" by LeBere to the murder of Linda Richards. (Ex. 9 at 32-33; Walker Dep. 27:23-25, 28:21-25, 63:10-16; Archuleta Dep. 15:9-20.)
- J.D. Walker did more than simply interview Archuleta during these visits. Walker "indicated he needed a confession from Kent LeBere," and "hand delivered" police reports for Archuleta to read and review. (Daniel Aff. ¶ 7; Archuleta Aff. ¶ 8; *see also* Archuleta Dep. 18:2-10)
- The reports that Walker gave to Archuleta "formed the basis for [Archuleta's] knowledge about the charges against Mr. LeBere," and for LeBere's supposed "confession," which Archuleta later invented. (Daniel Aff. ¶ 7; Archuleta Aff. ¶ 8; Archuleta Dep. 20:1-18, 21:9-19.)
- LeBere never made any confession to Archuleta. (Archuleta Aff. ¶¶ 6, 9, 10.) Rather, the details of this supposed confession came from the information that J.D. Walker fed to Archuleta. (*Id.* ¶ 8; Archuleta Dep. 46:5-8, 47:14-16.)
- Archuleta was eager to help Walker get his confession, because he knew that Walker would help him get favorable treatment from

the District Attorney. (Archuleta Aff. ¶ 7; Archuleta Dep. 18:16-19:4.) In the end, Archuleta did receive such favorable treatment. (Ex. 9 at 9-18, 40.)

- Walker knew that LeBere never confessed to murdering Richards. (Archuleta Aff. ¶ 9.) He knew that Archuleta's testimony about the confession was false, because Archuleta created the "confession" with information that Walker supplied. (*Id*.; Daniels Aff. ¶ 10).

The State did not disclose any of these facts to LeBere's trial lawyers. That failure to disclose allowed the State to commit further *Brady* violations by presenting perjured testimony from Archuleta regarding a confession that LeBere never made, and from Walker who lied to the jury about the true circumstances surrounding the procurement of Archuleta's testimony.

Walker, of course, disputes these facts. But the record shows that Archuleta's testimony about these events is more credible than Walker's flat-out denials that he did anything improper.

Archuleta's recanted testimony—which has remained consistent for the past fifteen years—makes far more sense than his trial testimony trial regarding LeBere's "confession." To assess the credibility of a post-trial recantation, courts look especially to any objective facts or evidence that support the finding that the original testimony was perjured. *See Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir. 2003). "In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what

it is about that recantation that warrants a conclusion that it is not credible evidence." *Dobbert v. Wainwright*, 468 U.S. 1231, 1235-36 (1984).

Here, the objective evidence shows that Archuleta's recantation, and not his trial testimony, is the true version of events. Nothing at trial corroborated Archuleta's testimony regarding LeBere's alleged confession. *Cf. Case v. Hatch*, 731 F.3d 1015, 1044 (10th Cir. 2013) (finding recantation not credible because the testimony given at trial corroborated many circumstances of the murder and was "highly similar" to testimony of other witnesses, including a pathologist). At trial, Archuleta provided the only evidence of LeBere's supposed motive for committing the murder—that LeBere raped Richards and then killed her to prevent her from identifying him based on his tattoo. (*See* Walker Dep. 53:20-54:10.) Archuleta also provided the only evidence at trial about where the crime supposedly took place. (*Id.* 44:18-20.) There was no other evidence supporting these elements, and indeed, as explained more fully above, it is unlikely that Archuleta's testimony about the location of the crime could have been true. (*See supra* Section III.B.) The balance of Archuleta's testimony included information that could have been gleaned either from police files or the newspaper. Under these circumstances, it is more plausible that Archuleta obtained these details from Walker, police files, and newspapers rather than learning of them through a detailed "confession" that LeBere gave to Archuleta. The "confession" story is even less plausible when considered against the fact that LeBere did not

even know Archuleta, and that immediately before LeBere's supposed "confession" to Archuleta, LeBere was warned by other inmates not to talk with Archuleta because he was a "snitch."

More important, the circumstances surrounding Archuleta's trial testimony and his recantation show that his recantation is substantially more credible. In February 2000, Archuleta, unprompted, contacted LeBere's counsel and recanted. (Archuleta Dep. 22:420.) He explained that Walker gave him access to the police files regarding Richards' death, and that Walker told him what to say in his trial testimony. There is no evidence that Archuleta's recantation was coerced, and he had absolutely nothing to gain by admitting to perjury. *Cf. United States v. Miller*, 987 F.2d 1462, 1467 (10th Cir. 1993) (finding recanted testimony not credible because there was evidence the "recantation was coerced"); *United States v. Ford*, 931 F.2d 63 (10th Cir. 1991) (same). For more than fifteen years, Archuleta's story has remained the same: he lied at LeBere's trial based on information provided by Walker.

If any testimony was coerced, the record shows that it was Archuleta's trial testimony about a "confession." As Archuleta recently testified at his deposition, his motive for testifying falsely at LeBere's trial was obvious—he wished to avoid more jail time Without the plea deal that Walker (improperly) offered, Archuleta faced a habitual criminal charge and likely jail time But "in return for me testifying against Mr. LeBere, I would be allowed to . . . pay . . . restitution, leave jail, and . . . I'd get to go home." (Archuleta Dep.

18:16-19:4.) In fact, Archuleta admits that he lied at LeBere's trial because "I was saving my butt." (*Id.* 73:9-13.) Indeed, Archuleta accepted Walker's unauthorized deal, and in exchange for his testimony against LeBere, Archuleta got out of jail.

Archuleta clearly had tremendous motive to lie at trial. But he had no such incentive to recant this testimony shortly after trial, or to maintain the truth multiple times, in sworn testimony, over the past 15 years. And today, Ronnie Archuleta has no incentive to do anything other than tell the truth about his and Walker's misconduct.

In contrast, Walker has a powerful motive to lie right now. Walker's misconduct in LeBere's case would subject him to serious consequences. Furthermore, Walker's own testimony tends to corroborate Archuleta's deposition testimony. For example, Walker testified that it would be helpful if Archuleta could supply certain information to obtain a conviction of LeBere. (Walker Dep. 43:7-10.) This supports Archuleta's version of events—that Walker dealt with Archuleta because Walker had already settled on LeBere as a suspect, and needed some evidence to get a conviction. Walker's conduct in this case is also consistent with Walker's suppression of evidence in another criminal case and other improprieties in conducting investigations. (*See supra* Section I.B.)

The facts surrounding Walker's interactions with Archuleta constitute favorable, exculpatory evidence that the State was required to disclose. When it

became clear that LeBere would not talk to Archuleta about the charges against him, Walker provided Archuleta with information about LeBere's case and encouraged Archuleta to invent LeBere's supposed confession. Walker knew that LeBere never confessed, and that Archuleta's testimony was based on information Walker himself had provided to Archuleta, but the State never disclosed those facts to LeBere. These are favorable facts that, under *Brady*, should have been disclosed.

As a result of this nondisclosure—which in and of itself is a *Brady* violation that entitles LeBere to habeas relief—the State was able to present and rely upon perjured testimony from Walker and Archuleta to obtain a conviction. In doing so, the State committed another *Brady* violation. At trial, Archuleta lied to the jury when he testified about LeBere's supposed "confession." This testimony was false, because LeBere never confessed and Archuleta concocted this testimony from police reports provided to him by Walker, publicly available information, and unverified facts that he simply made up. Walker also lied when he testified about his interactions with Archuleta, and Walker told the jury that Archuleta said LeBere had confessed. Walker knew that LeBere had never confessed, and that Archuleta's testimony was false.

The State's failure to disclose clearly favorable evidence—coupled with its presentation of perjured testimony from Archuleta and Walker that was critical to the State's case—violated *Brady* and deprived LeBere of his constitutional right to due process.

C. The Suppressed Evidence Was Material

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (internal quotation marks omitted). A "reasonable probability" means "the likelihood of a different result is great enough to undermine confidence in the outcome." *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014) (internal quotation marks omitted). Put another way, a court should find a *Brady* violation if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435; *Engberg v. Wyoming*, 265 F.3d 1109, 1118 (10th Cir. 2001).[5]

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[5] A slightly different materiality standard applies to the prosecution's knowing presentation of perjured testimony. Under that standard, false testimony is material "unless failure to disclose [the perjury] would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680. Unlike a traditional *Brady* claim that can rest upon unintentional conduct by the State, *Brady* claims based upon knowing use of perjured testimony require evidence that the State knew or should have known that the testimony at issue was false. *See United States v. Agurs*, 427 U.S. 97, 103 (1986); *United States v. Garcia*, 793 F.3d 1194, 1207-08 (10th Cir. 2015).

LeBere concedes that if he must show actual knowledge by prosecutors to meet the "harmless beyond a reasonable doubt" materiality standard, he does not have that evidence. But case law from the Tenth Circuit and other circuits indicate that, as with any other *Brady* claim, knowledge of police investigators can be imputed to the prosecuting attorneys for purposes of establishing a *Brady* claim based on knowing use of perjured testimony. *See, e.g.*, *United States v. Rangel*, 519 F.3d 1258, 1265 (10th Cir. 2008) (acknowledging that for purposes of knowledge

in a perjured testimony case "the case agent is the alter ego of the government and of the prosecutor" (citing *United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979); *Mesarosh v. United States*, 352 U.S. 1, 9 (1956)); *see also Guzman v. Secy, Dep't of Corr.*, 663 F.3d 1336, 1349 (11th Cir. 2011) (holding detective's knowledge of perjured testimony "was imputed to the prosecutor"); *Mastracchio v. Vose*, 274 F.3d 590, 600-01 (1st Cir. 2001) (holding that "the state supreme court's refusal to impute the police officers' knowledge [of false evidence] to the prosecutor runs contrary to established Supreme Court case law."); *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998) ("[K]nowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution.").

Here, Walker, and by imputation, the prosecution, clearly knew that Archuleta's and Walker's testimony regarding LeBere's confession and Walker's interactions with Archuleta was perjured. Archuleta testified credibly in his affidavit, and more than nine years later in his deposition, that Archuleta clearly told Walker that LeBere would not speak with Archuleta about LeBere's case. (Archuleta Dep. 17:6-15; 21:23-22:3.) Accordingly, Walker provided Archuleta with the police reports about the incident and the case file so that Archuleta could learn information he needed to testify against LeBere. (*See id.* 16:19-17:1, 18:2-10.) But even if Walker had not been directly informed by Archuleta that Archuleta's testimony about LeBere's confession was false, the record amply demonstrates that Walker knew, or should have known, that Archuleta was lying. The record is undisputed that Walker knew that Archuleta was a "chronic liar," including knowing about an internal police memorandum warning that Archuleta should not be used as an informant. (Walker Dep. 27:9-22, 58:18-63:8.) And there was objective evidence to support a conclusion that Archuleta was lying: Walker knew that when LeBere arrived at the jail another inmate had warned LeBere not to talk to Archuleta because Archuleta was a "snitch." (*Id.* 57:22-58:4.) Furthermore, despite the overwhelming evidence available to Walker and the prosecuting attorneys that Archuleta was dishonest and could not be trusted, neither Walker nor the prosecution did any independent investigation of Archuleta's story. Walker has consistently stated that he was aware of the ample reasons not to trust Archuleta and that he, Walker, had

Detective Walker's tampering with Archuleta, their manufacturing a "confession" that LeBere never actually made, and their presentation of perjured testimony regarding that confession was material information that—had the jury known about it—creates a reasonable probability that the result of trial would have been different.

The State of Colorado's case against Kent LeBere—without Ronnie Archuleta's testimony—was quite thin. The State presented no DNA or other physical evidence linking LeBere to the crime, and the only "eyewitness" to the scene of the crime could not identify LeBere from either a police line-up or surveillance video. LeBere also presented considerable evidence pointing to somebody else: the victim's violent, jealous fiancée who had a fight with her the night she died. The dearth of other evidence supporting LeBere's conviction made Archuleta—and his testimony about LeBere's so-called "confession"—critical to the State's

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implemented safeguard procedures to ensure the veracity of Archuleta's story about a "confession." But in reality, the prosecution did nothing to check Archuleta's story, even the easiest parts to objectively verify. (*See supra* Section III.B.) *See Morris v. Ylst*, 447 F.3d 735, 743 (9th Cir. 2006) ("The prosecution was obliged to, but did not, investigate the possibility that a government witness had perjured himself."). This utter failure to investigate, coupled with Walker's knowledge of his dealings and concerns with Archuleta, are more than sufficient to demonstrate that the prosecution knew or should have known that both Archuleta and Walker committed perjury at LeBere's trial.

In any event, regardless of which materiality standard the Court applies, LeBere satisfies either standard, as properly construed.

case. Therefore, evidence that he manufactured that confession at the behest of the police, using information that the police provided, would be highly material. *See Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999) (finding suppression of evidence that police officers planted fiber and hair evidence would be material where the "existence and cross-transference of the fiber and hair evidence was crucial to the State's case").

The Tenth Circuit recognized that Archuleta offered the only direct evidence linking LeBere to the murder. *LeBere*, 732 F.3d at 1226. Under these circumstances, where the State's conviction hinges on the credibility of a key witness, courts in the Tenth Circuit routinely find that exclusion of evidence that could be used to substantively attack or impeach that key witness is material under *Brady*. *See, e.g.*, *United States v. Cooper*, 654 F.3d 1104, 1123 (10th Cir. 2011); *United States v. Torres*, 569 F.3d 1277, 1282-82 (10th Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156, 1174 (10th Cir. 2009) (concluding that district court correctly granted habeas petition based on *Brady* where witness recanted trial testimony that: had "played the indispensable role" of identifying the defendants; that provided "the only direct evidence linking [defendants] to the murder;" and where if "the jury discounted [the] testimony as not credible, it almost certainly would not have had sufficient evidence on which to convict").

The State has previously argued that Archuleta's trial testimony about the "confession" could not have been material because the jury heard evidence and cross-examination about Archuleta's reputation for

untruthfulness. (*See, e.g.*, Dkt. No 70 at 54-59; Dkt. No. 95 at 30-31.) This is beside the point. The Tenth Circuit has found, in a very similar case, that where the government's case hinged on the credibility of a confidential informant, the government violated *Brady* when it failed to disclose all evidence that could be used as impeachment. *See Torres*, 569 F.3d at 1284. In *Torres*, for example, the government argued that it was not required to disclose evidence that the confidential informant had misidentified the defendant to law enforcement, because the evidence was cumulative of another misidentification by the same confidential informant. *Id.* at 1284. The Tenth Circuit rejected the government's position. Instead, the Tenth Circuit concluded that this additional evidence could have allowed defense counsel to show that the informant's first misidentification was more than a "one-time slip-of-the-tongue." *Id.*

Here, the State may have disclosed evidence about prior instances when Archuleta was untruthful, but that does not excuse the State from its duty to disclose that Archuleta's testimony in this case was a lie manufactured by the State's own lead detective. Indeed, disclosing this crucial evidence would have undermined the credibility of the State's entire investigation and would have been a unique tool for impeaching Archuleta. *See id.* ("Merely because other impeachment evidence was presented does not mean that additional impeachment evidence is cumulative; rather, this is a case where the agents' identification was weak at best and no physical evidence exists to link the defendant

to the alleged crime. The government's near-total reliance on the testimony of the [confidential informant] to establish that [defendant was linked to the crime] requires a new trial.").

The *Brady* evidence regarding Ronnie Archuleta goes far beyond his general character for truthfulness. Rather, it goes directly to the credibility of the central players in LeBere's conviction: Detective J.D. Walker and Archuleta.

It is undisputed that the jury heard no evidence that lead investigator Walker offered Archuleta favorable treatment if Archuleta fabricated a "confession" that LeBere never gave. It is undisputed that the jury heard no evidence that Walker gave Archuleta police reports and other information that Archuleta used to manufacture his trial testimony about that so-called "confession." And it is undisputed that the jury heard no evidence that LeBere refused to speak to Archuleta about his case and that Archuleta's and Walker's testimony to the contrary was perjured.

Furthermore, Archuleta's perjured trial testimony was not some run-of-the-mill falsehood about a tangential aspect of the crime. Archuleta's trial testimony went to the heart of LeBere's conviction. Archuleta presented the only direct evidence of LeBere's involvement in the crime—and his evidence was dramatic, stating that LeBere had actually confessed to the murder. As the Supreme Court has recognized, "[a] confession is like **no other evidence**" and "is probably the most probative and damaging evidence that can be

admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (emphasis added). Because of their unique qualities, "confessions have profound impact on the jury." *Id.*; *see also United States v. Perdue*, 8 F.3d 1455, 1469 (10th Cir. 1993) (reversing conviction where confessions admitted into evidence were the only direct evidence of defendant's involvement in the crime). At LeBere's trial, the State itself emphasized the importance of Archuleta's testimony; in the prosecution's closing argument, the prosecutor frequently referenced the confession, recognizing that it was an important cornerstone of the State's case. (Ex. 27, 08/12/1999 Trial Tr.)

The evidence at the heart of LeBere's *Brady* claim shows police misconduct and suborning perjury—before LeBere's trial—of the only witness who provided a direct link between LeBere and the crime. Walker's knowledge of those exculpatory facts are imputed to the prosecution. *Kyles*, 514 U.S. at 438. If the State had complied with *Brady* and informed LeBere's counsel about these facts, the jury would have seen Walker cross-examined about his feeding police reports to Archuleta. The jury would have seen Archuleta cross-examined about how he really got the information in his testimony, and how Walker told him to turn that information into a false "confession" by LeBere. Or, the State would have decided not to put Archuleta and Walker on the witness stand, thus preventing the false "confession" from ever being presented to the jury.

Had the jury heard this true evidence, there is surely more than a "reasonable probability" that the

result of LeBere's trial would have been different. *Kyles*, 514 U.S. at 433. The evidence about Walker's misconduct and the resulting perjury by Archuleta and Walker is plainly material.

CONCLUSION

By suppressing evidence that profoundly challenges the credibility of the detective who led the investigation into Kent LeBere, and the credibility of his only direct accuser, who falsely testified about a confession that never happened, the State of Colorado violated LeBere's right to due process of law as guaranteed by the United States Constitution. Because J.D. Walker and Ronnie Archuleta were able to testify against LeBere, unchallenged by information that the State knew but failed to share with LeBere's lawyers as required by *Brady*, LeBere's trial was constitutionally infirm and fatally flawed.

Kent LeBere respectfully requests that the Court grant his Amended Petition for a Writ of Habeas Corpus, and order the State of Colorado to be given 180 days from the date of the Court's order to commence a new trial. *See, e.g.*, *Powell v. Mullin*, Civ. No. 00-1859, 2006 WL 249632, at *12 (W.D. Okla. Jan. 31, 2006).

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Respectfully submitted,

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