No. 20-326

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

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

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law at NYU School of Law (the "Center") is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[1] The Center regularly participates as *amicus curiae* in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

The Center's appearance as *amicus curiae* in this case is prompted by its belief that criminal convictions should be untainted by false evidence. In the Center's experience, juries are likely both to assume that the prosecution believes testimony that it presents to be true and to be skeptical of defendants' efforts to discredit that testimony. Only the government's own correction of its witnesses' false testimony can ensure the fair administration of criminal justice.

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. The Center is affiliated with New York University, but no part of this brief purports to represent the views of New York University School of Law or New York University.

INTRODUCTION AND SUMMARY OF ARGUMENT

A criminal defendant's due process rights are violated when the prosecutor knowingly elicits false testimony and does not correct the testimony. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 270 (1959). A criminal defendant's due process rights are also violated when the government suppresses material, exculpatory evidence. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963). In the decision below, the Eleventh Circuit treated these two lines of cases as effectively protecting only a single due process right. In the court of appeal's view, because the state had not suppressed exculpatory evidence in violation of *Brady*, there was no *Napue* violation, even if the prosecutor allowed false testimony to go uncorrected. As Petitioner demonstrated, the relationship between the due process rights that *Napue* and *Brady* protect has generated confusion in the courts of appeals and state supreme courts. This Court's review is needed to resolve that confusion.

I. *Napue* and *Brady* provide complementary but distinct due process rights. Both cases recognize due process rights that play important roles in protecting a defendant's right to a fair trial, and in curbing governmental abuse of power. But the rights themselves are distinct. *Brady* protects the right to a fair trial by providing defendants with pre-trial access to favorable evidence for use in their defense. *Napue*, in contrast, protects the right to a fair trial by preventing the government from knowingly using false testimony or evidence during the trial itself. Many courts have correctly recognized this distinction and, unlike the

Eleventh Circuit here, have found a *Napue* violation even when the government satisfied its *Brady* obligations.

II. Due process demands more than simply ensuring that the defense can attempt to rebut false testimony. Allowing prosecutors to introduce false testimony undermines the criminal justice system because it increases the risk of wrongful convictions. False testimony is a frequent factor in wrongful convictions, and there is reason to doubt that the defense can effectively prove the falsity of the testimony be government witnesses. Juries afford the government witnesses a presumption of credibility that defendants cannot reliably eliminate through cross-examination. Moreover, defense counsel as a practical matter cannot feasibly rebut every possible falsity on the spot during trial. Finally, a defendant's right to appeal does not alleviate this concern because it will be difficult to know exactly how much weight a jury placed on the false testimony—a difficulty compounded by the deference given to a jury's view of a witness's credibility.

III. Prosecutors face competing pressures to do justice and to secure convictions. To protect a defendant's right to a fair trial, courts must constrain prosecutorial overzealousness by ensuring that the obligation to do justice prevails over the desire to obtain convictions. By setting aside a conviction if a prosecutor elicits testimony that he knows to be false and fails to correct it, *Napue*'s remedy ensure that prosecutors have the proper incentives to avoid eliciting false testimony in the first place. This remedy is critical

because disciplinary proceedings do not effectively deter misconduct.

ARGUMENT

I. *NAPUE* AND *BRADY* PROTECT DIFFERENT DUE PROCESS RIGHTS.

The Eleventh Circuit held that the government's knowing use of false testimony generally does not violate due process unless the defendant "identif[ies] evidence the government withheld that would have revealed the falsity of the testimony." Pet. App. 19. That holding conflates the two distinct due process rights recognized in *Napue* and *Brady*, which are independently necessary to provide "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

In *Napue*, the Court held that the government's knowing use of false testimony "prevent[s] . . . a trial that could in any real sense be termed fair." 360 U.S. at 270. When false testimony "appears" in a criminal trial, and the government is aware of the falsity, the prosecutor cannot remain "silen[t]," but instead "has the responsibility and duty to correct what [it] knows to be false and elicit the truth." *Id.* at 270.

Four years after *Napue*, the Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In deciding *Brady*, the Court did not suggest that it was displacing *Napue*'s clear rule prohibiting the knowing use of false

testimony. Nor have this Court's more recent decisions interpreted *Brady* as modifying the *Napue* rule. On the contrary, the Court recently cited *Napue*'s prohibition on the "knowing use of false evidence" as an example of the Due Process Clause's "constraint" on evidence "so extremely unfair that its admission violates fundamental conceptions of justice." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (quotation marks and citation omitted).

Brady and *Napue* are properly treated as protecting distinct due process rights because they serve different purposes. *Brady* imposes obligations on prosecutors *before* the trial to disclose favorable evidence to the defendant. *Brady*'s disclosure requirement serves the broad goal of enabling the accused to defend himself in court by providing access to material information in the government's possession, an opportunity to open new lines of investigation and trial preparation strategies, and an opportunity to present that evidence to the jury. In contrast, *Napue* places obligations on prosecutors *during* trial to protect defendants from being convicted based on the government's knowing use of false testimony. *Napue*'s distinct protection is critical—regardless of whether relevant evidence was suppressed or disclosed—because the defendant's right to a fair trial is undermined if the prosecution knowingly relies on false testimony.

That *Napue* and *Brady* protect different rights is evident from the different tests that apply for each right. A *Napue* violation occurs only when the prosecutor knew, or should have known, that the testimony was false. *See, e.g.*, *United States v. Bagley*, 473 U.S.

667, 679 n.8 & 9 (1985); *United States v. Agurs*, 427 U.S. 97, 103–04 (1976). In contrast, a prosecutor may unknowingly violate *Brady* by failing to identify and turn over exculpatory evidence in the government's case files. *See, e.g.*, *Bagley*, 473 U.S. at 679.[2]

The two due process rights are also subject to different standards of appellate review. *Napue* requires reversal of a conviction unless the *government* proves that introduction of false evidence was "harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680. By contrast, *Brady* requires affirmance unless the *defendant* shows the government suppressed material, exculpatory evidence and establishes "a reasonable probability that," had the prosecution disclosed the evidence, "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682 (quotation marks and citation omitted). Given this difference, courts routinely observe that this "analysis proceeds differently for *Brady* and *Napue* claims," *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008), and that *Napue*'s standard is "more defendant-friendly" than *Brady*'s, *Conyers v. State*, 790 A.2d 15, 38 (Md. 2002).

In contrast to the decision below, many courts have appropriately held that a *Napue* violation can occur

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[2] In *Agurs* and *Bagley*, the Court characterized a *Napue* violation as a type of *Brady* violation. *See* Agurs, 427 U.S. at 103; *Bagley*, 473 U.S. at 678. But the Court was not treating *Napue* and *Brady* as addressing the same due process right like the Eleventh Circuit here. Rather, the Court observed that *Brady* violations can take numerous different forms, be based on different government conduct, and impose different obligations on the defendant to prove a violation. *See id.* The Court's discussion of the different lines of cases in *Agurs* and *Bagley* thus confirms that the cases protect different rights.

even when the government has satisfied its *Brady* obligations. As the Connecticut Supreme Court recently explained:

> The rule advocated by the respondent, namely, that disclosure to defense counsel either conclusively or presumptively satisfies *Napue*, is simply incompatible on its face with the principles that the United States Supreme Court articulated in that case. . . . [I]n *Napue*, the high court was principally concerned not with the harms that flow from the suppression of exculpatory evidence but, rather, with the more fundamental insult to due process when the state knowingly attempts to secure the conviction of a criminal defendant on the basis of falsehoods and fabrications. . . . To hold otherwise would be to condone, if not encourage, unethical and unprofessional conduct on the part of the prosecutor.

Gomez v. Comm'r of Correction, No. 20089, 2020 WL 3525521, at *8 (Conn. June 29, 2020); *see also United States v. LaPage*, 231 F.3d 488, 491–92 (9th Cir. 2000); *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988).

Many courts have relied on *Napue* to reverse convictions without holding that *Brady* had also been violated. For example, in *United States v. Foster*, 874 F.2d 491 (8th Cir. 1988), the Eighth Circuit reversed

a conviction where a prosecutor failed to correct witnesses' false testimony, even though the defense was aware that the testimony was false. *See id.* at 494–95. As the court of appeals explained: "The fact that defense counsel was also aware of the letters but failed to correct the prosecutor's misrepresentation is of no consequence." *Id.* Rather, "[t]he obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution." *People v. Smith*, 870 N.W.2d 299, 306 n.7 (Mich. 2015).

The Eleventh Circuit's approach—which makes suppression of evidence an element of a *Napue* claim—fails to safeguard the truth-seeking function of the trial. Take, for example, the facts of *United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976), where the Fourth Circuit reversed a conviction on *Napue* grounds. There, the testimony of a key witness was induced by threats of an FBI agent, but the prosecutor had told the jury that no one had ever threatened the witness in question. Thus, the "prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness." *Id.* Under the reasoning of the decision below, so long as the prosecutor turned over evidence before trial regarding the FBI agent's conduct, the government could knowingly elicit false testimony about whether the witness was threatened. The truth-seeking function of a trial is no less destroyed because the government disclosed its lie to the defendant in advance.

II. ALLOWING PROSECUTORS TO INTRODUCE FALSE TESTIMONY INCREASES THE RISK OF WRONGFUL CONVICTIONS BECAUSE DEFENDANTS OFTEN CANNOT EFFECTIVELY REBUT SUCH TESTIMONY.

By conflating *Napue* and *Brady*, the Eleventh Circuit's approach allows prosecutors to introduce false testimony so long as they provide defendants with the information necessary to rebut that testimony. This approach will lead to more wrongful convictions because the introduction of false testimony often results in wrongful convictions, and defendants often face difficulty in explaining to a jury that the false testimony is in fact false.

The fairness of the criminal justice system is severely undermined by the introduction of false testimony. False testimony is a frequent factor in wrongful convictions. [3] A review of 330 cases in which the defendant was exonerated based on DNA evidence showed that 72% of the convictions involved incorrect eyewitness identifications.[4] Twenty-four percent of the cases involved false testimony by government informants.[5] As the study's author explained, "[f]ew jurisdictions across the country have adopted any

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

[4] *Id.*

[5] *Id.* at 7.

rules to better safeguard the reliability of informant testimony in response to these wrongful convictions. This problem of unreliable and contaminated informant testimony is one that still requires urgent attention."[6]

Far from solving this problem, the Eleventh Circuit's approach will exacerbate it. Under the decision below, a prosecutor does not violate a defendant's due process rights by knowingly eliciting false testimony so long as the defendant has the evidence necessary to prove the falsity of the testimony. But this approach—requiring defendants to disprove false testimony— depends entirely on the ability of defendants to successfully convince juries that false testimony is false. There are good reasons to think that defendants will often fail to do so.

The testimony of government witnesses carries a presumptive credibility in the minds of jurors that cross-examination by the defense cannot reliably eliminate. Jurors generally trust prosecutors to present evidence that the prosecutors believe to be true. They understand that prosecutors are public servants committed to the pursuit of justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). And prosecutors often capitalize on their role in the criminal justice system by telling jurors that they represent "the state" or "the people," thereby suggesting that they represent the jurors' interests. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the*

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[6] *Id.* at 12.

Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform, 32 Am. Crim. L. Rev. 743, 786–88 (1995). This dynamic allows a prosecutor to "position himself and the jury as 'us' and the defendant and his attorney as 'them.'" *Id.* As a result, many jurors will be influenced into believing testimony simply because the government offered it and will be skeptical of testimony offered by a defendant facing criminal charges.

There is also reason to doubt that the truth will always prevail because of the challenge that defense counsel will face in timely and effectively rebutting the false testimony. Prosecutors do not provide advance notice to defense counsel that they intend to elicit false testimony. Defense counsel thus will regularly be caught off guard by such testimony. Even if defense counsel knows that testimony is false, it still must prove the point to a jury. That will require being able to quickly identify the documents disproving the testimony and conducting an effective cross-examination on the spot. It does not further the fair administration of justice to encourage prosecutors to surprise the defense with false testimony to see whether the defense counsel is up to challenge of quickly and definitively disproving the testimony.

Identifying false testimony can also be challenging, even for able defense counsel. By importing *Brady* into this analysis, the Eleventh Circuit did not ask whether defense counsel knew the testimony was false, but rather whether they had access to documents that established its falsity. Pet. App. 49a. Complex criminal proceedings increasingly involve

vast amounts of evidentiary discovery. Cases involving alleged financial crimes or similar offenses can generate thousands or even millions of pages of discovery, and wiretaps can produce hundreds of hours of recordings. *See, e.g.*, *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) ("several hundred million pages" of documents), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010); Hilary Oran, *Does Brady Have Byte? Adapting Constitutional Disclosure for the Digital Age*, 50 Colum. J.L. & Soc. Probs. 97, 100 n.12 (2016) (citing additional cases). In such cases, the defendant may not even identify the relevant impeachment evidence.

Petitioner's case shows how that unfairness can arise. The impeaching evidence was disclosed in a batch of 282,000 documents, representing 185 gigabytes of data and 1.75 million pages. Opp'n to Def.'s Mot. to Compel, Ex. 1 at 2, ECF No. 46-1 (S.D. Fla. June 21, 2012). Although the government provided a list of "hot documents," the list did not include the relevant evidence. *See* C.A. Reply Br. 7 (Jan. 4, 2016). Separate from the government's production, petitioner later obtained independent access to the impeaching evidence as part of a large database of documents maintained by his former employer. *See* DE 264-14 ¶¶ 3-4. But petitioner did not uncover the documents in question until after the government completed its case-in-chief and the witnesses were excused. *See id.* ¶ 4. Thus, petitioner had no opportunity to rebut the false testimony on cross-examination because he had not yet found the documents.

Finally, the concern that a jury will believe false testimony cannot be alleviated by pointing to the defendant's right to appeal. Typically, it will be hard to know exactly how much weight a jury placed on the false testimony, so the government will regularly attempt to dismiss the false testimony as resulting in harmless error. *See, e.g.*, *Rosencrantz v. Lafler*, 568 F.3d 577, 588 (6th Cir. 2009) (finding prosecution's knowing use of false testimony to be harmless error). And the difficulty in prevailing on appeal is compounded by the deference given to a jury's view of a witness's credibility. *See, e.g.*, *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) ("It is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." (quotation marks and citation omitted)); *United States v. Simmons*, 923 F.2d 934, 953 (2d Cir. 1991) ("allegedly inconsistent prior statements . . . relate only to [witness's] credibility"; "[b]ecause, on appeal, we must construe the evidence in the light most favorable to the Government, we reject this challenge to [witness's] testimony").

In short, due process demands more than simply ensuring that the defense has the opportunity to cross-examine witnesses regarding their false statements. Allowing prosecutors to introduce false testimony increases the risk of wrongful convictions because the jury may not correctly identify the testimony as false, either because they place more weight on testimony elicited by the government or because defense counsel does not rebut the testimony effectively.

III. *NAPUE*'S REMEDIAL MEASURES ARE NECESSARY TO DISCOURAGE PROSECUTORS FROM INTRODUCING FALSE TESTIMONY.

Properly construed, *Napue* requires a prosecutor to correct testimony that the prosecutor knows is false. *Napue*, 360 U.S. at 270. If the prosecutor's failure to do so comes to light after the defendant has been convicted, the verdict must be overturned unless the government demonstrates, beyond a reasonable doubt, that the false testimony did not contribute to the conviction. *See id.* at 269 ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."); *see also Chapman v. California*, 386 U.S. 18, 26 (1967). These remedial measures for addressing false testimony are necessary to ensure that prosecutors have the proper incentives to avoid eliciting false testimony in the first place.

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

to employ all legally available tactics to obtain convictions.

Introducing false evidence will be viewed as an allowable tactic if the decision below is allowed to stand. Indeed, the Eleventh Circuit made clear that a prosecutor could elicit false testimony without violating the defendant's due process rights so long as the prosecutor complied with its *Brady* obligations. Given the possibility that a jury will nevertheless credit the false testimony, *see* Part II *supra*, prosecutors may think it advantageous to introduce false testimony.

The *Napue* rule is necessary because in practice there is no meaningful alternative to discourage prosecutors from knowingly introducing false testimony. Disciplinary proceedings often are put forward as one such alternative. But such proceedings are rarely instituted against prosecutors that violate the rules governing their conduct—rendering this tool ineffective as a deterrent.[7] As one commentator has

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[7] Professional rules have long prohibited the kind of conduct *Napue* seeks to deter. The American Bar Association's Criminal Justice Standards for the Prosecution Function provide that, "if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps." Am. Bar Ass'n, *Standards for Criminal Justice: Prosecution and Defense Function* § 3-6.6(c) (4th ed. 2015). According to the ABA standards, "[i]f the witness is still on the stand, the prosecutor should attempt to correct the error through further examination," and, "[i]f the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy." *Id.* Similarly, the National District Attorneys Association's National Prosecution Standards state that, "[i]f a prosecutor learns that material evidence previously presented by the prosecutor is false, the

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

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

Federal prosecutions under 18 U.S.C. § 242 are similarly ineffective. This law was enacted in 1866 to provide criminal liability for government officials who violate constitutional protections. *Id.* at 71. But in the 153 years since its enactment, only one prosecutor has been convicted under the statute. *See id.*

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prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence." Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 6-1.3 (3d ed. 2009).

Other evidence demonstrates the futility of relying on prosecutorial discipline as a check against the use of false testimony. A 2008 report by the California Commission on the Fair Administration of Justice, an arm of the State of California, described a review of "54 cases in which prosecutorial misconduct resulted in a reversal" between 1998 and 2008. Cal. Comm'n on Fair Admin. of Justice, Final Report at 71 (2008) ("CCFAJ Final Report"), http://digitalcommons.law.scu.edu/ncippubs/1/. California state law requires "a report . . . to the State Bar" whenever a conviction is reversed. CCFAJ Final Report at 71. But a State Bar employee reported to the Commission that, "after checking half of these 54 cases," the employee "had yet to find a single example of a report by a court of misconduct," even though "each year the State Bar sends out a letter reminding judges of the statutory requirements." *Id.*

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

A 2009 New York State Bar Association Task Force on Wrongful Convictions found similar results. The Task Force studied 53 cases where convictions

were overturned and the defendants exonerated. *See* N.Y. State Bar Ass'n Task Force on Wrongful Convictions, Final Report at 5 (2009) ("NYSBA Final Report"), https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/FinalWrongfulConvictionsReport.pdf. Thirty one of those convictions were attributable to "government practices." *Id.* at 7. But the study's authors were unable to locate any "public disciplinary steps against prosecutors" involved in the cases. *Id.* at 29. The Task Force also received testimony that, although courts found prosecutorial misconduct in approximately 200 cases between the late 1970s and 2003, only two prosecutors had ever been disciplined by their own offices. *Id.* at 31.

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

Together, this empirical record demonstrates that prosecutorial discipline is not a meaningful deterrent to the use of false testimony. Instead, only a meaningful remedy—reversing convictions—can check abusive prosecutorial practices. As Judge Kozinski observed, "a legal environment that tolerates sharp

prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same." Hon. Alex Kozinski, *Criminal Law 2.0*, Preface, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxvi (2015).

The Eleventh Circuit's approach does just that. By permitting the government to present false testimony so long as it does not "capitalize" on this evidence, the decision below essentially holds that this practice is not misconduct. But as explained above, adopting such a rule would meaningfully risk wrongful convictions and threatens the fair administration of criminal justice. Instead, enforcing the principle of *Napue*, and reversing convictions where prosecutors knowingly fail to correct false testimony, is the only way to create a legal environment that preserves the integrity of the judicial process and protects the fundamental fairness of criminal proceedings.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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