No. 20-____

In the

Supreme Court of the United States

MITCHELL J. STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause excuses the government's knowing use of false testimony in a criminal prosecution so long as the government divulged evidence during discovery indicating that the testimony was false.

STATEMENT OF RELATED PROCEEDINGS

United States v. Stein, 964 F.3d 1313 (11th Cir. 2020)

Stein v. United States, 138 S. Ct. 556 (2017)

SEC v. Stein, 906 F.3d 823 (9th Cir. 2018)

United States v. Stein, 846 F.3d 1135 (11th Cir. 2017)

SEC v. Stein, 2015 WL 13343180 (C.D. Cal. Feb. 18, 2015)

United States v. Stein, No. 11-80205-cr (S.D. Fla.)

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PETITION FOR A WRIT OF CERTIORARI

Mitchell J. Stein respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision is published at 964 F.3d 1313 and reprinted in the appendix to the petition ("Pet. App.") at 1a. The district court's August 28, 2018 order denying petitioner's motion for a new trial is unpublished but reprinted at Pet. App. 22a. The prior decision of the Eleventh Circuit is published at 846 F.3d 1135 and reprinted at Pet. App. 24a. The district court's June 9, 2014 order denying petitioner's motion for a new trial is unpublished but reprinted at Pet. App. 68a.

JURISDICTION

The court of appeals issued its opinion on July 13, 2020. Pet. App. 1a. On March 19, 2020, this Court issued an order automatically extending the time to file a petition for certiorari to 150 days from the date of the lower court judgment. That order makes this petition due on December 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

INTRODUCTION

This Court made clear long ago that when 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); *see also Mooney v. Holohan,* 294 U.S. 103, 112 (1935) (same). Thus, 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." *Napue v. Illinois*, 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.*

Subsequently, the Court established a separate due process rule: The government may not suppress material, exculpatory evidence in a criminal case. *See Brady v. Maryland*, 373 U.S. 83 (1963). Again, the Court stressed that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87; *see also, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (*Brady* rule, like the prohibition against the knowing use of false evidence, rests on "the special role played by the American prosecutor in the search for truth in criminal trials").

In the decades that have followed—and especially in recent years—courts have reached different conclusions regarding the relationship between these two lines of cases. Does the prohibition against knowingly introducing false testimony operate independently of

the *Brady* doctrine? Or did *Brady* cut back on the prohibition against introducing false testimony—such that the government now has a green light knowingly to introduce false testimony in a criminal trial so long as it does not also suppress evidence indicating that the testimony was false?

Eight federal courts of appeals and at least six state high courts have weighed in on this question. Two federal courts of appeals and four state high courts hold that "[t]he government's duty to correct perjury . . . is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony was false." *Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014) (internal quotation marks omitted). Conversely, four federal courts of appeals hold—like the decision below—that there is no violation of due process unless the defendant "identif[ies] evidence the government withheld that would have revealed the falsity of the testimony." Pet. App. 42a. And two federal courts of appeals and two state high courts try to follow a middle path, employing multi-factor tests to assess whether the government's use of false evidence violated the defendant's due process rights.

It is time for the Court to resolve this longstanding and deeply significant question. This case presents an ideal vehicle to do so. This Court should grant the petition and make clear that the *Brady* rule does not qualify the prohibition against the knowing use of false evidence. That prohibition is unequivocal and unqualified: "[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amend-

ment." *Napue*, 360 U.S. at 269. Period. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones," *Berger v. United States*, 295 U.S. 78, 88 (1935), regardless of whether the government also divulges evidence showing the falsity of testimony it elicits.

STATEMENT OF THE CASE

This prosecution arises from an alleged scheme to artificially inflate the stock price of a publicly traded corporation. It resulted in the conviction of petitioner Mitchell Stein, the company's in-house counsel, for fraud and other related federal offenses. Pet. App. 1a–2a.

1. Signalife, Inc.—formerly known as Recom Managed Systems, Inc., and now called Heart Tronics, Inc.—is a medical device company that specializes in developing and marketing electronic heart monitors. Petitioner served as Signalife's legal counsel and worked closely with its Chief Executive Officer, Lowell T. Harmison. Pet. App. 2a, 27a & n.3.

Following a trip with Harmison to visit potential clients in the fall of 2007, petitioner drafted three press releases announcing new sales by Signalife. These releases are central to the criminal charges against him. Pet. App. 27a.

On September 20, 2007, petitioner sent a draft press release to Signalife's securities attorney, John Woodbury. Pet. App. 27a. Woodbury was responsible for reviewing the company's press materials to ensure their compliance with the rules of the American Stock Exchange (AMEX), the exchange on which Signalife's stock was then traded. DE240:56–58. The September

20 press release said that Signalife had sold nearly $2 million worth of medical devices. Woodbury knew that petitioner had been traveling to meet with prospective clients and approved the release announcing the fruits of those efforts. Pet. App. 27a–28a.

On September 24, 2007, petitioner emailed Woodbury another draft press release; it announced a $3.3 million sales order. Pet. App. 28a.

On October 9, 2007, petitioner sent Woodbury a third draft press release; it announced that Signalife had received a sales order of $551,500. Woodbury issued each release without asking for supporting documentation. Pet. App. 28a.

Petitioner later emailed Woodbury purchase orders supporting each of the press releases. These included (1) a September 14, 2007 purchase order for $1.93 million placed by Cardiac Hospital Management (CHM); (2) a September 24, 2007 purchase order for $3.3 million placed by IT Healthcare; and (3) an October 4, 2007 purchase order for $551,500 also placed by IT Healthcare. Pet. App. 28a–29a.

Harmison's assistant, Tracey Jones, received a copy of a $50,000 check providing the down payment for the purchase order from CHM. That check was dated September 27, 2007 and the memo line identified the number on the CHM purchase order. The check was signed by Dolores Tribou—the wife of Thomas Tribou, a consultant who had worked with Signalife—and it was deposited into Signalife's account on September 28, 2007. Jones later emailed copies of the check and an accompanying deposit slip to

Norma Provencio, Signalife's certified public accountant. Provencio forwarded these documents to Woodbury, telling Woodbury that the documents represented "the $50k deposit on the 9-14 purchase order." Pet. App. 44a.

Harmison incorporated information about each of these three purchase orders into a March 2008 memorandum to Signalife's auditors. These orders were similarly detailed in reports that Signalife filed with the Securities and Exchange Commission (SEC). Pet. App. 29a.

Soon thereafter, Signalife began to experience manufacturing problems, after which it received cancellations for the two IT Healthcare purchase orders. On August 15, 2008, Signalife filed an SEC report describing the cancellation of those orders. Pet. App. 30–31a.

2. In 2011, the United States indicted petitioner for crimes related to his work with Signalife. The government alleged that he had conspired with two other men, Ajay Anand and Martin Carter, to disseminate false information about Signalife, sell Signalife shares at inflated prices, and obstruct the investigation into this alleged fraud. Separate from the conspiracy charges, the government alleged that petitioner engaged in the underlying substantive crimes of mail fraud, wire fraud, securities fraud, and money laundering. Pet. App. 32a.

Before trial, the government produced over 282,000 documents—approximately 1.75 million pages—that it had procured during its investigation. DE318, Ex. 1. The government also produced several

audio recordings and witness interview memoranda. DE318, Ex. 2.

At trial, the government contended that petitioner made up the purchases and purchase orders that he claimed supported the three press releases to boost Signalife's stock price. The government began its case with Woodbury, who had reviewed and approved the press releases. Despite having received from Provencio copies of the check constituting CHM's down payment and the deposit slip placing that check into a Signalife account, Woodbury said that petitioner was the sole source for the information in the press releases. Even though the government had produced the email showing Woodbury received copies of the check and deposit slip for the CHM order, the prosecution never corrected Woodbury's false testimony. Pet. App. 44a, 49a.[1]

The government's second witness was Jones. Jones testified that she "never received any backup or anything on" the purchase orders, and termed them "phantom purchase orders." Pet. App. 28a. In fact, Jones *had* received documentation for the CHM order: the $50,000 check from Tribou and the related deposit slip, both of which she herself later sent to Provencio. *See supra* pp.5–6. Although the government had produced those documents in discovery, it never corrected Jones's testimony.

[1] Woodbury reiterated his claim that petitioner was the sole source of the information in the press releases several times during the trial. *See* DE240:96, 102–10; DE241:18.

Carter—one of petitioner's alleged co-conspirators—also testified. Carter admitted that, "to impress" petitioner, Carter had fabricated stories about having connections in Asia and Israel with individuals who were interested in distributing Signalife products abroad. DE244:45. CHM and IT Healthcare were, according to the purchase orders, based in Tokyo and Israel, respectively. Pet. App. 29a. Carter received a lenient sentence for his cooperation as a government witness. DE453-34:5–6.

Before the close of trial, petitioner—who represented himself—discovered deep in the government's voluminous pretrial disclosures the critical email showing (1) that Signalife had received the down payment for the CHM order, and (2) that Woodbury and Jones, contrary to their testimony, were aware of this fact. Petitioner sought to introduce the email, check, and deposit slip into evidence, but the government objected on the ground that the email's contents were hearsay. Pet. App. 44a–45a.

After debate comprising significant portions of two days of the ten-day trial, the trial court sustained the government's hearsay objection to the email and its attachments. The parties then agreed to the following stipulation, which was read to the jury: "On or about September 27th, 2007, an individual named Thomas Tribou paid Signalife $50,000 for goods he expected to receive." Pet. App. 45a.

During closing arguments, the government repeatedly emphasized its position that petitioner had created "fake purchase orders" to "get the stock price up[and] manipulate the market." DE248:23, 31; *see*

also, e.g., DE248:46–47 (arguing that the CHM purchase order "never happened"). The prosecutor asserted that petitioner had lied to Woodbury and others, DE248:22, and specifically reminded the jury of Jones's reference to "phantom purchase orders." DE248:40. The jury found petitioner guilty on all counts. Pet. App. 33a.

Petitioner moved for a new trial, arguing that the government had violated his due process rights by knowingly using false testimony to convict him. Petitioner contended that the email from Provencio to Woodbury disproved Woodbury's assertion that the only information to substantiate the purchase orders came from petitioner. Petitioner likewise argued that Jones's statement that she "never received any backup or anything" for the purchase orders was directly contradicted by the email she had sent to Provencio, which enclosed a copy of Tribou's down-payment check for the CHM purchase order. Pet. App. 49a.

The district court denied petitioner's motion, entered his conviction, and sentenced him to 204 months in prison, over $5 million in forfeiture, and over $13 million in restitution. This sentence largely rested on the amount of loss caused by petitioner's alleged fraud. And the loss calculation was premised on the notion that the fraud began with the CHM press release—the press release supported by Tribou's check. Pet. App. 3a, 27a, 35a.

Petitioner filed a notice of appeal.

3. While petitioner's appeal was pending, he filed a new motion to dismiss the indictment or, alternatively, for a new trial. That motion argued that the government had made two admissions in its appellate briefing that confirmed it had relied on evidence it knew to be false to secure a conviction. First, the government switched from arguing that petitioner committed fraud because the purchase orders were "made up" to arguing that he committed fraud because "Signalife could not ship any product," DE479:7—an argument it had specifically contradicted at trial, DE248:56 ("Whether that device worked or not doesn't matter."). Second, the government argued that "the jury was aware that some back-up had been received for one of the purchase orders." Resp. Br. 53, *United States v. Stein*, No. 14-15621 (11th Cir. Sept. 28, 2015). For this proposition, the government cited the stipulation about Tribou's check and a page in a lengthy public filing that mentioned a down payment on the CHM purchase order. *Id.* (citing GX 73, at 22 [DE453-11]). Although this exhibit was introduced during Woodbury's testimony, the government had expressly told him *not* to "read all that language." DE240:96. And the government did not otherwise note that this exhibit showed that Signalife had received $50,000 towards the CHM purchase. *See* DE240:95–96.

The district court held the motion on its docket while petitioner's appeal proceeded.

4. In 2017, the Eleventh Circuit affirmed petitioner's conviction. Pet. App. 25a–26a. In addressing his due process claim, it began from the premise that the government's knowing use of false testimony is

merely "a species of *Brady* error"—which it called a "*Giglio* error," *see Giglio v. United States*, 405 U.S. 150 (1972)—that "occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury," Pet. App. 42a (internal quotation marks omitted). Under that rubric, it is not enough for the defendant to establish that the government knowingly used false testimony that was reasonably likely to affect the verdict. *Id.* Rather, a "defendant generally must [also] identify evidence the government withheld that would have revealed the falsity of the testimony." *Id.* Absent a showing of suppressed evidence, the court continued, "[t]here is no violation of due process" from the knowing prosecutorial use of false testimony. *Id.* at 43a (internal quotation marks omitted) (alteration in original).

Applying that rule to petitioner's appeal, the Eleventh Circuit held that the government's knowing use of Woodbury's and Jones's testimony did not violate due process because the government had divulged evidence of its falsity—namely, the email and its attachments—in a database it had produced to petitioner before trial. Pet. App. 49a–50a.

At the same time, the Eleventh Circuit vacated petitioner's sentence and remanded for resentencing. Pet. App. 26a.[2]

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[2] While the government was defending its criminal conviction against petitioner in the Eleventh Circuit, it was also pressing civil securities fraud charges against him in California. The district court entered summary judgment for the government "on

5. Petitioner sought this Court's immediate review of the Eleventh Circuit's due process ruling. Opposing his petition for certiorari, the Solicitor General asked the Court to defer any consideration of petitioner's case until he was resentenced and the district court was able to consider his still-pending post-trial motion seeking relief on the basis of false testimony. Br. for the United States in Opposition at 24, *Stein v. United States*, No. 17-250, 2017 WL 5158038 (U.S. Nov. 6, 2017) [hereinafter *Stein I* BIO]. This Court denied certiorari without comment. *Stein v. United States*, 138 S. Ct. 556 (2017).

6. After the case returned to district court, petitioner filed a supplement to his 2016 motion for a new trial or to dismiss the indictment. The supplemental filing provided a declaration from Tribou (who had not testified at trial), stating that he signed the CHM purchase order and that the September 20, 2007 press release truthfully reflected that purchase order. Tribou also confirmed, contrary to the government's arguments, that the $50,000 down-payment check on the CHM purchase order was authentic and that he and his wife wrote the CHM purchase order number in the check's memo line. DE529-1.

The district court denied petitioner's motion for a new trial without explanation. It also imposed a revised sentence of 150 months' imprisonment and three years' supervised release, and it reduced the

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the ground that Stein's prior criminal conviction precluded him from contesting the allegations at issue in the civil case," and the Ninth Circuit affirmed. *See SEC v. Stein*, 906 F.3d 823, 826 (9th Cir. 2018).

restitution amount to $1,029,570. The district court did not revise its prior forfeiture order. Pet. App. 5a.

7. The Eleventh Circuit affirmed. It believed the district court properly declined on remand to consider petitioner's due process argument. While the court acknowledged petitioner had submitted a declaration from Tribou for the first time in a supplemental motion for a new trial, it believed the law of the case doctrine barred the district court from considering that evidence, as did the fact that the "scope of [the] remand was" limited to addressing one aspect of petitioner's sentence. Pet. App. 18a. The Eleventh Circuit also reaffirmed its prior holding that, while "the government knowingly relied on false testimony" when it introduced certain statements at trial, there was no due process problem because petitioner "failed to show how the government either suppressed or capitalized on allegedly false testimony." *Id.* at 16a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals and state high courts are split over the question whether the government is free to rely knowingly on false testimony in a criminal trial as long as the government divulges evidence during discovery showing the falsity. Only this Court can resolve this entrenched and widespread disagreement. This Court should grant review and hold, consistent with its precedents, that the prosecution's use of false evidence is not excused simply because the prosecution also disclosed proof of the falsity to the defense.

A. Federal courts of appeals and state high courts are openly split over the question presented.

As one state high court recently recognized, federal courts of appeals and state courts of last resort are "fragmented" over "whether due process is offended if the state knowingly presents the false testimony . . . but also discloses the truth regarding that [testimony] to defense counsel." *Gomez v. Comm'r of Corr.*, 2020 WL 3525521, at *7 (Conn. June 29, 2020). Two groups of courts—in total, four federal courts of appeals and six state courts of last resort—have adopted rules that would have required reversal of petitioner's conviction because it rested on the government's knowing introduction of false evidence. By contrast, the Eleventh Circuit denied petitioner relief on that basis, consistent with the precedent of three other federal courts of appeals.

1. Two federal courts of appeals and four state high courts have held that the government violates a defendant's due process rights whenever the government knowingly uses false testimony. *See United States v. Foster*, 874 F.2d 491, 494–95 (8th Cir. 1988); *United States v. LaPage*, 231 F.3d 488, 491–92 (9th Cir. 2000); *People v. Lueck*, 182 N.E.2d 733, 733–34 (Ill. 1962); *State v. Brunette*, 501 A.2d 419, 424 (Me. 1985); *People v. Smith*, 870 N.W.2d 299, 304–11 (Mich. 2015); *State v. Yates*, 629 A.2d 807, 808–10 (N.H. 1993).

The Eighth Circuit has reasoned, consistent with this Court's holding in *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959), that when a government witness provides testimony that the government knows to be

false, the government has a constitutional duty to correct that testimony. *Foster*, 874 F.2d at 494–95. "The fact that defense counsel was also aware of [evidence revealing the falsity] is of no consequence." *Id.* at 495. Defense counsel's ability, with evidence the government disclosed during discovery, to try "to correct the prosecutor's misrepresentation . . . d[oes] not relieve the prosecutor of her overriding duty of candor to the court," and the obligation under the Due Process Clause "to seek justice rather than convictions." *Id.*

The Ninth Circuit has similarly held that "[w]here the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts." *LaPage*, 231 F.3d at 492. "[T]he 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." *Id.* After all, "[t]he jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism." *Id.* But because the prosecutor has "unique power," he also has a "commensurate" duty "to assure that defendants receive fair trials." *Id.*[3]

Four state high courts agree with this analysis. The Michigan Supreme Court has specifically rejected

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[3] The Fourth Circuit has issued an unpublished opinion to this effect as well. *See United States v. Cargill*, 17 F. App'x 214, 226 (4th Cir. 2001) ("The fact that defense counsel was also aware of the [evidence] but failed to correct the prosecutor's misrepresentation is of no consequence. This did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions." (internal quotation marks and citation omitted)).

the notion "that the prosecution's duty to correct false testimony under *Napue* must be coupled with the separate, though often overlapping, duty to disclose exculpatory information under *Brady*." *Smith*, 870 N.W.2d at 306 n.8 (internal citations omitted). Such an approach, the Michigan Supreme Court has explained, "conflates the distinct prosecutorial duties to disclose exculpatory information, and to refrain from using false or misleading testimony to obtain a conviction." *Id.* at 305 n.6 (internal citations omitted). A prosecutor's exploitation of false testimony by a state witness to gain a conviction" violates due process "whether done together with a failure to disclose or not." *Id.* at 306 n.8; *see Lueck*, 182 N.E.2d at 733–34 (government's use of false evidence denied defendant his right to due process, even though evidence of falsity was known to defense at time of trial); *Yates*, 629 A.2d at 810 (same); *Brunette*, 501 A.2d at 424–25 (same); *see also State v. True*, 153 A.3d 106, 111–12 (Me. 2017) (reaffirming *Brunette*).

2. In direct contrast, four federal courts of appeals hold that the Due Process Clause allows the government to introduce false evidence so long as it previously divulged evidence demonstrating the falsity. In the decision below, for example, the Eleventh Circuit reasoned that, even when the government knowingly uses false testimony to convict a defendant, the defendant cannot establish a due process violation unless he also "identif[ies] evidence the government withheld that would have revealed the falsity of the testimony." Pet. App. 42a. In other words, the Eleventh Circuit deems a false evidence violation a "species of *Brady* error": In the absence of failure under

Brady v. Maryland, 373 U.S. 83 (1963), to disclose exculpatory evidence to the defendant, Pet. App. 42a, there can be no due process problem, even if the government relies on false evidence to secure a conviction.[4]

Three other federal courts of appeals have likewise held that, where "[t]he government ha[s] disclosed th[e] impeachment evidence," "*Napue* is inapposite." *United States v. Crockett*, 435 F.3d 1305, 1318 (10th Cir. 2006); *see also United States v. Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976); *United States v. Lochmondy*, 890 F.2d 817, 822–23 (6th Cir. 1989). In their view, due process is satisfied as long as there is "no concealment" of evidence showing falsity by the government. *Lochmondy*, 890 F.2d at 823; *see also Decker*, 543 F.2d at 1105; *Crockett*, 435 F.3d at 1317–18.

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[4] The Eleventh Circuit has one exception to its rule that suppression is required to make out a false evidence violation: In its view, a due process violation occurs, even in the absence of suppression, when the government "capitalize[s]" on false testimony. Pet. App. 49a & n.13. The Eleventh Circuit did not explain exactly why this "capitalization" test was not satisfied here, given that the prosecution did, in fact, rely on the false testimony during closing argument. *See supra* pp.8–9. But for purposes of this petition, the Eleventh Circuit's "capitalization" test is irrelevant. Petitioner challenges the Eleventh Circuit's default rule—i.e., the rule that due process allows the government to introduce false evidence if it divulges evidence during discovery showing the falsity. If that antecedent rule is incorrect, the rule's exception—allowing due process claims when the government capitalized on the false testimony—does not matter. And, as detailed in this section, numerous federal courts of appeals and state high courts believe the Eleventh Circuit's default rule is indeed incorrect.

3. Two federal courts of appeals and at least two state high courts have attempted to "carv[e] out a middle path between these extremes." *Gomez*, 2020 WL 3525521, at *8; *see also Jenkins v. Artuz*, 294 F.3d 284, 294–95 (2d Cir. 2002); *United States v. Freeman*, 650 F.3d 673, 678–82 (7th Cir. 2011); *Hawthorne v. United States*, 504 A.2d 580, 591–93 (D.C. 1986). These courts eschew any bright-line rule regarding whether due process is violated when the prosecution knowingly introduces false testimony but also previously disclosed evidence showing falsity. The question, according to these courts, depends on "various factors"—"most important, whether the truth ultimately is revealed to the jury." *Gomez*, 2020 WL 3525521, at *8.[5]

Petitioner would have prevailed under this approach too. Nearly all of the other factors these courts consider—including the "most important" one—tilt against the government. *Gomez*, 2020 WL 3525521, at *8. The prosecution, not the defense, "elicit[ed] the false testimony"; the evidence was directly pertinent to the prosecution's theory of the case; the defense tried to introduce evidence to challenge the falsity, but the government successfully thwarted that attempt; and the truth was never "revealed to the jury." *Id.* Courts that apply multi-factor tests also consider "whether and how the prosecutor adopt[ed] and use[d] the false testimony." *Id.* The Eleventh Circuit opined that the government did not go so far as to make the false evidence "the centerpiece of [its] argument for

[5] The State of Connecticut has indicated that it plans to seek certiorari in *Gomez*. *See* Application for Stay, *Conn. Comm'r of Corr. v. Gomez*, No. 20A25 (U.S. Aug. 5, 2020).

guilt." Pet. App. 49a n.13. But the prosecution did repeatedly reference the false evidence during trial and during closing arguments, asserting that the CHM purchase order was a "phantom" and "never happened." *See supra* pp.8–9.

4. The sooner this Court brings order to the rules governing due process claims based on the government's introduction of false evidence at trial, the better. At this point, there is no prospect that the conflict among the federal courts of appeals and state courts will resolve; many of these courts have adhered to their chosen approaches to the question presented for decades. And this Court's review would help those courts that have not yet weighed in on the question presented. More important, it would provide much-needed clarity to prosecutors across the country, and to defendants whose convictions rest on false evidence. The rules regarding basic fair play in criminal trials should not depend on where defendants are prosecuted.

B. This case is an ideal vehicle to resolve the conflict.

This case provides a particularly good opportunity to resolve the entrenched disagreement among the courts on the question presented.

1. Petitioner raised his due process claim before the district court and the Eleventh Circuit, and his case is still on direct review. This Court can accordingly consider that claim de novo without being limited by the deferential standards applicable in collateral proceedings or on plain error review. *Cf. Shih Wei*

Su v. Filion, 335 F.3d 119, 127 (2d Cir. 2003) (recognizing that prosecution's introduction of false testimony would require a new trial if the case were on direct review, but declining to grant relief in case on collateral review); *Bowman v. Johnson*, 718 S.E.2d 456, 461 (Va. 2011) (declining to consider habeas petitioner's "claim that the Commonwealth failed to correct false testimony of its witness" because it was not "raised at trial and on appeal").

2. The split over what defendants must show to prevail on false evidence claims is also squarely implicated here. The Eleventh Circuit has now *twice* acknowledged that the government knowingly relied on false testimony when it introduced certain statements at petitioner's trial. Pet. App. 16a, 43a–50a. But it denied relief because it found that petitioner "failed to show how the government either suppressed or capitalized on" that false testimony. *Id.* at 16a.

Had petitioner been tried in the Eighth or Ninth Circuit, or in state court in Illinois, Maine, Michigan or New Hampshire, the government's introduction of false evidence would have, without more, constituted a due process violation. And had petitioner been tried in the Second or Seventh Circuits, in Connecticut state court, or in a court of the District of Columbia, the government's introduction of false evidence, under the totality of the circumstances here, would also have violated due process. *See supra* pp.18–19.

3. If the Due Process Clause was violated here, petitioner is entitled to a new trial. "[T]he standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard." *United States v. Bagley*, 473 U.S. 667, 679

n.9 (1985) (opinion of Blackmun, J.); *see also Stein I* BIO 14 (recognizing that *Napue* violations require new trials unless they are harmless beyond a reasonable doubt). Under the standard outlined in *Chapman v. California*, 386 U.S. 18 (1967), the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

The Eleventh Circuit has never made any such finding of harmlessness here. Nor could it. As noted above, the government convicted petitioner on the theory that he falsified three press releases announcing Signalife's sales. But evidence at trial showed that Signalife received down payments for one of the sales made to IT Healthcare. *See* DE453-19:1. And, contrary to the false evidence the government introduced at trial, the undisputed evidence shows Signalife received a down payment for another one of the sales, made to CHM. *See supra* pp.5–6, 10. That left only one purchase order that was not supported by other documentary evidence. In these circumstances—and especially in light of Carter's admission that he lied to petitioner in connection with Signalife's sales efforts, *see supra* p.8—the government's false evidence about the CHM purchase order was hardly harmless; it alone may have been what tipped the balance, convincing the jury to convict.

In its earlier brief in opposition in this case, the government protested that the testimony at issue from Woodbury and Jones was not "material." *Stein I* BIO 15–17. The Eleventh Circuit found the opposite, expressly acknowledging that "Jones's statement that she received no backup for the purchase orders" *was*

"material." Pet. App. 49a n.13. In any event, while materiality is a component of a *Brady* claim, it is not an element of a false evidence claim. And under the *Chapman* harmless-error standard, defendants have no burden to prove materiality.

C. The decision below is incorrect.

1. There is no basis in due process for the rule that a false evidence claim can succeed only if the defendant shows that the government suppressed evidence of falsity. Since *Mooney v. Holohan*, 294 U.S. 103 (1935), this Court has recognized that a conviction cannot stand if it is obtained "through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.* at 112. "The same result obtains" when the government allows false testimony "to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This duty reflects the principle that a 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." *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [a prosecutor's] 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." *Id.*; *see also United States v. Tucker*, 404 U.S. 443, 444, 447 & n.1 (1972) (applying same principle in the sentencing context to invalidate sentence "founded at least in part upon misinformation" supplied by the government).

The Due Process Clause imposes this duty on prosecutors for good reason: "[T]he average jury . . . has

confidence" in prosecutors and their unique "obligation to govern impartially." *Berger*, 295 U.S. at 88. By contrast, "[t]he jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). Accordingly, even if the defendant successfully introduces evidence indicating the falsity of the government's proof, the jury will not credit it the same way as if the government corrected its own error. No matter what the defendant does, "the knowing use of perjured testimony" by the prosecution still "corrupt[s] the truth-seeking function of the trial process." *United States v. Bagley*, 473 U.S. 667, 680 (1985) (internal quotation marks omitted); *see also Berger*, 295 U.S. at 88.

Worse yet, defendants often face additional roadblocks when they try to counter false testimony proffered by the government. As in this case, the evidence of falsity may be excluded because it is deemed hearsay, Pet. App. 45a, or privileged, *see People v. Werhollick*, 259 N.E.2d 265, 266–67 (Ill. 1970), thereby preventing the jury from learning about it at all. Or the defendant may be able to show that the government has subverted the truth only by testifying himself, even if he would prefer not to waive his Fifth Amendment rights. *See generally, e.g.*, *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("The defendant gains nothing . . . by knowing that the Government's witness has a personal interest in testifying unless he is able to impart that knowledge to the jury."). Or highlighting the government's lie may prejudice the defendant because the jury may view with distaste efforts to "implicat[e] the credibility of the

prosecutor before the jury" after the prosecutor has "throw[n] his or her weight behind a falsely testifying witness." *Jenkins v. Artuz*, 294 F.3d 284, 296 (2d Cir. 2002) (internal quotation marks and citation omitted). Or defense counsel's correction may be delayed "until rebuttal argument," by which time "the defense could no longer explain why the lie . . . was important." *LaPage*, 231 F.3d at 492.

In short, when the government deliberately uses false testimony against the accused, divulging evidence of the falsity to the defendant is no antidote—especially under circumstances like those here.

2. In reaching the contrary conclusion—that the knowing use of false testimony does not violate due process "[i]n the absence of government suppression of the evidence," Pet. App. 49a—the Eleventh Circuit mistakenly merged the government's duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to provide exculpatory evidence with its distinct duty under *Mooney* and *Napue* not to knowingly introduce false evidence. Nothing in *Brady*, or due process precedent generally, stands for the proposition that the government's observance of its *Brady* obligations relieves it of its separate, wholly independent duty to refrain from seeking convictions through false evidence. The government can violate *Brady* but comply with *Mooney/Napue* or comply with *Brady* yet violate *Mooney/Napue*. There is no basis for fusing these two separate government obligations—just as there is no reason to fuse other state duties, such as the duty to comply with *Brady* and the duty to provide counsel to defendants who cannot afford it, or the duty to comply

with *Napue* and the duty to produce material required by the Jencks Act, 18 U.S.C. § 3500.

Moreover, even if the question were an open one under a proper reading of this Court's precedent, it would make no sense to import *Brady*'s suppression element into the false testimony context. When the government improperly withholds evidence under *Brady*, but a defendant obtains that evidence through other means before trial, the trial itself is ultimately unaffected because the defendant is fully able to present the evidence in his defense. That is not true when the government resorts to false testimony. Even if the defendant acquires evidence of the falsity before trial, the government's introduction of the false testimony necessarily distorts the trial. As explained above, the defendant cannot purge his trial of the stink of the tainted evidence.[6]

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[6] Some courts have held that a defendant who has actual knowledge that the government has introduced false testimony "waive[s]" his *Napue* right if he chooses "for strategic reasons" not to object. *United States v. Mangual-Garcia*, 505 F.3d 1, 10–11 (1st Cir. 2007); *accord United States v. Harris*, 498 F.2d 1164, 1170–71 (3d Cir. 1974); *United States v. Meinster*, 619 F.2d 1041, 1045–46 & n.8 (4th Cir. 1980); *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002); *Evans v. United States*, 408 F.2d 369, 370 (7th Cir. 1969); *United States v. Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981); *People v. Carrasco*, 330 P.3d 859, 894 (Cal. 2014); *State v. Todden*, 364 N.W.2d 195, 198–99 (Iowa 1985); *Meece v. Commonwealth*, 348 S.W.3d 627, 679–80 (Ky. 2011). Those cases are inapposite here. The Eleventh Circuit did not find waiver; it held instead that due process was not violated. Nor could the court of appeals have found any waiver. Petitioner sought during trial to introduce evidence showing the relevant testimony was false, and he later moved for a new trial based on the introduction of the false evidence. *See supra* pp.8–9; *Smith*, 870 N.W.2d

Furthermore, 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). Given the acute threat to the integrity of the system posed by the prosecutor's knowing use of false evidence, the only appropriate constitutional response is a policy of zero tolerance. Any other rule undermines public confidence in the integrity of criminal proceedings and the judicial system more generally. "The government of [a] strong and free nation does not need convictions based upon [false] testimony. It cannot afford to abide with them." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

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at 306 n.7 (holding that waiver cases were irrelevant under similar circumstances).

CONCLUSION

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

Respectfully submitted,

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