No. 17-250

IN THE
Supreme Court of the United States

MITCHELL J. STEIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting litigation in which to participate is to identify cases that raise substantial legal issues regarding the meaning of the Constitution, criminal statutes or regulations, or criminal-justice policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of proper law-enforcement priorities. The Center also defends criminal-justice practices when discretionary decisions align with applicable law and standard practices and are consistent with appropriate law-enforcement priorities.

The Center's appearance as *amicus curiae* in this case is prompted by its belief that criminal convictions should be untainted by false evidence. In the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* also represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before it was due and that the parties have consented to the filing of this brief. Those written consents are being filed contemporaneously with this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

Center's experience, juries are likely both to assume that the prosecution believes testimony that it presents to be true and to be skeptical of defendants' efforts to discredit that testimony. Only the government's own correction of its witnesses' false testimony can ensure the fair administration of criminal justice.

SUMMARY OF ARGUMENT

Petitioner has already demonstrated that the courts of appeals and state supreme courts are divided over whether due process generally permits a criminal conviction to stand despite the government's knowing use of false testimony, unless the defendant proves that the government also suppressed the evidence demonstrating that the testimony was false. That division of authority alone justifies granting the petition. The Center files this brief to highlight two additional points that weigh in favor of granting review.

First, this case demonstrates that the time is ripe for this Court to reaffirm its holding in *Napue v. Illinois*, 360 U.S. 264 (1959), that the government's knowing use of false testimony violates the Due Process Clause. The Eleventh Circuit held that the government generally need not correct false testimony, unless the defendant shows that impeaching evidence was suppressed, in violation of the government's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). That approach conflates the distinct due process requirements that the defendant have an opportunity to present all material evidence to the jury (*Brady*) and that the trial not be tainted by false testimony (*Napue*). Compliance with both of those due process obligations is necessary to ensure that the defendant receives a fair trial.

Judicial enforcement of the *Napue* duty is necessary to ensure fair criminal trials because defendants are often unable to correct false testimony on their own. Jurors give greater weight to testimony elicited by prosecutors than to efforts at impeachment by defense lawyers. The Eleventh Circuit's approach compounds that problem. It holds that the use of false testimony generally does not violate due process unless the defendant shows that the government "suppressed" the evidence disproving the testimony. App. 26. Eliminating the *Napue* obligation so long as the government discloses impeaching documents somewhere in voluminous discovery productions does not comport with due process. To make matters worse, prevailing standards of appellate review allow for convictions to be affirmed even when efforts at impeachment do reveal inconsistencies or even untruths in witness testimony.

Second, resolving the question presented is important because the Eleventh Circuit's approach both undermines one of the few meaningful deterrents to the knowing use of false testimony and increases the risk of wrongful convictions. The overwhelming majority of prosecutors are ethical public servants motivated by a desire to do justice. That desire would be expected to lead most prosecutors to avoid false testimony and to correct it when it appears. But prosecutors also conform their conduct to what the law requires, and they face pressures to maintain high conviction rates. A legal rule that does not require the correction of false testimony so long as impeaching evidence is disclosed removes a deterrent to the knowing use of false testimony. Other than reversing convictions obtained through the use of false testimony, few other meaningful

deterrents to such prosecutorial misconduct exist. False testimony, moreover, has been shown to be associated with wrongful convictions.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT THE PROSECUTION'S KNOWING FAILURE TO CORRECT FALSE TESTIMONY VIOLATES DUE PROCESS

According to the Eleventh Circuit, the government's knowing use of false testimony generally does not violate due process unless the defendant "identif[ies] evidence the government withheld that would have revealed the falsity of the testimony." App. 19. That rule is fundamentally incompatible with the Due Process Clause as interpreted by this Court. It also threatens to produce profoundly inequitable results in light of the document-intensive nature of complex criminal proceedings in the computer age.

A. The Government's Knowing Use Of False Testimony Contravenes The Right To A Fair Trial

The touchstone of due process in criminal proceedings is the observance of "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). A central aspect of that "fundamental fairness" is the principle that "a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *White v. Ragen*, 324 U.S. 760, 764 (1945). The government's knowing use of false testimony "prevent[s] . . . a trial that could in any real sense be termed fair." *Napue v. Illinois*, 360 U.S. 264, 270 (1959); *see United States v. Agurs*, 427 U.S. 97, 103 (1976) ("[i]n a series of . . . cases, the Court has consistently held that a convic-

tion obtained by the knowing use of perjured testimony is fundamentally unfair"). As this Court explained in *Napue*, the prohibition on knowing use of false testimony in criminal trials is "implicit in any concept of ordered liberty." 360 U.S. at 269.

"The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* When false testimony "appears" in a criminal trial, and the government is aware of the falsity, the prosecutor cannot remain "silen[t]." *Id.* at 270. Instead, the government "has the responsibility and duty to correct what [it] knows to be false and elicit the truth." *Id.*

Four years after the seminal false-testimony decision in *Napue*, this Court decided *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Court did not suggest that *Napue*'s clear rule prohibiting the knowing use of false testimony had been diluted by the Court's holding in *Brady*. On the contrary, the Court recently cited *Napue*'s prohibition on the "knowing use of false evidence" as an example of the Due Process Clause's "constraint" on evidence "so extremely unfair that its admission violates fundamental conceptions of justice." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012).

Numerous courts have appropriately reversed convictions on the basis that the knowing failure to correct false testimony violates the Due Process Clause, regardless of whether the defense possesses evidence that the testimony is false. For example, in *United*

States v. Foster, 874 F.2d 491 (8th Cir. 1988), the Eighth Circuit reversed a conviction where a prosecutor failed to correct witnesses' false testimony that they had not received any promises in exchange for their testimony, even though the defense was aware of the promises. *See id.* at 494-95 ("The fact that defense counsel was also aware of the letters but failed to correct the prosecutor's misrepresentation is of no consequence."). And, in *People v. Smith*, 870 N.W.2d 299 (Mich. 2015), the Supreme Court of Michigan reversed a conviction where a witness falsely testified he received no payment of any kind for his participation in the prosecution. *See id.* at 305-11. The court specifically noted that "[t]he obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution." *Id.* at 306 n.7.

As petitioner demonstrates, the Eleventh Circuit's contrary approach cannot be reconciled with this Court's due process precedents. Pet. 23-29. Among other errors, the Eleventh Circuit radically curtailed the due process obligation to correct false testimony by rejecting petitioner's due process argument on the ground that the government complied with *Brady* (and the government did not "capitalize" on the testimony). Under the Eleventh Circuit's rule, there generally can be no *Napue* violation without a *Brady* violation. That approach conflates distinct due process requirements. *Brady* ensures that defendants have an opportunity to present all material evidence to the jury, whereas *Napue* protects defendants from trials tainted by evidence known to be false. *Brady* and *Napue* are distinct doctrines, and compliance with both is necessary to ensure that the defendant receives a fair trial.

B. The Obligation To Correct False Testimony Is A Recognized Duty Of Responsible Prosecutors

The prosecutor's obligation under *Napue* to correct false testimony is so well established and well recognized that the duty is reflected in guidance promulgated by leading professional organizations. The American Bar Association's Criminal Justice Standards for the Prosecution Function provide that, "if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps." Am. Bar Ass'n, *Standards for Criminal Justice: Prosecution and Defense Function* § 3-6.6(c) (4th ed. 2015). According to the ABA standards, "[i]f the witness is still on the stand, the prosecutor should attempt to correct the error through further examination," and, "[i]f the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy." *Id.* Similarly, the National District Attorneys Association's National Prosecution Standards state that, "[i]f a prosecutor learns that material evidence previously presented by the prosecutor is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence." Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 6-1.3 (3d ed. 2009). Neither of those codifications of the *Napue* rule suggests that the obligation to correct false testimony exists only when impeaching evidence has been suppressed.

C. Defendants Cannot Effectively Rebut False Testimony That The Government Has Failed To Correct

In this case, the Eleventh Circuit held that the government's compliance with its *Brady* obligation to produce exculpatory evidence essentially defeated petitioner's due process challenge to the use of false testimony. But the government's compliance with *Brady* does not enable the defendant to erase the inevitable prejudice resulting from false testimony when the government allows it to stand. That is so for at least three reasons.

First, testimony of government witnesses carries a presumptive credibility in the minds of jurors that cross-examination by the defense cannot reliably eliminate. Jurors generally trust prosecutors to present evidence that the prosecutors believe to be true. They understand that prosecutors are public servants committed to the pursuit of justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-5.001.F (1997) (recognizing "obligation to seek justice in every case"). When a prosecutor fails to correct false testimony, the jury is likely to give that testimony—supported by the perceived blessing of the government—greater weight than whatever evidence the defense is able to present through impeachment or in rebuttal. What might be an undisputed point in the absence of the false testimony instead becomes another contested fact for the jury to resolve, with the government's imprimatur tilting the scale against the truth.

Second, the defendant may have difficulty even locating the impeaching evidence among the documents produced by the government. Complex criminal proceedings increasingly involve vast amounts of evidentiary discovery. Cases involving alleged financial crimes or similar offenses can generate thousands or even millions of pages of discovery, and wiretaps can produce hundreds of hours of recordings. *See*, *e.g.*, *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) ("several hundred million pages" of documents), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010); Hilary Oran, Note, *Does* Brady *Have Byte? Adapting Constitutional Disclosure for the Digital Age*, 50 Colum. J.L. & Soc. Probs. 97, 100 n.12 (2016) (citing additional cases). In such cases, the defendant may not be able even to find the evidence, let alone to overcome the government witness's presumptive credibility through impeachment.

Petitioner's case shows how that unfairness can arise. The impeaching evidence at issue was disclosed in a batch of 282,000 documents, representing 185 gigabytes of data and 1.75 million pages. *See* DE46-1, at 2. Although the government provided petitioner with a list of "hot documents," that list did not include the relevant evidence. *See* C.A. Reply Br. 7 (Jan. 4, 2016). Separate from the government's production, petitioner later obtained independent access to the impeaching evidence as part of a large database of documents maintained by his former employer. *See* DE264-14 ¶¶ 3-4. But petitioner did not uncover the documents in question until after the government completed its case-in-chief and the witnesses were excused. *See id.* ¶ 4. Thus, petitioner had no opportunity even to try to rebut the false

testimony on cross-examination because he had not yet found the documents.

Even so, the Eleventh Circuit held that due process was not violated because "none of this evidence was suppressed" and because, in the court's view, the government did not "capitalize[]" on the testimony. App. 26. Notably, nothing in the Eleventh Circuit's analysis turned on the fact that petitioner at some point obtained independent access to the documents. The Eleventh Circuit's approach would apply equally in a case where the defendant obtains access to impeaching evidence only through a multi-million-page production of documents by the government. The Eleventh Circuit's no-suppression exception to the rule against knowing use of false testimony thus permits sharp practices in discovery. An approach that allows the government to use false testimony so long as the impeaching evidence is located somewhere within voluminous discovery cannot be squared with this Court's due process precedents.

Third, the deferential standards of review governing jury verdicts exacerbate the difficulties defendants face in rebutting false testimony that the government has failed to correct. Courts have indicated that jury determinations regarding witness credibility are given deference even when the witness is "inaccurate, contradictory and even untruthful in some respects." *United States v. Tropiano*, 418 F.2d 1069, 1074 (2d Cir. 1969); *see also United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) ("It is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony."); *United States v. Simmons*, 923 F.2d

934, 953 (2d Cir. 1991) ("allegedly inconsistent prior statements . . . relate only to [witness's] credibility"; "[b]ecause, on appeal, we must construe the evidence in the light most favorable to the Government, we reject this challenge to [witness's] testimony").

Combined with the Eleventh Circuit's watering-down of the government's duty to correct, those decisions raise the real prospect that, even when a defendant uncovers and uses impeaching evidence, the jury may still credit false testimony and convict the defendant based on that testimony. When that occurs, the prevailing standard of review may require the appellate court to affirm the conviction, notwithstanding doubts about the veracity of the testimony. That is another reason why requiring the government to correct false testimony "when it appears," *Napue*, 360 U.S. at 269, is the only reliable way to ensure the fairness of criminal trials.

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE TO THE CRIMINAL JUSTICE SYSTEM

A. The Eleventh Circuit's Approach Risks False Convictions

The Eleventh Circuit's rule provides an incentive not to correct false testimony when it occurs. If the government is aware that a witness has testified falsely in a manner adverse to the defendant, but the defense has access to material demonstrating that the testimony is false, then as long as the prosecutor does not "capitalize" on the testimony in closing, any resulting conviction will be upheld. Thus, by sanctioning the use of false testimony when the impeaching evidence is not suppressed, the Eleventh Circuit has made failure to correct false testimony just another "hard blow[]," *Berger*, 295 U.S. at 88, in the

prosecution's arsenal. That approach threatens to increase the presence of false testimony in criminal proceedings, as well as the attendant risk of wrongful convictions.

Prosecutors are frequently evaluated and rewarded based on their conviction rates. "Conviction rates serve as a tool to evaluate prosecutors, and trial prosecutors may use their rates of convictions to obtain both promotions within and positions outside of the office." Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under* Imbler*: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 253 (2012). That emphasis on conviction rates encourages prosecutors to employ any and all legally available tactics to obtain convictions.

Any increase in the use of false testimony in criminal trials increases the risk of wrongful convictions. False testimony has been shown to be a frequent factor in false convictions overturned by DNA evidence. A recent review of 330 cases in which the defendant was exonerated based on DNA evidence showed that 72% of the convictions involved incorrect eyewitness identifications.[3] Twenty-four percent of the cases involved false testimony by government informants. *See* Garrett, *Convicting the Innocent Redux* at 7. As the study's author explained, "[f]ew jurisdictions across the country have adopted any rules to better safeguard the reliability of informant testimony in response to these wrongful convictions. This problem

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[3] *See* Brandon L. Garrett, *Convicting the Innocent Redux* at 7, University of Virginia School of Law, Public Law and Legal Theory Research Paper Series 2015-39 (Aug. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638472.

of unreliable and contaminated informant testimony is one that still requires urgent attention." *Id.* at 12.

B. No Alternative Remedy Exists To Prevent The Use Of False Testimony

Meaningful sanctions are necessary to eliminate the temptation for unethical prosecutors to fail to correct false testimony. As a practical matter, reversing convictions is the only effective sanction. Recent research has shown that individual prosecutors rarely face disciplinary action, the primary alternative consequence for failing to correct false testimony.

Disciplinary proceedings are rarely instituted against prosecutors. As one commentator has explained, prosecutors "virtually never face discipline [from the bar] even when courts identify misconduct." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1517 (2009). Indeed, according to the commentator, "bringing ethics complaints against prosecutors" may be viewed as "'career suicide.'" *Id.* at 1518.

In 2003, the Center for Public Integrity conducted a comprehensive study of prosecutorial misconduct, examining 11,452 cases since 1970 in which appellate courts reviewed prosecutorial-misconduct claims. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 60, 67 (2005). In the overwhelming majority of cases, the alleged misconduct was either not addressed or ruled to be harmless error. *See id.* Misconduct resulted in the dismissal of charges, reversal of convictions, or reduction in sentences in more than 2,000 cases. *See id.* But prosecutors were disciplined in only 44 of those cases and were never criminally prosecuted. *See id.* at 60, 70. Moreover, of those 44 cases, only two resulted in disbarments. *See id.* at 70.

A 2008 report by the California Commission on the Fair Administration of Justice, an arm of the State of California, described a review of "54 cases in which prosecutorial misconduct resulted in a reversal" between 1998 and 2008.[4] California state law requires "a report . . . to the State Bar" whenever a conviction is reversed. CCFAJ Final Report at 71. But a State Bar employee reported to the Commission that, "after checking half of these 54 cases," the employee "had yet to find a single example of a report by a court of misconduct," even though "each year the State Bar sends out a letter reminding judges of the statutory requirements." *Id.*

A 2009 study by the Northern California Innocence Project reviewed 707 California cases from 1997 to 2009 that "explicitly found misconduct," out of 4,000 cases in which such conduct was alleged. Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 Berkeley J. Crim. L. 391, 399 n.12 (2011). "[T]he offending prosecutors were 'almost never discipline[d].'" *Id.* (quoting Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, at 3 (N. Cal. Innocence Project 2010)).

A 2009 New York State Bar Association Task Force on Wrongful Convictions found similar results. The Task Force studied 53 cases where convictions were overturned and the defendants exonerated.[5] Thirty-

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[4] Cal. Comm'n on Fair Admin. of Justice, Final Report at 71 (2008) ("CCFAJ Final Report"), http://digitalcommons.law.scu.edu/ncippubs/1/.

[5] *See* N.Y. State Bar Ass'n Task Force on Wrongful Convictions, Final Report at 5 (2009) ("NYSBA Final Report"), https://www.nysba.org/wcreport/.

one of those convictions were attributable to "government practices." NYSBA Final Report at 7. But the study's authors were unable to locate any "public disciplinary steps against prosecutors" involved in the cases. *Id.* at 29. The Task Force also received testimony that, although courts found prosecutorial misconduct in approximately 200 cases between the late 1970s and 2003, only two prosecutors had ever been disciplined by their own offices. *Id.* at 31.

Finally, a 2010 *USA Today* study of federal criminal prosecutions "found 201 cases where federal prosecutors acted improperly, but in a review of bar records could only locate a single instance where a federal prosecutor was disbarred in the [previous] twelve years." Thomas P. Sullivan & Maurice Possley, *The Chronic Failure To Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. Crim. L. & Criminology 881, 892 (2015) (citing Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today (Sept. 23, 2010)).

That empirical record demonstrates that alternatives to reversing convictions do not provide a meaningful deterrent to abuse of prosecutorial power. As Judge Kozinski has said, "a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same." Hon. Alex Kozinksi, *Criminal Law 2.0*, preface to 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxvi (2015). Enforcing the principle of *Napue*, and reversing convictions where prosecutors knowingly fail to correct false testimony, is the only way to create a legal environment that preserves the integrity of the judicial process and protects the fundamental fairness of criminal proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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