No. _____

In the
Supreme Court of the United States

PAYSUN LONG,

Petitioner,

v.

RANDY PFISTER, in his official capacity as Warden of Stateville Correctional Center,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DOUGLAS G. SMITH
Counsel of Record
MICHAEL W. GLENN
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000
dsmith@kirkland.com

Counsel for Petitioner

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QUESTION PRESENTED

Nearly sixty years ago, this Court held that the failure by a prosecutor to correct perjured testimony deprives an accused of liberty without due process of law. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The Court's ruling was consistent with a long line of precedent acknowledging "that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *While v. Ragen*, 324 U.S. 760, 764 (1945). When a prosecutor fails to fulfill his "duty to correct what he knows to be false and elicit the truth," he "prevent[s] . . . a trial that could in any real sense be termed fair." *Napue*, 360 U.S. at 270; *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) ("In a series of . . . cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair.").

In this case, a key prosecution witness offered false testimony critical to the conviction of petitioner Paysun Long. She swore to the jury, repeatedly, that she had been consistent in identifying Mr. Long as the person who murdered the decedent. It is undisputed that those statements were false, and the prosecution knew they were false. Yet, there is also no dispute that the prosecutor failed to correct those false statements before the jury deliberated.

A unanimous Seventh Circuit panel agreed that Mr. Long's conviction violated *Napue*. Nonetheless, the en banc court affirmed Mr. Long's conviction in a 5-3 decision, based on four purported "exceptions" to *Napue*'s directive that the prosecution must correct perjured testimony. According to the majority, this Court has not "expressly decided" that a *Napue*

violation occurs where the false testimony is elicited by the defense, the defense knows the testimony is false, the prosecutor does not "rely" on the false testimony during closing arguments, or the jury is presented with contrary evidence. App.7a. Absent this Court's intervention, Mr. Long will likely spend the rest of his life in jail, having been convicted based on perjury.

The question presented is:

Whether there are exceptions to this Court's ruling in *Napue v. Illinois*, 360 U.S. 264 (1959), that would allow a criminal defendant to be convicted based on perjury that the prosecution fails to correct.

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PETITION FOR WRIT OF CERTIORARI

For well over eight decades, this Court has consistently reinforced the fundamental principle that a conviction obtained through "the presentation of testimony known to be perjured," runs counter to due process and "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). Thus, this Court's directives "are clear" that whenever the government "obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law." *Hysler v. Florida*, 315 U.S. 411, 413 (1942).

Building upon this precedent, the Court in *Napue v. Illinois* held that when the government knows that a witness for the prosecution has testified falsely, the prosecutor "has the responsibility and duty to correct what he knows to be false and elicit the truth." 360 U.S. 264, 270 (1959). Failure to fulfill that duty "prevent[s] . . . a trial that could in any real sense be termed fair," *id.*, for the government's knowing use of false testimony "involve[s] a corruption of the truth-seeking function of the trial process," *United States v. Agurs*, 427 U.S. 97, 104 (1976).

Rather than apply this clearly established law, a number of federal and state courts—including the Seventh Circuit here—have created "exceptions" to *Napue*. Despite this Court's clear mandates, these judicially-created exceptions excuse the government from correcting knowingly false testimony that is placed before the jury.

For example, a number of courts have held that the prosecution need not correct perjury if the false testimony was elicited on cross-examination by the defense, rather than by the prosecution. *See, e.g.*, *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997) ("[W]hen the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony."); *United States v. Adebayo*, 985 F.2d 1333, 1342 (7th Cir. 1993) (same).

Courts likewise have refused to set aside convictions obtained through the knowing use of false testimony if the defendant had knowledge of the falsity. *See, e.g.*, *United States v. Mangual-Garcia*, 505 F.3d 1, 10–11 (1st Cir. 2007) (recognizing the "division within the circuits on the issue," but deciding that "[w]hen the defendant knows about the false testimony and fails to bring it to the jury or the court's attention," that "strategic choice[]" cannot be challenged on appeal); *United States v. Crockett*, 435 F.3d 1305, 1318 (10th Cir. 2006) ("The government had disclosed this impeachment evidence and *hence Napue is inapposite*." (emphasis added)); *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) (defense's failure to refute false testimony of which it was aware was a "deliberate defense strategy" that undermined due process claim); *Meece v. Commw.*, 348 S.W.3d 627, 680 (Ky. 2011) (same).

Some courts have held that a conviction may stand if the prosecutor did not "rely" on or "capitalize" on the falsehood during summation. *See, e.g., DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) (vacating conviction where "the

prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process"); *United States v. Sanfilippo*, 564 F.2d 176, 179 (5th Cir. 1977).

And, other courts have held that the introduction of perjured testimony without correction is permissible so long as the jury is provided with some contrary evidence. *See, e.g., United States v. Langston*, 970 F.2d 692, 700–01 (10th Cir. 1992) (concluding no reversible error where witness, who testified falsely on direct examination, "was extensively cross-examined and impeached"); *United States v. Santiago*, 798 F.2d 246, 247 (7th Cir. 1986).

The Seventh Circuit invoked each of these exceptions here. In its en banc decision, the court acknowledged that the prosecution knowingly used false testimony to convict Paysun Long. Yet, the court held that there was no due process violation because each of these "exceptions" to *Napue* could excuse the government's failure to correct the perjured testimony.

This ruling is not only at odds with the Court's broad directive in *Napue*, it is also at odds with the rulings of other federal circuits and state supreme courts that have remained faithful to *Napue's* teaching and have rejected each of the alleged "exceptions" identified by the Seventh Circuit.

Other courts have faithfully applied *Napue,* holding that it expressly imposes "an affirmative duty on the part of the prosecution to correct false testimony at trial, even when the testimony is unsolicited" by the prosecution. *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc); *see also*

Jenkins v. Artuz, 294 F.3d 284, 295–96 (2d Cir. 2002); *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988); *People v. Smith*, 870 N.W.2d 299, 306 n.8 (Mich. 2015); *State v. Brunette*, 501 A.2d 419, 424 (Me. 1985).

Nor, as these courts recognize, is this duty altered by the defendant's awareness of the false testimony because "[t]he obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution." *Smith*, 870 N.W.2d at 306 n.7. These rulings recognize "the free standing constitutional duty of the State and its representatives to protect the system against false testimony" embodied in *Napue* and this Court's other precedents. *Commw. of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001); *see also Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009) ("The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost.").

They likewise have rejected the proposition that there is any "reliance" or "capitalization" element required to establish a *Napue* violation. Under this Court's precedents, the defense need only show that the prosecution "knew or should have known that the testimony was false." *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146 (3d Cir. 2017); *see also United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994). As these courts recognize, "[a]ll perjury pollutes a trial, making it hard for jurors to see the truth." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).

Finally, courts have acknowledged that no amount of contrary evidence can cure the introduction

of perjury. *See e.g.*, *Hayes*, 399 F.3d at 987 (citing *Napue*, 360 U.S. at 270). As these courts have noted, "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, *and the jury may figure out*, that the testimony is false." *LaPage*, 231 F.3d at 492 (emphasis added).

Accordingly, there is a deep and persistent split among the circuits that warrants this Court's intervention. The Seventh Circuit's decision and those of other circuits recognizing these "exceptions" to *Napue* are inconsistent with rulings by the Second, Third, Eighth and Ninth Circuits (and several state courts of last resort) rejecting judicially-created loopholes that allow the prosecution to convict a criminal defendant based on perjury. This split in authority includes two en banc decisions on opposite sides of this question. The split is therefore more than ripe for this Court's intervention.

Moreover, the consequences of this split are profound. Criminal defendants may be convicted based on perjury simply by virtue of the jurisdiction in which they find themselves, depriving them of fundamental due process rights. While many courts continue to faithfully apply *Napue*, others refuse to require the prosecution to take the minimal step of simply correcting perjured testimony on the record, resulting in convictions based on perjury—a fundamental violation of due process—including that of Mr. Long here. By granting the petition, this Court can solidify what "[c]ourts, litigants, and juries" have long believed: "[O]bligations to refrain from improper methods to secure a conviction plainly resting upon the prosecuting attorney, will be faithfully observed."

Banks v. Dretke, 540 U.S. 668, 696 (2004)(internal quotation omitted).

The petition should be granted.

OPINIONS BELOW

The Seventh Circuit's en banc opinion and dissent are reported at 874 F.3d 544 and reproduced at App.1a–24a. The three-judge panel's opinion is reported at 809 F.3d 299 and reproduced at App.25a–53a. The District Court's decision is unreported and reproduced at App.54a–80a. The Illinois Appellate Court opinion and dissent denying post-conviction relief are unreported and reproduced at App.81a–107a.

JURISDICTION

The en banc Seventh Circuit issued its opinion on October 20, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

A. Factual Background

On June 11, 2001, Larriec Sherman was shot in the Taft Homes housing development in Peoria, Illinois. App.57a. When the responding officer arrived at the scene, Sherman lay on the ground near a bicycle. *Id.* Fifty to sixty people were gathered around Sherman, who was transported to a nearby hospital where he died from multiple gunshot wounds. *Id.*

B. Trial Proceedings

Petitioner, Paysun Long, was tried twice for the murder of Sherman. In the first trial, the prosecution made several improper and unsupported statements during closing argument, and the conviction was reversed. App.26a–27a. In the second trial, the prosecution obtained a conviction based on the testimony of an alleged eyewitness who the government agrees perjured herself on the stand.

No physical evidence tied Mr. Long to the murder. App.26a. Instead, the prosecution relied largely on witness testimony to convict Mr. Long. *Id.* Two of the witnesses testified that Mr. Long was not the shooter, but the prosecution was allowed to put into evidence earlier recorded statements by those same witnesses saying that he was. App.26a–27a. The testimony of a third witness, who was sixteen years old at the time of the shooting, was contradicted by other witnesses, including the responding officer. App.41a. It is the testimony of the fourth witness, Brooklyn Irby, which is the subject of this appeal.

Ms. Irby testified under oath that she saw Mr. Long shoot the decedent. On cross-examination, defense counsel asked her whether she had previously told the prosecutor and an investigator the exact opposite, stating that she had lied when she first told investigators that she had seen Mr. Long shoot the decedent. App.27a. Ms. Irby repeatedly denied that she had done so. These repeated sworn statements were indisputably false. Nonetheless, the prosecution failed to correct those statements and the jury was allowed to consider them.

Indeed, during closing argument, the prosecution told the jury that Ms. Irby "came in here and raised

her hand and told you what happened" and that she "was under oath" and "told you what she saw":

> [Defense counsel will] argue that Brooklyn Irby came to the State's Attorney's Office and said on an earlier occasion prior to her testifying and said I wasn't telling the police the truth. Well, she came in here and raised her hand and told you what happened and you saw her testimony. Maybe she thought if she told the State's Attorney's Office she wasn't telling the truth she wouldn't have to testify. But when she came in here and was under oath, she told you what she saw and that was consistent with what Keyonna [Edwards] told you and that was consistent with what she has told you and that was consistent with what Shawanda [Walker] told you and that was consistent with the physical evidence.[1]

App.109a. During rebuttal closing, another prosecutor, who was the lead prosecutor in Mr. Long's first trial, told the jury that "[Irby] testified here yesterday to what she saw that night of June 1, 2001. 'I saw Paysun shoot Larry Sherman in the back.'" App.100a. She emphasized that, while there were differences in the witnesses' testimony, "it was the truth that was consistent." *Id.*

Finally, the lead prosecutor committed what the dissent below described as "two outrages" during rebuttal closing argument. App.24a. Specifically, she

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[1] As the dissenting Justice in the Illinois Appellate Court noted, the only physical evidence was that Sherman was shot four times. App.98a n.2.

engaged in what the dissenters described as a "blatantly racist stunt" in order to explain away the failure of the numerous witnesses present to identify Mr. Long as the shooter by "comparing those present when the police arrived to the slave characters in *Gone with the Wind*," describing their reaction to police questioning as similar to a character in the movie who said she "don't know nothing 'bout birthin' babies." *Id.* Further, the prosecutor relied upon a letter that Irby wrote that was not in evidence, causing the judge to intervene *sua sponte* to address what was a "blatant attempt by the experienced lead prosecutor to put unadmitted hearsay in front of the jury." *Id.* Despite the judge's intervention, the jury specifically requested to see Ms. Irby's letter during deliberations. *Id.*

Based on Ms. Irby's testimony, Paysun Long was found guilty of first-degree murder and sentenced to 51 years in prison.

C. Post-Trial Proceedings

In April 2007, Long filed a pro se petition for post-conviction relief. Among his claims was that appellate counsel was ineffective for failing to raise the issue that the prosecution allowed Brooklyn Irby to testify falsely at Long's second trial. The State filed a motion to dismiss the post-conviction petition. The state court granted the motion and dismissed the petition without holding an evidentiary hearing.

Over a vigorous dissent, the Illinois Appellate Court affirmed Mr. Long's conviction. App.91a. The court recognized that, under *Napue*, the prosecutor's "knowing use of perjured testimony to obtain a conviction violates a criminal defendant's due process rights." App.86a. The court further acknowledged

that the "State has an obligation to correct false testimony," regardless of who elicits it. *Id.* Nonetheless, while the majority observed that the evidence against Long was far from "overwhelming," it concluded the constitutional violation was "harmless." App.87a.

The dissenting judge agreed that "the clear import of existing law is that *the State* has the obligation to correct the perjured testimony." App.93a. She strenuously disagreed, though, that the prosecution's failure to correct perjury in Mr. Long's case could be ignored on the ground that it was "harmless," particularly given that the "case against Long was *under*whelming" and, indeed, "a teetering edifice" based on perjured testimony. App.96a; App.102a.

After his petition for leave to appeal was denied by the Illinois Supreme Court, Long filed a pro se petition seeking collateral relief in the district court under 28 U.S.C. § 2254. While the district court denied the petition, a unanimous three-judge panel of the Seventh Circuit reversed it. App.26a; App.53a.

The Seventh Circuit concluded that the Illinois Appellate Court's decision on Long's *Napue* claim "was an unreasonable application of clear Supreme Court precedent." App.38a. As the court observed, there was no dispute that the prosecutor failed to correct Irby's perjured testimony. App.39a. In fact, during closing arguments, the prosecutor essentially "argued that Irby was credible and affirmatively relied on Irby's changing story to bolster her credibility." *Id.* The court ruled that the Illinois Appellate Court's failure to reverse Mr. Long's

conviction constituted "an unreasonable application of *Napue*." App.42a.

D. The Seventh Circuit's En Banc Decision

In a 5-3 decision, the en banc Seventh Circuit reversed the unanimous panel. In addressing his due process claim, the en banc court reasoned that Long's assertion that *Napue* and its successors serve as a full-stop, requiring a prosecutor to correct any false testimony presented by its witness, no matter if "the defense already knows the truth," "could be so understood" if "taken at a high level of generality." App.5a. In fact, the court recognized that *Napue* can "be read to imply that a prosecutor must correct testimony *no matter who solicited it*." App.6a (emphasis added).

Despite this recognition, the en banc court distanced itself from this Court's directives and determined that Long's due process claim raises four discrete issues that it suggested "have never been expressly decided by the Supreme Court":

> Do *Napue* and its successors apply when the defense rather than the prosecutor elicits the false testimony?
>
> Must the prosecutor correct false testimony when defense counsel already knows the truth?
>
> Does the Constitution forbid a conviction obtained when the prosecutor does not correct but also does not rely on the falsehood?
>
> Does the Constitution forbid a conviction obtained when all material evidence is presented to the jury before it deliberates?

App.7a. The court did not dispute that Irby's testimony was false or that the prosecution failed to correct her perjury. App.10a. Instead, the court held that, based on "the four open issues" it identified, it was not clearly established that a *Napue* violation had occurred. *Id.*

Three judges dissented from the majority opinion. As these judges observed, each of the exceptions to *Napue* that the majority identified was actually rejected in this Court's decision: "*Napue* itself considered and rejected the grounds the majority relies upon to excuse the Illinois' courts failure to follow it." App.11a. The dissent also noted that this Court made clear in *Napue* that it "does not matter . . . which side elicited the false testimony." *Id.* (citing *Napue*, at 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.'" App.18a (quoting *Napue*, 360 U.S. at 269). "Nor does it matter whether the defense knew of the false testimony or whether the jury heard evidence contradicting the false testimony." App.11a–12a (citing *Napue*, 360 U.S. at 269–70). Finally, regardless of whether the prosecution "relies" on the perjured testimony or contrary evidence is introduced, a failure to correct the perjury is "plainly contrary to *Napue*." App.21a.

The dissent concluded that *Napue* required reversal of Mr. Long's conviction. As the dissent noted, Ms. Irby's repeated statements under oath "were lies" and "the prosecutor knew it." App.13a. Nonetheless, "the prosecutor did nothing to correct Irby's false denials of having changed her story, even in redirect examination of Irby." *Id.* "To sum up, then, a key prosecution witness lied about a point

critical to her credibility, and the prosecution knew she was lying. Yet the prosecution took no steps to correct the perjury." App.15a (Hamilton, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court made clear in *Napue* "that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269. Nevertheless, a split of authority has developed over whether the Court really meant what it said. Multiple courts of appeals and state supreme courts have followed *Napue*'s holding that, because "[a] lie is a lie, . . . if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth." *Id.* at 269–70. But other courts have departed from this clear path, crafting various exceptions to *Napue* that negate its core protections by allowing the government to knowingly use perjury to obtain convictions.

The entire en banc Seventh Circuit agreed that this Court has never recognized such "exceptions for testimony elicited by the defense, or testimony known by the defense to be false, or testimony corrected before the jury deliberates." App.5a. That should have been the end of the matter. Paysun Long was convicted through the government's knowing use of perjury, which denied him "a trial that could in any real sense be termed fair." *Napue*, 360 U.S. at 270.

A slim majority of the court, however, affirmed Long's conviction. The majority reasoned that, because this Court "has never considered" several "possible qualifications" to *Napue*, the prosecution

could use perjury to convict Long because (1) the perjury was elicited by the defense, (2) the defense knew the testimony was false, (3) the prosecutor did not rely on the falsehood, and (4) contrary evidence was introduced before the jury deliberated. App.5a. By undercutting *Napue*'s rudimentary protections, however, the Seventh Circuit brought itself into conflict with numerous other federal circuit and state courts, which have rejected some or all of these "exceptions." The Court should grant the petition to resolve these unnecessary conflicts among the lower courts.

The Seventh Circuit's decision illustrates the deep division among the federal and state courts called upon to interpret *Napue*. This Court is uniquely suited to resolve this confusion by clarifying that its decision recognizes *none* of these purported exceptions. *Napue's* language is emphatic and clear. It makes plain that the Court did not contemplate any of the exceptions that have cropped up among the lower courts, seeking to evade this Court's clear directive that criminal convictions may not be based on perjured testimony. Under this Court's jurisprudence, "[t]here has been no deviation from" the fundamental principle "that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7 (1967).

Review is particularly warranted because the decisions by the Seventh Circuit and other courts that have created these "exceptions" to the fundamental rule against convictions based on perjured testimony are plainly at odds with *Napue* and have led to a significant violation of constitutional rights. As the

majority here acknowledged, "*Napue* itself holds [] that perjury known to the prosecution must be corrected before the jury retires." App.5a. And, as the majority further conceded, *Napue* and its successors do "not contain exceptions for testimony elicited by the defense, or testimony known by the defense to be false, or testimony corrected before the jury deliberates." *Id.* Whether *Napue* "expressly" considered these exceptions—as discussed further below, it did, and rejected them—thus is beside the point, App.7a, as "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quotation omitted); *see also Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) ("Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."). Rather, the state courts and Seventh Circuit should have "reasonably appl[ied] the rules 'squarely established' by this Court's holdings to the facts" of Long's case. *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). Under those rules, Long is entitled to a new trial in which the government does not knowingly use perjury to obtain his conviction.

Moreover, the fundamental premise of the majority's decision is wrong. As the dissent documented in detail, this Court has in fact implicitly considered each of the majority's purported "exceptions" to *Napue* and *rejected* them flat out, stating emphatically that the prosecution has a duty to correct perjured testimony, regardless of the source and regardless of other evidence offered at trial, so that the possibility that a conviction is obtained based

on perjury is precluded. This is what the Constitution and our nation's traditions fundamentally require and it is what this Court underscored when it decided *Napue*. In sum, *Napue* simply does not admit of "exceptions."

I. This Case Deepens A Conflict Among The Courts of Appeals And State Courts Of Last Resort.

It has long been a pillar of our criminal justice system that a prosecutor's ultimate responsibility, as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially," is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Consistent with this duty, courts have interpreted *Napue*—as requiring prosecutors to correct perjury, regardless of the circumstances. Thus, these courts have faithfully adhered to *Napue*'s directive that "a conviction obtained through use of false evidence, known to be such by representatives of the State," is a strict violation of due process. 360 U.S. at 269. Prosecutors must not allow false testimony "to go uncorrected when it appears." *Id.*

Despite these express directives, some lower courts have crafted exceptions to *Napue* and its successors that permit the government to obtain a conviction based upon the knowing use of false testimony when the defendant is aware of the falsity, where the government did not "solicit" the testimony, where it did not seek to "rely" or "capitalize" on it, or where it was contradicted by other evidence admitted at trial. Understandably, this has created "a division within the circuits," as well as the state courts of last

resort that have addressed the issue. *Mangual-Garcia*, 505 F.3d at 10. The split has only intensified, and shows no indication of a course correction absent this Court's intervention.

1. The Second, Third, Eighth and Ninth Circuits are among the courts that do not recognize exceptions to *Napue*. Recently, for example, the Third Circuit held that when a prosecutor "knowingly present[s] or fail[s] to correct perjured testimony, the threat to a defendant's right to due process is at its apex and the state's interests are at their nadir." *Haskell*, 866 F.3d at 152. The court granted habeas relief based on the prosecution's failure to correct false testimony on the ground that "[p]resenting false testimony cuts to the core of a defendant's right to due process." *Id.* at 147, 152.

The Second Circuit likewise affirmed a district court's grant of habeas relief when the government knowingly used false testimony to secure a conviction, even though it was the defense counsel that elicited the perjured testimony during cross-examination. *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002). The court observed that the defendant's due process rights were violated because the prosecutor "did nothing to correct th[e] false" testimony. *Id.* at 294; *see also Drake*, 553 F.3d at 241 ("We have interpreted Supreme Court precedent as holding that 'if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.'").

The Eighth Circuit has adopted a similar approach to situations where a government witness provides testimony the government knows to be false, holding that it is incumbent upon the prosecution to

correct the error, not the defendant. *United States v. Foster*, 874 F.2d 491 (8th Cir. 1988). In *Foster*, the court reasoned that "[t]he fact that defense counsel was also aware" of the false testimony and did not "correct the prosecutor's misrepresentation is of no consequence." *Id.* at 495. As the court observed, the fact that the defense is aware of the perjury "d[oes] not relieve the prosecutor of her overriding duty of candor to the court" and her responsibility "to seek justice rather than convictions." *Id.*

The Ninth Circuit has followed suit, issuing a series of opinions (including one decision en banc), holding that the government "has a constitutional duty to correct false testimony given by its witnesses, even when the defense knows the testimony was false but does nothing to point out such falsity to the jury or judge." *Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014); *see also Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc) (same). The court has observed that this Court's precedents provide "a workable set of precise rules" to govern such circumstances and that a prosecutor has a "freestanding ethical and constitutional obligation . . . as a representative of the government to protect the integrity of the court and the criminal justice system" by ensuring the trial is free of false testimony. *Bowie*, 243 F.3d at 1114, 1122.

The Supreme Judicial Court of Maine has faithfully adhered to the same view, holding that "[w]here false testimony, whether intentionally solicited or not, may have affected the outcome of a trial, not only is the trial fundamentally unfair, but the truth-seeking function of the trial process itself is unacceptably compromised." *State v. Brunette*, 501 A.2d 419, 423 (Me. 1985). In a thorough examination

of the issue, the unanimous court vacated the defendant's conviction despite the fact "the prosecution did not solicit the false testimony and immediately and fully informed both the defense counsel" and trial judge of the false testimony. *Id.* at 424. Invoking *Napue*, the court emphasized that "[w]hen the testimony is in any way relevant to the case," the duty rests with the prosecutor "to correct what he knows to be false and elicit the truth." *Id.*

In a similar vein, the New Hampshire Supreme Court concluded that a defendant's due process rights were violated and vacated his conviction where the prosecution failed to correct perjury, even though defense counsel could have, but did not, cross-examine the government's witness about his false testimony. *State v. Yates*, 629 A.2d 807, 809–10 (N.H. 1993). The court reiterated that, under *Napue*, "the final responsibility rest[s] with the prosecutor, not [the defendant], to bring to the attention of the court and the jury" that its witness' testimony contained falsehoods. *Id.* at 810.[2]

Nor do these courts sanction "exceptions" for the use of false testimony where the prosecution did not "rely" or "capitalize" on the perjury during summation or the defendant was able to introduce contrary evidence during trial. As to reliance, these courts recognize that "[a]ll perjury pollutes a trial, making it hard for jurors to see the truth." *LaPage*, 231 F.3d at 492. Regardless of whether the prosecution relies on the false testimony during closing arguments,

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[2] The Michigan Supreme Court has reached a similar conclusion, stating that the *Napue* "obligation . . . begins and ends with the prosecution." *People v. Smith*, 870 N.W.2d 299, 306 n.7 (Mich. 2015).

allowing perjury to go uncorrected constitutes "a corruption of the truth-seeking function of the trial process." *Drake*, 553 F.3d at 241 (internal quotation omitted). Nor does the introduction of contrary evidence remove the taint of perjured testimony—particularly in light of jurors' general skepticism of defense counsel. *LaPage*, 231 F.3d at 492. Allowing the jury to weigh false testimony along with other evidence expressly authorizes it to base a conviction on perjured testimony.

2. Other courts have disagreed, holding that *Napue* does not require the prosecution to correct perjury in all circumstances. In addition to the Seventh Circuit, the Fifth, Tenth and Eleventh Circuits have all recognized exceptions to *Napue*. *See, e.g., United States v. Stein,* 846 F.3d 1135, 1150 (11th Cir. 2017), *cert. denied* (Dec. 11, 2017); *United States v. Crockett*, 435 F.3d 1305, 1318 (10th Cir. 2006); *Beltran v. Cockrell*, 294 F.3d 730, 737 (5th Cir. 2002).

For example, the Tenth Circuit has read *Napue* to apply only in situations involving "a two-step process" where the government's nondisclosure of exculpatory evidence is combined with the "exploitation of that failure by the presentation of evidence or testimony the falsity of which would have been obvious but for the nondisclosure." *Crockett*, 435 F.3d at 1317. Thus, in instances where the government has disclosed impeachment evidence, giving a defendant contemporaneous knowledge of the falsity, the Tenth Circuit has concluded that "*Napue* is inapposite." *Id.* at 1318.

The Fifth Circuit has likewise held that *Napue* does not apply where the defense is aware of the

perjury on the ground that the defense's failure to address it "indicates waiver of the false testimony claim." *Beltran*, 294 F.3d at 737. The court characterized this as a "deliberate defense strategy" that somehow negates any due process violation under *Napue*. *Id.* at 736.

The Supreme Court of Kentucky permitted a conviction obtained through the use of false testimony to stand under similar circumstances, concluding that the defendant's "failure to impeach" a witness who offered false testimony "was strategic and tactical." *Meece v. Commw.*, 348 S.W.3d 627, 680 (Ky. 2011). Likewise, the Supreme Court of Iowa concluded that a defendant "waived" a claim of prosecutorial misconduct based on false testimony where the alleged falsity "was very apparent during pretrial depositions and during trial" and the defendant "fail[ed] to raise it at trial." *DeVoss v. State*, 648 N.W.2d 56, 63–64 (Iowa 2002).

Other courts have carved out exceptions to *Napue* where the prosecution did not "rely" or "capitalize" on the perjured testimony. The Eleventh Circuit has held, for example, that no due process violation lies unless the government "affirmatively capitalize[d] on" the false testimony. *Stein*, 846 F.3d at 1147; *see also Demarco*, 928 F.2d at 1077 ("[The prosecutor's argument to the jury capitalizing on the perjured testimony . . . contributed to the deprivation of due process.").

The Tenth Circuit has likewise rejected a *Napue* claim where the falsity of the witness's testimony was "extensively covered by defense counsels' questioning" and "fully developed before the jury." *United States v. Langston*, 970 F.2d 692, 700–01 (10th Cir. 1992); *see*

also United States v. Santiago, 798 F.2d 246, 247 (7th Cir. 1986) (no *Napue* violation where the defense "had an ample opportunity to impeach and discredit" the false testimony).

The en banc Seventh Circuit here thus aligned itself with a number of courts that have recognized various exceptions to *Napue* that excuse the prosecution's knowing use of false testimony to obtain a conviction. Had this case arisen in the Second, Third, Eighth or Ninth Circuits, Mr. Long unquestionably would have been entitled to a new trial based on the prosecution's violation of his due process rights. This deep and persistent split among the circuits warrants this Court's intervention.

II. The En Banc Decision Is Wrong.

Review by this Court is further warranted because the Seventh Circuit's decision flies in the face of this Court's precedent and threatens "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney*, 294 U.S. at 112. Indeed, this Court has long recognized that "the presentation of testimony known to be perjured" violates "the rudimentary demands of justice" and must fall. *Id.* Implicit within this fundamental rule is the recognition that a prosecutor is in a "very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger*, 295 U.S. at 88. Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." *Id.*

Napue, like this case, involved a murder prosecution in Illinois. 360 U.S. at 265. A police officer was fatally shot during the course of an attempted robbery. *Id.* One of the State's witnesses

was already serving a prison sentence for the same murder and testified that defendant Napue was one of the robbers. *Id.* at 265–66. During the trial, the prosecutor asked the witness whether he had received any promises of lenience in return for his testimony, and the witness said no. *Id.* at 267 n.2. That testimony was false, and was not corrected.

The prosecution later asked to have the witness's sentence reduced. *Id.* at 266. When Napue heard of the effort to reduce the witness's sentence, he sought relief from his conviction. *Id.* at 267. The state courts denied relief, *see id.*, but the Supreme Court reversed in a unanimous opinion, *id.* at 272. The Court based its decision on the fundamental proposition that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Id.* at 269 (citing *Mooney*, 294 U.S. 103).

Thus, *Napue* imposed a hard and fast rule that prosecutors must correct testimony that they know is false. This has been the rule for more than five decades, and follows upon a long tradition that criminal convictions tainted by perjury violate a defendant's constitutional rights. This fundamental principle—"implicit in any concept of ordered liberty"—is not susceptible to any broad exception. *Id.*

In this case, the Seventh Circuit did not dispute that the prosecution "knowingly use[d] false evidence . . . to obtain a tainted conviction" of Mr. Long. *Id.* Nonetheless, the majority held there was no constitutional violation based on its recognition of four "exceptions" to *Napue*'s requirement that the prosecution correct perjury. But, as the majority conceded, none of these exceptions are derived from

this Court's precedents. Nor can *Napue* be reasonably read to allow any such exception. In any event, each of the four exceptions invoked by the majority has been flatly refuted by *Napue* and its progeny. Thus, there was "no basis for . . . the Court of Appeals' view that" the Court's "more sweeping holding in" *Napue* should be given this devitalized reading. *Tenet v. Doe*, 544 U.S. 1, 9–10 (2005). The Seventh Circuit thus unreasonably applied this Court's clearly established law, and its decision warrants correction.

A. *Napue* Applies Regardless Of Who Elicits The Perjury

The Seventh Circuit first held that perjured testimony need not be corrected where the testimony is elicited by the defense, rather than the prosecution. However, the Court in *Napue* addressed this precise question, noting that "[t]he same result obtains when the State, *although not soliciting false evidence*, allows it to go uncorrected when it appears." 360 U.S. at 269 (emphasis added) (citing *Alcorta v. Texas*, 355 U.S. 28 (1957)).

This rule makes perfect sense given that the corrosive effect of perjury on the verdict does not depend on which witness introduced the perjury or whether it was elicited by the prosecution or the defense. The fundamental problem addressed by *Napue* is the problem of convictions based on perjured testimony. Accordingly, the fact that in this case the prosecution's witness lied during cross-examination, rather than on direct examination, does not render *Napue* somehow inapplicable.

The majority acknowledged that "[o]ne passage in *Napue*, 360 U.S. at 269, could be read to imply that a prosecutor must correct testimony no matter who

solicited it." App.6a. The majority, however, attempted to explain away this principle by noting that the Court cited *Alcorta* as support, and concluded that the *Napue* Court's statement must be limited to the facts of *Alcorta*. *Id.* Yet, the unanimous *Napue* decision offered no such limitation. Rather, it articulated a clear rule that the "same result" pertained no matter what party "solicit[ed] false evidence." 360 U.S. at 269.

Indeed, as the dissent observed, this Court subsequently applied this very rule in *Giglio v. United States*, 405 U.S. 150 (1972). There, a prosecution witness lied on cross-examination by denying he had received any promise of leniency. The prosecution failed to correct the false testimony because the prosecutor was unaware of the promise of leniency. This Court reversed and remanded even though the perjury was elicited by the *defense* in its cross-examination of the prosecution witness. *Id.* at 150–51. As the Court observed, "[i]t is the responsibility of the prosecutor" to ensure that "the due process requirements enunciated in *Napue*" are satisfied. *Id.* at 154–55.

As a result, the Seventh Circuit's view has been roundly rejected by other circuits. *See, e.g., Haskell*, 866 F.3d at 145–47 (due process is violated when the government "fails to correct false testimony in a criminal proceeding"); *Jenkins*, 294 F.3d at 295 (due process is violated where "the prosecutor, by action or inaction, is complicit in the untruthful testimony"); *LaPage*, 231 F.3d at 492 (due process violated where "the prosecutor sat silently as his witness lied" to defense counsel).

As the Ninth Circuit, sitting en banc, observed, "[t]here is no exception under *Alcorta* and *Pyle* for solicited false testimony." *Hayes*, 399 F.3d at 981. Rather, as the court noted, this Court's decisions in *Alcorta*, *Pyle*, and *Napue* all "create an affirmative duty on the part of the prosecution to correct false testimony at trial, even when the testimony is unsolicited." *Id.* Indeed, "it is illogical and contrary to principles of due process to conclude that the government is freed from any obligation simply because the false testimony is presented in response to defense questioning of a witness it called." *Longus v. United States*, 52 A.3d 836, 846 (D.C. 2012).

As these courts recognize, this Court has repeatedly underscored that the prosecution has a special duty "to refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88; *see also* ABA Model Rules of Prof'l Conduct 3.8 cmt. 1 (2017) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). This is a role that "transcends that of an adversary" and requires the prosecution "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985). Under *Napue*, the prosecution's constitutional and ethical duty to ensure that convictions are not based on perjury is not diminished merely because the defendant is the one who elicited the false testimony.

B. *Napue* Applies Regardless Of Whether The Defense Is Aware Of The Perjury

The Seventh Circuit's identification of an exception that would allow prosecutors to avoid their duty to correct perjured testimony where the defense knew the testimony was false is likewise contrary to

Napue and its progeny. Again, *Napue* made clear that the prosecution has both an ethical and constitutional obligation to correct perjured testimony. This duty applies even where the defense knows that the testimony is false. The directive under *Napue* is not to inform *defense counsel* of perjured testimony. Rather, it is to ensure that the court and ultimately *the jury* is informed that witnesses have perjured themselves so that the jury may not rely on perjured testimony to convict the defendant. That is why this Court declared in no uncertain terms that *Napue* and *Mooney* "impose upon the prosecution a constitutional obligation to report to the defendant *and to the trial court* whenever government witnesses lie under oath." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Napue*, 360 U.S. at 269–72, and *Mooney*, 294 U.S. 103) (emphasis added).

In *Giglio*, for example, the Court observed that the *Napue* rule plainly applies in cases where "'the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" 405 U.S. at 153 (quoting *Napue*, 360 U.S. at 269). Thus, as with the purported exception where defense counsel elicits the perjured testimony, there is no exception under *Napue* where defense counsel knows that the testimony was false.

The Seventh Circuit ignored this fundamental holding in *Napue* on the ground that the *Napue* rule is a "cousin to the *Brady* doctrine." App.9a. However, unlike *Brady*, the focus of *Napue* is not on *defense counsel's* knowledge. Rather, *Napue* addresses information provided to the *jury* and seeks to ensure that where the jury has been provided perjured testimony, that perjury is corrected by the prosecution

so that it may form no basis of a criminal conviction. Accordingly, *Napue* explicitly directs that the prosecution may not allow perjury "to go uncorrected when it appears." 360 U.S. at 269.

As the dissent observed below, "[w]hat matters is the risk that the jury will use the false evidence to convict." App.20a. "The *Napue* Court put the obligation squarely on the prosecution to see that false evidence is corrected, without the majority's proposed qualification." App.20a–21a (Hamilton, J., dissenting).

Accordingly, other courts that have considered similar arguments have rejected them. In *Foster*, for example, the Eighth Circuit reversed a conviction where three witnesses testified falsely regarding whether they had received any promises from the government in exchange for their testimony. 874 F.2d at 494–95. The court concluded that the fact that defense counsel was aware of the falsity was "of no consequence" and "did not relieve the prosecutor of her overriding duty of candor to the court." *Id.* at 495. The Ninth Circuit reached a similar conclusion in *LaPage*. As it observed, under *Napue*, "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows . . . that the testimony is false." *LaPage*, 231 F.3d at 492. Finally, in reversing a conviction based on a prosecutor's failure to correct false testimony, the Michigan Supreme Court succinctly recognized that placing the burden on prosecutors to "avoid presenting false or misleading testimony of its own witness . . . is prudent in the unique *Napue* context because *Napue* requires the *prosecution's* knowledge

of the false or misleading testimony of its own witnesses." *Smith*, 870 N.W.2d at 306 n.7.

In sum, it is the threat to the integrity of the judicial process that is *Napue*'s concern, not the defendant's knowledge of the false testimony: "A prosecutor's knowing use of perjured testimony is misconduct that goes beyond the denial of a fair trial, which is the focus of *Brady*. It is misconduct that undermines fundamental expectations for a 'just' criminal-justice system." *United States v. Garcia*, 793 F.3d 1194, 1208 (10th Cir. 2015). Indeed, it is wholly "irrelevant" whether the defense knew about the false testimony, because it is the prosecution's "ethical and constitutional obligation . . . to protect the integrity of the court and the criminal justice system." *Bowie*, 243 F.3d at 1122.

C. *Napue* Applies Regardless Of Whether The Prosecution "Relies" Upon The Perjury

There is likewise no exception under *Napue* for situations in which the prosecutor does not subsequently "rely" or "capitalize" on the perjured testimony during closing argument. Again, *Napue* itself makes clear that no exception exists, stating that a defendant's constitutional rights are violated where the prosecution merely "*allows* [perjured testimony] to go uncorrected." 360 U.S. at 269 (emphasis added). Accordingly, as the dissent observed below, the Court's language "flatly contradicts the majority's suggestion that *Napue* left the prosecution room to avoid its obligation to correct false evidence by merely refraining from asking the jury specifically to rely upon the perjured testimony." App.21a.

Moreover, *Napue* and its progeny make clear "that a State may not knowingly *use* false evidence . . . to obtain a tainted conviction," *Napue*, 360 U.S. at 269. Any false material testimony that the government leaves uncorrected is "used" to obtain a conviction, regardless of whether the government reuses it, for example, in a closing statement. And any "knowing use of perjured testimony involves . . . a corruption of the truth-seeking function of the trial process." *Bagley*, 473 U.S. at 680. Accordingly, if a government witness's lie "is in any way relevant to the case, the [prosecutor] has the responsibility and duty" not just to refrain from capitalizing on it, but "to correct what he knows to be false and elicit the truth." *Napue*, 360 U.S. at 269–70.

This case illustrates why the Seventh Circuit's exception-riddled reading of *Napue* is incompatible with due process. While both the majority and dissent agreed that the prosecution here did not "rely" on the perjured testimony, the prosecutor told the jury during closing that its key witness who offered the perjured testimony, Ms. Irby, "came in here and raised her hand and told you what happened" and that she "was under oath" and "told you what she saw." App.109a. Further, the prosecutor argued that Irby's testimony was "consistent with" that of other witnesses. *Id.* As the dissent observed, the exception identified by the majority allowed the prosecution to "soft-pedal[]" and "dance around" the perjury of its key witness during oral argument with impunity. App.14a. Recognizing such an exception would eliminate *Napue*'s protection and undermine "the rudimentary demands of justice." *Mooney*, 294 U.S. at 112.

D. *Napue* Applies Regardless Of Whether Contrary Evidence Is Introduced

Finally, there is no exception to *Napue* where evidence that tends to contradict the perjury is introduced at trial. The Court in *Napue* rejected such arguments, stating "we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner [Napue] turned what was otherwise a tainted trial into a fair one." 360 U.S. at 270.

More fundamentally, the motivation behind the *Napue* rule is to prevent convictions based on perjury, requiring prosecutors to *correct* the perjury so that the jury knows that it may not base a conviction on false testimony. The exception the Seventh Circuit endorsed would allow precisely this prohibited outcome. Jurors would be authorized to weigh perjured testimony against other evidence and, if they determined the perjured testimony was more credible or relevant, convict the defendant based on the perjured testimony—all contrary to *Napue*. *See Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (noting the duty to correct perjured testimony).

As the dissent observed, this exception, "ignores the reality of a jury trial in our adversarial system." App.21a. "A jury that hears evidence merely contradicting the perjury cannot be said to *know* the truth." *Id.* (Hamilton, J., dissenting). Rather, the jury would remain free to base a conviction on perjured testimony, contrary to the express directive of *Napue* and its progeny that the prosecution must *correct* the perjured testimony so the jury cannot rely on it to convict the defendant.

Napue's requirement that the prosecution correct the perjured testimony recognizes the special role "played by the American prosecutor in the search for the truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Jurors are inclined to believe that prosecutors fulfill that obligation and observe their traditional role to see "that justice shall be done." *Berger*, 295 U.S. at 88.

Nor does *Napue's* directive impose any undue burden on the prosecution. Rather, prosecutors are accustomed to addressing matters like this when they arise. When false testimony is offered, prosecutors frequently "work out in a bench conference with the judge and defense counsel how to inform the jury immediately that the testimony is false." *LaPage*, 231 F.3d at 492; *see also Smith v. State*, 34 N.E.3d 1211, 1220 (Ind. 2015).

III. This Case Is An Excellent Vehicle To Address The Question Presented.

The metes and bounds of what constitutes adequate protection of a defendant's due process right to a fair trial where a conviction is obtained through the knowing use of false testimony is plainly a question of exceptional national importance. This case is an ideal vehicle for the Court to reaffirm its holding in *Napue* that the prosecution must ensure that a trial is free from the taint of false testimony regardless of how that testimony arises or what contradictory evidence a defendant may possess.

First, the division among the Circuits regarding the proper interpretation of *Napue* presents a split ripe for review by this Court—one that is in need of urgent redress. Little would be gained by allowing further percolation in the lower courts as the decision

below directly conflicts with those of four other Circuits, which would have afforded Mr. Long a new trial had he had the fortune of being tried in those jurisdictions. Moreover, the opinions of the federal courts of appeals and state supreme courts on this issue provide thorough analysis and adequately set forth the arguments on both sides of the entrenched split. Thus, there is no colorable argument that this Court does not have the assistance of "the crucible of adversarial testing on which [it] usually depend[s]." *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

Second, the issue presented here received thorough consideration by both the panel and the en banc court. The en banc decision addresses the various permutations of the exceptions to *Napue* that the lower courts have recognized. It provides an excellent vehicle for this Court to clarify that its prior decision in *Napue* admits of *no* exceptions. Perjury must be corrected in order to afford the defendant a fair trial—regardless of the circumstances.

Third, the question presented is significant and has ramifications far beyond the present case. This Court has underscored that the judiciary has an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Allowing prosecutors to obtain convictions based on perjury "invites disrespect for the integrity of the court," and indeed undermines the legitimacy of the criminal justice system. *Id.* (internal quotation omitted). This Court has a compelling

interest in correcting the lower courts' deviations from *Napue* that allow such an outcome. The prohibition on the use of false testimony in criminal trials is "implicit in any concept of ordered liberty." *Napue*, 360 U.S. at 269.

Fourth, there are no issues of disputed fact relevant to the en banc court's analysis. There is no dispute that Ms. Irby's testimony was false. Nor is there any dispute that the prosecution failed to correct it. Every court to address the issue readily acknowledged these fundamental facts, as has the State itself.

Finally, the en banc court's ethereal test not only injects imprecision into the due process analysis but also incentivizes prosecutorial misconduct. "The adversary system places a premium on winning, and prosecutors are hardly exempt from the pressure to win." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2091 (2010). Given that prosecutors' career progression largely hinges on their conviction rates and disciplinary proceedings are rarely undertaken, it is no wonder that prosecutorial misconduct "still occurs and is sanctioned too lightly to deter effectively." Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 977 n.72 (2009). Absent this Court's intervention, there is little that will disincentivize the sort of behavior that could potentially lead to wrongful convictions obtained through the government's knowing use of perjury.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

DOUGLAS G. SMITH
Counsel of Record
MICHAEL W. GLENN
KIRKLAND & ELLIS LLP
300 North Lasalle
Chicago, IL 60654
(312) 862-2000
dsmith@kirkland.com

Counsel for Petitioner

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