No. 21-440

In The Supreme Court of the United States

MIGUEL ANGEL SANTANA,

Petitioner,

V.

STATE OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari
to the Maryland Court of Special Appeals

BRIEF *AMICUS CURIAE* OF THE MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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Brief of Amicus Curiae

The Maryland Criminal Defense Attorneys' Association and the National Association of Criminal Defense Lawyers, together as amicus curiae, submit this brief in support of Petitioner Angel Miguel Santana and urges this Court to grant the petition for a writ of certiorari.

Interest of Amicus Curiae[1]

The mission of the Maryland Criminal Defense Attorneys' Association ("MCDAA") includes research, education, and advocacy relating to criminal defense practice, the proper administration of justice, and the protection of individual rights.[2]

The MCDAA was formed to promote study and research in the field of criminal defense law and the related areas; to disseminate by lecture, seminars and publications the advance of the knowledge of the law as it relates to the field of criminal defense practice; to promote the proper administration of justice; to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases; and to foster periodic meetings of the defense lawyers and to provide a forum for the material exchange of information regarding the administration of criminal justice and

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[1] Counsel for *Amici* provided notice to the parties of their intent to file and *amicus* petition and the parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to the preparation or submission of the petition.

[2] *See* https://mcdaa.org/about.php.

thereby concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures. The 500 members include both attorneys and associated professionals throughout Maryland.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and boasts a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files many amicus briefs each year, including in the U.S. Supreme Court, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants. NACDL and its members have an important interest in ensuring that among other objective factors, lower courts may consider race under a flexible totality-of-circumstances test to determine whether a reasonable person would feel free to ignore a police officer's show of authority in determining whether a Fourth Amendment seizure has occurred.

Summary of the Argument

When a government witness provides material false testimony about an immunity agreement and the government fails to correct that false testimony in front of the jury, it is an important question of criminal law whether the government cures that due process violation by merely making defense counsel aware of the falsity of the testimony. Pet. i.

The answer to this question strikes at the heart of the due process guarantee and the justice system's fairness. Because we have an interest in advocating for a level playing field for all criminal defendants, MCDAA respectfully submits this *amicus curiae* brief supporting Miguel Angel Santana's petition for a writ of certiorari.

A clear divide is reflected in the split throughout the federal and state courts regarding when or even *if* disclosure by the State can cure a *Napue* violation. *Napue v. Illinois,* 360 U.S. 264 (1959). As articulated in Santana's petition, there are three views on this issue: (1) disclosure alone is never enough, rather, the government must correct the falsity in front of the jury; (2) disclosure alone can sometimes cure the violation depending on the circumstances of how the testimony is used at trial; and (3) a small minority hold that disclosure alone always cures the obligation to correct the falsity. Pet. 2–4, 10–18. The Maryland intermediate appellate court implicitly adopted this third minority position. Pet. App. 27a–28a.

This Court should speak definitively on this fundamental constitutional issue. In doing so it should flatly reject the minority viewpoint that

disclosure always cures a *Napue* violation, a position that never considers the circumstances of the case, or how the prosecutor may have benefited from or used such a falsity. As argued by Petitioner, this Court should either adopt the bright-line test applied by the six courts outlined by Petitioner, or the case-by-case approach applied by seven others, but in any case, should reject the minority view. Pet. 20–21.

Argument

I. The Prosecutor's Remedial Duty to Correct False Testimony Before the Jury is Broader than its Procedural Duty to Disclose the Falsity to Defense Counsel, and this Court Should Resolve the Split Among the Circuits and Articulate One Nationwide Standard.

In 1959, the *Napue* Court reinforced a duty that was imposed on the prosecutor explaining, that a "lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney *has the responsibility and duty to correct what he knows to be false and elicit the truth*. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." *Napue,* 360 U.S. at 269–70 (emphasis added).

This principle was not new. When the Court decided *Napue*, prior decisions had "established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth amendment." *Napue,*

360 U.S. at 269. It was also already established that prosecutors have an affirmative duty under the Fourteenth Amendment was the same, even if they were not the party soliciting the false testimony, but "allowed it to go uncorrected when it appears." *Id.* What *Napue* did was to extend those same principles – requiring remedial action – to false testimony that bears on the credibility of a witness. *Id.* at 269.

Napue articulated why remedial action was also required when the falsity goes to credibility. This Court recognized that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.*

The affirmative duty to disclose and the affirmative duty to correct a falsehood are different at their cores, and for good reason. The affirmative duty to disclose affords a criminal defendant a meaningful opportunity to prepare for trial, and the opportunity to address the issue at trial. On the other hand, the affirmative duty to correct a falsehood goes further. It means that defense counsel does not simply have the opportunity to address the falsehood at trial, but rather, the onus is on the prosecutor to correct the falsehood. The broader protection encompassed by the prosecutor's duty to correct guarantees a criminal defendant's due process rights, and supports the larger framework of the constitutional structure of the entire trial.

Napue's dictates however, were not meant to depend on the effectiveness of trial counsel's cross-examination. Instead the words of the *Napue* opinion

clearly signal that it is the prosecutor who "has the responsibility and duty to correct" the falsity, not the defense attorney, once the falsity has been disclosed to the defense. *Napue,* 360 U.S. at 270.

Similarly, *Napue's* language signals that it is "the responsibility and duty" of the prosecutor to "elicit the truth." *Id.* To elicit means to evoke or draw out a response, answer, or fact from someone (like a witness) in reaction to one's own questions.

The prosecutor is the architect of the case, from the inception of the charging document, be it through grand jury presentment or other permissible charging process. The prosecutor also elects which witnesses to present to the grand jury and which witness it puts in front of the factfinder at trial. The sheer awe and magnitude entrusted with all of this power is what inherently triggers the prosecutor to have a further obligation to correct false testimony before the jury from a prosecution witness.

Once a prosecutor is aware that their witness is testifying falsely, especially regarding the value a prosecutor places on their testimony, there should be a secondary obligation to correct it. So too, once the prosecutor becomes aware that their witness is testifying falsely, it is fundamental to the concepts of the presumption of innocence, the right to a fair trial and to the due process protections to correct it before the fact finders.

Without the duty to correct, the prosecutor would enjoy a windfall from the false testimony of their witness. That is so, especially with a cooperating witness because it is reasonable to believe that the importance of a prosecutor's turncoat witness regarding substantive testimony about a crime will

be bolstered in part by the value the State placed on it. The value the prosecutor placed on their testimony is reflected in any promises given to them in exchange for that testimony.

Moreover, the duty to correct is also implicit in the presumption of innocence. The natural assumption of a juror is that a prosecutor has high motives and good morals, and by extension, would not prosecute an innocent person. Having a prosecutor admit that their witness lied, when it occurs, levels the field, thus supporting the notion of the presumption of innocence. Prosecutors have an equal "duty to refrain from improper methods calculated to produce a wrongful conviction" as they do the right "to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. 78, 88 (1935) As this Court also explained in *Berger,* "it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed." *Id.*

Here, the prosecution's witness Brawner falsely expanded the provisions on the plea agreement that was before the jury. Even with 100 pages of cross-examination, defense counsel was unable to get Brawner to admit that the testimony was false. The State knew the truth and, even on redirect, did not correct the record. Pet. App. 28a–29a. Had the State corrected the record, Brawner's credibility would have been impeached.

Also, cross-examination is insufficient to fix this problem because, if unsuccessful, it merely turns a lie into a contested issue. When, as was the case here, trial counsel was unable to get the witness to

agree that his testimony was false, there is great risk that a jury thinks the defense failed, and thus undercut the defendant's credibility. Additionally, jurors might view the prosecution's silence as a tacit confirmation of the witness' testimony.

The Maryland court held that disclosure satisfied the State's obligation only because, since *Napue,* a divide has arisen among the country's federal circuits and states on this issue. In fact, without any real support to do so, the Maryland court concluded that "the State fully complied with the demands of justice by 'fully, fairly and honestly disclos[ing]' the extent of the plea agreement to both Santana and the jury." Pet. App. 29a. The Maryland opinion illustrates how diverse the application can be on this issue. This current divide creates inconsistent results in this country's legal system when false testimony from a State's witness rears its head. If this Court does not speak on this issue, the *Napue* doctrine will be reduced to a procedural rule of discovery.

II. The Duty to Correct is Explicit in the Rules of Conduct Governing Prosecutors.

The concept of a duty to correct is supported by recognized professional rules of conduct for prosecutors and woven tightly into their unique relationship to the entire criminal legal process.

The American Bar Association's Standards for Criminal Justice, to which this Court has looked for guidance,[3] addresses a prosecutor's heightened duty of candor. A "prosecutor should correct a prosecutor's representation of material fact or law that the

[3] *Rompilla v. Beard,* 543 U.S. 374, 387 (2005)

prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder." Am. Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE 3-1.4. (3d ed.).

The ABA Standards have long promoted that affirmative corrective action is required when a prosecutor discovers a falsity. The standard regarding presentation of evidence provides that "a prosecutor should not knowingly offer false testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity." Am. Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE §3-5.6 (3d ed. 1993). The comments that follow the 1993 standard is illustrative of how far this long recognized duty stretches.

> A prosecutor is barred from introducing evidence that he or she knows is false. This obligation applies to evidence that bears on the credibility of a witness as well as to evidence on issues going directly to guilt. Even if false testimony is volunteered by the witness and takes the prosecutor by surprise, if the prosecutor knows it is false, it is the prosecutor's obligation to see that it is corrected.

Am. Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE §3-5.6 (3d ed. 1993), *citing Napue v. Illinois*, 360 U.S. 264 (1959).

These standards are not created without significant input by prosecutors nationwide in an attempt to "ascertain a consensus view" of what

"good, professional practice is and should be." Am. Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE, xiv. (3d ed. 1993).

The current ABA standards echo the call for affirmative corrective action by the prosecutor and 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 §3-6.6(c) (4th ed. 2017). According to the standard, these remedial steps require correction while the witness is on the stand. *Id.*

Moreover, prosecutors have a duty to the courts and to our system of justice beyond that of other attorneys. They have a duty to seek justice and not merely to gain convictions. The ABA also recognizes prosecutor's heightened standard of candor to the courts. Am. Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE §3-1.4. This special relationship is reflected in the rules of professional responsibility that govern prosecutors' heightened duty of candor.

III. Failing to Require Correction Can Increase the Chance of Wrongful Convictions and Create Unconstitutional Delays in Preventing Them.

It is a generally accepted principle that false testimony increases the likelihood of wrongful convictions.[4] Often, as in *Napue*, falsehoods are discovered well after trial, and often by accident or chance of luck.

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[4] *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).

In *Napue* the falsehood was only discovered because the prosecutor filed a Writ of Error Coram Nobis on behalf of the witness who testified falsely. In that pleading the State sought unrealized benefits based on promises that were given to him in exchange for his testimony against Napue. It was *only* because Napue happened across that pleading that he knew of the falsehood. The murder in *Napue* occurred in 1938. *Napue*, 260 U.S. at 265. On conviction, Napue was sentenced to 199 years. *Id.* at 266. This Court issued its decision in 1959, almost 21 years later. Mr. Napue was lucky. But many inmates, even *if* they find the information may be procedurally barred from seeking relief because of the interplay between the short federal statute of limitations under 28 U.S.C. § 2254 and state post conviction statutes.[5]

If a prosecutor is not required to make an affirmative correction, the only meaningful chance for a defendant to make a record proving the issue is through state court postconviction proceedings while they are inmates in prison. Given the one-year statute of limitations for § 2254 proceedings, defendants must discover and prove the violation soon after their direct appeal ends.

Alternatively, many defendants receive short sentences as well, and are often released quicker than it could take to litigate a state post-conviction proceeding just to prove an error that the prosecutor could have been required to address on the record at trial. By not following that procedure, and instead

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[5] The Antiterrorism and Effective Death Penalty Act of 1996 created a one year statute of limitations to challenge convictions.

placing the burden of proof on the record with the defendant in post-conviction or §2254 proceedings, the minority rule effective prevents a large number of defendants from even having the opportunity to build the required record, as they will be released before time exists to get back in court for a postconviction hearing.

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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