NO.

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP KENNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW W. BRISSENDEN
Counsel of Record
MATTHEW W. BRISSENDEN, P.C.
666 Old Country Road, Suite 501
Garden City, NY 11530
(516) 683-8500
Matthew.W.Brissenden@gmail.com
Counsel for Petitioner Phillip Kenner

QUESTION PRESENTED

At a criminal trial, Petitioner sought to confront a Government witness with notes of an interview, taken by Government agents, which reflected a prior inconsistent statement concerning an issue of central importance. The Government's witness denied making the inconsistent statement recorded within the Government's notes.

Prosecutors did not seek to correct their witness's testimony. To the contrary, in rebuttal summation, prosecutors embraced their witness's testimony, arguing that their own notes of the interview should not be credited as an accurate record of his prior statement.

On Appeal, Petitioner argued that prosecutors were obligated to correct their witness where they knew or should have known that he had, in fact, made a prior inconsistent statement. Petitioner further argued that the prosecutor's conduct in endorsing such perjury constituted a clear-cut violation of this Court's holding in *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

The Second Circuit Court of Appeals affirmed Petitioner's conviction, holding that the Government's notes of the witness's interview were "not incontrovertible evidence" of the witness's earlier statements, and that as a result, Petitioner could not establish that the witness "committed perjury, let alone that the Government knew or should have known that he did so."

A prosecutor's obligation to correct perjurious testimony, offered by a government witness, is well established. However, this Court's precedent is silent as to the quantum of proof necessary to establish such perjury. In the absence of such guidance, different courts have adopted disparate and varying standards. Here, the Second Circuit Court of Appeals held that Petitioner was obligated to offer "incontrovertible evidence" of such perjury.

Accordingly, this Petition presents the following question:

1. What evidentiary showing is required, under *Napue v. Illinois*, 360 U.S. 264 (1959), to establish that a prosecution witness has offered false testimony?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit appears at the Appendix to the Petition, and is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 2023. A Petition for rehearing was filed by the Appellant on August 7, 2023, and denied by the Court of Appeals on September 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution is reproduced in the Appendix.

STATEMENT OF THE CASE

I. Trial

Phillip Kenner, an investment adviser, was convicted on multiple counts of fraud, conspiracy, and money laundering, based upon allegations that he deceived his clients and misappropriated their monies. At trial, one of the Government's central allegations was that Kenner solicited funds to invest in a Hawaiian real estate venture, and subsequently, without his client's knowledge or permission, diverted such funds to a different real estate project in Mexico. The Mexican project was being managed by an individual named Kenneth Jowdy.

In his defense, Mr. Kenner maintained that he had informed his clients of the Mexican investment opportunity, and that his clients had authorized him to use their money for such purpose. Indeed, at trial, Mr. Kenner took the stand and testified concerning a loan agreement he entered into with Kenneth Jowdy in 2005. He testified that his clients were apprised of the loan agreement and granted him permission to use their funds for that purpose.

The Government, seeking to rebut this claim, called a number of investors who testified that they were not informed of the Mexican loan deal, and did not authorize Kenner to use their money for such purpose. One of those investors was an individual named John Kaiser, who told the jury on direct examination that he had no knowledge of the Mexican loans until well after the fact.

On cross examination, Kenner's counsel sought to confront Mr. Kaiser with a prior inconsistent statement which he had made to the Government's investigators, recorded in the handwritten 3500 materials. Those notes reflected what John Kaiser told the Government in a 2010 interview – namely, that starting in 2003 (two years prior to the Mexican loan), Kaiser ("JK") engaged in multiple personal meetings and discussions with Kennth Jowdy ("KJ") regarding the prospect of loaning funds from the Hawaiian real estate venture to Jowdy's development in Mexico. The same notes indicated that a second investor/victim, Bryan Berard, was also part of the discussions, and that Kaiser was aware of the loans as they were being made. Hence, the Government's interview notes stated:

JK met Jowdy 2x in NYC
in NYC = Trust (2003) = Jowdy restaurant
-Discuss project in Hawaii
-funding in Mexico
another time @ a bar in NYC -- bar
-discussed Hawaii
-lending $ from Hawaii to Mexico

***

Saw KJ in Mexico couple times
-KJ wanted to borrow $ from Hawaii to Mexico
-would pay back after closing
-KJ brought up borrowing $ from Hawaii project
-discussed = Brian Berard
= PK
Borrowed millions >$5M/$6M from Hawaii project
-1st it was going to be $100ks not millions
-JK not happy amt started to grow to millions of $ to Mexico
=was Agreement to borrow $ from Hawaii

Kenner Trial Exhibit 43.

However, when confronted with the notes of his interview, Mr. Kaiser simply *denied* that he had ever made such statements to the Government, or that the FBI had even taken notes during his interview.[1] TR 1120-1122.

Although the defense was able to admit the raw interview notes into evidence, prosecutors thereafter embraced Mr. Kaiser's assertion that such notes did not actually reflect a prior inconsistent statement by their witness. Hence, on rebuttal summation, the prosecutor told the jury:

> Mr. Haley told you -- one of the first things he told you, he talked about the notes. Let's get the notes out of the way.
>
> He said the most important defense document in the case, Kenner 43, is a document reflecting notes of an interview with Mr. Kaiser. That's

[1] Notably, Mr. Kaiser was, at the time of trial, employed by Mr. Jowdy, overseeing construction at his Mexican resort. TR 1088.

> interesting. I thought the most important document in the case for them was the supposed loan to Ken Jowdy. Let's take their word for it; notes of an interview with Mr. Kaiser.
>
> And then they allege that the government sat silently by while Mr. Kaiser testified. That's not true. The very exhibit they showed you, Kenner 43, was stipulated into evidence by the government so you could see what it is and what it isn't.
>
> What is it? It's the notes of an investigator from another office, not the notes of an FBI agent, an investigator from another office. What is it not? It is not a transcript. It's not questions and answers. It's not direct quotes. You can't tell from the notes when they were written, if they were written before the interview or after the interview.
>
> Many of you have taken notes during this trial. Think for a moment if it would be fair to confront some witness with your notes and call them a liar based on what you wrote down. Think for a moment if your notes are a transcript, a verbatim transcript, or whether they mix in your own thoughts, your own views and questions, your own speculation, your own observations from multiple sources of information that you may be looking at while you are also talking to this person. Notes of a third party are just that, notes of a third party, nothing more, nothing less.
>
> And it's just as plausible for Mr. Kaiser's testimony was consistent with those notes. You can't conclude they were inconsistent. At the end of the day there is a reason why we don't run trials on notes. There is a reason that these people come in here and testify in person. They are subject to cross-examination, subject to your scrutiny. That's the best evidence. That's what you should consider. Enough said about notes.
>
> TR 5991-5993.

II. Appeal

On appeal, Kenner argued that Mr. Kaiser perjured himself when he denied making the prior inconsistent statement recorded in the Government's notes. Petitioner argued that, because such notes reflected an interview conducted by the Government's own agents – one of whom was sitting at the prosecution table throughout the trial – the Government knew or should have known that Kaiser had,

in fact, made such a prior inconsistent statement. Petitioner argued that under *Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors had an obligation to correct their witness's false denial. And Petitioner further argued that prosecutors breached that obligation when they instead argued that Kaiser was credible, that their own interview notes were unreliable, and that Kaiser *never made* a prior inconsistent statement.

III. Summary Order

The Court of Appeals rejected this argument, reasoning as follows:

> At trial, the government stipulated to the admission of the notes into evidence. Kaiser denied that he told investigators about advance meetings with Jowdy, and his denial was subject to cross-examination. Whether Kaiser was credible in denying that his testimony contradicted earlier statements was a question for the jury. Aside from the handwritten notes, which are not incontrovertible evidence of Kaiser's earlier statements, Kenner identifies no other evidence that the government knew or should have known that Kaiser was testifying falsely. Kenner did not seek corroborating testimony from the FBI agent who conducted the interview or the investigator who took the notes, relying instead on cross-examination of Kaiser. Under these circumstances, the record does not establish that Kaiser committed perjury, let alone that the government knew or should have known that he did so.

Summary Order at p. 8.

IV. Petition for Rehearing

Mr. Kenner subsequently filed a Petition for Rehearing, arguing, among other things, that the Court of Appeals had erected an incorrect and insurmountable standard in holding that Petitioner was obligated to come forth with "incontrovertible evidence" of perjury to establish a *Napue* violation.

Petitioner argued that such an "incontrovertible evidence" standard was inconsistent with prior decisions of the Second Circuit, which had suggested that a defendant need only demonstrate such perjury by a preponderance of the evidence.

The Court of Appeals denied Mr. Kenner's Petition for Rehearing on September 6, 2023.

ARGUMENT

This Court laid out a prosecutor's obligation to correct and disown perjurious testimony over sixty years ago. That obligation applies regardless of whether the perjury comes out on direct or cross-examination, and regardless of whether it merely goes to the credibility of the prosecution's witness:

> First, it is 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. *The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears*.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, *does not cease to apply merely because the false testimony goes only to the credibility of the witness*. 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.

Napue v. Illinois, 360 U.S. 264, 269 (1959) (emphasis added) (internal citations omitted); *see also California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984) ("The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath.").

As a result, it is clear that a prosecutor may not permit his or her witness to falsely disclaim a prior inconsistent statement made to Government agents. *See Giglio v. United States*, 405 U.S. 150, 151, 92 S. Ct. 763, 765 (1972) ("where reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility" constitutes *Napue* violation.).

Today, federal and state courts alike broadly recognize a prosecutor's obligation to correct perjurious testimony when offered by a Government witness. However, uncertainty abounds as to the quantum of proof necessary to establish such perjury.

Here, the Second Circuit held that the Petitioner could not meet his burden under *Napue* because he had failed to come forth with "incontrovertible evidence" of perjury.

Similarly, the Sixth Circuit Court of Appeals has repeatedly held that, in order to establish a *Napue* violation, a defendant must prove that the witness's testimony was "indisputably false." *See Davis v. Larson*, 769 F. App'x 233, 237 (6th Cir. 2019) ("Davis has the burden of proving the evidence was indisputably false."); *Rosencrantz v. Lafler*, 568 F.3d 577, 586 (6th Cir. 2009). Indeed, the Sixth Circuit recently noted that it will rarely be necessary to determine the materiality of the alleged perjury, "because of the difficulty in proving that the Government's witness testified in an indisputably false manner." *Monea v. United States*, 914 F.3d 414, 421 (6th Cir. 2019).

In contrast to this incredibly demanding standard, the Fourth and Seventh Circuits have held that a court need only be "reasonably satisfied" that testimony proffered by the government witness was false. *See United States v. Lanas*, 324 F.3d 894, 902-03 (7th Cir. 2003); *United States v. Lighty*, 616 F.3d 321, 374 (4th Cir. 2010).

Finally, many Circuits merely observe that a defendant is obligated to prove that the prosecution witness offered false testimony, without specifying the quantum of evidence necessary to satisfy this burden. *See United States v. Rodriguez*, 766 F.3d 970, 990 (9th Cir. 2014) (to prevail on a Napue claim, defendant must prove that testimony was "actually false."); *United States v. Oti*, 872 F.3d 678, 696 (5th Cir. 2017) (same); *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146 (3d Cir. 2017).

A similar lack of uniformity can be found in state court decisions. Hence, Alabama has adopted the "indisputably false" standard promulgated by the Sixth Circuit. *See McMillan v. State*, 258 So. 3d 1154, 1167 (Ala. Crim. App. 2017).

By way of contrast, Illinois's highest state court uses a clear and convincing standard. *See People v. Cornille*, 95 Ill. 2d 497, 506, 69 Ill. Dec. 945, 950, 448 N.E.2d 857, 862 (1983); *People v. Bounds*, 36 Ill. App. 3d 330, 337, 343 N.E.2d 622, 627 (1976).

And several other state courts – including Texas, Tennessee, and California – have adopted a mere preponderance of the evidence standard.[2] *See Ex parte De La*

---

[2] Ironically, the Second Circuit itself had previously suggested that a defendant meets his or her burden under *Napue* by demonstrating a mere "preponderance of the evidence" standard. *See Ortega v. Duncan*, 333 F.3d 102, 106 (2d Cir. 2003)

Cruz, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015) ("An applicant must prove the two prongs of his false-evidence claim by a preponderance of the evidence."); *State v. Allen*, No. E2022-00437-CCA-R3-CD, 2023 Tenn. Crim. App. LEXIS 247, at *129 (Crim. App. July 12, 2023); *People v. Marshall*, 13 Cal. 4th 799, 830, 55 Cal. Rptr. 2d 347, 362, 919 P.2d 1280, 1295 (1996).

We respectfully submit that the Court should grant *certiorari* to resolve this important question of constitutional law, which has divided the courts of appeal and state courts alike: what quantum of evidence must a defendant advance in order to establish that a government witness has committed perjury under *Napue* and its progeny?

This is not merely an academic question, because the application of an excessively exacting standard of proof renders *Napue* toothless. To understand how, consider the facts of this case.

(discussing, with approval, district court's use of preponderance standard); *see also United States v. Ng Lap Seng*, 2018 U.S. Dist. LEXIS 83441, at *46-47 (S.D.N.Y. May 9, 2018) ("When a defendant seeks a new trial based on the government's introduction of perjury . . . [i]t is the defendant's burden to prove perjury by a preponderance of the evidence."); *Cunningham v. Bennett*, No. 02 CV 4635 (ARR), 2005 U.S. Dist. LEXIS 26567, at *23 (E.D.N.Y. May 13, 2005) (in the context of an asserted Napue violation, "[t]he petitioner has the burden of demonstrating, by a preponderance of evidence, that the witness committed perjury."); *Black v. Rock*, 103 F. Supp. 3d 305, 317 (E.D.N.Y. 2015) ("The petitioner has the burden of demonstrating, by a preponderance of the evidence, that the witness committed perjury."); *Boyle v. United States*, 10-CV-2639, 2013 U.S. Dist. LEXIS 177924, 2013 WL 6684995, at *2 (E.D.N.Y. Dec. 18, 2013) (same); *Anekwe v. Phillips*, 2007 U.S. Dist. LEXIS 101352, at *19 (E.D.N.Y. May 31, 2007) (same); *Zimmerman v. Burge*, 492 F. Supp. 2d 170, 196 (E.D.N.Y. 2007) (same); *Herion v. Phillips*, No. 04-CV-5465 (ARR), 2008 U.S. Dist. LEXIS 117223, at *85 (E.D.N.Y. Mar. 25, 2008) ("Under [*Napue*] analysis, a petitioner has the initial burden of proving, by a preponderance of the evidence, that a witness committed perjury.").

The Government's notes of the Kaiser interview were both detailed and clear. They reflect that during a 2010 interview, Kaiser had told the Government that he personally met with Kenneth Jowdy in 2003, at Jowdy's restaurant in New York City. He told investigators that during the meeting, the two men discussed the possibility of "lending $ from Hawaii to Mexico." Indeed, the notes specifically described *at least* three separate meetings between Jowdy and Kaiser – taking place in New York and Mexico, during which Jowdy repeatedly "brought up borrowing $ from Hawaii project."

Clearly, written statements this detailed were not conjured out of thin air by investigators. The Government has never offered any explanation for these notes. It has not averred, in subsequent filings, that the notes were wrong, or that Kaiser never made such statements. And yet, prosecutors permitted Kaiser to baldly make this assertion in the presence of the jury.

Under *Napue*, the burden is on prosecutors to correct perjurious testimony when offered by a government witness. And yet the court of appeals – by embracing an overly rigid standard of proof – turned that notion on its head, holding that it was *the defendant's burden* to come forth with "incontrovertible evidence" of such perjury in the first instance. In this regard, the court suggested that it was not enough for Kenner to offer the Government's own notes, clearly reflecting the prior inconsistent statement. Rather, it was apparently Petitioner's obligation to also "seek corroborating testimony from the FBI agent who conducted the interview or the investigator who took the notes."

There are two important points to make here. First, Kenner's attorney believed that he had sufficiently highlighted the prior inconsistency by introducing the notes into evidence. Hence, he had no reason to call the agents who had taken the notes. He could not have anticipated that prosecutors would embrace Kaiser's perjury during their rebuttal summation, disowning their own notes, and telling jurors – without any apparent basis in fact – that such notes should *not be* treated as a reliable record of Kaiser's interview.

More importantly, courts generally – including the Second Circuit – have consistently held that no *Napue* violation occurs where defense counsel is able to establish the perjury during trial. *See United States v. Cassino*, 467 F.2d 610, 622 (2d Cir. 1972) ("the fact that the jury learned the details of the story precludes a successful [*Napue*] challenge"); *Long v. Pfister*, 874 F.3d 544, 548 (7th Cir. 2017) (en banc) ("All *Napue* itself holds is that perjury known to the prosecution must be corrected before the jury retires."); *United States v. Chavez*, 894 F.3d 593, 601 (4th Cir. 2018) ("It is difficult to imagine how a conviction could have been 'obtained by the knowing use of perjured testimony' when that testimony was almost immediately corrected"); *United States v. Butler*, 446 U.S. App. D.C. 247, 270-71, 955 F.3d 1052, 1075-76 (2020) ("*Napue* involved only 'uncorrected' false testimony").

Hence, if Kenner had done *exactly* as the court of appeals suggested – calling the Government's agents to offer "incontrovertible evidence" of Kaiser's prior inconsistent statement – the court would have *still* held that there was no *Napue*

violation, because evidence of such perjury would have then been conclusively established through cross examination.

In this manner, the court of appeals has erected a veritable catch-22 which assures that prosecutors will almost never be faulted for failing to correct perjurious testimony: if a defendant fails to introduce *incontrovertible* evidence to establish that the prosecution witness was lying, there is no *Napue* violation; however, if he does manage to introduce such evidence, there is *still* no violation.

Faced with this standard of review, a prosecutor in the heated pitch of trial has virtually no incentive to correct perjurious testimony offered by his or her own witness. Either such testimony will be uncovered through rigorous cross examination, at which point it will be considered harmless, or it will never be unequivocally established, in which case there is no provable *Napue* violation.

Completely lost in this mix is the prosecutor's "constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). In the absence of intervention by this Court, the lofty principles of prosecutorial self-correction endorsed by this Court in *Trombetta*, *Napue,* and *Giglio* will continue to fall by the wayside, replaced by an anything-goes contest of adversaries, where the burden of exposing perjurious testimony falls exclusively on defense counsel.

CONCLUSION

Accordingly, for the reasons set forth above, this Court should grant certiorari to clarify the quantum of evidence necessary to establish perjury in the context of a *Napue* violation.

Respectfully submitted,

MATTHEW W. BRISSENDEN
Counsel of Record
MATTHEW W. BRISSENDEN, P.C.
666 Old Country Road, Suite 501
Garden City, NY 11530
(516) 683-8500
Matthew.W.Brissenden@gmail.com
Counsel for Petitioner Kenner

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of July, two thousand twenty-three.

PRESENT: Denny Chin,
Steven J. Menashi,
Circuit Judges,
Eric R. Komitee,
District Judge.[*]

UNITED STATES OF AMERICA,

Appellee,

v. No. 21-2289

PHILLIP A. KENNER,

Defendant-Appellant.[†]

---

[*] Judge Eric R. Komitee of the United States District Court for the Eastern District of New York, sitting by designation.

[†] The Clerk of Court is directed to amend the case caption as set forth above.

For Defendant-Appellant: MATTHEW W. BRISSENDEN, Law Office of Matthew W. Brissenden, P.C., Garden City, NY.

For Appellee: J. MATTHEW HAGGANS, Assistant United States Attorney (Saritha Komatireddy, Assistant United States Attorney, *on the brief*), for Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Bianco, J.).

Upon due consideration, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court is **AFFIRMED**.

Phillip Kenner was a financial advisor to professional hockey players and other high-net-worth clients. In the early 2000s, Kenner and associates invested his clients' money and diverted substantial portions of the money for unauthorized purposes. Kenner also persuaded his clients to fund litigation to recover some of the lost money, and he diverted money from that fund too. The government indicted Kenner and a co-defendant on nine counts, including wire fraud and conspiracy to commit money laundering. After a trial, a jury convicted Kenner on six counts.

Kenner now appeals his conviction. He makes five arguments. First, he contends that the district court erred when charging the jury concerning the credibility of interested witnesses. Second, he argues that the government violated his right to due process by allowing a witness to give perjurious testimony. Third, he claims that the government made an inappropriate remark in its summation. Fourth, he suggests that the purported errors at trial, taken together, prejudiced

him. Fifth, he argues that the district court improperly calculated his sentence under the Sentencing Guidelines and erred in calculating the amount of restitution that it ordered him to pay. We affirm the judgment of the district court. We assume the parties' familiarity with the underlying facts and procedural history.

I

Kenner's first argument is that the district court erred when it charged the jury concerning the credibility of interested witnesses. "A party who objects to any portion of the instructions ... must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). If a party fails to make such an objection, "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Kenner concedes that he "did not object to the lower court's instructions concerning the evaluation of testimony from 'interested' witnesses. As such, the instruction is evaluated under the 'plain error' standard." Appellant's Br. 35. Kenner contends that the interested-witness charge was a plain error that prejudiced the outcome of the case and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The Supreme Court has explained that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (internal quotation marks omitted). After satisfying itself of those first three requirements, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467 (internal quotation marks omitted).

The district court gave the following charge before the jury retired to deliberate:

> In evaluating credibility of the witnesses, you should take into account any evidence that the witness who testified may benefit in

> some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.
>
> This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness' interest has affected or colored his or her testimony.

App'x 831. After giving this charge, the district court further instructed the jury as follows:

> I am now going to give you an instruction regarding the defendant Kenner's testimony. The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and the defendant is presumed innocent.
>
> In this case, one of the defendants, Mr. Kenner, did testify and he was subject to cross-examination like any other witness. You should examine and evaluate his testimony just as you would the testimony of any other witness.

Id. at 836.

Analogizing this case to *United States v. Solano*, 966 F.3d 184 (2d Cir. 2020), Kenner argues that this instruction constituted reversible error. In *Solano*, we vacated a conviction based on a jury charge about interested witnesses. The district court in that case instructed the jury in the following way:

> In evaluating the credibility of the witnesses, you should take into account evidence that the witness who testified may benefit in some way in the outcome of the case. Such an interest in the outcome creates a motive on the part of the witness to testify falsely, may sway the witness to testify in a way that advances his own interest. Therefore, if you find that any witness [whose] testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.
>
> Now, this is not to suggest that every witness who has an interest in the outcome of the case will testify falsely. There are many people who no matter what their interest in the outcome of a case may be would not testify falsely. It is for you to decide based on your own perceptions and common sense to what extent, if at all, the witness's interest has affected or colored his or her testimony.

Id. at 192 (quoting the trial transcript) (emphasis and alterations omitted). The district court in *Solano* also told the jury that "[t]he defendant was not obligated to call witnesses on his behalf, nor was he obligated to testify on his behalf. But he was permitted to do so. In this case the defendant decided to testify." *Id.* at 193 (alteration omitted). Still, the district court clarified, "[i]t is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent." *Id.*

The defendant in *Solano* "had not objected to the trial court's jury charge on assessment of the credibility of persons who testified at trial." *Id.* at 193. We therefore reviewed the charge under the plain-error standard, as we do here. Nevertheless, we vacated the defendant's conviction after we determined that the jury charge constituted plain error that affected the defendant's substantial rights.

The first two parts of the plain-error test led to the conclusion in *Solano* that the jury charge in that case constituted an error that was plain. Such a charge, we said, eroded the presumption of innocence to which defendants are entitled in our system of criminal justice. *See id.* at 195. Because the defendant has the greatest interest in the outcome of the case, such a charge suggests to the jury that this interest creates a motive to testify falsely. *See id.* The charge in *Solano* was therefore erroneous. And because "the language used by the trial court [there was] virtually identical to that found erroneous in" a prior summary order—*United States v. Munoz*, 765 F. App'x 547 (2d Cir. 2019)—we determined that the error was plain. *Solano*, 966 F.3d at 197.

We then considered whether the error prejudiced the defendant in *Solano* and seriously affected the fairness, integrity, or public reputation of judicial proceedings. It did. In *Solano*, the jury convicted the defendant of conspiracy to distribute and possess with intent to distribute cocaine. The case turned on the defendant's credibility in testifying that he did not know that a container held cocaine and that he never made certain statements to officers. *See id.* at 198. Because "[t]his was ... a credibility case," "we conclude[d] that there [was] a reasonable probability that the motive-to-testify-falsely error prejudicially affected [the defendant's] substantial rights"—an error that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 198-200.

In light of *Munoz* and *Solano*, we conclude that the interested-witness charge in this case constituted an error that was plain. The charge was substantially similar to the charge we held to be erroneous in *Solano*. In fact, the instruction to the jury to "examine and evaluate [Kenner's] testimony just as you would the testimony of any other witness" explicitly suggested the applicability to Kenner of the interested-witness charge—making the *Solano* problem worse. The fact that *Munoz* and *Solano* were decided after Kenner's trial does not make the error less plain; "it is enough that an error be plain at the time of appellate consideration" to satisfy the second prong of the plain-error test. *Henderson v. United States*, 568 U.S. 266, 279 (2013) (internal quotation marks omitted).

But we conclude that the error did not affect Kenner's substantial rights. Unlike in *Solano*, we are not confronted here with a pure "credibility case." The government called 39 witnesses—many of them clients of Kenner who testified that they did not authorize Kenner to use their funds for a loan that was the central object of one of the fraudulent schemes. The government also introduced a variety of exhibits that corroborated this testimony and demonstrated other fraud. And the government presented overwhelming evidence of Kenner's involvement in other fraudulent schemes. The case did not rise or fall—as *Solano* did—exclusively on Kenner's credibility. Rather, the jury had a substantial body of testimonial and documentary evidence before it. For this reason, we decline to disturb Kenner's conviction on account of the erroneous jury charge because the error did not seriously affect the fairness and integrity or public reputation of the proceedings. *See, e.g.*, *United States v. Weintraub*, 273 F.3d 139, 145 (2d Cir. 2001).

II

Kenner makes several arguments about purported prosecutorial misconduct at the trial. First, he argues that the government deprived him of due process when it allowed a witness—John Kaiser—to provide testimony that the government knew was perjurious. Second, Kenner argues that the government made improper comments at summation. Third, Kenner argues that the problems at the trial, considered as a whole, prejudiced him. We address each point in turn.

A

The Due Process Clause prohibits a prosecutor from allowing false testimony "to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "The government 'may not knowingly use false evidence, including false testimony, to obtain a tainted conviction.'" *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018) (quoting *Napue*, 360 U.S. at 269)). "Where the prosecution knew or should have known of the perjury, a new trial is warranted if there is any reasonable likelihood that the false testimony could have affected the judgment of

the jury." *United States v. Wong*, 78 F.3d 73, 81 (2d Cir. 1996) (internal quotation marks omitted).[1]

Kenner claims that the government knowingly permitted Kaiser—a key witness and one of Kenner's business partners—to give false testimony at the trial. Kaiser testified that he was unaware of Kenner's business dealings with a developer named Kenneth Jowdy, and his testimony supported the conclusion that Kenner's transactions with Jowdy were unauthorized. However, an investigator's handwritten notes from Kaiser's FBI interview appear to contradict Kaiser's testimony by indicating that Kaiser described having met Jowdy to discuss those transactions before the transactions occurred. Kenner argues that this discrepancy proves that the government knowingly allowed Kaiser to commit perjury. We disagree.

At trial, the government stipulated to the admission of the notes into evidence. Kaiser denied that he told investigators about advance meetings with Jowdy, and his denial was subject to cross-examination. Whether Kaiser was credible in denying that his testimony contradicted earlier statements was a question for the jury. Aside from the handwritten notes, which are not incontrovertible evidence of Kaiser's earlier statements, Kenner identifies no other evidence that the government knew or should have known that Kaiser was testifying falsely. Kenner did not seek corroborating testimony from the FBI agent who conducted the interview or the investigator who took the notes, relying instead on cross-examination of Kaiser. Under these circumstances, the record does not establish that Kaiser committed perjury, let alone that the government knew or should have known that he did so.

---

[1] "However, where the government was unaware of the perjury at the time of trial, a new trial is warranted only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Wong*, 78 F.3d at 81 (internal quotation marks and alterations omitted).

B

"The government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000). But "[a] prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant." *United States v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973). Still, we have said that "a defendant asserting that a prosecutor's remarks warrant a new trial faces a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of his right to a fair trial." *United States v. Coplan*, 703 F.3d 46, 87 (2d Cir. 2012) (internal quotation marks omitted). "Such cases are rare." *United States v. Ballard*, 727 F. App'x 6, 9 (2d Cir. 2018) (internal quotation marks omitted); *see also United States v. Whitten*, 610 F.3d 168, 202 (2d Cir. 2010) ("We will reverse on the ground of prosecutorial misconduct only if that misconduct caused substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.") (internal quotation marks omitted).

Kenner points to a remark that the government made at the summation: "Mr. Kenner told you that he used that money to get his piece in the Mexico investment with Ken Jowdy. You know exactly what that's for. That's in evidence." App'x 824. Here, "that money" refers to a loan that Kenner made to Jowdy with client money. According to Kenner, the government's remark told the jury that he admitted to doing something that he maintains he did not do: divert client funds to buy a personal stake in a Jowdy project in Mexico. Kenner argues that the remark prejudiced him so egregiously as to warrant a new trial. We disagree.

Even assuming that the government's remark constituted a misrepresentation of Kenner's testimony, such a misrepresentation did not substantially prejudice Kenner. The district court instructed the jury that "the statements that the attorneys make[], both in their opening statements and in their summations, are not evidence." Gov't App'x 169. And the remark did not implicate the government's core theory: that diverting funds *to* Jowdy—no matter

what those funds were ultimately used to do—constituted an unauthorized use of client money. Several witnesses testified to that diversion. Under these circumstances, the remark at summation does not require a new trial.

C

We have held that when various errors together work a "cumulative prejudice" on a defendant, reversal is warranted. *United States v. Certified Env't Servs.*, 753 F.3d 72, 95 (2d Cir. 2014). In *Certified Environmental Services*, we explained that while "we would hesitate to vacate and remand [the] case for a new trial based on any one of the errors ... in isolation, or perhaps even any one category of those errors," after "considering the record *as a whole*, we [were] compelled to conclude a new trial is warranted." *Id.* at 96 (emphasis added).

Kenner suggests that even if the errors in isolation do not warrant reversal, the cumulative prejudice requires a new trial. In addition to the jury charge, the perjury issue, and the summation remark, Kenner points to an exchange during his testimony in which the government accused him of lying. The district judge sustained an objection to this line of questioning and told the prosecution—outside the presence of the jury—that questions beginning with "aren't you lying or isn't it a fact you stole" constitute "argumentative questions." App'x 719. He warned the government that he did not "want any more of those." *Id.*

As we have previously explained, "[t]he facts of *Certified Environmental Services* were particularly egregious, including references by the prosecutor to the potential consequences of the verdict." *United States v. Mendlowitz*, No. 21-2049, 2023 WL 2317172, at *7 (2d Cir. March 2, 2023). "The lesson of *Certified Environmental Services* is that in certain cases, when several evidentiary errors combine with various examples of prosecutorial misconduct to render a trial unfair, a new trial is warranted." *Id.* Kenner has not met this high bar. Even taken together, the issues discussed above did not prejudice the proceedings, given the evidence against Kenner. And we determine that the district court prevented the

government's argumentative line of questioning from creating undue prejudice by sustaining Kenner's objection.

III

Last, Kenner argues that the district court erred in both its calculation of his offense level under the Sentencing Guidelines and its calculation of restitution. Kenner contends that the district court improperly used gross investment amounts to determine its Guidelines loss calculation and its order of restitution. We address each issue.

A

In cases involving fraud, the U.S. Sentencing Guidelines provide for increases to the offense level based on the amount of loss. If the district court determines that the loss amount is more than $9.5 million but less than $25 million, the Guidelines provide that the district court should add 20 levels to the total offense level. U.S.S.G. § 2B1.1(b)(1). That is what the district court did in this case, determining that the proper loss calculation was over $14 million.

"In calculating the amount of loss under the Guidelines, a sentencing court 'need only make a reasonable estimate of the loss.'" *United States v. Rigas*, 583 F.3d 108, 120 (2d Cir. 2009) (quoting U.S.S.G. § 2B1.1 cmt. n.3(C)). We will affirm the district court's calculation as long as we are satisfied that the loss amount exceeds the relevant minimum for the offense level enhancement. *See id.* at 112, 120 (upholding an offense level enhancement of 26 levels for losses exceeding $100 million because "regardless of the precise amount of the loss attributable to the [defendants'] fraud, that figure easily exceeds $100 million").

Kenner contends that he made a variety of legitimate expenditures with client funds—such as the purchase of thousands of acres of property in Hawaii. In Kenner's telling, the crash of the real estate market and the collapse of Lehman Brothers (which was financing the Hawaii project) were the actual causes of many of the losses of client funds. Yet Kenner fails to identify improperly calculated

losses that would reduce the loss amount by the over $4 million it would take to place his Guidelines calculation in a lower category.

B

"[R]estitution may be imposed only for losses arising from the specific conduct that is the basis of the offense of conviction." *United States v. Goodrich*, 12 F.4th 219, 228 (2d Cir. 2021) (internal quotation marks omitted). "We review a district court's restitution order for abuse of discretion, which we will identify only if the order 'rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions.'" *United States v. Messina*, 806 F.3d 55, 67 (2d Cir. 2015) (quoting *United States v. Thompson*, 792 F.3d 273, 277 (2d Cir. 2015)). Applying these principles, we have upheld a restitution order that was based on a finding that a defendant "directly and proximately harmed … investors by using false and fraudulent statements to induce them to make an investment that was ultimately much riskier and worth less because of the fraudulent nature of the scheme." *United States v. Quatrella*, 722 F. App'x 64, 69-70 (2d Cir. 2018) (internal quotation marks omitted).

Kenner takes issue with the district court's calculation of restitution, which totaled $16,223,121.82. Kenner argues that the restitution award should be reduced by the amount of legitimate expenditures because "there was uncontested evidence that much of the investors' money was used in precisely the manner promised." Appellant's Br. 58. Kenner blames outside forces—such as the economic downturn of the late 2000s—for the collapse of the Hawaii project and the investors' loss of funds. He also points to certain funds that went to finance litigation. He claims that *Quatrella* is inapposite because this case does not have an element of fraudulent inducement; Kenner notes that "[t]he investors in this case were [his] clients for many years before the alleged fraud began" and "[t]here was no evidence that they invested with him based upon material misrepresentations." Reply Br. 22. We disagree.

That the victims had been Kenner's clients before the purported fraudulent inducement does not mean that Kenner did not induce them to invest in the schemes at issue in this case. The district court determined that Kenner had not "met [his] burden to show that with respect to those losses that the money was utilized … in the fashion that was agreed to by the victims." App'x 1237-38; *cf. United States v. Stitsky*, 536 F. App'x 98, 112 (2d Cir. 2013) ("[I]nvestors would not have been exposed to such risks had defendants not fraudulently induced them to invest in the first instance."). Lending to Jowdy, who failed to make payments on the revolving line of credit, exposed the clients to a risk that ultimately had a drastic impact on the Hawaii scheme's continued viability. *See* Appellant's Br. 6-7 ("By 2007, the real-estate market had begun its dramatic collapse, an unforeseen development which had a cascading series of effects on both the Hawaiian and Mexican developments. To begin with, Kenneth Jowdy ceased making payments on the revolving line of credit."). Moreover, the purported need for Kenner's clients to invest in the litigation fund was caused in the first place by Kenner's diversion of money to Jowdy. We conclude that the district court did not abuse its discretion in its order of restitution.

* * *

We have considered Kenner's remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of September, two thousand twenty-three.

United States of America,

Appellee,

v.

Phillip A. Kenner,

Defendant-Appellant.

ORDER

Docket No: 21-2289

Appellant, Phillip A. Kenner, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

USCS Const. Amend. 5, Part 1 of 13

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code Service
Copyright © 2023 All rights reserved.

End of Document