

NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021

BRYANT CALLOWAY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Alison Brill, Esq.
Assistant Federal Public Defender
Office of the Federal Public Defender
22 South Clinton Avenue
Station Plaza #4, Fourth Floor
Trenton, New Jersey 08609
(609) 489-7457
alison_brill@fd.org

Attorney for Petitioner
Bryant Calloway

QUESTION PRESENTED

1. Whether this Court should consider material perjury before the grand jury as structural error that is not cured by the guilty verdict of the petit jury.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINION BELOW	2
JURISDICTION.....	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	7
I. An indictment grounded in material perjury to the grand jury is structural error not cured by the petit jury’s guilty verdict.....	7
II. The Third Circuit’s decision failed to follow this Court’s precedent addressing perjury and other errors before the grand jury.....	11
III. This case presents an ideal vehicle to determine if material perjured grand jury testimony should be left unreviewable.....	12
CONCLUSION	12

TABLE OF AUTHORITIES

<u>Federal cases</u>	<u>Page</u>
<i>Ballard v. United States</i> , 329 U.S. 187 (1946).....	6
<i>Bank of Nova Scotia v. United States</i> , 487 U.S. 250 (1988)	6, 8-9
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	10
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	10-11
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	9
<i>United States v. Agurs</i> , 427 U.S. 97 (1976)	10
<i>United States v. Calloway</i> , 2022 WL 989362 (3d Cir. 2022).....	1, 5-6, 11
<i>United States v. Console</i> , 13 F.3d 641 (3d Cir. 1993)	6, 11
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006)	9
<i>United States v. Harmon</i> , 833 F.3d 1199 (9th Cir. 2016)	6
<i>United States v. Lombardozzi</i> , 491 F.3d 61 (2d Cir. 2007)	6
<i>United States v. Lopez-Gutierrez</i> , 83 F.3d 1235 (10th Cir. 1996)	6
<i>United States v. Mandujano</i> , 425 U.S. 564 (1976)	10
<i>United States v. Mechanik</i> , 475 U.S. 66 (1986).....	7-9, 11
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	7-9
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	6
<i>Weaver v. Massachusetts</i> , 582 U.S. ---, 137 S. Ct. 1899 (2017)	9
<u>Federal statutes</u>	
18 U.S.C. § 922	3
18 U.S.C. § 924.....	3

18 U.S.C. § 1623.....	8
18 U.S.C. § 3231.....	2
18 U.S.C. § 3742.....	2
21 U.S.C. § 846	3
21 U.S.C. § 856	3
21 U.S.C. § 860.....	3
28 U.S.C. § 1254	2
28 U.S.C. § 1291	2

Rules

Federal Rule of Criminal Procedure 6(d).....	8
Supreme Court Rule 10(c)	7
Supreme Court Rule 13.1	2

Other authorities

U.S. Const., amend V.....	2, 7
---------------------------	------

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2021

BRYANT CALLOWAY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bryant Calloway respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Third Circuit affirming the District Court's judgment is unpublished but available at 2022 WL 989362 (3d Cir. April 1, 2022) (unpub.) and is attached at Pet. App. 1-5.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court entered judgment on April 1, 2022. This petition is timely filed within ninety days after the judgment issued. *See* Sup.Ct.R. 13.1 The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law”

STATEMENT OF THE CASE

1. This case presents an important question whether perjury before the grand jury, that affects the fundamental fairness of the prosecution, is the type of injury that is necessarily cured by the petit jury's guilty verdict.
2. The procedural question presented by this case arises in the context of a prosecution for murder in connection with a dispute over drug distribution territory, among other offenses. In August 2013, Brian Littles was shot and killed at a playground in West Philadelphia, in the Eastern District of Pennsylvania. After an alleged retaliatory shooting in November 2013, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began investigating what it determined to be two separate drug trafficking organizations. In 2017, Petitioner Bryant Calloway and four other young men were charged in a 31-count indictment. Only Mr. Calloway went to trial on seven counts:
 - Conspiracy to distribute 280 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 846 (Count One);
 - Murder in the course of using, carrying, and discharging a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(j) (Count Two);
 - Discharge of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three);
 - Possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) (Counts Four and Five);
 - Maintaining a premises for drug distribution, in violation of 21 U.S.C. § 856(a)(2) (Count 28); and
 - Maintaining a premises for drug distribution within 1,000 feet of a protected location, in violation of 21 U.S.C. § 860(a) (Count 29).
3. Mr. Calloway was found guilty on all counts and sentenced to 10 years imprisonment on Counts One, Four, Five, and 29 (Count 28 merged with Count

29), to run concurrently, and then consecutive sentences of lifetime imprisonment on Count Two and 10 years' imprisonment on Count Three.

4. Only Counts Two and Three are at issue in this petition.
5. Before the grand jury, Mr. Calloway was identified as a shooter based on the direct perceptions of Thomas "Valdo" Guilford, who presented himself as an all-knowing and omnipresent witness about all the players in and activities of the competing drug organizations in that section of West Philadelphia, and Mr. Calloway's actions and Littles' murder, in particular. Guilford testified he saw various things from his brother's stoop on the southeast side of a playground. First, he saw Mr. Calloway talking heatedly to a rival drug dealer at a nearby block party. Next, he saw Mr. Calloway enter the playground from the southeast corner. Finally, after hearing multiple shots fired, he saw Mr. Calloway trotting away holding a gun from that same direction, and even locked eyes with him. Guilford also testified that Mr. Calloway confided in him about a motive before the shooting and confessed after the murder. Guilford was blind at the time of trial but had limited vision when the events occurred. For later helping the rival drug dealers locate Mr. Calloway in November 2013, which resulted in Mr. Calloway being shot many times, Guilford pled guilty to conspiring to use a firearm and aiding and abetting use of a firearm.
6. Mr. Calloway was also identified as the shooter before the grand jury based on hearsay testimony by the rival drug dealer and a compilation of law enforcement officers.

7. Guilford's testimony was perjurious and incredible before both the grand and petit juries. Much of Guilford's trial testimony differed significantly from prior statements he made to the grand jury. The trial testimony was not a different recollection, a flaw in memory, a minor inconsistency, or a mere discrepancy from his grand jury testimony. Instead, Guilford just flatly denied making any of the inconsistent statements. His eyewitness and confessional testimony did not change from the grand jury to trial, even though two other trial witnesses made clear that his eyewitness testimony was false. A new eyewitness who had fled from the shots, as well as an expert in strike mark identification who collected evidence at the scene and testified about bullet trajectory, established that the shots had been fired from the northwest side of the playground, not the southeast side, the scenario compelled by Guilford's description of events.
8. Petitioner timely appealed to the Third Circuit, arguing, *inter alia*, that the government's use of perjured testimony before the grand jury was structural error, with prejudice presumed and not subject to harmless-error review. He also argued that the perjury below, coming from an allegedly percipient witness who testified about being an eyewitness and hearing a confession, established prejudice, if such prejudice needed to be proved.
9. On April 1, 2022, the Third Circuit affirmed Mr. Calloway's conviction. In a non-precedential opinion, a panel of the Third Circuit (Chagares, Schwartz, and Rosenthal, JJ.), determined, *inter alia*, that the petit jury's guilty verdict rendered harmless any allegedly perjurious grand jury testimony. *United States*

v. Calloway, 2022 WL 989362 (3d Cir. 2022) (not for publication) (Pet. App. 1-5) (citing *United States v. Console*, 13 F.3d 641, 672 (3d Cir. 1993)). The panel explained that none of the limited exceptions to the harmless-error rule recognized by this Court were applicable. (Pet. App. 2) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (discrimination based on race); *Ballard v. United States*, 329 U.S. 187 (1946) (discrimination based on gender)).

10. The panel also explained how some Circuits recognized an additional exception to the harmless-error rule for prosecutorial misconduct that misleads the jury, with some circuits further cabining the misconduct as to issues of essential fact, but not credibility:

Some appellate courts have also concluded that there is structural error when “the prosecutor’s conduct . . . amount[s] to a knowing or reckless misleading of the grand jury as to an essential fact,” *United States v. Lombardozzi*, 491 F.3d 61, 79 (2d Cir. 2007) (citation and quotation marks omitted), or when “the prosecutor engage[s] in flagrant or egregious misconduct which significantly infringe[s] on the grand jury’s ability to exercise independent judgment,” *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1245 (10th Cir. 1996) (quotation marks omitted). [*Cf. United States v. Harmon*, 833 F.3d 1199, 1204 & n.7 (9th Cir. 2016) (holding no structural error occurred when the “intentional misconduct by the prosecution goes to a witness’s credibility,” as opposed to an “essential fact”).]

Even assuming our Court recognized these exceptions, Guilford’s allegedly perjurious grand jury testimony does not implicate them. First, the essential facts from Guilford’s grand jury testimony tracked his trial testimony: . . .

(Pet. App. 2). Thus, the Third Circuit assumed that structural error could be found if the government engaged in intentional misconduct with regard to an

essential fact, but then fleshed out why Guilford's testimony was consistent about the essential facts of Mr. Calloway's case. *Id.* This and the other Circuit decisions, finding a difference between credibility and essential fact, are inconsistent with this Court's precedent. They also let stand clear perjury and government misconduct if the petit jury ultimately issues the "right" result. This Court's intervention is necessary to maintain the fundamental fairness of the criminal process.

REASONS FOR GRANTING THE PETITION

This Court should grant the writ of certiorari because the decision below is inconsistent with this Court's precedent. *See* Sup.Ct.R. 10(c). It also presents and sidesteps a recurring and important issue: whether the use of perjured grand jury testimony is structural error which cannot be cured by a guilty verdict by the petit jury. This issue raises Fifth Amendment grand jury and due process concerns.

I. An indictment grounded in material perjury to the grand jury is structural error not cured by the petit jury's guilty verdict

In *United States v. Williams*, 504 U.S. 36 (1992), this Court clarified the type of prosecutorial misconduct before the grand jury for which a court could exercise its supervisory powers and dismiss an indictment. The misconduct must violate a Rule of Criminal Procedure, statute, or constitutional guarantee, one of the "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." *Id.* at 46 & n.6 (quoting *United*

States v. Mechanik, 475 U.S. 66, 74 (1986)). *Williams* specifically cited “[t]he statutory prohibition against making a false declaration before a grand jury, set forth in Title 18 U.S.C. § 1623,” as a statutory violation that would justify dismissal of an indictment based upon misconduct before the grand jury. *Id.* By contrast, this Court, in *Williams*, declined to impose upon the prosecutor a legal obligation to present exculpatory evidence in his possession, because this obligation was not grounded in any rule, statute, or constitutional guarantee.

In adopting the standard that a violation of codified rules could lead to an indictment being dismissed, *Williams* remained consistent with *Mechanik*, 475 U.S. at 66, and *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) which required prejudice to be established before dismissing an indictment. In *Mechanik*, this Court reviewed the effect of a violation of Federal Rule of Criminal Procedure 6(d), when two agents had been simultaneously present before the grand jury, and this Court concluded that the error was harmless. The actual jury verdict ensured that there had been probable cause for the grand jury’s charge and that the charge was true beyond a reasonable doubt, and there, the societal costs of retrial were not warranted. In *Bank of Nova Scotia*, adopting the standard for dismissing non-constitutional errors articulated by Justice O’Connor’s concurring opinion in *Mechanik*, this Court explained that the prejudicial inquiry must focus on whether any violations had an effect on the grand jury’s decision to indict. 487 U.S. 250, 256 (1988). If violations substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the

violations cannot be deemed harmless. *Id.* at 263. Under *Mechanik, Bank of Nova Scotia*, and *Williams*, then, there is not a per se rule that all guilty verdicts cure grand jury errors.

Some errors defy analysis by harmless error standards. Structural error “affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.” *Weaver v. Massachusetts*, 582 U.S. ---, 137 S. Ct. 1899, 1907 (2017) (internal quotations omitted). This Court identified three broad rationales to find errors structural: “if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest”; if the effects of the error are simply too hard to measure”; and “if the error always results in fundamental unfairness.” 137 S.Ct. at 1908. Notably, “[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case. *See id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). A defendant is entitled to a new trial regardless of whether the structural error contributed to the verdict. In other words, even when the jury reaches the “right” result, a new trial is necessary. The consequences of such errors are “necessarily unquantifiable and indeterminate” and are therefore not susceptible to a harmless-error inquiry. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

The problem that occurred below, where perjurious testimony was primarily responsible for causing the grand jury to return an indictment charging murder, should be considered structural error. Perjury before the grand jury threatens the fair and effective administration of justice. It is axiomatic that a defendant is denied

due process when the prosecution knowingly uses perjured testimony or allows untrue testimony to go uncorrected. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976) (explaining that the presentation of perjury involves “a corruption of the truth-seeking function of the trial process”). As this Court has explained: “Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.” *United States v. Mandujano*, 425 U.S. 564, 576 (1976). Unless this Court uses the structural-error framework or clarifies that the petit jury’s guilty verdict does not always cure such an error before the grand jury, there can be no effective restraint on such misconduct.

Here, where the perjurious witness provided the two most powerful types of proof to the grand jury, eyewitness and confession evidence, *cf. Napue v. Illinois*, 360 U.S. 264, 267 (1959) (examining perjury as it related to a key eyewitness), Mr. Calloway can establish that the perjury prejudiced him and substantially influenced the jury. Moreover, dismissal of the indictment was the only way to protect the sanctity of the grand jury process. Instead, the Third Circuit found that the petit jury’s verdict cured any of the claimed errors, thereby foreclosing appellate review of a significant, not technical, error.

II. The Third Circuit's decision failed to follow this Court's precedent addressing perjury and other errors before the grand jury

The decision below had two major errors that failed to adhere to this Court's precedent. It created a distinction between perjurious testimony that touched on the witness's credibility and or that went to an essential fact from the case. That is contrary to this Court's instruction in *Napue*, 360 U.S. at 269-70 that "[i]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. 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." Next, the Third Circuit followed its precedent which had overemphasized the reach of this Court's decision in *Mechanik*. Here, the Third Circuit relied on *United States v. Console*, 13 F.3d 641, 671 (3d Cir. 1993) which had favorably cited *Mechanik* for the proposition that the petit jury's verdict cures errors before the grand jury. (Pet. App. 1-2). But in *Console*, the prosecutorial misconduct at issue before the grand jury was impermissibly testifying, badgering, and commenting on the veracity of witnesses and evidence. *Id.* at 671 n.40. Neither *Console*, regarding non-constitutional errors, nor *Mechanik*, regarding a technical rule violation, help this Court determine whether the petit jury's verdict can clear the error here. Here, the material perjury was both a statutory violation and struck at the core of the criminal justice system.

III. This case presents an ideal vehicle to determine if material perjured grand jury testimony should be left unreviewable

This case presents a good vehicle to decide this issue because of the different proofs offered to the petit and grand jury. The perjurious testimony before the grand jury provided the only direct identification and confessional testimony, and otherwise, the grand jury heard mostly hearsay testimony. Accordingly, the perjurious testimony must have substantially affected the grand jury's decision to indict. By contrast, the petit jury again heard direct identification and confessional testimony from this perjurious witness, but also now heard from another eyewitness and an expert on strike mark whose testimony corroborated each other and contradicted the perjurious witness. Accordingly, this case presents an ideal vehicle to examine perjurious grand jury testimony and determine if it is fundamentally unfair to proceed with a case initiated with material perjury but consummated with further evidence.

CONCLUSION

For the foregoing reasons, Petitioner Bryant Calloway respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

s/Alison Brill

ALISON BRILL
Assistant Federal Public Defender

Dated: June 23, 2022