No. 21-440

IN THE

Supreme Court of the United States

MIGUEL ANGEL SANTANA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

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

[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 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.

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—especially false evidence sponsored by the prosecutor. In the Center's experience, juries are likely both to assume that the prosecution presents testimony that it believes 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents an important question of Due Process on which the lower courts are sharply divided. All agree that under this Court's holding in *Napue* v. *Illinois*, 360 U.S. 264, 270 (1959), a prosecutor violates a criminal defendant's due process rights under the Fourteenth Amendment when she or he knowingly elicits false testimony that she or he knows, or should know, is false and does nothing to identify or correct the falsehood. But the courts of appeals and state supreme courts disagree on what the obligations of the prosecutor are after a government witness provides false testimony. One group of lower courts applies a rule that a prosecutor can discharge his or her *Napue* duty merely by disclosing to defense counsel that the testimony was false. Another reads *Napue* to mandate

that the prosecutor correct the false testimony his or herself in front of the jury—which is the right rule. This Court's review is needed to resolve that split in light of the important role the *Napue* duty plays in our criminal-justice system. In addition, this Court's review would provide the clarity necessary to ensure that criminal defendants are provided an equal opportunity for a fair trial regardless of where they are tried.

I. Prosecutors play an extremely powerful role in our legal system as representatives of the sovereign. As such, prosecutors, unlike private defense counsel, are ethically bound to prioritize the pursuit of justice over winning. And, because they bear the state's imprimatur, prosecutors are inherently trusted by juries in a way that defense counsel are not. By allowing material false testimony to go uncorrected, prosecutors not only prevent an individual criminal defendant from experiencing a fair trial, but also sow doubt that the criminal-justice system is capable of performing its truth-finding function. The *Napue* duty—which explicitly requires a prosecutor to "correct" testimony she or he knows to be false, 360 U.S. at 270 (quotation omitted)—is thus critical to ensuring that prosecutors treat a dedication to the truth as paramount, something our legal system assumes as a basic "concept of ordered liberty." *Id.* at 269. In addition, it is crucial that courts apply *Napue*'s duty consistently, lest a defendant's right to a fair trial turn on where he happens to be tried.

II. Because the *Napue* duty bears on testimony that the prosecutor actually presents to the jury, it is distinct from the rule established in *Brady v. Maryland*, and merits independent consideration by this Court. The *Brady* rule merely requires a prosecutor to inform the defense of the existence of material, excul-

patory information—it does not obligate the prosecutor to present that material to the jury. The *Napue* duty, in contrast, imposes an affirmative duty on the prosecution to correct material false testimony in front of the jury. The *Napue* duty imposes this requirement because it concerns scenarios where prosecutors have introduced to the jury testimony that they knew, or should have known, was false. Those situations involve a "more fundamental insult to due process," *Gomez* v. *Comm'r*, 243 A.3d 1163, 1174 (Conn. 2020). It is thus imperative that this Court provide clarity on the scope of a prosecutor's obligations under *Napue*.

ARGUMENT

I. A Split Amongst The Lower Courts Over The Scope Of The *Napue* Duty Threatens The Fairness Of Criminal Trials

A. Prosecutors Are Uniquely Powerful Quasi-Judicial Actors

1. The prosecutor is a uniquely powerful actor in our legal system. As Justice (and then-Attorney General) Robert Jackson proclaimed in 1940, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940). This awesome authority means the prosecutor who acts "at his best" serves as "one of the most beneficent forces in our society"; the prosecutor who does not, however, serves as "one of the worst." *Id.*

The prosecutor's power derives from his role as "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). The prosecutor's "interest … in a criminal prosecution," "therefore," "is not that [she or he] shall win a case, but that justice shall be done." *Id.*; *see also United States* v. *Agurs*, 427 U.S. 97, 110-111 (1976) (same).

Prosecutorial power is so great, and the obligation to wield it responsibly so inherent to the role, that U.S. courts and observers have long analogized between the prosecutor's role and that of the judge. Because "[t]he prosecuting officer represents the public interest, … [h]is object[ive,] like that of the court, should be simply justice." *Hurd* v. *People*, 25 Mich. 405, 416 (1872). Accordingly, nineteenth-century courts routinely drew parallels between prosecutors and judges, referring to the former as "public officer[s]" who "act[] in a quasijudicial capacity," *People* v. *Cahoon*, 50 N.W. 384, 385 (Mich. 1891), and thus must "be fair and impartial," because they are "[e]qually … the representative of law and justice" as "the court." *People* v. *Lee Chuck*, 20 P. 719, 723 (Cal. 1889); *see also People* v. *Fielding*, 53 N.E. 497, 498 (N.Y. 1899) (observing that the "public prosecutor, who is a *quasi* judicial officer, represent[s] the [P]eople of the state, and [is] presumed to act impartially in the interest only of justice.").

Modern jurisprudence and commentary reaffirm these foundational principles. As "representative[s] of the government," prosecutors have a "freestanding ethical and constitutional obligation … to protect the integrity of the court and the criminal justice system." *N. Mariana Islands* v. *Bowie*, 243 F.3d 1109, 1122 (9th Cir. 2001). Their "role as representative[s] of the government" also provide prosecutors "a unique power to affect the evaluation of the facts by the fact-finder, who inevitably views [them] as … special guardian[s] and thus warranter[s] of the facts— … expert[s] who can be

trusted to use the facts responsibly." Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309, 315 (2001). Those "responsibilities" leave prosecutors "different from lawyers in private practice," because their "duty is to seek justice, not merely to convict." *Jenkins* v. *Artuz*, 294 F.3d 284, 296 n.2 (2d Cir. 2002) (quoting N.Y. Code of Prof'l Responsibility EC 7-13). And it is those special responsibilities that cause the prosecutor, "as the representative of the people," to act "in a quasi[]judicial capacity in [the] search for justice." *State* v. *Monday*, 257 P.3d 551, 555 (Wash. 2011); *cf. Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976) (explaining, in the context of common-law prosecutorial immunity, how prosecutors have long been seen and treated "as 'quasi-judicial' officers.").

It is not just courts that speak to this responsibility. The Model Rules of Professional Conduct, for instance, devote a section to the "[s]pecial [r]esponsibilities of a [p]rosecutor," defined as those "of a minister of justice and not simply [those] of an advocate." Model Rules of Prof'l Conduct R 3.8, cmt. 1 (2020). And the American Bar Association's Standards for Criminal Justice make clear that the prosecutor, "[i]n light of [these] public responsibilities … has a heightened duty of candor to the courts." ABA Standards for Criminal Justice 3-1.4 (4th ed. 2017).

2. Because the role of a prosecutor is so singular, "[j]uries very properly regard [them] as unprejudiced, impartial, and non-partisan." *Cahoon*, 50 N.W. at 385. This favorable impression causes juries to inherently trust prosecutors and the witnesses they present.

Prosecutors operating in the real world often capitalize on the trust given to them by juries. For instance, prosecutorial training manuals "caution[]" pros-

ecutors "not to refer to themselves as 'the prosecution' but rather as 'the state,' 'the government,' or, in the most extreme version of this practice, 'the people.'" Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process*, 32 Am. Crim. L. Rev. 743, 787 (1995) (quoting Goldstein & Lane, 1 Goldstein Trial Technique § 10.59 (2d ed. 1969)). By use of these rhetorical devices, prosecutors "position [themselves] and the jury as 'us' and the defendant and his attorney as 'them.'" *Id.* at 788.

The trust juries place in prosecutors is only heightened when contrasted with juries' perceptions of defense counsel. Defense counsel have an ethical obligation to treat "the interests of [their individual] client" as "generally paramount to the interest in the administration of justice." Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. Rev. 687, 687 n.1 (1991). Juries are generally aware of this "duty of advocacy," and, as a result, "frequently listen[] to defense counsel with skepticism." *United States* v. *LaPage*, 231 F.3d 488, 492 (2000); *see also* Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 Berkeley J. Crim. L. 391, 413 (2011) ("most jurors regard" "defense counsel" "skeptically," while "the prosecutor is typically cloaked in a presumption of virtue.").

B. False Testimony Occurs At An Alarming Rate

The criminal justice system necessarily depends on witness testimony to further its search for the truth. But witnesses are human, and all too often find themselves testifying inaccurately (intentionally or otherwise). When that false testimony is material to a conviction, it casts doubt on the "concept of ordered liberty." *Napue* v. *Illnois*, 360 U.S. 264, 269 (1959).

Available data make clear that false testimony contributes to wrongful convictions. To date, 375 people in the United States have been exonerated by DNA testing. *See* The Innocence Project, *DNA Exonerations in the United States*, https://tinyurl.com/kzdb5p75. Approximately 70% of those cases involved incorrect eyewitness identification testimony. *See id.* In 17% of them, false testimony had been provided by a government informant. *See id.* And there is reason to suspect that "witness perjury is a far more common cause of error in murders and other capital cases than in lesser crimes." Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, Law & Contemp. Probs. 61, no. 4 (1998), at 139. Indeed, according to a study of 350 cases between 1900 and 1985 where the defendant was wrongfully convicted of a crime punishable by death, 193 (or roughly 55%) involved either mistaken eyewitness identification, perjury, or some other form of erroneous testimony by a government witness. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 56 (1987).

Despite the fact that no reasonable judge or lawmaker would support the introduction of material false testimony, judicial systems and legislative bodies continue to struggle with solutions to the problem. Indeed, "[f]ew jurisdictions across the country have adopted any rules to better safeguard the reliability of informant testimony in response to these wrongful convictions." Garrett, *Convicting the Innocent Redux* University of Virginia School of Law, Public Law and Legal Theory Research Paper Series 2015-39 (July 24, 2018), at 12.

C. The *Napue* Duty, Properly Interpreted, Holds Prosecutors To Their Heightened Duty Of Candor

Our law recognizes juries' inherent trust of prosecutors. For instance, prosecutors may not offer their "personal opinion" of a witness's credibility because such opinion "carries with it the imprimatur of the Government and" thus risks "induc[ing] the jury to trust the Government's judgment rather than its own view." *United States* v. *Young*, 470 U.S. 1, 18-19 (1985). Put differently, when a prosecutor "vouch[es]" for a witness, and "provid[es] personal assurances of the witness's veracity," she or he "places the prestige of the government behind the witness" and improperly influences the jury. *United States* v. *Stinson*, 647 F.3d 1196, 1212 (9th Cir. 2011).

The same concerns animate the *Napue* duty. In *Napue*, this Court held that the prosecution denies a criminal defendant due process when it "allows" "false evidence … to go uncorrected" at his trial. 360 U.S. at 269. This "principle," the Court observed, is "implicit in any concept of ordered liberty." *Id.* Thus, relying on a New York Court of Appeals decision from three years prior, the *Napue* Court declared that a prosecutor who is aware of a government witness's false testimony "has the responsibility and duty to **correct [it] and elicit the truth**." *Id.* at 270 (quoting *People* v. *Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)) (emphasis added). To do otherwise—that is, to "allow" the false testimony "to go uncorrected when it appears," *id.* at 269—"prevent[s] … a trial that could in any real sense be termed fair." *Id.* at 270 (quoting *Savvides*, 136 N.E.2d at 855).

As the Ninth Circuit has described it, *Napue* establishes a prosecutor's "constitutional duty to correct the

false impression of the facts" that the jury may have gathered from a government witness's testimony. *LaPage*, 231 F.3d at 492. Similarly, three judges of the Seventh Circuit recently explained that *Napue* "imposes a duty on the prosecution not merely to *inform* the defense but to ensure that [] perjury is *corrected*." *Long* v. *Pfister*, 874 F.3d 544, 554 (7th Cir. 2017) (en banc) (Hamilton, J., dissenting). That requirement, the judges wrote, results directly from the fact that "*Napue* addresses not what the defense knows but the integrity of the evidence before the jury," and "the risk that the jury will use the false evidence to convict." *Id.* Such an understanding of *Napue* also accords with the reality that "it is … prosecutor[s]," and not defense counsel, "who [are] best positioned to repair the damage that is done to the efficient and fair administration of justice … when a state's witness provides false testimony." *Gomez*, 243 A.3d at 1175-1176 (internal quotation marks and citation omitted).

Other courts, however, like the one below, essentially ignore *Napue*'s insistence that the prosecutor *correct* false testimony, and instead hold that prosecutors satisfy due process merely by informing defense counsel of the testimony's falsity. *See Gomez*, 243 A.3d at 1174. Those courts proceed from the assumption that "defendant[s] [who] know[] about … false testimony and fail[] to bring it to the … court's attention … d[o] so for strategic reasons." *United States* v. *Mangual-Garcia*, 505 F.3d 1, 10-11 (1st Cir. 2007). But that rationale ignores the fact that when defense counsel chooses to alert the jury about false testimony, she is less likely to be believed than would be the prosecutor and thus her client—through no fault of her own—suffers as a result.

When the prosecutor knows, or should know, that testimony that is both false and material has been presented to the jury, due process requires that the prosecutor be the one to correct it.[2] Any other rule—where the prosecutor is permitted to sit silently as defense counsel tries to expose the false testimony on her own—puts at risk "our society['s] … fundamental value determination … that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

D. *Napue* Must Be Applied Consistently To Protect The Fundamental Fairness Of Criminal Trials

Defendants tried in jurisdictions that read *Napue* as requiring prosecutors to only inform defense counsel of a testimony's falsity are placed at a disadvantage to those tried in courts that understand *Napue* as mandating the prosecutor to correct false testimony to the jury him or herself. Because a defendant's right to a fair trial should be the same regardless of where he is tried, this Court should grant the petition to provide clarity on *Napue*'s obligations for prosecutors.

As the above establishes, *Napue* protects the integrity of a criminal trial through a prophylactic rule based in the understanding that it must be prosecutors who "correct" testimony that they "know[] to be false." *Napue*, 360 U.S. at 270 (quoting *Savvides*, 136 N.E.2d

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[2] The materiality requirement ensures that prosecutors are not required to correct every conceivable false statement that a government witness offers as testimony, but rather only statements that are relevant to the jury's deliberation. For example, *Napue* does not oblige the prosecutor to inform the jury that a witness was mistaken in recalling the type of eggs she ate, or the color of socks she wore, on the day she is testifying about.

at 854). Indeed, due process requires that prosecutors "elicit," or draw out, "the truth"; anything else "prevent[s] … trial[s] that could in any real sense be deemed fair." *Id.* The lack of guidance from this Court causes jurisdictions that require prosecutors only to disclose, (but not correct) false testimony, to provide disproportionately unfair trials for defendants.

Even worse yet, the jurisdictions that apply this lackadaisical version of *Napue* threaten perceptions of the entire criminal justice system because the *Napue* duty has implications for the legal system extending far beyond an individual criminal case. By allowing false testimony to go uncorrected, prosecutors, as representatives of the state, not only prevent an individual criminal defendant from experiencing a fair trial, but also sow doubt that the criminal justice system is capable of performing its truth-finding function. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), for example, this Court held that the prosecution denies a defendant equal protection when it uses peremptory challenges to exclude members of his race from the jury. *Id.* at 86. The Court there made clear that the harm from such prosecutorial behavior "extends beyond that inflicted on the defendant and the excluded juror [and] touch[es] the entire community" by "undermin[ing] public confidence in the fairness of our system of justice." *Id.* at 87 (citation omitted). Although *Napue* addresses different circumstances, it endorses a similar proposition: that it is not only the defendant—but the community at large—that is harmed when the prosecution knowingly allows false testimony to go uncorrected at a criminal trial.

II. THE *NAPUE* DUTY IS DISTINCT FROM THE *BRADY* RULE AND MERITS THIS COURT'S INDEPENDENT CONSIDERATION

Four years after *Napue*, this Court decided *Brady*, where it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

Although the *Brady* rule is similarly intended to ensure that prosecutors prioritize truth-finding over conviction, it arose in a separate context from *Napue*. Its rule, accordingly, is distinct. *Brady* concerns instances where the "accused" has "demand[ed] evidence" from the prosecutor that "would tend to exculpate him or reduce the penalty" he might face. *Id.* at 87-88. In those situations, *Brady* makes clear, a prosecutor may not "withhold[]" such evidence from the defendant. *Id.* But *Brady* has no further application once the prosecutor has disclosed the exculpatory evidence to the defendant.

Napue, by contrast, involves the question of what a prosecutor must do when false testimony has in fact been presented to the jury by a government witness. *Napue* v. *Illinois*, 360 U.S. 269, 270 (1959). Because such evidence "taint[s]" the jury's evaluation of the case, *Napue* requires the prosecutor to "correct" the misleading testimony and "elicit"—or bring forth—"the truth" for the jury. *Id.* at 269-70 (quoting *Savvides*, 136 N.E.2d at 854).

The two cases thus impose distinct duties upon prosecutors: *Napue* requires a prosecutor to correct false testimony *in situ*, while *Brady* ensures only that

she or he will provide the defense with all evidence that is potentially exculpatory.

This distinction is well-recognized. The Connecticut Supreme Court, for example, has said that the Court "in *Napue* … 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." *Gomez* v. *Comm'r*, 243 A.3d 1163, 1174 (Conn. 2020).

This difference explains why courts apply different tests for *Napue* and *Brady* claims: under *Napue*, courts ask whether a prosecutor knew, or should have known, that the testimony was false, *see United States* v. *Agurs*, 427 U.S. 97, 103-104 (1976); while *Brady* claims do not consider the prosecutor's knowledge. The tests also result in different standards of appellate review, with *Napue* requiring reversal unless the government shows the evidence was "harmless beyond a reasonable doubt," *United States* v. *Bagley*, 473 U.S. 667, 680 (1985), and *Brady* requiring affirmance unless the defendant shows a "reasonable probability that" "the result of the proceeding would have been different" had the evidence been disclosed. *Id.* at 682 (quotation marks and citation omitted). In short, *Napue* is a much "more defendant-friendly" standard than *Brady*. *Conyers* v. *State*, 790 A.2d 15, 38 (Md. 2002).

It is crucial that courts appreciate the distinction between *Napue* and *Brady*. At its root, *Napue* involves a "more fundamental insult to due process," *Gomez*, 243 A.3d at 1174, as it addresses instances where the prosecutor has allowed testimony that she or he knows, or should know, is false to go uncorrected at

trial. *Brady*, by contrast, although serious in its own right, can involve a good-faith prosecutor who inadvertently fails to turn over exculpatory information. *See Brady*, 373 U.S. at 87 (clarifying that whether the prosecutor acted in "good faith or bad faith" is irrelevant to the constitutional analysis). To treat *Napue* and *Brady* violations the same thus ignores the particular danger at hand—both to the individual defendant and our legal system more generally—when the prosecution *intentionally* risks convicting a defendant on the basis of false testimony. Thus, especially in light of the fact that *Brady* is so frequently considered, *see, e.g.*, *Turner* v. *United States*, 137 S. Ct. 1885 (2017), *Wearry* v. *Cain*, 577 U.S. 385 (2016), while *Napue* has not been examined at any length since 1985, *see Bagley*, 473 U.S. at 679 n.8, the time is ripe for this Court to clarify the distinction between the two cases and the requirements necessary for a prosecutor to comply with *Napue*.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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OCTOBER 2021