THE TRUTH SHOULD SET YOU FREE: THE CASE FOR REMOVING STATE KNOWLEDGE REQUIREMENTS FROM FALSE TESTIMONY STANDARDS

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False testimony claims are an increasingly popular vehicle in a handful of states through which petitioners can challenge unconstitutional criminal convictions. Successful false testimony claims grant petitioners access to remedies guaranteed by the Due Process Clause and overturn offending convictions, giving individuals access to new trials or similar relief. But like many post-conviction standards, false testimony is evaluated differently from state to state, producing disparate results. While every state's standard requires that the testimony used at trial be proven both false and material to the petitioner's conviction, states diverge as to whether petitioners must show that a state actor—usually prosecutors or police—knew when introducing that testimony that it was false. Most state courts require such evidence, known as a state knowledge element. But not all states demand proof of knowledge. Some have removed the knowledge prong from their false testimony standards, recognizing that a knowledge element is superfluous to a determination of whether lies were used to convict and incarcerate a defendant. These states understand due process to be violated when petitioners demonstrate that their convictions were based on material lies, not just when petitioners can find evidence proving police or prosecutors knew about those lies. The result of such divergence is that petitioners in some states receive relief for claims that are barred in others—including claims in which courts openly acknowledge that false, material testimony was used.

This Note argues that state knowledge requirements should be removed from state-level post-conviction false testimony standards because they are constitutionally unnecessary and violate the Due Process Clause's fundamental fairness principle. First, this Note describes the three broad types of state knowledge

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standards employed by state courts: actual knowledge requirements, constructive knowledge requirements, or no knowledge requirements. Second, it examines the Supreme Court's line of false evidence and false testimony cases and asserts that not only do these cases have no knowledge requirement—a common misconception used to justify state knowledge standards—but the Court's reasoning suggests that a standard without knowledge would support their understanding of false testimony. Third, it examines the institutional factors that make state knowledge so difficult to prove, including the incentive structures of law enforcement and the nearly impossible hoops petitioners must jump through to obtain evidence that could prove knowledge. It concludes by proposing that states eliminate their knowledge standards by either reexamining Supreme Court jurisprudence or situating this more expansive right to due process in state constitutions.

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INTRODUCTION

Robin Lee Archer was sentenced to death in 1993 for first-degree murder.[1] The sole evidentiary basis for his conviction was testimony from the admitted perpetrator James Patrick Bonifay, who testified that Archer masterminded a murder-robbery as a revenge plot against the manager who fired him.[2] Years later, Bonifay recanted this testimony in two post-conviction evidentiary hearings, disavowing his inculpation of Archer in the murder and admitting that Archer only helped him plan a robbery.[3] Pursuant to this twice-disavowed testimony, Archer filed a writ of habeas corpus to challenge his conviction, contending that Bonifay's recantation proved that false testimony—statements offered under oath that are untrue or misleading and material to a conviction in violation of the Due Process Clause of the Fourteenth Amendment—was given at his trial.[4] According to the Florida Supreme Court's own determination, Archer

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1 Archer v. State, 613 So. 2d 446, 447 (Fla. 1993). Archer was convicted in a Florida state court of first-degree murder, armed robbery, and grand theft in 1991, though he was not accused of being physically present for the commission of any crime. Archer v. State, 934 So. 2d 1187, 1191 (Fla. 2006).

2 *Archer*, 934 So. 2d at 1192. The State argued that Archer convinced Bonifay, his seventeen-year-old cousin, to kill the auto shop manager Archer supposedly blamed for terminating his employment almost a year earlier. *Id.* Bonifay, who confessed to carrying out the murder-robbery with a group of friends, testified that Archer gave him a gun, instructed Bonifay to target an employee, and provided inside information about the shop so Bonifay could stage a robbery to cover up the murder. *Id.*

3 *Id.* at 1193. Bonifay first recanted the parts of his confession implicating Archer in his own post-conviction evidentiary hearing. *Id.* Bonifay's articulated reason for doing so was that he was tired of lying, that he no longer wished "to have the blood of another man on his hands," and that he only implicated Archer in the murder in an attempt to avoid receiving the death penalty himself. *Id.* at 1193–94. Bonifay again recanted the parts of his confession related to Archer's alleged role in the murder at Archer's post-conviction evidentiary hearing. *Id.*

4 *See id.* at 1191–93, 1199. Archer made two claims in this writ—false testimony and newly discovered evidence—in relation to Bonifay's recanted implication of Archer in the murder. *Id.* at 1193, 1199. Archer convinced the Florida Supreme Court that Bonifay's recanted testimony was newly discovered evidence but could not meet Florida's high bar for a newly discovered evidence remedy. *Id.* at 1195, 1198–99. In Florida, "newly discovered evidence [claims] must be of such a nature that it would probably produce an acquittal on retrial." *Id.* at 1193 (citing Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). While the court in *Archer* recognized that Bonifay's recanted testimony constituted newly discovered evidence, it deferred to the lower court's ruling that the recanted testimony was not credible. *Archer*, 934 So. 2d at 1195, 1198. However, the fact that Bonifay's recanted confession was not credible newly discovered evidence does not preclude it from being false testimony; false testimony requires proof that a witness lied at trial, not that their subsequent iteration of events is credible. *See id.* at 1199–201; *see, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (holding that false testimony constitutes a due process violation); Alcorta v. Texas, 355 U.S. 28, 31 (1957) (granting a claim based on the prosecution's failure to correct misleading, though not plainly false, testimony). *See generally* 2 D. MARK ELLISTON & TERRENCE W. KIRK, TEXAS PRACTICE GUIDE: CRIMINAL PRACTICE & PROCEDURE § 19:17 (2024).

clearly met two of the requirements for a false testimony claim: Bonifay's testimony was both (1) false and (2) material.[5] The court found that Bonifay continuously lied under oath, and his testimony was clearly material to Archer's conviction, as it linked Archer to the murder.[6] In five states and four federal circuits, this likely would have met the standard to vacate Archer's death sentence, entitling him to a new trial.[7]

But Archer could not prevail on a false testimony claim in Florida because courts in that state, like those in forty-four others, require petitioners to prove a third element to succeed on false testimony claims: that a state actor knew the testimony was false.[8] Archer's claim for knowledge appeared strong: the prosecutor who tried his case testified at an evidentiary hearing that he did not believe Bonifay's testimony at trial and that he was unsurprised Bonifay admitted to lying.[9] Yet, according to the Florida Supreme Court, this was not enough to deduce that the prosecutor knew or should have known Bonifay's testimony was false, so Archer's petition was denied.[10] Because Archer could not prove that the prosecutor—despite his admission to disbelieving his star witness—had "personal knowledge" or evidence that Bonifay's testimony was false at the time of Archer's trial, his conviction could not be overturned on false testimony grounds in Florida state court.[11] It did not matter that Archer's conviction was based on unreliable testimony recanted under oath; because he could not prove state knowledge, appellate courts dismissed

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5 *See Archer*, 934 So. 2d at 1199–201.

6 *See id.* at 1201.

7 The Second, Third, Ninth, and D.C. Circuits have precedent recognizing federal claims involving the unknowing use of false testimony. *See* Sanders v. Sullivan, 863 F.2d 218, 226 (2d Cir. 1988) (recognizing a due process violation for the State's unknowing use of false testimony); Lee v. Houtzdale SCI, 798 F.3d 159, 162 (3d Cir. 2015) (affirming relief where a forensic expert's unknowing use of false testimony undermined fundamental fairness); United States v. Young, 17 F.3d 1201, 1204 (9th Cir. 1994) (granting a new trial to the applicant on false testimony grounds regardless of "whether or not the prosecutor knew [an officer's] testimony was false," reasoning that "even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different'" (quoting United States v. Endicott, 869 F.2d 452, 455 (1989))); United States v. Williams, 233 F.3d 592, 593 (D.C. Cir. 2000) (citing a standard for evaluating false testimony that does not include a state knowledge prong).

8 *Archer*, 934 So. 2d at 1199–1201; *see infra* Part I. The state actor requirement generally includes the knowledge of the prosecutor, other state officials, such as police, or both. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (holding that knowledge held by the police is imputed to the prosecutor).

9 *Archer*, 934 So. 2d at 1199–200.

10 *Id.* at 1201.

11 *Id.* at 1199–201.

his false testimony claims.[12] In 2022, Archer died of natural causes in prison, still challenging his death sentence.[13]

Archer's case exemplifies the negative and illogical implications of requiring proof of state knowledge in false testimony standards. But this practice persists, despite the absence of a mandate from the Supreme Court for a state knowledge element and the unjust results that knowledge-inclusive standards produce. The Court recognized in *Mooney v. Holohan* that using false testimony to secure a conviction denies defendants due process in violation of the Fifth and Fourteenth Amendments.[14] The test courts should use to decide when false testimony triggers a due process violation, however, has never been decided.[15] Also left unresolved is the question of how claims should be adjudicated when a state actor does not know, or cannot be proven to know, false testimony was presented.[16] All state and federal courts agree that false testimony claims require petitioners to show the testimony was material and false to prove a due process violation.[17] They diverge as to whether a petitioner must also prove the State knew the testimony was false to be granted relief.[18] A majority of state courts require petitioners to prove state officials knew, or should have known, a witness's testimony was false to

12 *See id.*

13 *Inmate Release Information Detail*, FLA. DEP'T. CORR. (Jan. 30, 2022), https://fdc.myflorida.com/offenderSearch/detail.aspx?page=detail&dcnumber=216728&typesearch=ir [https://perma.cc/K3XG-PZNG]; *Robin Lee Archer Obituary*, ECHOVITA (Jan. 25, 2022), https://www.echovita.com/us/obituaries/fl/pensacola/robin-lee-archer-14122072 [https://perma.cc/T3RC-UA39].

14 294 U.S. 103, 112–13 (1935). The due process clauses of the Fifth and Fourteenth Amendments guarantee an individual's right to not be deprived of "life, liberty, or property, without due process of law" by both federal and state governments. U.S. CONST. amend. V; *id.* amend. XIV, § 1. Due process cannot be deemed to have been satisfied "through the pretense of a trial" that is "inconsistent with the rudimentary demands of justice." *Mooney*, 294 U.S. at 112.

15 State v. Lotter, 771 N.W.2d 551, 562 (Neb. 2009) (citing Jacobs v. Scott, 513 U.S. 1067 (1995) (Stevens, J., dissenting)).

16 *See* Evenstad v. Carlson, 470 F.3d 777, 783 (8th Cir. 2006) (noting that the Supreme Court has not determined whether the unknowing use of false testimony violates due process and acknowledging the circuit split this has created).

17 *See* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Violations*, 116 PA. ST. L. REV. 331 (2011). While every state has false and material prongs, each state defines these elements differently. Proving testimony false in Texas, for example, requires only that testimony was misleading, not "criminally perjurious." *Ex parte* Ghahremani, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). In contrast, Missouri requires false testimony to be perjurious. State v. Albanese, 9 S.W.3d 39, 50 (Mo. Ct. App. 1999). Materiality has a similarly elastic definition, conceived generally across state and federal courts as testimony that influenced the factfinder. *See* Noah Matthew Rich, *The Common-Law Roots of Materiality Under the False Claims Act*, 91 U. CIN. L. REV. 1052, 1058 (2023).

18 *See infra* Part I.

trigger due process protections.[19] But at least five states—Texas, Nevada, Kentucky, New Mexico, and Idaho—join the Second, Third, Ninth, and D.C. Circuit courts to recognize a due process violation when petitioners cannot prove the State knew false testimony was presented.[20]

The issue of false testimony in criminal proceedings is almost universally accepted by courts and legislatures alike, and calls from scholars and advocates to implement more expansive remedies abound.[21] Less attention has been paid to modifying the three-element post-conviction false testimony standard itself to widen pathways for relief.[22] Archer's rejected claim is not an anomaly; many courts will acknowledge that false testimony was given at trial, but refuse a remedy—either a new trial or a vacated conviction—because state knowledge was deemed unproven.[23] This leaves petitioners who received trials tainted by otherwise cognizable constitutional violations without recourse.[24]

This Note argues that state knowledge requirements for false testimony claims are constitutionally unnecessary and fundamentally unfair. It proposes that states should expand remedies for petitioners incarcerated because of false testimony by recognizing that Supreme Court jurisprudence does not require state knowledge and adjusting their standards accordingly. Part I identifies and distinguishes the three false testimony standards state courts currently use. Part II analyzes the

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19 *See, e.g.*, State v. Isham, No. 15976, 1997 WL 24794, at *2 (Ohio. Ct. App. Jan. 24, 1997); Williams v. State, 497 S.W.3d 395, 398 (Mo. Ct. App. 2016); *In re* FitzGerald, 2020 VT 14, ¶ 66, 229 A.3d 446; People v. Smith, 870 N.W.2d 299, 304 (Mich. 2015); People v. Brown, 660 N.E.2d 964, 967 (Ill. 1995); State v. Call, 508 S.E.2d 496, 511 (N.C. 1998); State *ex rel.* Franklin v. McBride, 701 S.E.2d 97, 100–02 (W. Va. 2009); Gates v. State, 555 S.E.2d 494, 496 (Ga. Ct. App. 2001); State v. Hebert, 82 P.3d 470, 487 (Kan. 2004); Howard v. State, 2003-DR-1881-SCT (¶¶ 98–99) (Miss. 2006), 945 So. 2d 326; Simpson v. Moore, 627 S.E.2d 701, 708 (S.C. 2006); Teleguz v. Commonwealth, 643 S.E.2d 708, 729 (Va. 2007); Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006); State v. Yates, 629 A.2d 807, 809 (N.H. 1993); Santana v. State, No. 2146, 2021 WL 142145, at *10 (Md. Ct. Spec. App. Jan. 15, 2021).

20 *See infra* Section I.C.

21 Andrew M. Pardieck, Vanessa A. Edkin & Lucian E. Dervan, *Bargained Justice: The Rise of False Testimony for False Pleas*, 44 FORDHAM INT'L L.J. 469, 519–20 (2020) (suggesting that high rates of false testimony demand a reformed plea bargaining structure); Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483, 502–05 (2020) (examining how post-conviction writs based in change in science statutes provide avenues for relief); Poulin, *supra* note 17, at 391–401 (arguing that federal courts should adopt more lenient knowledge and materiality standards); Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 78–80 (2017) (proposing pretrial reliability hearings for incentivized witnesses to reduce false testimony); Peter A. Joy, *Constructing Systemic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677, 677–83 (2010) (examining ideal safeguards against false testimony when incentivized informants testify).

22 *See* Poulin, *supra* note 17, at 334.

23 *See id.*

24 *See, e.g.*, Archer v. State, 934 So. 2d 1187, 1201 (Fla. 2006).

Supreme Court's false testimony and more stringent false evidence standards, identifies the absence of a knowledge requirement for false testimony claims, and examines how courts misapply false evidence precedent, which does have a knowledge requirement, to false testimony. Part III argues that the institutional and systemic factors that render knowledge nearly impossible for petitioners to prove violate due process's fundamental fairness requirement. It further addresses a defense of standards like knowledge elements—that the on-the-record admonishment state actors may receive when courts overturn convictions deters misconduct and promotes accountability—and argues that upholding a knowledge requirement to theoretically increase accountability actually helps sustain the misconduct it seeks to deter. Finally, Part IV proposes two paths states could pursue to remove knowledge requirements: following Texas by interpreting Supreme Court false testimony precedent to not mandate a knowledge requirement or emulating New Mexico by expanding due process protections under their respective state constitutions.

I. STATE KNOWLEDGE STANDARDS

State courts employ one of three types of false testimony knowledge requirements: an actual knowledge requirement ("Group A"), a constructive knowledge requirement ("Group B"), or no knowledge requirement ("Group C"). Groups A and B require petitioners to affirmatively prove a state official knew at trial that testimony was false.[25] Due process violations require action by a state official, and these courts read Supreme Court precedent to exclude all conduct other than state knowledge as the predicate state action.[26] States in Group C read the Supreme Court's false testimony cases more expansively, declining to demand proof of state knowledge and envisioning a more expansive view of state action.[27] These states adopt a knowledge-optional or unknowing

25 *See infra* Sections I.A–I.B.

26 *See Due Process*, CORNELL UNIV. L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process [https://perma.cc/7GDM-PQH6] ("Even when an individual is unmistakably acted against on individual grounds, there can be a question whether the state has 'deprive[d]' her of 'life, liberty or property.' The first thing to notice here is that there must be state action."). Courts demanding a knowledge standard explain that false testimony claims without state knowledge lack state action and therefore do not constitute due process violations. *See, e.g.*, People v. Brown, 660 N.E.2d 964 (Ill. 1995).

27 *See infra* Section I.C. Some states like Kentucky, however, apply different materiality standards to unknowing claims. *See, e.g.*, Commonwealth v. Spaulding, 991 S.W.2d 651, 657 n.1 (Ky. 1999).

standard in which a petitioner is not required to prove the State knew the testimony was false to succeed.[28]

While federal standards receive heightened attention, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 made state standards more consequential to the vast majority of petitioners.[29] AEDPA is best understood to acutely restrict petitioners' access to additional—and sometimes more generous—conviction review provided by federal courts.[30] False testimony claims are raised in post-conviction litigation, initially as part of a petitioner's state writ of habeas corpus.[31] Habeas petitions frequently raise both federal and state law claims, but federal courts are accessible to state prisoners only after state court remedies are exhausted.[32] The overwhelming majority of criminal defendants are tried in state courts, and AEDPA's constraints to federal review practically mean that federal courts may only consider whether a state court has so unreasonably applied clearly established Supreme Court precedent that no rational juror would agree.[33] This exceptionally high standard requires a state court to have issued a "basically irrational" ruling to entitle petitioners to federal review, a criterion claims almost never can meet with the restricted information made available to petitioners.[34] For the more than one million individuals incarcerated due

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28 *See infra* Section I.C.

29 Pub. L. No. 104-132, 110 Stat. 1214.

30 Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT (2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights [https://perma.cc/YYY4-DC4C] ("As a federal judge, I have observed a considerable number of cases where state courts overlooked clear constitutional violations . . . .").

31 *See* Gary A. Udashen, Writs of Habeas Corpus 17–18 (Jan. 2013) (unpublished manuscript), http://www.udashenanton.com/wp-content/uploads/2017/06/applications-for-writ-of-habeas-corpus-January-17-18-2013.pdf [https://perma.cc/N73P-TXL4]. In a few states—for example, New York—a separate statutory mechanism replaces state habeas for claims like false testimony. N.Y. CRIM. PROC. LAW § 440.10(1)(C) (McKinney 2022). Habeas petitions challenge the legality of confinement on procedural grounds like due process, rather than guilt or innocence. *See* David M. Maria, Lauren Oland & Ian M. Schwartz, *Habeas Relief for State Prisoners*, 88 GEO. L.J. 1649 (2000).

32 Maria et al., *supra* note 31, at 1659; 28 U.S.C. § 2254(b)(1).

33 CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 4 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/K7LL-N655] ("Approximately 95% of criminal defendants are charged in State courts."); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 960 (2012) ("Under AEDPA, a federal court may consider granting habeas relief to an individual in state custody under very limited circumstances.").

34 Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. DENV. CRIM. L. REV. 34, 36 (2015) ("First, the Court's definition of what law it has 'clearly established' is disconcertingly narrow, requiring that the Supreme Court confronted on a prior occasion, in which it had granted its notoriously parsimonious certiorari review on direct appeal, essentially the same set of facts presented by the habeas petitioner. Second, building on its increasing deference to any

to state criminal convictions, state standards are the foremost factors upon which their continued incarceration is justified or rejected.[35]

A. *Group A: Actual Knowledge Requirement*

Delaware and Vermont courts exemplify the most rigid knowledge standard, which requires petitioners to prove the State had actual knowledge that the testimony they presented or solicited was false.[36] This standard is construed strictly; even when the State has "every reason to believe" a witness will give false testimony at trial, legal knowledge cannot be claimed unless the petitioner can show the State definitively knew the testimony was false.[37] The Vermont Supreme Court derived its actual knowledge requirement from an apparent misinterpretation of *United States v. Agurs*,[38] stating that the "knew or should have known" standard *Agurs* acknowledged was actually the standard the Supreme Court sought to overturn.[39] The Vermont court's reasoning is more explicit than the Delaware Supreme Court's, which grounded its strict standard in the holding of *Napue v. Illinois* with little additional explanation.[40]

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determinations by state courts on the merits of the constitutional claims, the Court appears to require such a determination to be basically irrational to warrant federal relief—if *any* 'fairminded jurist' could arrive at the same conclusion, habeas is precluded.").

35 The Bureau of Justice Statistics recorded 1,047,008 sentenced prisoners in state prisons in 2021. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2021—STATISTICAL TABLES 6 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/EZA4-7G9P].

36 O'Neal v. State, 247 A.2d 207, 210 (Del. 1968); *In re* FitzGerald, 2020 VT 14, ¶¶ 71–73, 229 A.3d 446.

37 State v. Davis, 2010 VT 9, ¶ 15, 992 A.2d 302.

38 427 U.S. 97 (1976). In *Agurs*, the defendant unsuccessfully attempted to claim self-defense on a second-degree murder charge, which arose from the stabbing of a man she spent time in a motel room with. *Id.* at 98. That man's criminal record, evidencing a history of violent crimes, was not disclosed to the defendant after trial. *Id.* at 100–01. The Court held that a due process violation occurs when the State does not disclose evidence that it knew or should have known may be used by the defendant to create their defense. *See id.* at 103–04.

39 *In re FitzGerald*, 2020 VT 14, ¶ 69 (citing *Agurs*, 427 U.S. at 103).

40 360 U.S. 264, 269 (1959) (holding that the knowing use of false testimony is a due process violation). While not expressly renouncing "should have known" verbiage, the Delaware Supreme Court's rejection of a claim in which the prosecutor believed, but did not definitively know, his witness to be lying effectively bars claims that do not allege actual knowledge. State v. Jones, No. 9911016309, 2008 WL 4173816, at *15 (Del. Super. Ct. Sept. 3, 2008) (citing *O'Neal*, 247 A.2d at 210).

Unsurprisingly, neither Delaware nor Vermont has ever granted a false testimony claim in a post-conviction proceeding.[41]

B. *Group B: Constructive Knowledge Requirement*

The vast majority of states have adopted a false testimony standard with a state knowledge requirement that allows petitioners to prove constructive, rather than actual, knowledge of false testimony.[42] This expansion is typically attributed to the Supreme Court's rulings in *Napue v. Illinois* and *Giglio v. United States*.[43] Like Group A states, Group B state courts read Supreme Court precedent—particularly in *Giglio*[44] and *Mooney v. Holohan*[45]—to mandate a knowledge element, and see the consequent decisions of a handful of federal circuit courts as reinforcing

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41 *Vermont*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (select filter by state, choose "VT") [https://perma.cc/P845-KRKH] (showing exonerations in Vermont); *Delaware*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (select filter by state, choose "DE") [https://perma.cc/7YKW-SQDP] (showing exonerations in Delaware).

42 These states include New York (People v. Stern, 641 N.Y.S.2d 248 (App. Div. 1996)), California (People v. Gray, No. B282321, 2019 WL 6206257 (Cal. Ct. App. Nov. 21, 2019)), Illinois (People v. Cornille, 448 N.E.2d 857 (Ill. 1983)), Massachusetts (Commonwealth v. Ware, 128 N.E.3d 29 (Mass. 2019)), Pennsylvania (Commonwealth v. Romansky, 702 A.2d 1064 (Pa. Super. Ct. 1997)), Virginia (Fitzgerald v. Bass, 366 S.E.2d 615 (Va. Ct. App. 1988)), Connecticut (Adams v. Comm'r of Corr., 71 A.3d 512 (Conn. 2013)), Maryland (Watts v. State, No. 0098, 2017 WL 527698 (Md. Ct. Spec. App. Feb. 9, 2017)), Arizona (State v. Branch, No. 1 CA-CR 13-0130, 2014 WL 1515645 (Ariz. Ct. App. Apr. 17, 2014)), Ohio (State v. Kimble, No. 54154, 1988 WL 112405 (Ohio Ct. App. Sept. 22, 1988)), Minnesota (State v. Wilbur, No. C1-98-155, 1998 WL 372773 (Minn. Ct. App. July 7, 1998)), West Virginia (State *ex rel.* Franklin v. McBride, 701 S.E.2d 97 (W. Va. 2009)), Washington (State v. Flook, No. 34220-4-III, 2017 WL 2955539 (Wash. Ct. App. July 11, 2017)), Indiana (Deatrick v. State, 392 N.E.2d 498 (Ind. Ct. App. 1979)), Nebraska (State v. Galindo, 994 N.W.2d 562 (Neb. 2023)), Wyoming (Pearson v. State, 828 P.2d 663 (Wyo. 1992) (mem.)), Mississippi (Howard v. State, No. 2003-DR-1881-SCT (Miss. 2006), 945 So. 2d 326), and Michigan (People v. Lester, 591 N.W.2d 267 (Mich. Ct. App. 1998)). While Michigan did not explicitly include "should have known" in its explanation of its false testimony standard, courts appear to interpret this standard as allowing constructive knowledge. *See, e.g.*, People v. Hawkins, No. 262677, 2006 WL 2987563, at *4 (Mich. Ct. App. Oct. 19, 2006); People v. Reed, No. 327639, 2020 WL 746926, at *6–7 (Mich. Ct. App. Feb. 13, 2020).

43 Courts typically reference *Giglio* as mandating a knowledge requirement, and *Napue* as expanding that knowledge requirement to constructive knowledge—though not challenging the requirement overall. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Ohio, a Group B state, follows the Fifth Circuit's ruling in *Skipper v. Wainwright*, a case that claims *Giglio* requires the State to knowingly use false testimony. 598 F.2d 425, 427 (5th Cir. 1979). Later that year, in *United States v. Antone*, the Fifth Circuit used *Napue* to extend state knowledge to that which the prosecutor should have known was false. 603 F.2d 566, 569 (5th Cir. 1979).

44 *Giglio*, 405 U.S. 150.

45 294 U.S. 103 (1935).

this requirement.[46] None of these state courts treat *Napue*, *Agurs*, or their accompanying cases as granting minimum constitutional protections for due process claims; rather, these cases are interpreted to circumscribe how false testimony claims may be raised.

States in Group B justify their standards with direct citations to Supreme Court precedent or deference to federal circuit court decisions.[47] Most Group B states, as exemplified by Nebraska, do both.[48] The Nebraska Supreme Court cites to *Alcorta v. Texas*,[49] *Agurs*,[50] *Napue*,[51] and *Mooney*[52] as the sources of the prohibition against knowing false testimony being used at trial, but grounds its rejection of an unknowing standard in an amalgamation of other decisions.[53] The Nebraska Supreme Court combined Justice Stevens's dissent in *Jacobs v. Scott*—a false confession-based stay of execution petition in which Stevens acknowledged that the Supreme Court had not explicitly decided the issue of unknowing false testimony[54]—with the Fifth Circuit's argument for a knowledge requirement in *Luna v. Beto* as constitutional grounds to reject unknowing claims of false testimony.[55] Under this interpretation, the unknowing use of false testimony at trial is a mere "evidentiary mistake"[56] that does not impact a trial's "truth-seeking function," leaving the trial and conviction otherwise fundamentally fair.[57] While other states base their standards in different Supreme Court and circuit court false evidence cases, each rejects the notion that false testimony, without state knowledge, violates due process.[58]

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46 For example, Ohio's knowledge requirement in *State v. Kimble* is sourced from the rulings of the Fifth, Seventh, and Eleventh Circuits. No. 54154, 1988 WL 112405, at *5 (Ohio Ct. App. Sept. 22, 1988). Those courts cited *Giglio* and *Mooney* as the basis for their knowledge requirement. Moore v. Zant, 722 F.2d 640 (11th Cir. 1983); United States *ex rel.* Burnett v. Illinois, 619 F.2d 668 (7th Cir. 1980); *Skipper*, 598 F.2d 425.

47 *See* cases cited *supra* note 42.

48 State v. Lotter, 771 N.W.2d 551, 562 (Neb. 2009).

49 355 U.S. 28 (1957).

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

51 Napue v. Illinois, 360 U.S. 264 (1959).

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

53 *Lotter*, 771 N.W.2d at 562 n.41.

54 *Id.* at 562 & n.42 (citing Jacobs v. Scott, 513 U.S. 1067 (1995) (Stevens, J., dissenting)).

55 *Id.* at 562 & n.44 (citing Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968)).

56 *Luna*, 395 F.2d at 40 (Brown, C.J., concurring).

57 *Lotter*, 771 N.W.2d at 562.

58 *See* cases cited *supra* note 42.

C. *Group C: No Knowledge Requirement*

Five states—Kentucky,[59] New Mexico,[60] Texas,[61] Idaho,[62] and Nevada[63]—do not require petitioners to prove state knowledge to qualify for post-conviction relief on false testimony grounds.[64] These states interpret state knowledge to be optional or irrelevant,[65] and focus their concerns on the preservation of fundamental fairness in a trial rather than the specific state action depriving the petitioner of due process.[66]

The Kentucky and New Mexico Supreme Courts justify their knowledge-optional standards with the rationale of *Sanders v. Sullivan*, the seminal federal false testimony case from the Second Circuit.[67] The *Sanders* court rejected the premise that false testimony unknown to the State at trial does not implicate state action, viewing such a gratuitous restriction as a violation of the Fourteenth Amendment's requirement that "fundamental fairness essential to the very concept of justice" be maintained in criminal proceedings.[68] Echoing the Supreme Court's dissent in *Durley v. Mayo*, the *Sanders* court agreed that the State's lack of action to remedy a conviction after discovering that materially false testimony was used may serve as the requisite state action for a due process claim.[69] The *Sanders* court, its followers, and Group C courts generally represent a view of due process that centers the fundamental fairness requirement of due process claims over Group A and B courts' strict insistence upon recognizing only explicit acts at trial as qualifying state actions.[70]

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59 Commonwealth. v. Spaulding, 991 S.W.2d 651 (Ky. 1999).

60 Case v. Hatch, 2008-NMSC-024, 183 P.3d 905.

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

62 Bean v. State, 809 P.2d 506 (Idaho 1990).

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

64 Idaho, however, has a standard unique to the other four. Instead of a knowledge standard for state officials, Idaho requires convicted defendants to show they were "diligent in challenging the testimony, or did not know of its falsity until after the trial." *Bean*, 809 P.2d at 507. Later adopted by the Idaho Supreme Court, this standard does not consider knowledge on behalf of the prosecutor or other state actor as requisite to a state false testimony claim, but something that may, nebulously, have "serious constitutional implications" of its own. State v. Ellington, 253 P.3d 727, 750 (2011).

65 *Compare* Commonwealth v. Spaulding, 991 S.W.2d 651, 656–57 (Ky. 1999) (interpreting state knowledge as optional), *with Ex parte* Chabot, 300 S.W.3d 768, 771–72 (Tex. Crim. App. 2009) (interpreting state knowledge as irrelevant).

66 *See, e.g.*, *Spaulding*, 991 S.W.2d at 656; Case v. Hatch, 2008-NMSC-024, ¶ 11, 183 P.3d 905.

67 863 F.2d 218 (2d Cir. 1988); *Spaulding*, 991 S.W.2d at 656; *Hatch*, 2008-NMSC-024, ¶ 11, 183 P.3d 905.

68 *Id.* at 224 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

69 *Sanders*, 863 F.2d at 223–24 (citing Durley v. Mayo, 351 U.S. 277, 290–91 (1956) (Douglas, J., dissenting)); *see infra* Section II.B.

70 *See supra* Sections I.A–I.B.

Texas and Nevada courts reached a similar initial conclusion to the *Sanders* court, but their engagement with due process rationale guided those courts to determine that false testimony standards should be even more expansive. The Texas standard set forth in *Ex parte Chabot*,[71] based on a previous case, *Ex parte Carmona*,[72] removed *any* consideration of state knowledge from false testimony claims—not even permitting it to be optionally considered, as the *Sanders* court did.[73] This new standard was based on the *Carmona* court's conviction that there should be no differentiation between the State's knowing use of false testimony and the State allowing false testimony to go uncorrected, including after trial—a significant diversion from the vision endorsed by Groups A and B.[74] The assumption underlying this reading is that "unknowing" and "uncorrected" are legally equivalent, making both into valid mechanisms to meet the state action requirement.[75] The Nevada Supreme Court, in contrast, reached its similar conclusion by engaging in an expansive examination of Supreme Court precedent in its *Riley* decision.[76] That court distinguished the unknowing use of false testimony as factually different from the decisions passed down in *Pyle v. Kansas*,[77] *Alcorta v. Texas*,[78] *Miller v. Pate*,[79] *Napue*,[80] and *Giglio*.[81] This interpretation, like the Second Circuit's in *Sanders*, views state knowledge as a type of state action—but not the only state action—that may meet due process

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71 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

72 *Carmona*'s holding is best explained in its dissent, which agreed with the majority that due process relief was required in this case of unknowing false testimony:

> [J]ust as the prosecution has a duty to correct perjured testimony at trial when it comes to its attention thus establishing the requisite state action in that circumstance, the courts of this State should have a similar duty when a conviction based on perjured testimony comes to their attention with their failure to correct it also supplying the requisite state action.

Ex parte Carmona, 185 S.W.3d 492, 497–98 (Tex. Crim. App. 2006) (Hervey, J., dissenting) (footnote omitted).

73 *Chabot*, 300 S.W.3d at 771–72; *Sanders*, 863 F.2d at 224.

74 *Carmona*, 185 S.W.3d at 497–98 (Hervey, J., dissenting).

75 *See generally id.*

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

77 317 U.S. 213, 215–16 (1942) (explaining that a conviction obtained through knowingly false testimony and evidence suppression is a due process violation).

78 355 U.S. 28, 31 (1957) (holding that due process is violated when a prosecutor knowingly elicits false testimony from a witness).

79 386 U.S. 1, 7 (1967) (holding that due process is violated when a prosecutor knowingly uses false evidence at trial).

80 Napue v. Illinois, 360 U.S. 264, 269 (1959) (affirming that the knowing use of false testimony is a due process violation).

81 Giglio v. United States, 405 U.S. 150, 153 (1972) (holding that the State's failure to correct false testimony is a due process violation).

requirements.[82] What is dispositive to a due process claim is not the nefarious actions or negligence of a state official, but the infringement upon fundamental fairness that is intrinsic to using false testimony to obtain a conviction.

II. THE MISINTERPRETATION AND MISAPPLICATION OF SUPREME COURT PRECEDENT

State courts overwhelmingly justify their knowledge requirements, or lack thereof, as the state-level implementation of the Supreme Court's false testimony and evidentiary nondisclosure cases: *Mooney*,[83] *Agurs*,[84] *Alcorta*,[85] *Brady*,[86] *Giglio*,[87] and *Napue*.[88] While Group A and B states claim otherwise, the Supreme Court does not explicitly or implicitly interpret the Constitution to require a knowledge requirement, and free of such authority, states may eliminate theirs. Group A and B states misread Court precedent to require state knowledge for false testimony claims in three ways: they mistakenly apply stricter evidentiary nondisclosure standards to false testimony claims, they ignore indications within false testimony precedent that state knowledge need not be endemic to false testimony claims, and they overlook cases showing the Court's support for removing the knowledge element. Courts reading these cases to bar relief when the State unknowingly uses false testimony incorrectly conflate the Court's condemnation of misconduct with a requirement that all cases must present the same facts to evince a due process violation.

A. *Courts Incorrectly Apply Evidentiary Nondisclosure Standards to False Testimony*

Courts' confusion over false testimony standards is grounded in disorientation about when false testimony or nondisclosure standards apply. The Supreme Court maintains different standards for false evidence and false testimony, though lower courts consistently treat these

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82 Riley v. State, 567 P.2d 475, 476 (Nev. 1977).

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

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

85 Alcorta v. Texas, 355 U.S. 28 (1957).

86 Brady v. Maryland, 373 U.S. 83 (1963) (holding that the State must turn over favorable evidence in its possession to the defense).

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

88 Napue v. Illinois, 360 U.S. 264 (1959).

distinct categories as interchangeable.[89] Defendants are entitled to relief on false testimony grounds if there is "any reasonable likelihood" that false testimony "affected the judgment of the jury."[90] But when a *Brady* violation occurs and favorable evidence is not disclosed to the defense at trial, defendants must meet a higher standard: there must be "a reasonable probability that the outcome" of the trial would be different if the evidence was disclosed.[91] The Supreme Court's less stringent requirements for relief on false testimony grounds should be a signal to courts that they should be even less reticent to grant false testimony claims than those for evidentiary nondisclosure.[92]

The Supreme Court has not explained why its false evidence and testimony standards are different, but the Court's apparent understanding of prosecutorial misconduct may indicate how this came to be.[93] While the Court ostensibly acknowledges prosecutorial misconduct as repugnant and unjust, it nevertheless appears to believe that misconduct results from the actions of rogue actors departing from the legal and ethical norms of their offices.[94] Because these "bad apples" are believed to constitute isolated cases in an otherwise trustworthy system, prosecutors accused of misconduct are viewed by the Court to only threaten the integrity of the cases they try, not the system overall.[95] False testimony, conversely, is perceived to do something more insidious: subvert the system as a whole.[96] Courts cannot perform their "truth-seeking function" when trials are vitiated by lies.[97] False testimony is

89 Poulin, *supra* note 17, at 335.

90 Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271); Poulin, *supra* note 17, at 335.

91 United States v. Bagley, 473 U.S. 667, 682 (1985).

92 *See generally* Poulin, *supra* note 17.

93 *See* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 56 (2016); Chiraag Bains, *"A Few Bad Apples": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29, 30 (2018).

94 *See* Green & Yaroshefsky, *supra* note 93, at 56 ("[T]he . . . criminal procedure revolution largely overlooked prosecutors. The Court evidently regarded prosecutorial misconduct as a rare and individual problem . . . ."); Bains, *supra* note 93, at 30 (arguing that the Court sees constitutional violations as driven by a "Few Bad Apples").

95 *See* Bains, *supra* note 93, at 30; Green & Yaroshefsky, *supra* note 93, at 54–61.

96 *See* Mooney v. Holohan, 294 U.S. 103, 109 (1935) ("Nor does it make a particle of difference from what source the act or omission complained of emanates, for it is not the act or omission itself but its effect upon the hearing accorded by the court to the defendant that results in, or does not result in, a denial of due process of law."); Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

97 United States v. Agurs, 427 U.S. 97, 104 (1976) ("[T]he Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.").

particularly fearsome not because it is perpetuated by state and nonstate actors—such as ordinary witnesses—but because it compromises what courts view as the integrity of the criminal legal system. Therefore, false testimony specifically demands a more accessible standard of relief to preserve system legitimacy.

The Court's decision to view false testimony as a structural problem can be seen most clearly in *Napue*, where the Court condemned the prosecutor's failure to correct false testimony because that testimony tainted the trial—not because the prosecutor's actions did.[98] Quoting the New York Court of Appeals, the *Napue* Court opined that it "matter[ed] little" if "the district attorney's silence was . . . the result of guile or a desire to prejudice," because "its impact was the same."[99] While it may be perverse for prosecutorial malfeasance to implicate higher standards of relief,[100] the Court's decisions and laxer standard may be read as a determination that false testimony is a greater systemic threat than the actions (or inactions) of occasionally mendacious prosecutors.[101]

Despite these discrete standards, Group A and B courts ignore the differences between different standards applied in false testimony and evidentiary nondisclosure cases.[102] This results in the incorrect application of harsher nondisclosure standards to cases where they do not apply.[103] A prime example of this long-standing trend is courts' improper labeling of *Agurs* as a false testimony case.[104] *Agurs* is actually a nondisclosure case[105]: at issue was the State's failure to release to defense counsel the criminal record of the victim, which included information highly relevant to the applicant's claim of self-defense.[106] As a nondisclosure case, the principles of *Brady*, its higher "reasonable probability" standard, and its state knowledge element—the prosecutor's suppression of the favorable evidence—logically apply.[107] But these

98 *Napue*, 360 U.S. at 269–70.

99 *Id.* at 270 (quoting People v. Savvides, 136 N.E.2d 853, 854–55 (N.Y. 1956)).

100 This is especially true because state misconduct, in false testimony and nondisclosure cases alike, is not an issue of isolated "bad apples." *See infra* Part III.

101 *See* Giglio v. United States, 405 U.S. 150, 153; Poulin, *supra* note 17, at 335.

102 *See* Poulin, *supra* note 17, at 335; *supra* Sections I.A–I.B.

103 *See* Poulin, *supra* note 17, at 335.

104 *See* Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1566 (2000). For example, the Vermont Supreme Court sources its actual knowledge-only standard from *Agurs*. *In re* FitzGerald, 2020 VT 14, ¶ 69, 229 A.3d 446. This is curious reasoning, as the *Agurs* Court clarified that *Mooney v. Holohan* extends at least as far as perjured testimony the State should have known was false. United States v. Agurs, 427 U.S. 97, 103 (1976).

105 Poulin, *supra* note 17, at 335 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

106 *Agurs*, 427 U.S. at 100.

107 Poulin, *supra* note 17, at 335 (citing *Bagley*, 473 U.S. at 682).

elements only apply because the issue in *Agurs* is nondisclosure, not false testimony.[108] By applying *Agurs* to all false testimony, courts incorrectly apply a higher standard than precedent requires.[109]

Knowing use courts further compound confusion over *Agurs* when they point to Justice Stevens's categorization, in dicta, of *Mooney* as a *Brady* case.[110] To those courts, this apparently indicates that *Agurs* specifically, and false testimony generally, mandate a knowledge requirement.[111] But Justice Stevens, writing for the *Agurs* majority, did not categorize all false testimony as nondisclosure or suggest that all false testimony should be subject to a knowledge element.[112] Stevens theorized that only where the State's purposeful action in using false testimony results in the "deliberate deception of [the] court and jury" should nondisclosure standards apply.[113] In other words, in cases where the State knows the truth and chooses to obscure it—as state actors do when they knowingly engage in evidentiary nondisclosure—*Agurs* suggests that this subcategory of false testimony resembles evidentiary nondisclosure.[114] All other false testimony is not implicated.[115] Justice Stevens's conceptualization of *Mooney* in *Agurs* may misunderstand false testimony generally, but it does not, as knowing use courts declare or imply, close the door on unknowing use claims.[116]

B. *Courts Ignore Indications Within Precedent Signifying Support for Claims Without State Knowledge*

The confusion sparked by *Agurs* continues through courts' readings of *Napue* and *Giglio*, the Supreme Court's two most critical false testimony cases. Read together, these cases are incorrectly construed by many lower courts to mandate a state knowledge requirement.[117] Courts interpreting *Napue* and *Giglio* this way, however, ignore that the

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108 Saltzburg, *supra* note 104, at 1566; Poulin, *supra* note 17, at 340.

109 *See supra* Sections I.A–I.B.

110 *Agurs*, 427 U.S. at 103.

111 Poulin, *supra* note 17, at 340; *see, e.g.*, Dozier v. Commonwealth, 253 S.E.2d 655, 656–57 (Va. 1979).

112 *Agurs*, 427 U.S. at 103–04.

113 *Id.* at 103 n.7 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

114 *Agurs*, 427 U.S. at 100.

115 *See generally id.*

116 *See* Saltzburg, *supra* note 104, at 1566 (arguing that Justice Stevens mischaracterized false testimony as false evidence by "rewr[iting] the history of Supreme Court precedent in the realm of false testimony and perjury" by categorizing *Brady* as applicable to *Mooney*).

117 Napue v. Illinois, 360 U.S. 264, 269 (1959); Giglio v. United States, 405 U.S. 150, 153–54 (1972).

presence of state knowledge was an incidental fact, not a central premise, to the Court's grant of relief in each.[118] In neither case does the Court declare state knowledge to be a mandatory element of false testimony claims, and these cases may actually indicate the opposite: precedential support for a knowledge-free standard.[119] *Napue* addressed a prosecutor's failure to correct the false testimony of a witness,[120] while *Giglio* dealt with a witness falsely testifying, unknown to that prosecutor, that he received no benefit for his testimony.[121] Both opinions make clear that what ultimately concerned the Court was not the prosecutor's knowledge (or lack thereof) of the false testimony they presented, but that the jury did not receive the information necessary to make a legally informed decision.[122] In *Giglio*, such information would have prevented the defendant from even being indicted.[123] *Napue* and *Giglio* each expanded what may constitute knowledge in the preexisting false testimony structure: *Napue* requires prosecutors to correct false testimony when it is presented,[124] and *Giglio* imputes knowledge to prosecutors when it is possessed by other state officials.[125] Neither case proposed a minimum for what knowledge must be, or actually suggested it must be present.[126] In fact, the prosecutor in *Giglio*'s personal lack of knowledge that he was

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118 *See supra* note 43 and accompanying text.

119 *See Napue*, 360 U.S. at 264; *Giglio*, 405 U.S. at 150.

120 *Napue*, 360 U.S. at 265.

121 *Giglio*, 405 U.S. at 150–53. The witness in *Giglio* was promised that he would not be prosecuted if he testified against the defendant. *Id.* at 153.

122 The Court in *Napue* stated:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 269–70. In *Giglio*, the Court extended the "good or bad faith of the prosecut[or]" rationale from *Brady* to hold that the prosecutor's unknowing use of false testimony, done so in ignorance of another assistant district attorney's promise of leniency to his witness, violated due process as false testimony that "could . . . in any reasonable likelihood have affected the judgement of the jury." Brady v. Maryland, 373 U.S. 83, 87 (1963); *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

123 *Giglio*, 405 U.S. at 154–55.

124 *Napue*, 360 U.S. at 269–70.

125 *Giglio*, 405 U.S. at 154.

126 *Id.*; *Napue*, 360 U.S. at 269–70.

introducing false testimony indicates the opposite: that knowledge is not actually mandatory for false testimony claims.[127]

This principle is true for all the Court's false testimony cases; none actually contain a state knowledge requirement for false testimony or ban unknowing use claims. This line of cases consecutively expanded how state knowledge requirements may be met based on the facts that case presented—they did not demand that knowledge requirements exist. These cases command a greater focus on the fairness of trials and convictions, not a narrowing of the factors used to rectify due process violations. *Mooney* posits that due process is not satisfied when the "state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury" by presenting false testimony.[128] *Alcorta* and *Napue* look to see if false testimony's misleading impact affected the outcome of a trial, not if that testimony is criminally perjurious or if the State knew it to be false.[129] Although *Brady* should not be applied to false testimony generally, that case emphasized that a prosecutor's good or bad faith is irrelevant; when the State purposefully or accidentally conceals evidence, the jury is prohibited from considering the defendant's constitutionally informed defense and a trial's integrity is destroyed.[130] And the core of *Giglio* is that false testimony is a due process violation because it deceives a jury, not because the State knows about it.[131] The Court has not issued a binding ruling on the unknowing use of false testimony, but state and federal courts' claims that Supreme Court precedent mandates state knowledge or bars a standard without a knowledge element is unsupported by the language of the cases themselves.[132]

C. *Courts Overlook Language Suggesting Knowledge Is Not a Constitutional Requirement*

Lacking an affirmative Supreme Court mandate for a knowledge element, state and federal courts are not required to implement one—even if the language of their standards suggests they believe they are.[133] But the Court has gone further and indicated that it may approve of false

127 *Giglio*, 405 U.S. at 154–55.

128 Mooney v. Holohan, 294 U.S. 103, 112 (1935).

129 Alcorta v. Texas, 355 U.S. 28, 31–32 (1957); *Napue*, 360 U.S. at 269–70.

130 *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

131 *Giglio*, 405 U.S. at 154–55.

132 *See* Jacobs v. Scott, 513 U.S. 1067, 1069–70 (1995) (Stevens, J., dissenting).

133 *See generally supra* Sections I.A–I.B.

testimony standards that do not include state knowledge. This suggests, at least tacitly, an understanding that unknowing use claims qualify for due process protections. This encouragement is supported by the Court's description of false testimony in cases like *Durley v. Mayo*,[134] *Mesarosh v. United States*,[135] and *Townsend v. Burke*,[136] in addition to *Giglio*.[137] These cases often go ignored by courts suggesting the Supreme Court's precedent exclusively points in favor of a state knowledge requirement,[138] but each signals that removing the knowledge element would not contravene the Court's understanding of false testimony.

The Court most clearly signaled acceptance for a standard without a knowledge requirement in *Durley*,[139] where the petitioner submitted a habeas petition featuring recantations from two witnesses who implicated him at trial.[140] Neither witness, nor the petitioner, suggested the State knew their testimony was false.[141] The majority did not reach the merits of the case in *Durley* and dismissed for lack of jurisdiction.[142] Four dissenting Justices did, however, write to address the lack of state knowledge in the claim.[143] In language later cited by the Second Circuit and other Group C state courts, the dissenters concluded the case was "clear": the State *now* knew, because of the witnesses' recantations, the testimony was false.[144] This present knowledge "amounts . . . to a denial of due process of law" and "a grave miscarriage of justice involving an invasion of federal rights guaranteed by the Fourteenth Amendment."[145] In the standard envisioned by the dissenters, and put into practice today by the four federal circuits and five state courts without a knowledge element, the mandatory state action—and even a state knowledge requirement, if a court insists upon requiring one—for due process is satisfied when the State discovers materially false testimony and does not

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134 351 U.S. 277, 290–91 (1956) (Douglas, J., dissenting).

135 352 U.S. 1, 9, 14 (1956). While lower courts occasionally engage with *Mesarosh* in attempts to distinguish it, they do so unpersuasively. *See* Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1940 n.59 (1985).

136 334 U.S. 736, 740–41 (1948).

137 *Giglio*, 405 U.S. 150.

138 *See supra* Sections I.A–I.B.

139 Durley v. Mayo, 351 U.S. 277, 278–79, 285 (1956); *see also* Sanders v. Sullivan, 863 F.2d 218, 223 (2d Cir. 1988).

140 *Durley*, 351 U.S. at 287 (Douglas, J., dissenting).

141 *Id.* at 291.

142 *Id.* at 285 (majority opinion).

143 *Id.* at 290–91 (Douglas, J., dissenting).

144 *Sanders*, 863 F.2d at 223; Case v. Hatch, 2008-NMSC-024, ¶ 11, 183 P.3d 905; Commonwealth v. Spaulding, 991 S.W.2d 651, 656 (Ky. 1999); *Durley*, 351 U.S. at 290–91 (Douglas, J., dissenting).

145 *Durley*, 351 U.S. at 291.

overturn the conviction.[146] Knowledge at the time of the violation is not required.[147]

The *Durley* dissent is not binding, but the Court is no stranger to deciding unknowing use cases in favor of applicants. The aforementioned cases, *Giglio*, *Townsend*, and *Mesarosh*, involve unknowing use claims.[148] *Townsend* held that "materially untrue" assumptions, not alleged to be known as false by the State, "whether caused by carelessness or design," deprive defendants of due process.[149] In *Mesarosh*, like *Durley*, the state only found reason to question the veracity of a witness's testimony after trial.[150] As in *Durley*, the *Mesarosh* Court did not propose, nor did the defendant allege, that the State knew or should have known the witness's testimony was false.[151] The Court nevertheless held that the "waters of justice" were polluted by the witness's false testimony.[152] In *Townsend*, *Mesarosh*, *Durley*, and *Giglio*, the Court was concerned by the impact of false testimony, not by what state officials knew and when they knew it.[153] Informed by the language of these cases, the Court's understanding of false testimony should not be read to bar false testimony standards without knowledge elements. Unencumbered by such a mandate, state courts may implement a knowledge-free standard.

146 *See* cases cited *supra* note 7; *supra* Section I.C.

147 *See* cases cited *supra* note 7; *supra* Section I.C.

148 *See* Giglio v. United States, 405 U.S. 150 (1972); Townsend v. Burke, 334 U.S. 736 (1948); Mesarosh v. United States, 352 U.S. 1 (1956).

149 *Townsend*, 334 U.S. at 741.

150 *Mesarosh*, 352 U.S. at 4.

151 *See generally id.*

152 *Id.* at 14.

153 *See Townsend*, 334 U.S. at 740–41; *Mesarosh*, 352 U.S. at 14; *Durley*, 351 U.S. at 290–91 (Douglas, J., dissenting); *Giglio*, 405 U.S. at 154–55.

III. STATE KNOWLEDGE REQUIREMENTS ARE NOT FUNDAMENTALLY FAIR

The lack of affirmative Supreme Court precedent requiring state knowledge gives state courts the freedom to eliminate their knowledge requirement, but the Due Process Clause demands that they do. State knowledge requirements are not only constitutionally superfluous, but fundamentally unfair. As interpreted by the Supreme Court, the Due Process Clause of the Fourteenth Amendment requires states to comport with minimum fundamental fairness requirements.[154] These requirements extend to state post-conviction proceedings.[155] Though the Supreme Court has embraced fluctuating interpretations of fundamental fairness, its cases establishing false testimony as a due process violation endorse a view of this doctrine that primarily considers how violations affect the fairness of a trial.[156] When a violation results in an unfair trial, as occurs when materially false testimony is employed to convict a defendant, that proceeding violates fundamental fairness and the petitioner should receive relief.

Informed by this understanding of due process, state knowledge requirements that obstruct petitioners from due process relief should be seen as undermining fundamental fairness. In an environment where misconduct is notoriously more significant than courts are inclined to admit and knowledge is virtually impossible to prove, a petitioner's success in proving this element is based more on luck than the merits of their case.[157] Sixty percent of reported exonerations included "official

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154 Danforth v. Minnesota, 552 U.S. 264, 269–70 (2008).

155 Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 69 (2009) (holding that states providing post-conviction relief must ensure these proceedings are fundamentally fair).

156 *See* Caleb Linton, Note, *Like Putting Lipstick on a Pig: Why the History of Crime Control Should Compel the Prohibition of Incentivized Witness Testimony Under Fundamental Fairness Principles*, 113 J. CRIM. L. & CRIMINOLOGY 391, 419–26 (2023) (discussing the Court's embrace of this perspective in *Napue* and *Agurs*).

157 *See* Daniel E. Murray, *Convictions Obtained by Perjured Testimony: A Comparative View*, 27 OHIO STATE L.J. 102, 107 (1966) ("[E]ven though there may be no question that perjured testimony was used, it is virtually impossible to prove the knowledge of the prosecuting authorities because it will be the word of a confessed perjurer against the word of the authorities."); Daniel Medwed, *The U.S. Prison System Doesn't Value True Justice*, TIME (Nov. 29, 2022, 8:00 AM), https://time.com/6236494/criminal-exoneration-prison-system-feeds-on-innocent [https://perma.cc/Y5R8-TLZQ] ("Even if you can prove an error occurred at trial and the error is appropriate for review on appeal, that argument isn't enough to win. You're up against something called the 'harmless error doctrine.' That rule requires defendants to show not only the errors surfaced at trial, but also that those errors affected the end result. Time and time again, appellate courts treat even serious trial errors as harmless in comparison to the quantity of evidence signaling guilt."); *see infra* Sections III.C–III.D.

misconduct,"[158] though this figure cannot truly capture the extent of convictions tainted by the unconstitutional acts of state officials.[159] Requiring a petitioner to prove state knowledge is an imprecise, unfair, and often infeasible burden for petitioners who are usually incarcerated.[160] A petitioner's inability to prove state knowledge does not mean misconduct has not occurred or that the fundamental fairness of a petitioner's trial has not been violated. The knowledge element's role in barring relief in such situations should be seen to preclude constitutionally guaranteed due process.

The difficulty of proving knowledge in a system with rampant misconduct clearly implicates fundamental fairness because, in contrast to the Supreme Court's apparent belief, misconduct is not confined to a handful of individual state actors whose small number poses minimal threat to the legitimacy of the criminal legal system.[161] Recognizing how the criminal legal system is structured to perversely encourage state actors

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158 *% Exonerations by Contributing Factor and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS (Mar. 2, 2025), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/DW7G-74BS].

159 *See* SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 6 (2017) ("Official misconduct in criminal cases is under-reported because, by its very nature, most misconduct is deliberately concealed—and much if not most remains hidden."); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (arguing that systemic police misconduct, including the elicitation of false confessions and testimony, threatens the legitimacy of the criminal legal system); David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211 (2011) (describing prosecutorial misconduct as a "serious problem" and citing over two thousand appellate cases in which prosecutorial misconduct led to sentence modification or exoneration); Andrew F. Daughety & Jennifer F. Reinganum, *Evidence Suppression by Prosecutors: Violations of the* Brady *Rule*, 34 J.L. ECON. & ORG. 475 (2018) (evaluating the incentive structures for prosecutors to suppress evidence favorable to criminal defendants); Robin McDowell, *'Alarming' Rates of Police and Prosecutor Misconduct*, AP NEWS (Sept. 15, 2020, 5:46 PM), https://apnews.com/article/police-lifestyle-crime-us-news-82a0a00ad9b9876b465f99137d9376c6 [https://web.archive.org/web/20240709131638/https://apnews.com/article/police-lifestyle-crime-us-news-82a0a00ad9b9876b465f99137d9376c6] (finding that, in cases ending in exoneration, 54% involved "intentional or negligent mistakes by police, prosecutors and other law enforcement officials").

160 Habeas petitioners generally must, by means of a federal requirement adopted by states, be "in custody" to file a writ. 28 U.S.C. § 2241(c); Note, *Habeas Corpus—Custody and Release from Custody Requirements of Habeas Corpus—Viability of* McNally v. Hill *in the Modern Context*, 65 MICH. L. REV. 172, 172 (1966). States construe the custody requirement differently, but all require petitioners to be under some degree of state restraint at the time of filing. *See* Bostick v. Weber, 2005 SD 12, ¶ 16, 692 N.W.2d 517, 522 (requiring "physical restraint" by the State to satisfy custody requirements); *In re* Azurin, 104 Cal. Rptr. 2d 284, 288 (Cal. Ct. App. 2001) (holding that immigration detention does not meet the custody requirement for California habeas relief); Sabisch v. Moyer, 220 A.3d 272, 275 (Md. 2019) (holding that unsupervised probation in another state does not constitute custody).

161 *See* Green & Yaroshefsky, *supra* note 93; Bains, *supra* note 93.

and their witnesses to create, solicit, and support false testimony demands a standard that accepts this as fact and does not create further artificial barriers to address violations. False testimony, with or without state knowledge, facilitates fundamentally unfair convictions. And when knowledge does indeed exist, it is exceptionally difficult to prove in a system awash with incentives to cover it up.

State knowledge standards should be seen as violating fundamental fairness requirements for five reasons. The first and second reasons relate to the American systems of prosecution and policing, which are structured to incentivize ignorance of, participation in, and concealment of false testimony. Third, applicants do not have equal access to actors with the necessary information, should it exist, to prove knowledge. Fourth, prosecutors do not and cannot always know the testimony they presented was false. And fifth, knowledge elements both fail to deter or punish state actors for misconduct and promote a reductionist view of false testimony as an isolated problem.

A. *Prosecutors Are Incentivized Not to Know and Not to Come Forward*

Prosecutors do not generally set out to tolerate constitutional violations, but their offices are designed to incentivize convictions at nearly any cost.[162] Few offices view themselves as turning a blind eye to misconduct or excessive prosecution; many state that ending "[o]ver-incarceration,"[163] providing disclosure in excess of that required by *Brady*,[164] and declining to prosecute quality of life offenses are firmly held office policies.[165] But the structure of these institutions, whatever their goals may be, does not just increase the risk that state officials knowingly or unknowingly solicit false testimony—it practically guarantees it.[166]

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162 *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 33–34 (2007); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132–50 (2004) (describing institutional factors fostering reluctance within prosecutors' offices to cooperate in post-conviction litigation).

163 Day 1 Memo Fact Sheet from Alvin Bragg, Manhattan Dist. Att'y (Jan. 6, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Fact-sheet-Final-1.6.22.pdf [https://perma.cc/BT9U-HHHY].

164 PHILA. DIST. ATT'Y'S OFF., PHILADELPHIA DAO POLICIES ON: (1) DISCLOSURE OF EXCULPATORY, IMPEACHMENT, OR MITIGATING INFORMATION, (2) OPEN-FILE DISCOVERY 3 (2020), https://phillyda.org/wp-content/uploads/2021/11/DAO-Brady-Policy.pdf [https://perma.cc/X28L-RRXL].

165 GEORGE GASCÓN, SPECIAL DIRECTIVE 20-07 at 2 (2020), https://da.lacounty.gov/sites/default/files/pdf/special-directive-20-07.pdf [https://perma.cc/84U8-LGNW].

166 *See generally* DAVIS, *supra* note 162 (discussing how the structure of prosecutors' offices produce constitutional violations).

The attitudes held by prosecutors chasing convictions by any means necessary reflect the values and priorities of the system they operate within.[167] The American system of prosecution values and prioritizes convicting criminal defendants, but does not give much thought to the impact of constitutional violations on either defendants or the criminal system.[168] This compels a systemic avoidance of learning information, which may result in lost convictions and prompts many prosecutors to overlook constitutional violations in pursuit of guilty verdicts.[169] Some prosecutors do come forward and assist defense counsel when they learn of misconduct, but they are exceptions proving the rule.[170] More typically, prosecutors vigorously defend the integrity of their convictions and refuse to contemplate constitutional violations, even in the face of information definitively proving the foundation of a conviction to be faulty.[171] Prosecutors who do admit to presenting false testimony, still seeking to preserve convictions, may do so only when they are confident the testimony is so immaterial that a court will not grant post-conviction relief.[172]

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167 Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 ("[P]rosecutorial misconduct is not chiefly the result of isolated instances of unprincipled choices or the failure of character on the part of some prosecutors. Rather, prosecutorial misconduct is largely the result of . . . institutional conditions . . . .").

168 *Id.* at 410.

169 *See* DAVIS, *supra* note 162; Medwed, *supra* note 162.

170 *See, e.g.*, Green & Yaroshefsky, *supra* note 93, at 475–76; Bruce A. Green, *Should Prosecutors Be Expected to Rectify Wrongful Convictions?*, 10 TEX. A&M L. REV. 167, 204–05 (2023); Benjamin Weiser, *Doubting Case, a Prosecutor Helped the Defense*, N.Y. TIMES (June 23, 2008), https://www.nytimes.com/2008/06/23/nyregion/23da.html [https://perma.cc/VJ2A-VFPR].

171 Former prosecutor Mark Godsey described prosecutors showing "extreme, mind-blowing level[s] of denial," even when DNA evidence definitively pointed to another perpetrator. MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 14 (2017); *see also* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 393–422 (2018) (discussing a culture of prosecutors doubling down on miscarriages of justice to avoid admitting to mistakes or constitutional violations); Medwed, *supra* note 162, at 130 (describing the "institutional and political barriers that deter district attorneys' offices from recognizing potentially valid innocence claims"); Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 338 (2015) ("Prosecutors often erect procedural hurdles to prevent petitioners having their habeas claims heard in court. They circle the wagons, even when their own investigating officers suggest that a mistake has been made.").

172 "Even when prosecutors know their behavior is illegal, the harmless error doctrine and the absence of meaningful oversight by bar disciplinary authorities serve to encourage the offending behavior." DAVIS, *supra* note 162, at 141. Such was the case of Robin Lee Archer's prosecutor, who confessed to presenting false testimony, but only admitted to knowing that clearly immaterial testimony was false. Archer v. State, 934 So. 2d 1187, 1197–98 (Fla. 2006). This thinking is sufficiently pervasive that when Bryon Aven, an Assistant State Attorney in Florida, was formally

Such reactions are not atypical when these offices are viewed in context. Perverse incentives within prosecutors' offices encourage ignorance to please voters and elected leaders,[173] advance careers,[174] and maintain the high conviction rates perceived to indicate success.[175] Prosecutors are not supposed to consider "winning" when deciding whether and how to prosecute a case, but institutional cultures that prioritize convictions over truth seeking beget this outcome.[176] After a conviction is obtained, prosecutors may perceive pressure to defend it, fearing that exonerations undermine office credibility and threaten career prospects.[177]

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disciplined by the Florida Bar for prosecutorial misconduct including the knowing use of false testimony, his defense boiled down to the assertion that the kind of false testimony he introduced was not sufficiently featured at trial to constitute a due process violation. John A. Torres, *Torres: Prosecutor Admits Presenting False Testimony but Denied Breaking the Rules*, FLA. TODAY (May 16, 2023, 5:00 AM), https://www.floridatoday.com/story/news/2023/05/16/florida-bar-moving-ahead-with-formal-charges-against-brevard-prosecutor/69836514007 [https://perma.cc/VT]8-QWBY]. *See generally* Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV 181 (2012) (arguing that the conflict of interest arising from prosecutors and their offices revisiting previous convictions clashes with the interests these individuals and institutions have in preserving the convictions they obtain).

173 This ignorance exists throughout every stage of a case, from charging to conviction, and especially when police practices are implicated. "By engaging in a 'don't ask, don't tell' policy, prosecutors may claim ignorance if it is discovered that the police acted illegally." DAVIS, *supra* note 162, at 40; *see also* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RSRV. L. REV. 531, 552–53 (2007) ("[P]rosecutors [are] well aware that if [they] choose[] to remain ignorant of evidence located in the files of another agency, or fail[] to aggressively look for it, [they] will only be held accountable for non-compliance with *Brady* if the evidence is eventually . . . discovered . . . . [A] prosecutor who seeks to game the system in this way will almost always choose to avoid knowledge and assume the risk—an extremely safe risk—that [they] will never be held accountable."); *see also* Medwed, *supra* note 162, at 136–37; Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 384, 388 (2001).

174 *See* Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) ("Promotions for subordinate prosecutors depend on their 'scores' for convictions.").

175 *See* DAVIS, *supra* note 162; Medwed, *supra* note 162.

176 Medwed, *supra* note 162, at 135–36. Prosecutors within this system do not see their role as providing a fair trial, but to facilitate convictions of the criminal defendants whose guilt they presume. *See* Smith, *supra* note 173, at 384, 388 ("Notwithstanding the legal presumption of innocence, the cultural and institutional presumption in most prosecutor offices is that *everybody is guilty*. . . . In view of the institutional culture of prosecutor's offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning." (footnote omitted)).

177 *See* Medwed, *supra* note 162, at 136–37 ("In a sense, each exoneration opens the lid further on the prosecutorial Pandora's Box, precipitating an inquiry into the factors that contributed to the wrongful conviction and an assessment of whether local prosecutors may have convicted other innocent people."); Smith, *supra* note 173, at 384, 388.

This attitude is supported and sustained by entities outside prosecutors' offices, including courts.[178] Prosecutors are internally rewarded when they convict,[179] but rarely face internal or external discipline when they violate constitutional rights to do so.[180] Even when prosecutorial misconduct cannot be ignored and courts must admit the system got it wrong, the harmless error rule may be invoked to avoid jeopardizing convictions.[181] This lack of accountability, wherein a prosecutor is more likely to be promoted for securing convictions at any cost than incur a citation for doing so in violation of the constitution, may turn the active or passive solicitation of false testimony into a worthwhile risk.[182] These practices do not foster an environment in which prosecutors act to prevent false testimony, admit to knowing about it after a conviction, or aid petitioners in discovering its existence from other state actors. A petitioner attempting to prove state knowledge is not only up against their individual prosecutor, but an entire system incentivized to ignore or suppress misconduct.

B. *The Police-Prosecutor Relationship*

Structural incentives for prosecutors to ignore misconduct or presume its absence are heightened when working with police witnesses, who exist within an institution where perjury and fabricated evidence is not exceptional.[183] False testimony by police witnesses has become so

178 *See* DAVIS, *supra* note 162, at 127–30 (arguing that the lack of judicial review and Supreme Court rulings protecting prosecutorial immunity support continued misconduct).

179 *See* Medwed, *supra* note 162, at 135 ("Individual prosecutors may not have explicit financial incentives to procure convictions—such as receiving money for each guilty verdict—yet the inducements are implicit in a system where promotions are contingent on one's ability to garner convictions." (footnote omitted)).

180 *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) ("The Supreme Court has recommended that prosecutors be referred to the relevant disciplinary authorities when they engage in misconduct. However, for reasons that remain unclear, referrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct.").

181 *See* Murray, *supra* note 157; Medwed, *supra* note 157.

182 *See* Ferguson-Gilbert, *supra* note 174, at 290–92.

183 *See* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 905 (2020) ("[P]art of what it meant to be a prosecutor was to align with the police at all costs—even when there were egregious errors in cases."); Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html [https://perma.cc/3PJS-6KMX].

endemic that the term "testilying" was coined by officers to describe it.[184] Yet, the mutually dependent police-prosecutor relationship prevents prosecutors from questioning police testimony before trial and stops them from helping post-trial petitioners obtain evidence in police custody that may prove state knowledge.[185]

Prosecutors and police maintain a highly codependent relationship: police arrest and collect evidence so that prosecutors can convict defendants.[186] In this "bilateral monopoly," police require prosecutors to charge and convict the individuals they arrest, and prosecutors rely on police to give them the evidence to do so successfully.[187] This relationship encourages prosecutors to at best implicitly trust police testimony,[188] and at worst disregard police violations that may call their convictions into question. This would be problematic for any kind of witness, but it is especially so when police are implicated.[189] Similar incentives to those present in prosecutors' offices exist in police departments to commit or ignore misconduct so a suspect will be convicted, and professional consequences for or recognition of such misconduct is comparably unusual.[190] This creates an atmosphere ripe for officers to commit and conceal misconduct.[191]

Despite the prevalence of police perjury, police testimony enjoys a tremendous social and legal legitimacy that makes its use at trial highly

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184 COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP'T, CITY OF N.Y., COMMISSION REPORT 36 (1994) (identifying "the most common form of police corruption" to be police perjury, known as "testilying," and describing police practices of testimonial perjury, documentary perjury, and evidence falsification); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/K9EU-938X].

185 *See* Trivedi & Gonzalez Van Cleve, *supra* note 183, at 915–16; Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 578–80 (2014).

186 *See* Trivedi & Gonzalez Van Cleve, *supra* note 183, at 912.

187 Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003); Trivedia & Gonzalez Van Cleve, *supra* note 183, at 912.

188 *See* Trivedi & Gonzalez Van Cleve, *supra* note 183, at 905, 913.

189 *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 872 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042–44 (1996); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 4 (2010); Goldstein, *supra* note 184.

190 *See* Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 541–42, 587 (2021) (detailing how police are incentivized to arrest, how rewards and employment outcomes may be based in quota-based records, and how this incentive system perverts due process principles); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (arguing that systemic tunnel vision in police departments and prosecutors' offices impacts every stage of a criminal proceeding).

191 *See* Ossei-Owusu, *supra* note 190; Findley & Scott, *supra* note 190.

valuable.[192] It also makes finding information proving police testimony was known to be false exceedingly difficult.[193] Intra-officer loyalty can result in officers collaborating to falsify evidence, producing false testimony, and covering their tracks.[194] Police control investigations, evidence, and access to information about both.[195] Prosecutors, needing their testimony and evidence to win future cases, are thus disincentivized from vigorously questioning police witnesses or allowing post-conviction petitioners access to their zealously guarded police files.[196] This is problematic not only from a transparency perspective, but also a practical one: it is in these files where evidence proving testimony was false—and that the State knew it was false—often is found.[197] The impact of the police-prosecutor relationship is twofold: prosecutors ignore past police false testimony and continuously solicit it in the present to win convictions, and petitioners must request access to the evidence they need from actors who directly contributed to their conviction and are incentivized to preserve it.

C. *The State as a Gatekeeper*

Petitioners do not only suffer the effects of misconduct-perpetuating institutional factors during their trial. Assuming evidence of misconduct does exist in police and prosecutor files, there lies a glaring issue in the process necessary for post-conviction petitioners to obtain them: the files are typically accessible only by request from the convicting prosecutor, or, for police files, with permission from the police.[198] States heavily

192 *See* Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. SOC. JUST. 1, 6–7 (2018); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 340–41 (2012).

193 *See infra* note 202 and accompanying text.

194 *See* sources cited *supra* note 189.

195 *See generally* Trivedi & Gonzalez Van Cleve, *supra* note 183.

196 *See id.* at 909–10.

197 *See* Innocence Staff, *Jabar Walker Exonerated After 25 Years of Wrongful Conviction in Manhattan Double Homicide*, INNOCENCE PROJECT (Nov. 27, 2023), https://innocenceproject.org/jabar-walker-exonerated-after-25-years-of-wrongful-conviction-in-manhattan-double-homicide [https://perma.cc/MJG9-FREE] (detailing how access to police materials proved evidence was false and known as such to the State).

198 *See* Seth Apfel, Note, *Prosecutorial Misconduct: Comparing American and Foreign Approaches to a Pervasive Problem and Devising Possible Solutions*, 31 ARIZ. J. INT'L & COMP. L. 835, 868 (2014) ("[T]he present American system is completely counterintuitive; prosecutors are commanded to turn over evidence favorable to an accused. Thus, the very person who is charged with prosecuting a defendant, and upon whom pressure to obtain a conviction is significant, is also

restrict post-conviction investigation and discovery by statute and common law,[199] which greatly impedes a petitioner's ability to discover and prove constitutional violations.[200] Police and prosecutors alike may blindly reject file access requests by defense counsel, and without a court agreeing to intervene, their contents will remain unknown to petitioners in post-conviction proceedings.[201] Even then, court orders and post-conviction discovery laws do not cover the entirety of these files, so state actors are free to pick and choose the information a petitioner can access.[202]

Petitioners working without a sympathetic district attorney's office or the aid of a robust conviction integrity unit ("CIU") may be prevented from proving state knowledge while documents substantiating that claim sit, otherwise inaccessible, in a precinct's storage unit.[203] A successful

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responsible for determining what evidence is 'favorable' to an accused person and so must be turned over to the defense. There is no system of checks and balances to ensure prosecutorial compliance." (footnote omitted)); *see also* Levenson, *supra* note 185, at 568 (discussing prosecutorial reluctance to request police files).

199 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4433 (2019) (requiring post-conviction interviews to be conducted through the prosecutor's office); FLA. R. CRIM. P. 3.575 (requiring petitioners to show cause for post-conviction interviews of jurors and schedule them through the courts); OKLA. STAT. tit. 22, § 1089(C) (2022) (limiting post-conviction discovery in capital cases only to claims that could not have been raised on appeal, would raise factual innocence, or support a reasonable probability of a different outcome at trial); State v. Harris, 859 A.2d 364, 430–31 (N.J. 2004) (requiring petitioners to show "good cause" to conduct post-conviction interviews); Merrifield v. Arave, 912 P.2d 674, 678 (Idaho 1996) (giving trial courts the sole discretion to grant or deny any post-conviction discovery).

200 *See* Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 155 (2018).

201 *See* Levenson, *supra* note 185, at 567–68.

202 *See id.* ("Postconviction discovery in many states is very limited. Many times, there are no[t] specific statutes governing postconviction discovery. Prosecutors are not eager to open their files, nor those of their investigators, for inspection by habeas petitioners. There is certainly nothing like open file discovery of these files . . . . Practically, it can be a nightmare for habeas petitioners to get the evidence they need to support their claims." (footnote omitted)). Most state statutes provide that the court "may" order post-conviction discovery, not that it shall. *Id.* at 548 n.15. A few states have codified "open file discovery" laws, mandating that all convicted criminal defendants receive the State's entire file during post-conviction proceedings. *Id.*

203 *See* Ed White, *Charges Dropped Against Man Who Served 21 Years in Prison for Deaths of 2 Michigan Hunters*, AP NEWS (June 1, 2023, 9:58 PM), https://apnews.com/article/michigan-hunters-killed-charges-dropped-jeff-titus-dcc7 [https://perma.cc/J84Y-S82Q] (discussing how an Ohio serial killer was investigated by police for crimes of which the petitioner was convicted with evidence discovered in police files twenty years later and showing that police falsely testified about their investigation); *Nina Morrison*, DEFENSE, https://indefenseof.us/stories/nina-morrison [https://perma.cc/VCC9-EAHA] (explaining how exculpatory information sat undisturbed in files for years before new prosecutors, political change, or a CIU stepped in to allow defense counsel access). *See generally* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (detailing pervasive practices of omitting, misstating, or inventing facts and documents from both defense counsel and police in police-produced documents for criminal investigations).

post-conviction case hinging on a misconduct element de facto requires the assistance of a prosecutor with access to the relevant documents.[204] For lucky petitioners, that prosecutor will be assigned to a CIU.[205] Comprised of specially assigned prosecutors within a district attorney's office, CIUs can grant defense teams full access to files they would not typically receive, or have been previously denied access to, by prosecutors, police, or courts.[206] Without this access or the weight of a district attorney behind an investigation, it is almost certain that a petitioner will never obtain the requisite information to prove state knowledge.[207] This assistance, however, is limited. CIUs may be more inclined than most prosecutors to grant expansive discovery, but they are still prosecutorial bodies: they exist within the same culture and misaligned incentive structures as prosecutors' offices, and maintain—albeit less symbiotic—relationships with police.[208] Though CIUs are meant to review convictions for any legally invalidating constitutional errors, not merely innocence, many CIUs formally or informally require petitioners to have actual innocence claims to receive assistance.[209] A supportive CIU may help a petitioner access information, but the systemic issues inherent to reliance upon prosecutors and police to prove knowledge do not

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204 Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV 613, 651 (2014) ("[F]or the typical indigent, convicted innocent . . . the odds of uncovering exculpatory evidence without prosecutorial assistance are remarkably low. Even for those who were adequately represented by counsel in the first instance, postconviction review may be the first opportunity the convicted has to see the inculpatory and exculpatory evidence assembled by the prosecutor." (footnote omitted)).

205 *See, e.g.*, Maurice Possley, *Teshama Beal*, NAT'L REGISTRY OF EXONERATIONS (Feb. 10, 2022), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6108 [https://perma.cc/RD6Y-TMVJ] (detailing work completed in collaboration with a CIU resulting in an exoneration); *Rosa Jimenez Is Exonerated of a Crime That Never Took Place After 20 Years*, INNOCENCE PROJECT (Aug. 7, 2023), https://innocenceproject.org/rosa-jimenez-is-exonerated-of-a-crime-that-never-took-place-after-20-years [https://perma.cc/R2VX-2BLF] (same); Vimal Patel, *Convicted Using False Testimony, Michigan Man Is Free After 38 Years*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/us/walter-forbes-freed.html [https://perma.cc/R2VQ-NS4E] (same).

206 *See* Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and* Brady *Claims*, 55 LOY. L.A. L. REV. 1005 (2022).

207 *See* Boehm, *supra* note 204, at 651.

208 *See* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 710–12 (2017) (arguing that independent institutions, rather than those attached to prosecutorial bodies, should "supplant the function 'conviction integrity' units are attempting to perform").

209 INNOCENCE PROJECT, CONVICTION INTEGRITY UNITS (2016), https://leg.mt.gov/content/Committees/Interim/2015-2016/Law-and-Justice/Meetings/Jun-2016/Exhibits/innocence-project-conviction-integrity-doc-june-2016.pdf [https://perma.cc/X3XV-SYV7] (describing the purpose of the King's County District Attorney's Conviction Review Unit in Brooklyn, New York, as a "national model" in which reinvestigations are performed "into cases with plausible claims of innocence"). CIUs may also actively fight exonerations if they are not sufficiently convinced a petitioner is innocent, regardless of the viability of their procedural claims. *See id.*

disappear. The consequence is that fundamental fairness is supplied to only the select few.

D. *Prosecutors May Lack Actual Knowledge*

False testimony often emanates from systemic misconduct, but it is not universally the result of state officials' purposeful acts.[210] False testimony may be unknown or unknowable to even the most fastidious state officials in several situations. Most traditionally, prosecutors, who are inexperienced or poorly trained to assess witness truthfulness and are disincentivized from discovering whether a cooperating witness is lying, may lack knowledge when a witness fabricates testimony but does not testify so inconsistently as to implicate legal knowledge.[211] Convictions based upon the "foundation of perjury," which occurs when a witness offers materially false testimony unbeknownst to the State were deemed antithetical to due process by the Texas Court of Criminal Appeals in *Chabot*.[212] Yet, in Group A and B state courts, a false testimony claim raising the *Chabot* scenario would fail on the knowledge element—even after those witnesses recant—like in the case of Robin Lee Archer.[213] Less recognized, but also important, are circumstances where attorneys are not properly equipped to understand the limits of relevant science or systemic barriers preventing information sharing.[214] Some of these

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210 *See supra* Sections III.B–III.C; *see, e.g.*, Case v. Hatch, 2008-NMSC-024, 183 P.3d 905 (holding that an instance of false testimony, created between prosecution witnesses, was sufficiently consistent to not raise State suspicion of knowledge).

211 *See* Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RSRV. L. REV. 593, 602–03 (discussing prosecutors' difficulty in determining witness truthfulness); *see supra* Section III.B.

212 *Ex parte* Chabot, 300 S.W.3d 768, 770 (Tex. Crim. App. 2009).

213 *See supra* notes 5–17 and accompanying text; *see also Cardozo's Perlmutter Center for Legal Justice Helps Vacate Convictions of Four Men Falsely Accused of 1991 Murder*, CARDOZO L. (Dec. 2, 2024), https://cardozo.yu.edu/news/cardozos-perlmutter-center-legal-justice-helps-vacate-convictions-four-men-falsely-accused [https://perma.cc/SL55-X6C6] (explaining that where, despite the long-recanted false testimony of the State's star witness, four men—Al Cleveland, Lenworth Edwards, John Edwards, and Benson Davis—served more than a century combined in prison on the basis of false testimony until the Lorain County Prosecutor moved to dismiss and vacate their convictions).

214 Because very few states have statutes that address changes in science, which can allow for habeas claims based solely on a petitioner's demonstration that the science used to convict them was later disproven, these claims are generally raised as false testimony claims. Caitlin M. Plummer & Imran J. Syed, *Criminal Procedure v. Scientific Progress: The Challenging Path to Post-Conviction Relief in Cases That Arise During Periods of Shifts in Science*, 41 VT. L. REV. 279, 318–19 (2016); Beety, *supra* note 21, at 486. This confusion is especially prevalent where expert witnesses testify beyond the scientific boundaries of their discipline, but definitive research showing these misapplications does not become known until the discipline affirmatively self-regulates. Beety,

impediments are more surreptitious than others, but none are acceptable excuses for individuals convicted on the basis of false testimony to remain incarcerated.

Testimony is often least "knowable" when trials take place amidst scientific advancements or when policies prevent state officials from accessing information.[215] When a scientific discipline is repudiated or standards are revised, the average trial attorney—prosecution or defense—is unlikely to know of that shift as it is happening.[216] In 2015, the Department of Justice and the Federal Bureau of Investigation admitted that almost every examiner in a renowned forensic unit unknowingly gave false testimony at trials, leading to the convictions and subsequent deaths or executions of fourteen people.[217] Each examiner believed the scientific methods used to render their expert opinions were absolutely reliable until the basis of their discipline was disproven decades later.[218] In such a scenario, a knowledge element for those convicted because of such testimony would be impossible to prove.[219] Similarly absurd results may ensue on the institutional end when local or state policies preclude prosecutors from accessing relevant police personnel files, which indicate whether officer witnesses have disciplinary histories involving perjury or evidence falsification.[220] Without such information, a prosecutor may rely on police witnesses who are known to persistently present false testimony and, barring major inconsistences, have no legally cognizable reason to know their testimony was false—even when it is later proven to be. Neither circumstance makes convictions based upon false testimony any less egregious.

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supra note 21, at 506–07 (describing this process in relation to hair microscopy). Regarding government impediments to sharing scientific information, see generally Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (explaining how government institutions use protective orders, oppose discovery, and fight intra-agency information sharing, preventing entities like prosecutors' offices from accessing potentially exculpatory information or discovering false testimony).

215 *See generally* Beety, *supra* note 21.

216 Plummer & Syed, *supra* note 214, at 319.

217 Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST (Apr. 18, 2015, 5:44 PM), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html [https://perma.cc/75GS-8BBF].

218 *Id.*; *see also* NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (highlighting the questionable basis of forensic disciplines long regarded by courts to hold evidentiary value, including bloodstain pattern analysis, bitemark analysis, tire track and shoe print analysis, and microscopic hair analysis).

219 This is why some—though very few—states have adopted statutes addressing changes in science. *See* Plummer & Syed, *supra* note 214; Beety, *supra* note 21.

220 *See* Abel, *supra* note 214.

E. *Knowledge Elements Do Not Meaningfully Deter or Address State Misconduct*

Those who recognize how the institutions of prosecution and policing prevent petitioners from meaningfully challenging false testimony may still see knowledge elements as useful to promote accountability and deter misconduct.[221] This more progressive-minded defense of the knowledge element is rooted in traditional accountability theory, which posits that the "naming and shaming" of state actors that courts may engage in when granting post-conviction claims can deter future constitutional violations and encourage professional discipline from the appropriate authorities.[222] This tactic is especially attractive to those who see value in prosecutors and police enduring public admonishment for wrongdoing, a practice that does not typically occur when state knowledge or similar misconduct is not alleged.[223] But this perceived accountability, which is not borne out in practice, fails to deter or punish state actors, and implicitly suggests that false testimony is a problem of individual "bad apple" actors.[224] This distorted view does not discourage misconduct. Rather, it preserves the status quo that allows it to fester.

Support of a knowledge element on accountability grounds is unhelpful in the pursuit of fundamental fairness for two reasons. First, while courts with a knowing use standard can and do name and shame state officials on the record, they frequently choose not to.[225] Even when

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221 *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062–64, 1088–89 (2009); Medwed, *supra* note 169, at 175; Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 314 (2016).

222 *See* Gershowitz, *supra* note 221, at 1062–64, 1088–89 (arguing that the practice of publicly shaming prosecutors by naming them in judicial opinions effectively punishes and deters future misconduct); Medwed, *supra* note 169, at 175 (suggesting that "shaming by naming" could deter future prosecutorial misconduct); Bazelon, *supra* note 221, at 314 (discussing the shaming of prosecutors by judges in oral argument and positing that prosecutors would be receptive to more widespread shaming as a means to protect their reputations).

223 *See, e.g.*, *Ex parte* Jimenez, No. WR-75,266-04, 2023 WL 3733662, at *1 (Tex. Crim. App. May 31, 2023) (pertaining to a grant of false testimony relief in Texas, where state knowledge is not considered, and state actors are not identified); *cf. infra* note 225 and accompanying text.

224 *See* Bains, *supra* note 93; Green & Yaroshefsky, *supra* note 93.

225 Judges may choose whether to directly name and shame state officials in their decisions when they overturn convictions for use of false testimony. Some choose to explicitly identify the actor who introduced or solicited the false testimony. *See* Gomez v. Comm'r of Corr., 243 A.3d 1163, 1177 (Conn. 2020) ("[D]uring his direct examination, [prosecutor] Murray directly solicited false testimony from both witnesses regarding their cooperation agreements with the state."); People v. Kasim, 66 Cal. Rptr. 2d 494, 511 (Cal. Ct. App. 1997) ("Because [prosecutor] Fitzpatrick's improper

courts do engage in this tactic, officials show almost none of the theorized fear of professional discipline that they supposedly assume when a colleague is named responsible for an overturned conviction.[226] State officials rarely incur disciplinary action for misconduct, and when they do, they are almost never subject to significant consequences.[227] Personal humiliation may be incurred, but professional repercussions are seldom a threat.[228] That embarrassment, however, may be enough to chill prosecutors' participation in future post-conviction litigation.[229] The State of Texas has argued that knowledge elements disincentivize prosecutors from objectively evaluating convictions for false testimony.[230] One explanation for this chilling effect is the perceived threat of accountability, even if it does not exist in practice.[231] The consequences of this theoretical accountability are not borne out by the State, but by the petitioners whose false testimony claims are rejected.[232]

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conduct seriously impacted the jury's ability to fairly evaluate the evidence, the judgment of the jury has been undermined, thus requiring reversal."). Others refer only to "the prosecutor." People v. Brown, 958 N.W.2d 60 (Mich. 2020) (vacating the defendant's conviction on false testimony grounds, where "the prosecutor" affirmatively concealed the nature of the false testimony); People v. Smith, 870 N.W.2d 299, 306, 308 (Mich. 2015) (ordering a new trial on false testimony grounds, referring to the prosecutor only as "she").

226 *See, e.g.*, State's Brief on Application for Writ of Habeas Corpus at 15–16, *Ex parte* Thomas, No. WR-94,420-01, 2023 WL 7382706 (Tex. Crim. App. Nov. 8, 2023), 2023 WL 5832176 (discussing the State's argument that prosecutors feared naming and shaming).

227 *See* Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 FORDHAM L. REV. 1179, 1179 (2021) ("Prosecutorial misconduct is a serious problem in the United States. Unfortunately, the two main mechanisms to deal with the problem—lawyer disciplinary boards and adjudicatory remedies—have not been up to the task.").

228 *See* Davis, *supra* note 180, at 277.

229 *See* State's Brief on Application for Writ of Habeas Corpus, *supra* note 226, at 15–16 (arguing against the implementation of a knowledge standard because "[r]equiring some act of bad faith (such as knowing use) could create a potential chilling effect or reluctance to objectively evaluate whether material testimony has been rendered false by new information or developments if that evaluation requires a finding that a witness or actor has engaged in misconduct").

230 *Id.*

231 *See* Gershowitz, *supra* note 227; Keenan et al., *supra* note 159 (discussing the near-complete lack of accountability for prosecutors who commit misconduct); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 896 (2015) ("[D]uring the past forty years virtually none of the reported cases of prosecutors' violations of the rules of professional conduct—regardless of the subject, severity, and extent of the violation—have been reported to disciplinary authorities.").

232 *See* Gershowitz, *supra* note 227; *see also* Jennifer E. Laurin, *Progressive Prosecutorial Accountability*, 50 FORDHAM URB. L.J. 1067, 1071 (2023) ("Prosecutors, including progressive ones, wield enormous power, threaten dire and destructive consequences for peoples' lives. How and the degree to which they are checked in that work matters from the standpoint of ensuring accuracy and fairness."); Bina Ahmad, *The Professionalized Violence of Prosecutorial Power and Misconduct*, 27 CUNY L. REV. 336, 348 (2024) ("Though many public defenders know the wrongs prosecutors routinely commit, they realize that if they push too hard for accountability, this same prosecutor or prosecutor's office will make *their clients*—not them—suffer the consequences.").

Second, the deterrence logic of a naming and shaming approach relies on the assumption that state misconduct stems from the isolated acts of "bad apples" whose misdeeds can be separated from otherwise law-abiding institutions.[233] Under this view, singling out those few bad actors on the record will serve as a cautionary tale for junior officials, who will be repulsed from misconduct after seeing their superiors suffer the consequences of it.[234] This result is not only unlikely, but counterproductive.[235] Focus on individual actors at the cost of examining the systemic factors that drive misconduct reinforces the myth that these behaviors are as rare as exonerations themselves.[236] The sheer number of overturned convictions on false testimony grounds relative to other post-conviction claims indicates that false testimony is not a problem confined to "bad apples" in select jurisdictions, but is inherent to the system in which it operates.[237] In labeling misconduct as an individual problem subject to individual solutions, the naming and shaming approach fundamentally misunderstands the systemic nature of false testimony and cannot be expected to adequately address it.

Nor does a narrow focus on state accountability and misconduct address the systemic issues sustaining false testimony given by nonstate actors. Nonstate actor witnesses testify falsely with alarming frequency.[238]

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233 Green & Yaroshefsky, *supra* note 93, at 53–59.

234 *See* Gershowitz, *supra* note 221, at 1063–64, 1088–89.

235 *See* Trivedi & Gonzalez Van Cleve, *supra* note 183; Alexander, *supra* note 183; Gershowitz, *supra* note 227.

236 *See* Trivedi & Gonzalez Van Cleve, *supra* note 183.

237 *See generally* NAT'L REGISTRY OF EXONERATIONS, 2022 ANNUAL REPORT 4 (2023), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf [https://perma.cc/2WSV-PJHF]; SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 40 (2012), https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/3MD3-2WD6] (finding "perjury or false accusation" and "mistaken eyewitness identification" to be the two most common causal factors of wrongful convictions out of 873 studied exonerations).

238 SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 2 (2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/2N2E-ZBKQ] (identifying mistaken eyewitness identifications as a leading cause of wrongful convictions); ROB WARDEN, HOW MISTAKEN AND PERJURED EYEWITNESS IDENTIFICATION TESTIMONY PUT 46 INNOCENT AMERICANS ON DEATH ROW 1 (2001), https://www.prisonpolicy.org/scans/northwestern/StudyCWC2001.pdf [https://perma.cc/TX38-U3ZJ] ("Erroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system."); Sarah Stillman, *The Throwaways*, NEW YORKER (Aug. 27, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways [https://perma.cc/PZX8-PGXV] ("[T]he snitch-based system has proved notoriously unreliable, fueling wrongful convictions."); Jeffrey S. Neuschatz et al., *The Truth About Snitches: An Archival Analysis of*

They do so because they face pressure to comply with police and prosecutors, stand to gain from cooperation, or make earnest errors in pursuit of envisaged justice for community members.[239] Reducing false testimony to an issue of prosecutors and police, without considering the individuals utilized by the State to incarcerate others, does not take seriously the scale of false testimony in the criminal legal system. Knowledge requirements, whether they precipitate shame-induced accountability or deter future misconduct, are poor substitutes for real due process remedies.

IV. STATES SHOULD ELIMINATE THE KNOWLEDGE REQUIREMENT

States should remove unnecessary and unfair knowledge requirements from their false testimony standards, and they should follow the lead of Texas or New Mexico to do so. Removing the knowledge requirement would expand the universe of claims available for petitioners to challenge constitutionally invalid convictions. States may remove the knowledge requirement and create a knowledge-optional standard in two ways. They could, as Texas does, read the requirements of due process to directly allow unknowing use claims.[240] They could also—additionally or alternatively—enhance due process rights by reading additional protections into their state constitutions, as exemplified by New Mexico.[241]

Texas's *Chabot* standard and the flood of successful false testimony claims after its implementation provides a model for states seeking constitutional justifications for an unknowing use standard and evidence for why it is so important.[242] In *Chabot* and its predecessor, *Carmona*,

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Informant Testimony, 28 PSYCHIATRY PSYCH. & L. 508 (2021) ("Research has shown that false testimony from informants . . . is one of the leading causes of the growing number of wrongful convictions" (footnote omitted)). *See generally* NAT'L REGISTRY OF EXONERATIONS, *supra* note 237; GROSS & SHAFFER, *supra* note 237.

239 *See* sources cited *supra* note 238; Guerra Thompson, *supra* note 192, at 330–32, 348–51 (identifying false testimony as a leading cause of "[e]rroneous guilty verdicts" and arguing that pressure from police conduct, moral or financial coercion, incentives, or a combination thereof generate testimony from witnesses that is often untruthful). *See generally* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413 (2007) (discussing the use of—and risks of false testimony from—incentivized witness testimony).

240 *Ex parte* Chabot, 300 S.W.3d 768, 770–72 (Tex. Crim. App. 2009) (citing *Ex parte* Carmona, 185 S.W.3d 492 (Tex. Crim. App. 2006)).

241 Case v. Hatch, 2008-NMSC-024, ¶¶ 6, 11, 183 P.3d 905.

242 *Chabot*, 300 S.W.3d at 771–72. For a list of post-*Chabot* standard false testimony exonerations, see *Texas*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/

Texas determined that *Napue*'s mandate for the State to correct false testimony continues after a conviction.[243] The mandatory state action for a due process violation, therefore, may be fulfilled when the State does not act to remedy wrongful convictions once evidence shows one occurred. Texas does not consider state knowledge when evaluating the constitutionality of a conviction at all; false testimony claims are evaluated only based on (1) whether the testimony was false, and (2) whether the false testimony was material to the conviction.[244]

Texas proves why a well-implemented false testimony standard without a knowledge requirement is worth pursuing.[245] As of February 2024, false testimony was present in over 80% of Texas's capital exoneration cases, and nearly 30% of Texas's exonerations after 2009 resulted from false testimony claims.[246] While these numbers are considerably exceeded by the extent of false testimony in the criminal legal system, they show that a more accessible false testimony standard may lead to increased habeas grants and, consequently, individuals freed from incarceration.[247] Tragically, the *Chabot* standard was implemented only after widespread recognition that Texas executed a likely innocent man, Cameron Todd Willingham, on the basis of false testimony.[248] States should not wait for their own Willingham to expand due process protections.

Unencumbered by a constitutional mandate for state knowledge in false testimony claims, states may also interpret their state constitutions to demand an unknowing false testimony standard. Even if state courts believe the federal standard only covers knowing false testimony claims, states may provide greater rights to their citizens than those granted by

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exoneration/Pages/detaillist.aspx (select filter by state, choose "TX") [https://perma.cc/942Q-PXC3].

243 *See supra* notes 71–82 and accompanying text.

244 *Ex parte* Weinstein, 421 S.W.3d 656, 664–65 (Tex. Crim. App. 2014).

245 In contrast to Texas, Nevada's *Riley* standard, which theoretically should function exactly the same as *Chabot* in Texas, is exercised far more rarely because of a statutory two-year filing limit. Riley v. State, 567 P.2d 475 (Nev. 1977); ROCKY MOUNTAIN INNOCENCE CTR., PROPOSED WRONGFUL CONVICTION REFORMS FOR ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE 1–2, https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/10447 [https://perma.cc/6CJX-PHGT]. Despite this, thirteen of Nevada's twenty-two exonerations after *Riley* included perjury or false accusation as a contributing factor. *Nevada*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (select filter by state, choose "NV") [https://perma.cc/37JC-58RD].

246 NAT'L REGISTRY OF EXONERATIONS, *supra* note 242.

247 *See id.*

248 Maurice Possley, *The Prosecutor and the Snitch: Did Texas Execute an Innocent Man?*, MARSHALL PROJECT (Aug. 3, 2014, 10:38 PM), https://www.themarshallproject.org/2014/08/03/did-texas-execute-an-innocent-man-willingham [https://perma.cc/M59W-78HS].

the U.S. Constitution.[249] Such was the decision of the New Mexico Supreme Court, which declared that the State's "particular interest in ensuring accuracy in criminal convictions in order to maintain credibility within the judiciary" required a knowledge-optional false testimony standard, so as to not "make truth subordinate to process and underline the '[f]undamental fairness [that] is intrinsic within the concept of due process that is provided by the New Mexico Constitution.'"[250] For courts looking to anchor this expansion of rights to something other than nebulous Supreme Court precedent, or to avoid reinterpreting false testimony cases entirely, this may be a more palatable alternative.

An expanded, fairer false testimony standard based on the aforementioned examples should be implemented by state courts because it would offer incarcerated individuals a new way to challenge unconstitutional convictions. But this kind of reform should not be seen as a solution to the problem of false testimony, nor should it be viewed—as efforts to reform post-conviction standards can be—as validating the righteousness of convictions that would not qualify for relief under this standard.[251] False testimony is endemic to a criminal legal system that is too broken for reinvigorated post-conviction standards to mend.[252] An expanded false testimony standard cannot solve the fundamental problems of that system, but it would grant some criminal defendants a mechanism through which to meaningfully challenge their incarceration, and should be implemented for that reason. While radical, systemic change is long overdue, opportunities to free individuals while broader efforts are pursued should not be overlooked.[253]

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249 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that states can use their constitutions to extend those rights guaranteed by the Constitution as it is interpreted by the Supreme Court, and envisioning expansions of due process as part of this project).

250 Case v. Hatch, 2008-NMSC-024, ¶ 11, 183 P.3d 905 (alterations in original) (quoting Montoya v. Ulibarri, 2007-NMSC-035, ¶¶ 21, 23, 163 P.3d 476).

251 *See generally* Erica Bryant, *Why We Say "Criminal Legal System," Not "Criminal Justice System,"* VERA INST. JUST. (Dec. 1, 2021), https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system [https://perma.cc/2ZM4-SH2L] ("[P]olicing, prosecution, courts, and corrections in the United States . . . do not deliver justice, nor have they ever."); Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010) (arguing that post-conviction claims may be inadvertently hierarchical by focusing on actual innocence, thereby threatening post-conviction safeguards in the criminal legal system for other defendants).

252 *See* Bryant, *supra* note 251; Smith, *supra* note 251.

253 *See* sources cited *supra* note 205 (detailing the stories of individuals whose freedom from incarceration resulted from expanded false testimony standards).

CONCLUSION

To Robin Lee Archer and other criminal defendants incarcerated on the basis of false testimony, it matters little if their prosecutor knew the testimony they used to convict them was false. They will suffer the consequences for reluctance to reevaluate Supreme Court false testimony precedent and artificially imposed barriers to due process protections. State courts reviewing petitions for habeas relief on false testimony grounds should not penalize petitioners with knowledge requirements that are constitutionally unnecessary, immensely difficult to prove, and in violation of the demands of fundamental fairness. Instead, courts should remove state knowledge mandates from their analysis and employ a framework that requires only that (1) testimony presented at trial was false, and (2) that testimony was material to the petitioner's conviction. Applying this standard will correct the misunderstanding that state knowledge is required for due process protection and will remove one of the innumerable falsely erected barriers for petitioners to remedy convictions obtained in violation of the Constitution.