No. 17-250

IN THE

Supreme Court of the United States

MITCHELL J. STEIN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association for Public Defense ("NAPD") is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models.

In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal. Accordingly, NAPD has a strong interest in the

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[1] Counsel for *Amicus* provided notice to the parties of their intent to file an *amicus* brief on September 1, 2017, giving more than ten days advance notice. The parties have consented to the filing of this brief and attached hereto are their letters of consent. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

issues raised in this case and fully supports the grounds for certiorari identified by Petitioner.

As Petitioner has detailed, this case presents a concrete federal and state court split on an important constitutional issue, and the Eleventh Circuit's decision is on the wrong side of that split. Furthermore, the facts of this case present an ideal vehicle for addressing the issue, as the decision below accepts the premise that the government may knowingly use false testimony to convict a criminal defendant. This Court's jurisprudence, and basic principles of fairness and due process, reject such a proposition.

NAPD writes separately as amicus curiae only to provide additional discussion, from the perspective of the indigent criminal defense bar, about the importance of the issue and the practical implications of the Eleventh Circuit's rule if left unchecked.

SUMMARY OF ARGUMENT

Petitioner's case asks a basic but fundamental question: Will our criminal justice system permit convictions obtained through the knowing use of false testimony, simply because the prosecutor has not also suppressed evidence indicating the testimony was false? The Eleventh Circuit answered this question in the affirmative, but for decades this Court has known a very different justice system, one in which the knowing, uncorrected use of false testimony by the prosecutor could never be countenanced. And for good reason. As this Court has long recognized, the knowing use of false testimony is "as inconsistent with the rudimentary demands of justice as is the

obtaining of a like result by intimidation." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

The manner in which the Eleventh Circuit's rule undermines the integrity of the criminal justice system becomes especially acute when considering the overwhelming burdens and obstacles that the indigent defense bar encounters in striving to fulfill their constitutional and ethical duties to clients. Public defenders throughout this country perform a noble and often heroic function, providing adversarial representation for the people of the United States, "one at a time." *See Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, J. dissenting) ("Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time."). What's more, they do so in the vast majority of criminal cases. *See, e.g.*, Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Defense Counsel in Criminal Cases* 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf (estimating that eighty-two percent of criminal defendants facing felony charges cannot afford to hire counsel).

Unfortunately, in many jurisdictions the indigent defense bar must perform these functions despite overwhelming caseloads and extreme underfunding. Such conditions are simply not conducive to a rule like the Eleventh Circuit's, which shifts ultimate responsibility from the prosecution, which is the party in the best position to prevent and correct its knowing use of false testimony at trial, to the defense, which is the party that does not know the testimony is false and

may lack the resources and time to uncover its falsity.

Such a shift also threatens to divorce prosecutors from their historic obligation to seek justice, not convictions. Amicus has no doubt that the problem Petitioner identifies is not the norm; most prosecutors would not think of knowingly introducing false testimony, much less refusing to correct it. But for those prosecutors who have—and would—the consequences should be clear: if discovered, any resulting conviction will be reversed, regardless of whether the prosecutor silently disclosed enough evidence to allow defense counsel to uncover the falsehood.

The Eleventh Circuit erroneously rejected this rule, and in so doing sent the pernicious message that the U.S. Constitution winks at convictions that are the product, at least in part, of knowing false testimony. Such a rule disrespects those prosecutors who play by the rules and undermines the long-standing principles that have governed the heightened ethical obligations that have traditionally accompanied prosecutorial powers in our system. Most importantly, this rule deprives indigent defendants of the fairness and due process that the Constitution guarantees that common sense requires.

Put simply, prosecutors have great power, and with that power comes a great responsibility to ensure that convictions are the product of an honest, fair, and just process. The Eleventh Circuit's rule allows prosecutors to pass that responsibility off to overworked, under-resourced defense counsel, and discourages prosecutors from discharging their responsibilities in an ethical, fair,

and transparent manner. For these reasons, *Amicus* respectfully submits that this Court should grant the petition and hold that the Eleventh Circuit's rule is fundamentally inconsistent with both the integrity of the criminal justice system and prosecutors' historic role in that system.

ARGUMENT

I. THE INDIGENT DEFENSE BAR LACKS THE RESOURCES TO MEET THE ELEVENTH CIRCUIT'S UNWORKABLE AND UNJUST STANDARD

Prosecutors should never be permitted to obtain a conviction through the intentional and knowing use of false testimony. Under the Eleventh Circuit's rule, a prosecutor can potentially avoid reversal if she can later show she disclosed enough information that would have allowed defense counsel to correct the testimony. Such a rule is inconsistent with the fundamental guarantees of fairness and due process. First, it places the burden on underfunded public defenders to correct a prosecutor's intentional and knowing use of false testimony, and is thus much less likely to be effective in ensuring the integrity of criminal trials. Second, this rule enables—and incentivizes—a prosecutor to circumvent the duty to correct false testimony and sends a message that that the knowing use of false testimony will have no consequences whatsoever. This is a prescription for injustice.

To be sure, *Amicus* does not believe that defense counsel will acquiesce to a prosecutor's knowing use of false testimony or will forego serious efforts to correct it. Indeed, *Amicus* has no

doubt that defense counsel will vigorously attempt to correct false testimony when they know about it or when they learn enough to suspect it. But, as demonstrated below, defense counsel will often be in a poor position to do so. A defense lawyer is already, by definition, in the dark when a prosecutor knowingly presents false testimony. And exposing such errors is often difficult or impossible because indigent defense systems around the country often suffer from inadequate resources and unreasonably high (sometimes shockingly high) caseloads. These factors suggest that the current system, in which the duty to correct remains with the prosecutor, is the much more effective and fair one. The Eleventh Circuit's misguided rule, if anything, makes it more likely that criminal trials and convictions will be tainted with unfairness and characterized by injustice. In situations where indigent defendants are represented by underfunded and often overworked public defenders, this result is all but certain.

A. The indigent defense bar is chronically underfunded across the United States.

Public defense systems suffer from chronic underfunding. For example, in 2009 alone, 37 states experienced significant shortfalls in public defense by mid-year. *See* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 59 (Apr. 14, 2009) ("*Justice Denied*"), https://constitutionproject.org/documents/justice-denied-america-s-continuing-neglect-of-our-constitutional-right-to-counsel/. These budgetary shortfalls have caused many public defender offices

to drastically reduce funding, staff, and resources. *See id.* at 59-60.

On average, spending on prosecution is three times higher than on public defense. *See* William D. Lawrence, *The Public Defender Crisis in America:* Gideon*, the War on Drugs and the Fight for Equality*, 5 U. Miami Race & Soc. Just. L. Rev. 167, 177 (2015). In fact, in 2008 spending on prosecution and corrections overshadowed spending on public defense by a ratio of 14:1. *See id.* at 178. Similarly, a study of Kentucky's funding in 2005 found that spending on indigent defense tallied $56.4 million, while prosecutorial spending on indigent cases alone amounted to $130–$139 million. *Justice Denied* at 61. Likewise, a study in California found that, in 2006–2007, indigent defense services were underfunded by at least $300 million. Further exacerbating this problem, the funding gap between prosecution and indigent defense in California grew 20% between 2003–2004 and 2006–2007. *See id.*

In the Eleventh Circuit, public defense is also plagued by a chronic lack of funding. In Florida, for example, the Brevard County Public Defense office received $6.7 million in funding during fiscal year 2014–2015, which was only one-third of the $17.2 million allocated to the prosecutor's office. Andrew Ford and J.D. Gallop, *Public Defenders Struggle to Stay Ahead: Brevard's Public Defender Face Long Days, Low Pay, and an Overwhelming Caseload* ("*Brevard Public Defenders*"), Florida Today, http://www.floridatoday.com/story/news/local/2014/07/12/public-defenders-struggle-to-stay-ahead-of-caseloads-and-stress/12569621/. Likewise, Georgia had no state-wide

public defender program until 2003, and it did not receive funding until 2005. *See* Southern Center for Human Rights, *Right to Counsel*, https://www.schr.org/our-work/counsel (last visited Sept. 11, 2017). To make matters worse, in one Georgia judicial circuit, Cordele, the public defense office had an annual caseload of 1700, amounting to 567 cases per attorney and resulting in defendants waiting months before speaking to counsel. Southern Center for Human Rights, *Lack of Representation by Public Defender Office Challenged* (Sept. 24, 2014), https://www.schr.org/resources/process_for_selecting_cordele_circuit_public_defender.

Because jurisdictions across the country suffer from comparable resource disparities and excessive workloads, the implications of the Eleventh Circuit's ruling are far-reaching. Yet another stark illustration of the public defense crisis comes from Missouri, which ranks 49th in state funding for public defense. In the face of crippling staff shortages, the Director of the state public defense system appointed then-Governor Jay Nixon to serve as indigent defense counsel. Matt Ford, *A Governor Ordered to Serve as a Public Defender*, The Atlantic (Aug. 4, 2016), https://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/. While largely a symbolic gesture, the move was a public cry for help by a system facing crisis-level funding deficits and unmanageable caseloads.

Ultimately, the dire situation facing public defender systems—as evidenced by underfunding and extraordinary caseloads—has led public defense lawyers to repeatedly seek relief from the

courts. *See, e.g.*, *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *Public Defender v. Florida*, 115 So. 3d 261 (Fla. 2013); *State ex rel. Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 599-601 (Mo. 2012); *Simmons v. State Public Defender*, 791 N.W.2d 69, 89 (Iowa 2010). It is also an unmistakable sign that public defenders face difficult obstacles when striving to ensure the fairness and integrity of the criminal justice process. The Eleventh Circuit's rule increases the likelihood that these difficulties will become insurmountable, and that no remedy will exist when a prosecutor knowingly uses false testimony to secure a conviction.

B. Crushing caseloads prevent thorough investigation by the indigent defense bar.

The American Bar Association standards call for reasonable caseloads for indigent defense counsel, acknowledging explicitly that the quality of defense suffers significantly as caseloads increase. *See* Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of A Public Defense Delivery System* 3 (Feb. 2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckedam.pdf. Yet in many jurisdictions workloads are so onerous that the right to counsel exists merely in the abstract. *See* Christopher Campbell, Ph.D., *et al.*, *Unnoticed, Untapped and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 Behav. Sci. & L. 751, 753 (2015).

For example, in Brevard County, Florida, the 18 public defenders handling felony cases each

worked 433 felony cases, nearly tripling the 150-case limit suggested by the National Association of Chief Defenders decades ago and rising to three times the standard suggested by recent workload studies in other jurisdictions. *See* Ford and Gallop, *Brevard Public Defenders*; Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 Ohio State J. Crim. L. 403, 423 (2017). Public defenders handling misdemeanors had 810 cases per attorney, which is double the recommended 400 misdemeanor cases per attorney. *See* Ford and Gallop, *Brevard Public Defenders*. And in Dade County, Florida, average caseloads rose in recent years from "367 to nearly 500 felonies and from 1380 to 2225 misdemeanors." *Justice Denied* at 68. What's more, these skyrocketing caseloads occurred in the face of a 12.6% budget reduction. *See id.*

These crushing caseloads have led defenders in some jurisdictions—including jurisdictions within the Eleventh Circuit's purview, *see, e.g.*, *Public Defender v. Florida*, 115 So. 3d 261—to refuse additional cases. *See also Justice Denied* at 68 (describing response in 2006, when six misdemeanor attorneys in Knox County, Tennessee, had to handle "over 10,000 cases, averaging just less than one hour per case.").

To make matters worse, staffing levels are also on unequal footing, with state prosecutors typically enjoying more—and higher paid—staff than public defense institutions. *Id.* at 61-63. For example, prosecutors in Cumberland, New Jersey, have over seven times the investigative staff on hand than do their indigent defense counterparts. *See id.*

Beyond legal staffing, the public defense bar has far fewer critical support services than prosecutors, even though prosecutors have built-in investigative support in law enforcement agencies. *See id.* Prosecutors also benefit from state and federal resources such as crime labs, expert witnesses, and special investigators. *See id.* In contrast, public defenders must often carve resources from already emaciated budgets for these functions or seek prior approval from the court, which is often denied. *Id.* These disparities demonstrate that the deck is stacked against indigent defense counsel who strive to provide effective assistance to criminal defendants and ensure the fairness of a criminal trial. The Eleventh Circuit's rule makes it more likely—if not certain—that public defenders will be unable to achieve these salutary objectives.

C. The Eleventh Circuit places the burden to detect and correct false testimony on the wrong party.

Overwhelming caseloads, shockingly inadequate funding, and lack of institutional resources demonstrate that the public defense bar cannot—and should not—bear the burden of identifying and combating false testimony that the prosecution already knows is false. By excusing a prosecutor's knowing use of false testimony when the prosecutor has disclosed the material that demonstrates its falsity, the Eleventh Circuit places the burden on the wrong party and devalues the ethical obligations prosecutors must uphold when seeking a conviction.

The practical consequences of such a rule could, and likely will, exacerbate an already-

disturbing trend in criminal practice generally—namely, so-called document dumps in which the State "discloses" voluminous quantities of documents to the defense on the eve of trial. *See* Bennett L. Gershman, *Litigating Brady v. Maryland*: *Games Prosecutors Play*, 57 Case Western L. Rev. 531, 542-48 (2007); Joel Cohen & Danielle Alfonzo Walsman, *The 'Brady Dump': Problems With 'Open File' Discovery*, N.Y. L. J. (Sept. 4, 2009). Such gamesmanship stretches already thin resources to their breaking point, sometimes preventing the defense from discovering and effectively using important evidence. And when combined with the Eleventh Circuit's standard such practices would become especially pernicious. These last-minute disclosures would not only undermine a meaningful defense, but also would inoculate the knowing subornation of false testimony during the trial itself. Put simply, the Eleventh Circuit's rule enables prosecutors to say, "yes, I knowingly used false testimony to mislead the court and jury, but I'm not responsible because you didn't catch me." Due process and basic guarantees of fairness require much more.

This underscores the dangerous result flowing from a misguided legal standard that makes unfairness in the criminal justice process more likely and unaccountability in the prosecution of criminal defendants all but certain. The burden of preventing and correcting false testimony should be placed on the shoulders of the attorneys who, by definition, know the testimony is false and are constitutionally charged with a duty to seek justice: prosecutors.

II. EXCUSING PROSECUTORS' INTRODUCTION OF FALSE TESTIMONY UNDERMINES PROSECUTORIAL ETHICS

The Eleventh Circuit's rule not only threatens the integrity of the trials infected by the knowing presentation of false testimony, but also sends a larger message that threatens to infect the entire criminal justice system. After all, the integrity of the criminal justice system depends, in large part, on public faith in the integrity of prosecutors. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is fair to say that the average jury . . . has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."). Indeed, prosecutors make important decisions every single day about who gets charged, who gets prosecuted, who goes to jail, and who goes free. For this reason, the Court has said for a century that United States attorneys are not mere advocates but servants of justice. *See id.* The high ethical standards imposed on prosecutors by our adversarial system are particularly important when a defendant is indigent and relies on public defense for representation. The Eleventh Circuit's rule allows prosecutors to evade these standards at their convenience and to prioritize the securing of convictions over the necessity of ensuring justice.

A. The criminal justice system imposes high ethical standards on prosecutors because they are servants of the law.

Prosecutors have a special role in the United States criminal justice system. As the Court explained in *United States v. Berger*, a federal

prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all[.]" 295 U.S. at 88. The prosecutorial role—and therefore duties—is distinct from the defense attorney's role. A defense attorney in the criminal justice system is an officer of the court, but not a "servant of the law" in the "peculiar" and "definitive" sense that a prosecutor is. *Id.* In short, prosecutors are obligated to seek justice, not convictions at any cost.

The ethical standards for prosecutors and criminal defense attorneys reflect this difference. Because a prosecutor serves the public and has no individual client, her duty is that "justice shall be done." *Id.* In contrast, a criminal defense attorney's duty is to her client, protecting the client's legal rights in a complex system. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also* Criminal Justice Standards for the Defense Function, § 4-1.2 (Am. Bar Ass'n 4th ed.). In essence, our adversarial system depends on both the advocacy of defense counsel and the independent duty of the prosecutor to seek justice.

Moreover, as officers of the court, both defense counsel and prosecutors owe duties of candor to the court, but the nuances of those duties differ because of the prosecutorial powers in the adversarial system. Specifically, while ethical standards recognize that defense counsel's duty of candor must be "tempered" in some cases by "competing ethical and constitutional obligations," the prosecution has no such competing interest. *Compare* Criminal Justice Standards for the Defense Function, § 4-1.4 (Am. Bar Ass'n 4th ed.)

with Criminal Justice Standards for the Prosecution Function, § 3-1.4 (Am. Bar Ass'n 4th ed.). Thus, prosecutors have a "heightened" duty of candor, precisely because of their role as a servant of the public. *See* Criminal Justice Standards for the Prosecution Function, § 3-1.4 (Am. Bar Ass'n 4th ed.). This duty of candor prohibits prosecutors from making statements of "fact or law, or offer[ing] evidence, that the prosecutor does not reasonably believe to be true[.]" *Id.* § 3-1.4(b). Likewise, prosecutors have further ethical duties to correct false evidence or testimony when they have introduced it. *Id.* § 3-6.6(c). The Eleventh Circuit's rule transforms this duty from mandatory to optional with no consequences—except for indigent criminal defendants.

At bottom, prosecutors have an unflagging duty to seek justice, and "[i]t is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. The Eleventh Circuit's decision disregards these principles and makes it more, not less, likely that prosecutors will use "improper methods calculated to produce a wrongful conviction." *Id.*

B. Permitting prosecutors to knowingly use false testimony undermines prosecutorial ethics and contributes to a culture of corruption.

Lowering the standards imposed on prosecutors threatens the integrity of the criminal justice system because prosecutors will have limited consequences and the behavior will become normalized. As Petitioner shows, the only remedy

for prosecutorial misconduct is reversal of the conviction. *See* Pet'r Br. at 30-31. Studies of state prosecutorial discipline show that only a handful of prosecutors have been disciplined for misconduct, despite courts reversing convictions and ordering new trials for misconduct many more times. *See* Shawn Musgrave, New England Ctr. for Investigative Reporting, *Scant Discipline Follows Prosecutors' Impropriety in Massachusetts*, (Mar. 6, 2017), https://www.necir.org/2017/03/06/scant-discipline-follows-prosecutors-impropriety-massachusetts/ (describing 120 reversed convictions since 1985 in Massachusetts, but only two prosecutors publicly disciplined since 1980); Joaquin Sapien and Sergio Hernandez, ProPublica, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, (Apr. 3 & 5, 2013), https://www.propublica.org/article/ who-polices-prosecutors-who-abuse-their-authority-usually-nobody (describing 30 reversed convictions in New York City, but only one prosecutor publicly disciplined).

Given these facts, if the Eleventh Circuit's standard is upheld, no regularly enforceable remedy for the use of false testimony will exist, and no mechanism will exist to deter prosecutors from intentionally and knowingly using false testimony to secure a conviction. Thus, such a standard will degrade prosecutorial ethics, compromise the reliability of criminal verdicts, and undermine appellate courts' capacity to correct resulting injustice—all at the expense of indigent criminal defendants. *Cf. United States v. Olsen*, 737 F.3d 625, 631-32 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of reh'g en banc) ("When a public official behaves with such casual disregard

for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.").

Importantly, while most prosecutors will not use false testimony, the change in standard will nonetheless affect their behavior, whether intentionally or not. Behavioral economics shows that standards can institutionalize poor individual and organizational behavior. When an individual sees an institution tolerating behavior in another, then the individual will internalize that they, too, are permitted to engage in similar behavior. *See* Linda Klebe Trevino & Stuart A. Youngblood, *Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-Making,* 75 J. Applied Psychol. 378, 379 (1990). This phenomenon is pronounced where the individual rationalizes that "by serving the company's interest, they are also serving the public's interest." Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Res. in Org. Behav. 6 (2003). Further contributing to the institutional pressure to engage in bad behavior, "leniency and low frequency of formal sanctioning by governments and professional associations often makes [bad behavior] . . . rational." *Id.*

Accordingly, if the Court permits the Eleventh Circuit's rule to stand, thus excusing prosecutors from any consequences flowing from the knowing use of false testimony in the courtroom, it will normalize conduct that compromises the integrity of the criminal justice

system and undermines the Constitution's guarantees of fairness and due process for all defendants, regardless of their socio-economic status. Without condemning the improper use of false testimony, the Court will signal a tacit encouragement for others to engage in this behavior. To prevent that result, this Court should grant certiorari and reverse the Eleventh Circuit's decision.

III. THE ELEVENTH CIRCUIT'S STANDARD THREATENS THE INTEGRITY OF CRIMINAL TRIALS

The Eleventh Circuit's standard also undermines this Court's repeated admonitions about the prosecutor's fundamental obligation to ensure that convictions are not obtained through the knowing use of false testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Mesarosh v. United States*, 352 U.S. 1 (1956); *Mooney v. Holohan*, 294 U.S. 103 (1935). Breaking with this strong body of law, the Eleventh Circuit conflated two distinct elements of due process: the prosecutorial duty to disclose exculpatory evidence and the prosecutorial duty not to knowingly introduce false testimony. In so doing, the Eleventh Circuit added a requirement to obtain relief for violations of the latter—a defendant must also show that the prosecution withheld evidence of the testimony's falsity. This additional requirement was based on the separate duty to disclose exculpatory evidence. But the additional requirement destroys the integrity of the trial process, and severely undermines the ability of public defenders to ensure the integrity of that process.

A defendant cannot have a fair trial when it is based on false evidence knowingly introduced by the prosecution. Indeed, *Napue* was based on the principle, "implicit in any concept of ordered liberty," that the government "*may not knowingly use false evidence, including false testimony, to obtain a tainted conviction*[.]" *Napue*, 360 U.S. at 269 (emphasis added). To this end, prosecutors must carry the burden to obtain convictions through just means. After all, "'[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.'" *Id.* at 270 (quoting *People v. Savvides*, 136 N.E. 2d 853, 854-55 (N.Y. 1956)).

The Eleventh Circuit's standard ignores the fundamental corruption of the trial process when a conviction is based on false testimony. False testimony alone is already a problem that the courts regularly combat, particularly in the context of jailhouse informants. *See generally* Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (Winter 2004–2005), http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf; Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (finding in a comprehensive study of 200 exonerations that 18% of exonerees were convicted, in part, based on informant testimony). Permitting prosecutors to knowingly use false testimony, as was the case here, will worsen the false testimony problem, and result in more wrongful convictions.

Ultimately, the burden to ensure a fair trial cannot rest solely on the work of defense counsel. The role of defense counsel is to protect his client's legal rights, not to police prosecutors. Placing the burden on defense counsel alone, during trial, to combat prosecutorial misconduct would be devastating to the criminal justice system and undermine the adversarial process. This Court has recognized that it is not defense counsel's burden alone to correct false testimony. Rather, the pursuit of a fair trial is a shared obligation among the court, the prosecution, and defense counsel because "[t]he government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide [by] them." *Mesarosh*, 352 U.S at 14.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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