No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

JUAN MARTINEZ PEDRAZA, PETITIONER

V.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE

FIFTH CIRCUIT COURT OF APPEALS

GEORGE W. ARISTOTELIDIS
Law Office of Jorge G. Aristotelidis
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Juan Martinez Pedraza was convicted on the strength of trial testimony by a co-defendant who entered into a written cooperation agreement with the government. On direct examination by the prosecutor, the co-defendant falsely testified that his cooperation agreement did not involve a promise from the government to consider his cooperation and to reward the cooperation by filing a motion with the district court to reduce his sentence, and that in any event, a cooperation-based reduction of his sentence would be decided solely by the district court, without any input from the government. The Fifth Circuit affirmed Pedraza's conviction, ruling that when the defense elicits perjury on cross-examination, no material falsehood has occurred under this Court's holding in *Napue v. Illinois*, 360 U.S. 264 (1959), because the government has not itself knowingly presented false testimony.

The question presented before this Court is:

Whether the Fifth Circuit's holding that false testimony presented by a government witness at trial that is elicited by the defense on cross-examination need not be corrected by the government, violates this Court's holding in *Napue*, which provides that, even if the false testimony is not initially solicited by the government, the government has a duty to correct it, under the Due Process Clause of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Constitutional Provision

Cases

Statutes

Rules

Sentencing Guidelines

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

JUAN MARTINEZ PEDRAZA, PETITIONER

V.

THE UNITED STATES OF AMERICA

_____

PETITION FOR WRIT OF CERTIORARI TO THE

FIFTH CIRCUIT COURT OF APPEALS

_____

Juan Martinez Pedraza asks that a writ of certiorari issue to review the opinion and judgment entered by the Fifth Circuit Court of Appeals on September 12, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals, *United States v. Pedraza*, No. 21-50221, 2022 U.S. App. LEXIS 25522 (5th Cir. Sep. 12, 2022) is attached as **Appendix A.**

The Fifth Circuit's order denying *en banc* review of the panel's opinion was issued on October 18, 2022, and is attached as **Appendix B.**

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 12, 2022. A timely motion for rehearing *en banc* was denied on October 18, 2022. The deadline to file a certiorari petition is January 17, 2023. This petition is therefore timely. *See* SUP. CT. R. 13.1.

The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person "shall be deprived of life, liberty, or property, without due process of law..."

STATEMENT

A. Trial Facts

On March 20, 2019, Mr. Pedraza, was indicted for the offense of conspiracy to transport and move, and attempt to transport and move, by means of transportation or otherwise, aliens who entered and remained in the United States in violation of law, knowing and in reckless disregard of the fact said aliens came to, entered, and remained in the United States in violation of law, and in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(1)(A)(v)(I) and (B)(i), which carries a maximum sentence of ten years. ROA.867. Mr. Pedraza's jury trial began December 5, 2019. ROA.173. The Court's evidence against Pedraza included his fingerprint match on a ledger containing alien smuggling information that was found in a Chevrolet Silverado operated by Flores Guerra and owned by his wife, Laura Pimentel, that was involved in an alien smuggling bail out (ROA.275, 289, 306); [1] Pedraza being the title owner of and a passenger in a Red Expedition vehicle that was stopped and searched without incident (the driver of the Expedition during that uneventful stop and search was later arrested for illegally transporting aliens in a separate incident, and the Expedition, also used in a separate alien smuggling incident, was afterwards released to Pedraza) (ROA.342, 362-364, 455). The only direct evidence of Pedraza's involvement in the conspiracy was testimony by alleged co-conspirator Edward Flores Guerra, a cooperating

[1] A "bail out" involves the sudden exit of smugglers and aliens in a vehicle, after they are ordered stopped. ROA. 273.

witness.

1. Cooperating Witness Edward Flores Guerra's Testimony

During an intermission in Mr. Pedraza's jury trial, and in the prosecutor's presence, defense counsel requested a copy of the sealed plea bargain and its cooperating agreement addendum, entered into by Edward Flores-Guerra. ROA.427-428. The district court directed the government to provide copies to defense counsel (ROA.428.), and the government complied. ROA.440, 443. Counsel explained his concern that Flores-Guerra, a Spanish speaker, may not recall his agreement, and because the document was in English, Flores Guerra could not review it. ROA.446-448. The Court observed that "there's no specific language in [the plea documentation] that tells him what to expect," but acknowledged that the agreement "tells [Flores Guerra] that *if he cooperates, in the government's discretion, [the government] can decide whether or not to file a 5K1.1 and for how much*…" ROA.447-448. (emphasis added) Counsel expressed that *language about the government's discretion to recommend a sentence reduction was contained within the addendum portion of the plea agreement, which involved "5K1 and Rule 35" provisions*, to which the Court responded that "*it's still all within the discretion of the government*." ROA.448. (emphasis added) The Court surmised that counsel wanted to "pin [Mr. Flores-Guerra] down to how much [or a reduction] he's expecting," which counsel denied, explaining that the focus of his interest in confronting Mr. Flores-Guerra with the addendum was "to get him to say…I'm here to testify because I would – *I would hope that [the government] would consider giving [Mr. Flores-Guerra] some sort of reduction*."

ROA.449. (emphasis added) After discussing the logistics of translating the document into Spanish to impeach Mr. Flores-Guerra with the addendum, the Court observed "that the plea agreement *and the [addendum]* were in English…". ROA.452. (emphasis added)

Flores-Guerra testified extensively about criminal activity he committed as a co-conspirator with Mr. Pedraza. ROA.457-558. Towards the end of Flores-Guerra's direct examination, the prosecutor asked, in relevant part:

Q Okay. Now, you got arrested in 20 -- December of 2018; is that right?

A Yes.

Q And do you know what you were arrested for?

A Yes.

Q What is that?

A Trafficking illegal aliens.

Q And was it for the -- the time that you had trafficked with Juan [Pedraza]?

A Yes.

Q And at some point did you plead guilty to that charge?

A Yes.

Q Did you sign a plea agreement?

A Yes.

Q And did you go over the -- was -- was the plea agreement in English or Spanish?

A I do not remember.

Q Was it explained to you in a language that you understood before

you signed it?

A Yes.

Q And did you understand that document?

A Yes.

Q Did you understand that you were pleading guilty to conspiracy to transport illegal aliens?

A Yes.

Q And did you understand you would get an acceptance of responsibility by pleading guilty?

A Yes.

Q And that was because your case didn't go to trial?

A Yes.

Q Now, that plea agreement, did it also talk about what kind of sentence might be imposed?

A Yes.

Q Did it talk about that there is no guarantee of what your sentence might be?

A Yes.

Q It's 100 percent up to the judge?

A Yes.

Q And did you understand that you weren't being promised anything in return for pleading guilty?

A Yes.

Q Was it your understanding that the acceptance of responsibility was a standard deduction for pleading guilty?

***

Q What did you understand that deduction to be?

A Reduction –

Q The –

A -- in time?

Q Yeah. Yeah, the acceptance of responsibility.

A The three points for -- for -- for the guilt?

Q Yes.

A Yes.

Q *Was -- was that the government promising something for your testimony?*

A *No.*

Q *Was – was it your understanding that was for pleading guilty?*

THE COURT: What was his understanding…[w]hat was his understanding it was for, not –

Q (By AUSA KENNEDY) What was your understanding that the deduction was for?

A Yes.

Q What was your understanding that the deduction was for?

A For – for pleading guilty. That's it.

Q And pleading guilty to who?

INTERPRETER: To who?

A No, just for me.

Q Okay. To the Court?

***

THE COURT: *Where are we going with this? Get to what his expectations are.*

Q (By AUSA KENNEDY) Okay. Yes, Your Honor. *Were you -- what are your expec – were you promised anything in coming in here today and testifying?*

A No.

***

Q Okay. And you've had an attorney through these proceedings, haven't you?

A Yes.

Q And he's here today back there in the back row?

A Yes.

Q Wearing the green shirt?

A Yes.

Q Because you haven't been sentenced yet?

A Why?

Q I'll rephrase. Your case isn't over yet because you haven't been sentenced yet?

A Yes.

Q *And no one's promised you anything on what you'll be sentenced to?*

A *No.*

Q *Are you hoping that your testimony is taken into consideration for*

your sentencing?

A *Possibly, but I leave that to the discretion of the judge. She is the one that has the last say.*

Q *Okay.*

AUSA KENNEDY: No further questions, Your Honor. Pass the witness.

ROA. 518-524. (emphasis added). During cross-examination of Mr. Flores-Guerra by defense counsel, the following relevant exchange occurred:

Q Okay. You want to stay in the United States if you can, don't you?

A If I was given the opportunity, yes.

Q *Okay. I mean, obviously you would like the government to be happy with you, correct?*

A *I do not understand the question.*

Q Well, you understand -- you testified a little bit about it -- that obviously the Court or the judge, ultimately, come sentencing time, has the ultimate decision what kind of sentence you're going to receive, right?

A Yes.

Q *Okay. But you also realize that these gentlemen here to my left* (prosecutors) *are the only group of people that can ask the Court for a reduction for you, correct?*

AUSA KENNEDY: Objection, Your Honor.

THE COURT: Okay. What's the objection?

AUSA KENNEDY: Speculation.

THE COURT: No. If he knows the answer, he can answer it. Go ahead.

THE WITNESS: They have never mentioned that.

Q *(By MR. GREG TORRES) Well, what is your understanding of who's going to ask for a reduction, possibly -- a request for you testifying today?*

A *My understanding is that the judge is the one that has the last word, and that nobody can manipulate the decision that she is going to make.*

Q *But you understand that someone has to make that request on your behalf?*

AUSA KENNEDY: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: No.

Q (By MR. GREG TORRES) Okay. Well, why are you testifying today?

A Simply because I know now the harm that your client did to me now, because he never spoke to me with the truth. Yes.

Q So you're mad at him?

A He never -- he never really told me what could happen to me if I was arrested with people, the consequences of my taking cars out in my name and to the name of my family members. He always said that there would be no problem. He knew what he was doing, and what he did was use me for some benefit. He never cared about the harm that he caused to me or my family, children.

ROA. 536-537. (emphasis added)

2. Agent Joe Bonilla's Testimony

During defense counsel's cross-examination of Agent Joe Bonilla the following relevant exchange occurred:

Q Have you been involved in the -- in the year and a half you've been in Del Rio with other cases where people who are

testifying for the government that are -- pled guilty?

A Yes.

Q Okay. Would you agree with me that based on your experiences with these cases, people usually have expectations of getting some sort of positive recommendation from the government?

AUSA KENNEDY: Objection, Your Honor. Speculation.

THE COURT: If he knows, he may answer. Don't speculate.

THE WITNESS: Could you repeat that?

Q (By MR. GREG TORRES) Yeah. in other words, you sat in the meetings where people debrief, right?

A Uh-huh.

Q *In other cases, right?*

A (NODS HEAD)

Q *Okay. Is that a "yes"?*

A *I've sat in meetings, yes.*

Q Yes. Okay. Where people debrief?

A Yes.

Q Okay. Based on your experience in those other meetings, when people come and testify, they're usually hoping for some sort of reduction in sentencing, correct?

A There's some that ask, yes.

Q *Okay. Well, but, I mean, you – you've been around long enough to realize that, number one, the only person that can make that recommendation is the government; you know that, right?*

A *Yes.*

Q *Okay. So in other words, it's -- yes, it's up to the judge ultimately, but the judge can't give those reductions unless -- for substantial assistance unless the government asks and files a motion, right?*

A *I believe so.*

Q *Okay. Based on your experience, that's how it works, correct?*

A *Yes.*

Q Okay. And -- and based on your experience in all the cases You've had, people testify because they want to go home sooner, right?

A I -- I can't answer for them. I'm – I'm not sure.

Q Well, based on what you've seen and your interaction with them, stuff like that. In other words, people want to help themselves, correct?

A I -- I really can't answer that.

Q Well, but isn't that the way that you guys usually couch it, or when you explain to these people, Look –

AUSA KENNEDY: Objection, Your Honor. He -- he stated that he doesn't know.

THE COURT: Okay. He can answer the following question.

Proceed, Mr. Torres. But, Mr. Torres, I'm going to let Mr. Kennedy ask the follow-up question about consistencies of answers.

MR. GREG TORRES: Yes, ma'am.

THE COURT: Okay.

MR. GREG TORRES: Yes, ma'am. Okay. And if I -- if I move on, will -- we won't have to deal with that, Your Honor?

THE COURT: No. Guideline's –

MR. GREG TORRES: We're already there.

THE COURT: We're already there.

MR. GREG TORRES: I'll –

THE COURT: So you can ask your next question –

MR. GREG TORRES: Okay.

THE COURT: Go ask -- go ahead and ask the question you were asking.

MR. GREG TORRES: Very good. Very good, Your Honor.

Q (By MR. GREG TORRES) And so, in other words, it's – it's -- *based on your experience in the past,* usually when the government and -- and yourself and other people visit with these people, you explain to them, This is your opportunity to help yourself. Isn't that more or less the language that you use?

A *Not directly, no.*

Q Well –

A *We can't -- we can't promise them anything.*

Q *Right. You don't promise them anything other than if they provide substantial assistance, you'll – you'll make a recommendation to the U.S. Attorney's Office and they'll make a recommendation or a request to the judge, right?*

A *That's the process, right.*

Q Right. So in other words, there's no guarantee because the judge is the one that says yea or nay ultimately, right?

A That's – that's right.

Q *But would you agree with me that -- that the way that people receive a benefit for testifying for the government is hopefully a positive sentencing recommendation for a lower sentence, correct?*

A *There's a possibility.*

Q *That's what you've seen, right?*

A *That's what I've seen.*

Q *Okay. And that's the way it works, right?*

A *Yes.*

ROA. 600-604 (emphasis added)

3. Prosecutor's Closing Arguments

During closing arguments, the prosecutor argued:

> So, first of all, when Edwin [Flores-Guerra] was up there, he said he was hoping that the -- *the jurors would take into consideration his testimony. He said that he wasn't promised anything. He wasn't. He said that pled guilty because he had done it. He didn't even understand about the three-point deduction at the time.*

ROA. 680-681.

4. Defense Counsel's Closing Arguments:

> Mr. Bonilla was -- was honest. Mr. Bonilla finally stated at the end, Look, that's the way it works. In my experience *in the past*, people that testify have the expectation of getting a sentencing reduction.

ROA. 667. (emphasis added)

B. The Fifth Circuit's Ruling

On plain error review, the Fifth Circuit Court of Appeals affirmed Pedraza's conviction by rejecting, in relevant part, his challenge of Flores-Guerra's testimony on *Napue* grounds. *See United States v. Pedraza*, No. 21-50221, 2022 U.S. App. LEXIS 25522 (5th Cir. Sep. 12, 2022) (unpublished) (Opinion). But the circuit court's decision did not turn on the onerous nature of the plain error standard. Rather, it was based on the bare legal principle that, to fall under *Napue's* purview, false testimony by a government witness that

is first elicited by the defense during cross-examination need not be corrected by the government. Rather, reasoned the Court, the sole duty to correct the false testimony lies with defense counsel's cross-examination efforts, which leads to the inescapable conclusion that the uncorrected, false testimony will remain undisturbed before the jury:

> While Flores-Guerra testified that the Government did not promise him anything in exchange for his testimony, he did acknowledge that he "possibly" hoped that his testimony would be considered for sentencing purposes. Martinez Pedraza's issue lies with what Flores-Guerra omitted: *i.e.*, he did not state that the Government could move for a U.S.S.G. § 5K1.1 sentence reduction based on his substantial assistance [explain how Dvorin resolved this]...[A]ssuming Flores-Guerra testified falsely regarding his plea agreement, "the Government can discharge its responsibility under *Napue* . . . to correct false evidence by providing defense counsel with the correct information at a time when recall of the prevaricating witnesses and further exploration of their testimony is still [ ] possible." *Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002) (internal quotation marks and citation omitted). Here, defense counsel was provided with Flores-Guerra's plea agreement and sealed plea addendum, which included the full recitation of the promises made by the Government to the witness, and counsel could have questioned Flores-Guerra as to the full gamut of those promises. [2] Moreover, some of the testimony that Martinez Pedraza now complains of was elicited on cross-examination, so there was no material falsehood that the Government had a duty under *Napue* to correct; it was Martinez Pedraza's duty to correct the testimony. *See* [*United States v.*] *Stanford*, 823 F.3d [814] at 840 [(5th Cir. 2016)]; *United States v. Fields*, 761 F.3d 443, 477 (5th Cir. 2014); *United States v. O'Keefe*, 128 F.3d 885, 895 (5th Cir. 1997). Insofar as the Government made any inaccurate statements concerning Flores-Guerra's plea agreement during its closing argument, any "falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." *O'Keefe*, 128 F.3d at 896.

---

[2] The circuit court correctly pointed out that Flores-Guerra's cooperation agreements were made available for examination by defense counsel before he cross-examined Flores-Guerra, but then observes that "counsel could have questioned Flores-Guerra as to the full gamut of those promises," *Opinion*, at *3-4, the implication being that defense counsel did not. But as the facts prove, defense counsel vigorously confronted Flores-Guerra with the terms of his cooperation agreement with the government - efforts that were repeatedly thwarted by the prosecutor through frivolous objections, and ultimately *via* closing arguments by the prosecutor that vouched for Flores-Guerra's credibility.

Opinion, at *2-3.

Following the Fifth Circuit affirmance of Pedraza's convictions, Pedraza filed a motion for rehearing *en banc*, addressing the portion of the Fifth Circuit's holding that limits the government's obligation to only correct false testimony from its own witness when the false testimony is elicited by the prosecutor. Pedraza cited a dissenting opinion by Justice L. Dennis in *United States v. O'Keefe*, 169 F.3d 281 (5th Cir. 1999) (*O'Keefe II*), in which Justice Dennis identified a change in law in the Fifth Circuit's second appeal in O'Keefe's case, *United States v. O'Keefe*, 169 F.3d 281 (5th Cir. 1999) (hereinafter *O'Keefe II*), concluding that the panel's reasoning violated *Napue's* mandate on the subject of a prosecutor's obligation to correct a government witnesses' false testimony. The Fifth Circuit denied Pedraza's *en banc* motion.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S ABROGATION OF THE GOVERNMENT'S DUTY UNDER THE DUE PROCESS CLAUSE TO CORRECT FALSE TRIAL TESTIMONY BY A GOVERNMENT WITNESS, AS PROMULGATED BY THIS COURT'S HOLDING IN *NAPUE V. ILLINOIS*, 360 U.S. 254 (1959), WHEN THE FALSE TESTIMONY IS FIRST ELICITED ON CROSS-EXAMINATION BY THE DEFENSE.

> *We take this opportunity to reemphasize in the strongest possible terms that "a trial is not a mere 'sporting event;' it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory."*
>
> *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986).

The Fifth Circuit has decided an important question of federal law in a way that partially abrogates this Court's holding in *Napue v. Illinois*, 360 U.S. 254 (1959). The

Fifth Circuit's controlling precedent, that the government is only required to correct false testimony that is presented by a government's witness at trial, when it is first elicited by a prosecutor on direct examination, contravenes the part of this Court's holding in *Napue* that requires the government to *always* correct false testimony by its witnesses, without regard as to whether the false testimony is elicited at trial by a prosecutor, or defense counsel. The Fifth Circuit's holding is unique in this respect, and an outlier among the circuits.

Pedraza will address how Flores-Guerra testified falsely about his cooperation agreement with the government, and how the prosecutor not only committed *Napue* error by failing to correct Flores-Guerra's false testimony, but also repeatedly thwarted defense counsel's own efforts to do so, by raising frivolous objections during defense counsel's cross-examination of Flores-Guerra, and then arguing in closing arguments that Flores-Guerra's testimony was truthful.

1. The Cooperation Agreement between Flores-Guerra and the Government

Flores Guerra entered into two agreements with the government. The first, a conventional plea agreement and the second, a cooperation agreement (also known as the addendum), the focus of this petition. The plea agreement contained the standard government recommendation for a three-point reduction for acceptance of responsibility, in consideration for the plea. The cooperation addendum constituted a wholly separate agreement by Flores Guerra to cooperate with the government under sections 5K1.1 of the United States sentencing guidelines (pre-sentence cooperation) and Rule 35 (post-sentence

cooperation) of the Federal Rules of Criminal Evidence. Under this agreement, Flores Guerra provided the government information about crimes, to include information about, and testimony against Pedraza at Pedraza's trial, in exchange for the government's promise to consider recommending that the Court reduce Flores Guerra's sentence, if the cooperation was deemed substantial by the government.

Once the government satisfies its obligation to disclose the cooperating witnesses' plea and cooperation agreements to defense counsel before the cooperating witness testifies, its discussion of these agreements at trial is largely a matter of strategy. Once they have been timely disclosed to the defense before trial, the government is not obligated to disclose the existence of plea and cooperation agreements during its direct examination of a cooperating witness at trial, though it generally elects to do to minimize its impact on the jury when their existence is first revealed during defense counsel's cross-examination of the cooperating witness (*i.e.*, taking the "sting" out of defense counsel's cross-examination). Curiously, the prosecutor took a unique, piecemeal approach. During direct examination, the prosecutor elected to question Flores-Guerra only about his plea agreement and the three-point, acceptance guideline reduction that the government routinely recommends as a reward for pleading guilty and accepting responsibility for committing the offense pled to by Flores-Guerra. The prosecutor omitted any reference to the cooperation agreement in the addendum to the plea agreement. At this juncture, this line of questioning was potentially misleading to the jury, because it suggested that the only thing that Flores Guerra bargained for when he pled guilty was a three-point reduction for acceptance of responsibility. Had the prosecutor stopped there, there would probably be nothing to

complain about on this issue. The subsequent questioning by the prosecutor, and Flores Guerra's responses, however, became the producing cause of the *Napue*-error.

2. Flores Guerra's First False Statement

Towards the end of Flores Guerra's direct examination, and after questioning Flores Guerra about his plea agreement and the three-point reduction, the prosecutor shifted gears by asking Flores Guerra whether the three-point reduction was the thing promised by the government for *testifying* ("Was -- was that the government promising something for your testimony?"), to which Flores Guerra responded "[N]o." The prosecutor then asked whether the three point reduction was a result of his pleading guilty ("Was – was it your understanding that was for pleading guilty?"), to which Flores Guerra responded, "yes." In an attempt to clarify his question and Flores Guerra's answer, the prosecutor then asked Flores Guerra "[w]hat was your understanding that the deduction was for?", to which Flores Guerra responded "For – for pleading guilty. That's it." At this point, impatient with the prosecutor's line of questioning, the Court urged the prosecutor to "[g]et to what [Flores Guerra's] expectations are." [3] The prosecutor, again, in blanket fashion asked Flores Guerra whether he was promised *anything* in coming to court and testifying ("Were you -- what are your expec – were you promised anything in coming in here today and testifying?"), which Flores Guerra denied.

Flores Guerra's affirmation that he received a three point reduction for pleading

[3] It appears that at this juncture, the Court was instructing the prosecutor to have Flores Guerra explain what his expectations were, relative to his cooperation with the government.

guilty was correct, but his claim that he was promised nothing for testifying for the government was clearly false. As noted, under the terms of the cooperation addendum, the government promised to consider recommending that the Court reduce Flores Guerra's sentence, if the cooperation provided by Flores Guerra - to include his testimony against Pedraza - was substantial. [4] At this point, aware that Flores Guerra's response was not truthful, the prosecutor should have focused on correcting it. Rather, at the tail end of the direct, he asked Flores Guerra if he was hoping that his testimony would be taken into consideration at his sentencing ("[a]re you hoping that your testimony is taken into consideration for your sentencing?"). This question, at this point in the examination, was misleading, because it prompted Flores Guerra to elaborate on the false premise that he was promised nothing for his testimony, which Flores Guerra responded to by giving yet another false response, that that determination was the Court's alone to make ("[p]ossibly, but I leave that to the discretion of the judge. She is the one that has the last say."), when in fact, the Court could not "have the last say" without first receiving a recommendation from the government. This false, uncorrected testimony by Flores Guerra paved the way to his second false assertion, that no one, including the government, was in a position *to recommend* that the Court consider his testimony when sentencing him. The Fifth Circuit has previously recognized that a due process, *Napue*-based violation may result when the

[4] Towards the end of the prosecutor's direct examination, the prosecutor asked Flores Guerra whether anyone had promised Flores Guerra what sentence he would receive for testifying ("[a]nd no one's promised you anything on what you'll be sentenced to?"), which was a truthful statement. However, this did not correct the false impression on the jury from Flores Guerra's false claim that he was promised *nothing* in exchange for his testimony.

false information has been provided to the defense but the government reinforces the falsehood by failing to correct it, and asks misleading questions. *United States v. Barham*, 595 F.2d 231, 243, 243 n.17 (5th Cir. 1979). Drawing from *Barham*, "[Pedraza] was entitled to a jury that, before deciding [Flores Guerra's credibility], was truthfully apprised of any possible interest of Any Government witness in testifying falsely." *Barham*, 595 F.2d at 233. "Knowledge of the Government's promises to [Flores Guerra] would have given the jury a concrete reason to believe that [he] might have fabricated testimony in order to…minimize the adverse consequences of prosecution. *Id*. *Cf. United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977). Emphatically, *Barham* elaborated:

> And the subsequent failure of the Government to correct the false impression given by Shaver and the Beeches shielded from jury consideration yet another, more persuasive reason to doubt their testimony the very fact that they had attempted to give the jury a false impression concerning promises from the Government. In this case, in which credibility weighed so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discredit the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. We therefore reverse Barham's convictions and remand for a new trial.

Id. As Pedraza will explain, this no longer appears to control the application of *Napue's* standard in the Fifth Circuit.

3. Flores Guerra's Second False Statement, the Prosecutor's Attempts at Preventing Flores Guerra from Giving a Truthful Account of his Cooperation Agreement with the Government, and Flores Guerra's Sanitized Explanation about his Motive for Testifying Against Pedraza

Far from desisting from his fruitless attempts, defense counsel zealously continued his efforts to have Flores Guerra admit that, as provided by the cooperation agreement, it was *the government* who would be making the recommendation to the Court to consider

Flores Guerra's testimony in determining his sentence. This was important because at this point in Flores Guerra's testimony the jury was left with the false impression that the Court's consideration of Flores Guerra's testimony began and ended with the Court, when in fact, as is it contracted for between the government and Flores-Guerra, and is universally recognized in our criminal federal practice and the specific language in section 5K1.1, [5] the Court could only consider a downward departure as a reward for Flores Guerra's testimony if, and *only* if the government recommended a reduction under section 5K1.1. Flores Guerra's misrepresentation about how the Court's consideration of his testimony in determining his sentence was a process exclusively managed by the Court, to the exclusion of the government, was made worse by the prosecutor's efforts to prevent Flores Guerra from responding to defense counsel's questions, which was done by lodging frivolous objections during defense counsel's cross-examination of Flores Guerra on this subject.

---

[5] Section 5K1.1 of the United States Sentencing Guidelines provides in relevant part, the following:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, **the court may depart from the guidelines.**

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, **taking into consideration the government's evaluation of the assistance rendered;**

***

(emphasis by Pedraza)

Defense counsel began this portion of Flores Guerra's cross-examination by asking if he would like the government "to be happy" with Flores Guerra, who claimed to not understand the question. Defense counsel recapped the Court's role as the ultimate decider of Flores Guerra's sentence ("…obviously the Court or the judge, ultimately, come sentencing time, has the ultimate decision what kind of sentence you're going to receive, right?"), which Flores Guerra agreed with. Defense counsel then honed in on the principal question, whether Flores Guerra realized the prosecutors, "these gentlemen here to my left," were "the only group of people that can ask the Court for a reduction" for Flores Guerra. At this juncture, and before Flores Guerra could respond, the prosecutor objected to the question on speculation grounds. The objection was clearly improper, since the government's role in recommending a downward departure to the Court was not in question, or in any way a matter of speculation, but an indisputable, black-letter-based, and contracted-for fact. Predictably, the Court overruled the objection and directed Flores Guerra to respond, if he knew the answer. Flores Guerra responded that "they" - the prosecutors - had never mentioned that. At this juncture, it really mattered not whether Flores Guerra was actually lying about not being told of a need for the government's recommendation by the prosecutors. The response was again a false statement, the prosecutor was aware of its falsity, and the jury still had not been (and would not be) made aware of the need for a prosecutor's recommendation before the Court could consider a downward departure under section 5K1.1, and as dictated by the specific terms of the cooperation addendum.

Undeterred, defense counsel point blank then asked Flores Guerra whom it was that

he believed was tasked with possibly asking the Court for a reduction of his sentence, in consideration for his testimony, to which Flores Guerra responded that it was his understanding that the judge had the last word, this time adding that "nobody can manipulate the decision that she is going to make." Once again, the clear implication from this response was that the process of considering how Flores Guerra's testimony was going to affect his sentence was exclusive to the Court, *and* devoid of *any* outside influence, to include the government's necessary recommendation. Instead of concerning himself, even at this late stage, with correcting Flores Guerra's false response, the prosecutor again obstructed defense counsel's efforts at seeking the truth about Flores Guerra's cooperation agreement with the government by lodging another frivolous objection.

Defense counsel's efforts culminated when he asked if Flores Guerra understood that "someone" had to make a request to the Court, on Flores Guerra's behalf, for the Court to consider how Flores Guerra's testimony would affect his sentence ("[b]ut you understand that someone has to make that request on your behalf?"). Again the prosecutor objected to the inquiry, this time arguing preposterously that the question had been asked and answered, which was promptly overruled by the Court. Flores Guerra falsely responded "no" to this question.

Lastly, defense counsel asked Flores Guerra why it was that he testified against Pedraza. Flores Guerra explained that his motivation for doing so was Pedraza's failure to apprize Flores Guerra of the consequences of his actions, Pedraza's assurances that there would be no repercussions from his activities, and that Pedraza never cared about the harm he caused Flores Guerra or his family. In isolation, this response would be harmless. But

in actuality, Flores Guerra ingratiated himself to the jury by representing himself as naïve and as having been exploited by Pedraza, on the back of his false testimony. In light of his false assertions about there being no promises from anyone in connection with his testimony, and his denying that the prosecutors had a role in possibly recommending a lenient sentence to the Court, the testimony was patently misleading to the jury, which only emphasized the prosecutor's obligation to correct Flores Guerra's testimony.

It bears mentioning Agent Bonilla's testimony, as it related to his previous experience with cooperating witnesses. As a last attempt to bring to light the true nature of Flores-Guerra's cooperation agremeent, counsel attempted to get Bonilla to fill the wide gaps left by Flores Guerra's testimony. Bonilla admitted, after much prodding, that in his *past* experience, the government sometimes recommends favorable sentencing recommendations to the Court. But Bonilla did not (and apparently could not) render an opinion as it related to Flores Guerra's case. Bonilla's testimony on this subject was therefore ineffective to properly clarify the full measure of Flores Guerra's cooperation agreement, or to otherwise repair the damage from Flores Guerra's false testimony.

4. The Prosecutor's Exploitation of Flores Guerra's False Statements About his Cooperation Agreement During Closing Argument

During closing arguments, the prosecutor argued to the jury that Flores Guerra had testified that "he wasn't promised anything" in exchange for his testimony, elaborating Flores Guerra's assertion that he pled guilty because he had committed a crime ("because he had done it."), and muddying the waters on the subject with his additional assertion that Flores Guerra "didn't even understand about the three-point deduction at the time," which

was transparently false. "False testimony deprives a defendant of due process when 'the government reinforces the falsehood by capitalizing on it in its closing argument.'" *United States v. Wall*, 389 F.3d 457, 472-473 (5th Cir. 2004) (citing *United States v. O'Keefe*, 128 F.3d 885 at 895 (5th Cir. 1997) (*O'Keefe I*); *United States v. Sanfilippo*, 564 F.2d at 178.

5. The Napue Violations were Material

The Supreme Court has defined "material" in terms of a "reasonable probability" of a different outcome if the evidence or testimony was excluded. *See Oti*, 872 F.3d at 696 n.14 (5th Cir. 2017) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Restated, "[m]ateriality…occurs when the falsehood results in 'a corruption of the truth-seeking function of the trial process.'" *O'Keefe*, 128 F.3d at 894 (5th Cir. 1997) (citing *United States v. Agurs*, 427 U.S. 97, 104 (1975); *United States v. Meinster*, 619 F.2d 1041, 1042 (4th Cir. 1980) (holding that underlying purpose of *Napue*…is not to punish prosecutor for the misdeeds of a witness, but rather to ensure that jury is not misled by any falsehoods). There was evidence other than Flores-Guerra's testimony that connected Pedraza to the conspiracy, but it was largely tangential, and clearly insufficient on its own to support his conviction or, for that matter, even his indictment. The importance of Flores Guerra's testimony cannot be overstated. It was the heart of the government' case against Pedraza. Pedraza recaps how Flores-Guerra's false testimony was material, in three ways.

First, with some prompting from the prosecutor, Flores Guerra gave a false account of his reason for testifying, by 1. first denying that he was promised anything for it and by 2. later elaborating that he was unaware that the government was the only party to his agreement with the authority to request that the Court reduce his sentence on the basis of

his cooperation. Moreover, 3. Flores Guerra gave a sanitized, one-sided account of his motivation for testifying by claiming that he was manipulated and lied to by Pedraza, a characterization that remained unabated throughout trial.

6. The Fifth Circuit Provides Legal and On-Point Authority for Pedraza to Prevail on a Napue Claim

Pedraza's predicament was squarely addressed by this Court *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016), which involved the same *Napue*-type error, and the same type of cooperation agreement by a government witness. *Dvorin* is instructive on its resolution of the *Napue*-type error by the prosecutor. There, cooperating witness Derrington, like Flores-Guerra, acknowledged that his cooperating testimony at Dvorin's trial would ultimately be decided by the Court, when considering his punishment as a co-conspirator in Dvorin's prosecution, and also like Flores-Guerra, denied that he'd been promised anything by the government in exchange for his testimony at Dvorin's trial. The Fifth Circuit affirmed the district court's granting of a new trial - which was based on *Napue*. *See Dvorin*, 456-57. The panel in *Dvorin* reasoned:

> If, in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance. Whether and to what extent the motion are granted are matters solely within the Court's discretion.
>
> ***
>
> Regardless of whether this provision of the supplement is an enforceable guarantee, under *Napue*, *"the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration."* *LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 735 (5th Cir. 2011) (alterations omitted) (quoting *Napue* [*v.*

> *Illinois*], 360 U.S. 254 at 270 [(1959)]; *see also Giglio*, 405 U.S. at 155 ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility . . . ."). In fact, as the Supreme Court recognized in *United States v. Bagley*, [473 U.S. 667 (1967)] the fact that the government's willingness to seek leniency for a defendant is not guaranteed, but "was expressly contingent on the [g]overnment's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction." 473 U.S. at 683. The focus is "on the extent to which the testimony misled the jury[.]" *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).
>
> *Here, Derrington's testimony that he had not received any promise from the government was at best misleading, and at worst false, in light of the government's agreement to file a motion urging sentencing consideration if it determined that Derrington had substantially assisted its prosecution of Dvorin.* Accordingly, we hold that the district court properly concluded that Sauter violated *Napue* in permitting Derrington to testify that that the government had not made any promises in exchange for his testimony.

Id. at 452 (emphasis added). Indeed, *Dvorin* represents solid, Fifth Circuit precedent that supports a finding that the prosecutor in Pedraza's trial committed *Napue* violations during Flores-Guerra's testimony.

But Pedraza cannot benefit from *Dvorin's* holding under current Fifth Circuit precedent for one, salient reason. The distinguishing factor that prevents Pedraza from obtaining *Napue* error relief in the Fifth Circuit is that in *Dvorin*, it was the prosecutor who elicited the government witnesses' false denials about being promised consideration from the government for his cooperation (*See Dvorin* at 444), while in Pedraza's case, it was defense counsel who elicited Flores-Guerra's false testimony about his cooperation agreement with the government through cross-examination. This distinction alone now allows prosecutors to leave untruthful testimony uncorrected in the eyes of the jury. This should not stand.

7. ***Justice James L. Dennis Sounds the Alarm in O'Keefe II, and Uncovers The Fallacy of O'Keefe I's holding.***

Pedraza's argument that the Fifth Circuit's current precedent is in conflict with this Court's holding in *Napue* is not written on a clean slate. The evolution of the Fifth Circuit's modification of *Napue* was narrated and analyzed in a dissenting opinion authored by Justice James L. Dennis, in a follow-up opinion to *O'Keefe I*, *United States v. O'Keefe*, 169 F.3d 281 (5th Cir. 1999) (hereinafter *O'Keefe II*).

After his convictions for conspiracy, wire fraud, mail fraud, and money laundering, the district court granted O'Keefe's motion for a new trial. *United States v. O'Keefe*, *II* at 282. The government then filed an interlocutory appeal contesting the district court's new trial order, which the Fifth Circuit Court reversed in *O'Keefe I*. *Id*. The matter litigated in *O'Keefe II* that came before Justice Dennis's panel was the government's appeal of the district court's order granting O'Keefe an appeal bond while O'Keefe appealed the Fifth Circuit's original ruling. A majority of the panel agreed with the government, and O'Keefe's appeal bond was denied. But Justice Dennis dissented from this determination, specifically with the third prong of the test to determine the merits of an appeal bond, which was "whether the defendants' appeals raise a substantial question of law or fact, *i.e.*, one of more substance than would be necessary to a finding that it was not frivolous[;]…a 'close' question or one that very well could be decided the other way.'" *Id*. at 281-282 (citing *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)(cleaned up)(*quoting United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). "The primary substantial question of law raised for appeal" he thus observed, was *"whether the government obtained*

the defendants' convictions through use of perjury and other false evidence, known to be such by the government's representatives, that the government knowingly allowed to go uncorrected during the jury trial in which it appeared." Id. at 290. [6] (emphasis added).

The government at O'Keefe's trial presented testimony from cooperating witness Donaldson, but refrained from asking Donaldson any questions about his alteration of the minutes of a shareholders meeting. Also, prior to Donaldson's direct examination by the government's attorneys, the prosecution handed a copy of the FBI 302 report to the defense that addressed the subject of the alterations. As with Flores-Guerra, it was during cross-examination that Donaldson testified falsely about that and other matters. Applying the constitutional principles set forth by the Supreme Court, Justice Dennis determined that O'Keefe's appeal "raise[d] a substantial question whether their convictions and sentences must fall under the Fourteenth Amendment because (1) they were obtained through the use of perjured testimony and false evidence, known to be such by representatives of the government (citing *Napue* at 269 (string citation omitted); (2) "although the government may not have directly solicited the perjury or false evidence, it...knowingly allowed [Donaldson's testimony] to go uncorrected when it appeared before the jury" [7] (citing *Giglio v. United States*, 405 U.S. 150 at 154 (1972); *Napue* at 269 (string citation omitted) and (3) the perjury and false evidence could in any reasonable likelihood have affected the

---

[6] *Okeefe's* holding is the seminal opinion on which Pedraza's appellate panel relied on to deny *Napue* relief, and now controlling precedent in the Fifth Circuit. *See* Opinion, *supra*.

[7] The falsity of Flores-Guerra denying that the government promised consideration of a downward departure if it was satisfied with his cooperation was well-known to the government, because, as the facts relate, it was contained in the cooperation agreement that it executed with Flores Guerra and his lawyer.

judgment of the jury. *Id*. (citing *United States v. Bagley*, 473 U.S. 667 at 678-79 (1985); *Giglio*, 405 U.S. at 154; *Napue*, at 271; 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 19.5, at 534 (1984) ("This obligation [of the prosecutor to disclose] requires that it not suborn perjury, not use evidence known to be false, and not allow known false testimony of its witnesses to stand uncorrected."). "Consequently," added Justice Dennis "there is a substantial question as to whether *O'Keefe I* clearly erred by applying incorrect principles of law to determine whether the government violated its duty to correct perjury and false evidence and, if so, whether the government's violations were material." *Id*. at 292-293. Justice Dennis considered it "arguable" that *O'Keefe I's* modification of *Napue's* holding is clearly erroneous because it is contrary to the decisions of the Supreme Court and to previous panel opinions of this Circuit following the Supreme Court cases. *Id*. "In *Napue* and *Giglio*, both of which involved perjury by a prosecution witness during his cross-examination by a defense attorney, *see Napue*, 360 U.S. at 267-68 & n.2; *Giglio*, 405 U.S. at 153," observed Dennis, "the Court held that a conviction obtained through use of false evidence, known to be such by representatives of the prosecuting government, must fall as a violation of due process; and that "'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Id*. at 291 (citing *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 269). "Prior to *O'Keefe I*," elaborated Justice Dennis, "[the Fifth] Circuit...consistently followed *Napue* and *Giglio*. *Id*. (citing *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998) ("A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected.") (quoting *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996) (citing

Napue); *Cordova v. Collins*, 953 F.2d 167, 171 (5th Cir. 1992)).

Justice Dennis was correct. *Napue* did not distinguish between false testimony fronted through the government's examination of their witness, and false testimony that is first elicited by the defense on cross-examination, when determining materiality. *Napue* added:

> It is of no consequence that the falsehood bore on 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 anyway relevant to the case, the [government] has the responsibility and the duty to correct what he knows to be false and elicit the truth. * * * That the [government'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 269-270.

CONCLUSION

The Supreme Court in *Napue* requires prosecutors to ensure that false testimony that is produced by government witnesses be corrected before the jury. *O'Keefe I's* modification promotes anomalous results, and has laid a blueprint for prosecutors to avoid *Napue's* mandate, by never having to correct a government witnesses' dishonest testimony. For example, to skirt *Napue's* obligation to correct false testimony from a cooperating witness like Flores Guerra, the prosecutors in the Fifth Circuit can simply avoid any questioning on the subject of cooperation, so that if the cooperating witness renders dishonest testimony on the subject, it will only be elicited and corrected through defense counsel's cross-examination efforts. If, as occurred with Flores-Guerra, the defense attorney's diligent cross-examination efforts fail to persuade the cooperating witness to correct the false testimony - in this case, admitting the existence of a cooperation agreement with the

government that could be rewarded with a motion for a downward departure of his sentence - the false testimony will remain unabated before the jury, *the very evil that Napue was designed to prevent*. This way the only false testimony that could result - and did result - from Flores Guerra's testimony, would be elicited from defense counsel's cross-examination. Because the false testimony was elicited through defense counsel's cross-examination, the Fifth Circuit's current precedent relieves the government of any duty to correct it. The panel that decided Pedraza's appeal has put its stamp of approval on this practice. This should be corrected. *O'Keefe I's* holding turns *Napue's* mandate on its head, and should be abrogated. Because Pedraza's conviction was obtained almost exclusively on the basis of Flores's dishonest testimony, the perjury and false evidence were material to Pedraza's conviction.

FOR THESE REASONS, The Court should grant certiorari, reverse the Fifth Circuit's panel opinion in this case, overrule the Fifth Circuit's anomalous modification of *Napue's* holding, and remand this case for a new trial.

Respectfully submitted.

/s/ George W. Aristotelidis
GEORGE W. ARISTOTELIDIS

Counsel of Record for Petitioner

DATED: January 17, 2023.