

No.

IN THE
Supreme Court of the United States

KENYA DABNEY,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Judicial Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two questions of significant importance. The first implicates a deep split in the lower courts; the second calls for summary reversal.

Question Presented One

Lower courts are divided over whether the right to “effective cross-examination” protected by the Sixth Amendment, *see Davis v. Alaska*, 415 U.S. 308, 318 (1974), includes any right to introduce extrinsic evidence to impeach a government witness. The Fifth and Ninth Circuits have held that a defendant has a Sixth Amendment right to introduce extrinsic evidence to impeach a government witness, while the First, Fourth, and Eighth Circuits have, like the court below, concluded that the admissibility of extrinsic impeachment evidence during cross-examination is solely a matter within the trial court’s discretion. But the Sixth and Seventh Circuits are internally divided – different panels of those courts have reached disparate conclusions on this question.

In this case, a key government witness (the alleged victim) lied about a material fact. Despite repeated requests, the defense was never allowed to introduce the extrinsic evidence that would have exposed the witness’s lie, and it is undisputed that the entire case rose and fell on this witness’s credibility.

The first question presented is:

Does a defendant have a Sixth Amendment right to introduce extrinsic evidence that exposes and contradicts false testimony by a key government witness about a material issue of fact?

Question Presented Two

Should this Court decline review of the first question presented, it should summarily reverse because the government blatantly violated its duty to correct false testimony. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). Over repeated defense objections, the government here not only failed to correct its lying witness, but it actively concealed the falsehood by selectively redacting records – which were already admitted in evidence – to *take out* the parts that proved the witness was lying while *keeping in* the parts that made the lie look true and thus furthered the government’s case. In other words, rather than correct the lie, the prosecutor redacted the truth to match it. And, during closing argument, the prosecutor relied upon and exploited the falsehood to bolster the credibility of the lying witness. Again, the entire case turned on this witness’s credibility, and her material perjury went uncorrected for the entirety of the trial.

The second question presented is:

Does the government violate its constitutional duty to correct false testimony when it redacts admitted evidence to conceal perjury by its key witness?

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PETITION FOR A WRIT OF CERTIORARI

Kenya Dabney respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINION AND ORDER BELOW

The opinion of the Supreme Judicial Court of Massachusetts (“SJC”) is published at 478 Mass. 839, 90 N.E.3d 750 (2018), and is attached hereto as Appendix A. Mr. Dabney timely filed a petition for rehearing, which is attached hereto as Appendix B. Said petition was denied by the SJC, and the order denying the petition is attached hereto as Appendix C.

JURISDICTION

The judgment of the SJC was entered on February 13, 2018. A timely request for rehearing was denied on March 6, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

The Fourteenth Amendment provides, in pertinent part: “No State shall ... deprive any person of life, liberty, or property, without due process of law.”

INTRODUCTION

In this case, the government's key witness lied about a material fact. Both the defense and the prosecution knew that she was lying, because the records that proved it were already admitted in evidence. But the government affirmatively pushed to keep the truth from the jury. Once the witness lied, the government urged that the evidence showing the lie be redacted to take out the parts that proved she was lying, while keeping in the parts that helped the government's case. And Mr. Dabney was barred from reintroducing the redacted portions of the extrinsic evidence to expose the falsehood on cross-examination. Solely on the word of this lying witness, he will spend the next decade in state prison.

This case is a clean vehicle to resolve a clear split in the lower courts over the scope of a defendant's Sixth Amendment right to confront the government's witnesses. The Confrontation Clause guarantees defendants "the right of effective cross-examination." *Davis*, 415 U.S. at 318. For cross to be effective, defense counsel must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* "But this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (original emphasis). Given this dearth of authority, lower courts are divided over whether a restriction on the introduction of extrinsic impeachment evidence can implicate the Sixth Amendment. The Fifth and Ninth Circuits, and many state supreme courts,

have held that confrontation can require the admission of extrinsic evidence that impeaches a government witness. On the other hand, the First, Fourth, and Eighth Circuits have said the opposite – that confrontation is implicated by restricted questioning, but not disallowed evidence. And the Sixth and Seventh Circuits are of two minds: different panels of those courts have reached opposite conclusions on whether the Sixth Amendment requires the introduction of extrinsic evidence.¹

As explained herein, the right to “effective cross-examination” must include more than just the ability to ask questions to which a witness can freely lie in response. If confrontation ever requires the introduction of extrinsic impeachment evidence, that right must be implicated here: when the government’s key witness lies about an issue of fact material to the defendant’s guilt or innocence. Indeed, exposing such falsehoods is doubly important, for it both tells the jury the underlying material facts *and* that the government’s key witness is willing to lie about them at the trial. In these circumstances, the defendant must have a Sixth Amendment right to put the truth before the jury.

This case is an ideal vehicle to resolve this issue for three reasons. First, the error was outcome determinative in this case, resulting in an errant judgment. Second, there are no fact-bound issues that will impede review of the issue raised. And third, this case arises on direct appeal, and will thus allow this Court to resolve

¹ Compare *Jordan v. Warden, Lebanon Corr. Inst.*, 675 F.3d 586, 597 (6th Cir. 2012) (holding that “a defendant is generally unable to establish a confrontation-clause violation where he or she is denied the opportunity to present extrinsic evidence that would impeach another witness”), with *Blackston v. Rapelje*, 780 F.3d 340, 353 (6th Cir. 2015) (holding, over a dissent by Judge Kethledge, that a defendant had a “clearly established” Sixth Amendment right to introduce evidence of a witness’s “recantations of prior inculpatory testimony”).

a split that seems to arise most often in the context of federal habeas, but in a clean vehicle that raises none of the complications of the AEDPA standard of review.

In the alternative, should this Court decline review of the first question presented, it should summarily reverse on the second because the government violated its duty to correct false testimony. When false testimony “appears” in a criminal trial, the prosecutor cannot remain “silen[t].” *Napue*, 360 U.S. at 269-70. A prosecutor has a “duty to correct what he knows to be false and elicit the truth.” *Id.* at 270. Here, the prosecutor not only failed to correct false testimony, but actively sought (and obtained) the redaction of the admitted evidence to make the lie look true, and then capitalized on the lie in closing argument. That was an undeniable breach of the government’s due process duty to correct false testimony, and this Court should summarily reverse, both to correct the critical error that infected Mr. Dabney’s trial and to deter such prosecutorial misconduct in future cases.

This is an issue of exceptional importance. False testimony begets false convictions. The SJC’s ruling not only excuses the government’s failure to correct false testimony, it also empowers the government to argue against defense efforts to put the truth before the jury, incentivizing prosecutorial misconduct. Absent this Court’s intervention, there is little to deter the sort of prosecutorial misbehavior that could potentially lead to wrongful convictions. Whatever the right to a fair trial means, it does not allow the government to do what it did here: selectively redact evidence to conceal a lie told by its key witness, vehemently argue against repeated

defense efforts to tell the jury the truth, and then exploit the falsehood in closing argument to obtain a conviction.

STATEMENT OF THE CASE

I. Factual Background²

On February 4, 2015, Kenya Dabney was indicted and charged with human trafficking and ten other offenses (R.A.6).³ The alleged victim of the trafficking charge was Mr. Dabney's then-girlfriend, who voluntarily engaged in prostitution both before and during their relationship. The government's theory of the case was that Mr. Dabney had engaged in human trafficking by encouraging her to move her solicitation to a website (Backpage.com) rather than do so on the street, and by helping her write and prepare the online ads. The government further theorized that Mr. Dabney used the proceeds of her prostitution to support himself because he was unemployed.

The discovery did not fit either theory. Before trial, the government subpoenaed all of the alleged victim's records from Backpage (R.A.78-79). The government's claim was that Mr. Dabney had encouraged, assisted, and profited

² Herein, the record appendix before the SJC is cited as "R.A.", the trial transcript is cited by "Volume Number/Page Number", and the defendant's brief below is cited as "Defendant's Br."

³ Of the eleven charges, Mr. Dabney was acquitted of six and convicted of five. The five convictions include: human trafficking, deriving support from a prostitute, rape, and two counts of assault and battery. The latter three offenses involved an allegation that Mr. Dabney had attacked the alleged victim in December 2014. Those allegations are recounted in considerable detail in the SJC's opinion below (Pet.App.5a-8a). His factual defense to those allegations was that they were false: the alleged victim was angry at him because he had ended their relationship, moved out of their apartment the night of the alleged attack (II/136, 200), and had restarted a relationship with a woman who was pregnant with his child (II/134-35). Also, the 911 caller reported seeing "two women" fighting on the night that the alleged victim was injured (II/45-46), the alleged victim told both her mother and the police that night that another woman had hit her (II/101, 104), and (per expert testimony) the limited extent of her injuries was not remotely consistent with the brutal beating she later claimed (Pet.App.8a-9a). Ultimately, five of the six acquittals arose from the same alleged incident.

from her online solicitation from November 2014 until his arrest on December 14, 2014. The dates and times on the Backpage ads and invoices that it received in response to the subpoena were as follows:

November 7, 2014 at 8:46PM	November 12, 2014 at 4:27PM
November 22, 2014 at 1:28AM	November 28, 2014 at 11:44AM
[December 14, 2014 – Mr. Dabney is arrested and detained in prison.]	
December 29, 2014 at 11:34PM	December 31, 2014 at 11:13PM
January 1, 2015 at 11:10PM	January 2, 2015 at 4:42PM
January 3, 2015 at 12:13AM	January 3, 2015 at 5:28PM
January 4, 2015 at 1:36AM	January 4, 2015 at 4:19AM
January 4, 2015 at 6:23PM	January 5, 2015 at 12:03AM
January 6, 2015 at 3:04PM	January 14, 2015 at 5:28PM
January 14, 2015 at 11:54PM	January 16, 2015 at 10:59PM
January 19, 2015 at 11:14PM	January 21, 2015 at 12:07AM
January 21, 2015 at 1:53AM	January 23, 2015 at 10:36PM
January 26, 2015 at 3:50PM	February 3, 2015 at 1:49AM ⁴

(R.A.80-141.) Of the 24 postings, four fit the government’s theory that Mr. Dabney was responsible for the alleged victim’s use of Backpage and supported himself with her prostitution in the period prior to his incarceration. The other 20 postings undermined that theory, showing that she had continued to post on Backpage – five times more often – *after* Mr. Dabney’s arrest and detention. Notably, there is zero

⁴ The subpoena to Backpage was dated February 3, 2015 (R.A.79), so the government would not have obtained any records from the period thereafter.

difference between the pre-arrest and post-arrest invoices; they were obtained in response to a single subpoena, and are identical in every way other than their dates. During *in limine* proceedings, the prosecutor let slip that it had received those 20 post-arrest records “probably accidentally” in response to its subpoena (I/209).

In a joint pre-trial memorandum, the parties stipulated that the full records were “true, authentic, and complete,” waived all objections to their authenticity, and “state[d] that they need not be obtained via a trial subpoena for admission at trial” (R.A.45).

II. Trial Proceedings

Before trial, the government moved *in limine* to exclude all 20 post-arrest postings, while the defense moved for their admission (R.A.58, 63). At this point, the judge sided with the defense: the post-arrest ads were admissible and “relevant to her susceptibility to be influenced by Mr. Dabney” (I/216).

On direct examination, the full set of 24 records was put before the alleged victim, and she confirmed that the records contained the ads that she had uploaded to Backpage (II/79). The records were admitted in evidence (II/79). During cross-examination, defense counsel asked the alleged victim whether she had reposted the ads in the period after Mr. Dabney was incarcerated. She denied having done so (II/177).

That was a lie. The parties had already agreed to the truth and authenticity of the full set of records, and, on direct examination, the witness had authenticated the full stack of 24 records and invoices. Their clarity is undeniable: as the trial

prosecutor said during *in limine* proceedings, “[t]here’s certainly ads under her user name that continue ... up until February 3rd, 2015, which is two months after Mr. Dabney’s date of arrest” (I/202-03). And the alleged victim had already testified that there was no system for automatic reposting on Backpage, and that the only way ads can be reposted is if someone does so manually (II/170). Further, she explained how she used her email address and password as a “login” for restricted access to her account, which was the target of the subpoena (II/151). Finally, as if to extinguish any possible doubt, the contact phone number in the post-arrest ads had been changed to match the alleged victim’s brand new number, which she had obtained in December 2014 (*i.e.*, after all of the four pre-arrest postings) (*see* Defendant’s Br. at 44-45). Thus, the records clearly and incontrovertibly show that she was lying, and had, in fact, reposted ads with her new phone number after Mr. Dabney was incarcerated.

Despite the judge’s *in limine* ruling, defense counsel was never allowed to confront the alleged victim with the full Backpage records or ask any follow-up questions. At the government’s urging, the judge then redacted the admitted records – to keep in the four records that helped the government and remove the 20 identical records that exposed the lie. Defense counsel made repeated written and oral requests to be allowed to reintroduce the records showing that she had just lied (R.A.74; II/165, 177-78; III/4). He was never allowed to do so.

The judge offered a few reasons. First, she said that counsel could not introduce the records because “[i]f you’re trying to impeach somebody, you have to

impeach him or her with his or her own statement. ... [Y]ou can't impeach somebody with somebody else's statement" (II/165). The judge believed that it was "improper" to impeach a witness with anything other than her own prior statement (II/177). Next, she indicated that counsel could only introduce the Backpage records if the witness first acknowledged that she had reposted the ads; to the judge, the witness's willingness to lie protected her from the exposure of the truth (II/161). Finally, the next day, after defense counsel renewed his request to introduce the records by a second written motion, the judge stated – despite the fact that the parties had stipulated to authenticity and admissibility without a trial subpoena – that defense counsel was "obligated to get somebody from Backpage to explain these somewhat confusing records to us" (III/6).⁵ The judge imposed no such obligation on the government; the four identical records that made the lie look true and furthered its theory were not considered confusing at all. They were left in evidence and the government argued in its closing that those records were so clear that they "confirm[ed]" Mr. Dabney's guilt (IV/28).

The alleged victim's lie was never corrected, and the entire case turned on her credibility. It is impossible to overstate the importance of her testimony for the government's case. Without her, the case could not have even reached the jury; there was no other evidence of Mr. Dabney's alleged involvement in her prostitution and the other charges against him. The totality of the Backpage records – and, of course, the witness's willingness to lie about them during the trial – could have

⁵ This was at the urging of the prosecutor, who argued that "[w]e have no idea what these records mean" (III/5). The prosecutor would later argue to the jury that the four identical, admitted records were so clear that they "confirm[ed]" Mr. Dabney's guilt (IV/28).

given “[a] reasonable jury ... a significantly different impression of [her] credibility.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

Rather than correct the lie, or even just ignore it, the government turned the lie to its advantage. In closing argument, the prosecutor argued that the jury could believe the whole of the alleged victim’s testimony because she had been forthright about her prostitution.⁶ The prosecutor told the jury that she had “owned her prostitution,” that she “answered [defense counsel’s] questions the same way she answered [the prosecutor’s],” and had told the truth because she had “g[otten] up on the stand and tak[en] an oath and answer[ed] those questions” (IV/27). She rhetorically asked: “[i]s this somebody who’s lying, who has something to hide?” (IV/27.) The answer, of course, was yes – she did lie, and she did hide something. But the government had kept the truth from the jury, redacted the records to make the lie look true, and then used the lie to try to convince the jury that its key witness was more credible.

And her credibility was clearly in some doubt with the jury. Every one of the eleven charges against Mr. Dabney depended entirely on this witness’s word. He was acquitted of six, and convicted of five. Solely on the word of this witness, Mr. Dabney was sentenced to ten to fourteen years in state prison.

III. The Supreme Judicial Court’s Opinion

Throughout the proceedings below, Mr. Dabney asserted a constitutional right to introduce the full, unredacted records to correct and expose perjury by the

⁶ The prosecutor also repeatedly emphasized Mr. Dabney’s greed and need for money as the reason for her prostitution (IV/18-32), despite knowing that the postings continued (five times more often) in his absence.

government's key witness. He did so before the trial judge,⁷ in his appellate briefs,⁸ and again in a petition for rehearing (*see* Pet.App.38a).⁹ In its opinion, the SJC concluded that the correction of perjury by a key government witness was a matter for the trial judge's discretion:

The defendant points out, accurately, that a witness who perjures himself or herself opens the door to rebuttal of the false statements. Nevertheless, impeachment is not a "blank check," and is limited by other rules of evidence. The trial judge was best situated to assess the extent to which the invoices might have been confusing to the jury. We conclude that her ruling was not an abuse of discretion.

(Pet.App.36a-37a, citations omitted.) The court never addressed the fact that identical "confusing" records and invoices were left in evidence, after being selectively redacted, and were deemed clear enough to be used by the government against Mr. Dabney to make the lie look true and argue to the jury that the lying witness was credible.

Mr. Dabney's petition for rehearing, which was filed the day after the decision, reemphasized the constitutional magnitude of the trial court's error (*see* Pet.App.38a). The petition was denied without further comment (*see* Pet.App.42a).

⁷ In two separate written motions *in limine*, one filed before trial and one filed after the witness lied, Mr. Dabney argued at length that the failure to admit this evidence violated his "federal and state constitutional and statutory rights to due process, to present a defense, [and] to confront the witnesses against him" (R.A.63, 74).

⁸ In his brief, Mr. Dabney repeatedly cited and incorporated his written motions in limine, argued that the records were constitutionally required to "expose her act of perjury" and that the failure to correct it violated his "constitutional right to present evidence" and the "constitutionally based right of effective cross-examination" and his right to a fair trial and the Sixth Amendment (Defendant's Br. at 49-50). He also cited both due process and confrontation precedent in support of his argument, and appended both the Sixth and Fourteenth Amendments (Defendant's Br. at 49-52).

⁹ In the petition, which is appended hereto in full, the defendant again argued that he "was doubly denied his constitutional rights – both due process and confrontation" (Pet.App.40a).

REASONS FOR GRANTING THE PETITION

This case raises an issue that has long divided the federal courts of appeals and state supreme courts. Lower courts are split over whether defendants have a Sixth Amendment right to introduce extrinsic evidence to impeach a government witness. As explained below, the defendant must be able to use extrinsic evidence to expose material lies during cross-examination. This Court has already recognized that, despite a trial judge’s “broad discretion” over the scope of cross-examination, a defendant has a confrontation right “to impeach the credibility of a prosecution witness by cross-examination directed at possible bias.” *Davis*, 415 U.S. at 309, 316. This case raises an even more basic application of that confrontation right. If the defendant has a right to show the witness’s *motive* to lie, in order to show the *possibility* that she lied, he must have a right to show that the key witness has *actually* lied, about a material fact, in the very proceeding in which the jury is being asked to believe her testimony beyond a reasonable doubt. Whether by questioning or by extrinsic evidence, confrontation must allow the defendant to put the truth before the jury. Without a right to introduce extrinsic evidence to contradict a government-sponsored falsehood – particularly as to a material issue of fact – the witness can freely lie and the jury will never know the truth. Lower courts are deeply divided over the scope of a defendant’s Sixth Amendment right to introduce extrinsic evidence to impeach a government witness.

The protection of a defendant’s right to be tried on truthful testimony is a matter of the utmost importance. A trial judge has no discretion to allow the

government to do what it did here – conceal the truth, redact the evidence to make the lie appear true, and then use the uncorrected false testimony to convict a defendant and send him to prison for over a decade. No defendant should lose his liberty on such evidence. The decision below not only excused this affirmative act of concealment, but it failed to even acknowledge the misconduct that occurred. Such cursory review removes any effective check on prosecutorial misconduct.

I. This Court Should Grant Certiorari To Answer The First Question Presented Because This Case Is an Ideal Vehicle To Address An Issue That Has Long Divided The Lower Courts.

A. Lower Courts Are Split Over Whether a Defendant’s Sixth Amendment Right to Confrontation Includes the Right to Introduce Extrinsic Evidence For Impeachment Purposes.

The Sixth Amendment affords defendants the right “to confront adverse witnesses and present a defense.” *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The Confrontation Clause provides that “the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. Confrontation “is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004). The Confrontation Clause requires that “the defense [be] given a full and fair opportunity to probe and expose [testimonial] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving

scant weight to the witness’ testimony.” *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam).

The lower courts are starkly divided over whether confrontation requires the introduction of extrinsic impeachment evidence. For example, in *Blackston v. Rapelje*, 780 F.3d 340, 353 (6th Cir. 2015), a divided panel of the Sixth Circuit held, on habeas review, that the defendant had a clearly established Sixth Amendment right to introduce evidence of a witness’s “recantations of prior inculpatory testimony.” In dissent, Judge Kethledge argued that “not a single Supreme Court case holds that the Confrontation Clause guarantees *any* right to admit evidence ... at trial.” *Id.* at 363 (Kethledge, J., dissenting). And, on petition for certiorari, three Justices of this Court agreed as a matter of habeas precedent.¹⁰

A few other circuits have rendered the same holding – that the Confrontation Clause can require the admission of impeachment evidence – also on federal habeas review. In *Fowler v. Sacramento Co. Sheriff’s Dept.*, 421 F.3d 1027 (9th Cir. 2005), the state trial court had prevented the defense from presenting extrinsic evidence that the complainant had previously made an unfounded allegation of sexual assault. The Ninth Circuit granted habeas. In *Holley v. Yarborough*, 568 F.3d 1091 (9th Cir. 2009), that court held that a state trial court acted “objectively unreasonably” in excluding evidence that an eleven-year-old complainant had previously made comments to her friends regarding a past sexual encounter, which

¹⁰ See *Rapelje v. Blackston*, 136 S. Ct. 388 (2015) (Scalia, J., with whom Thomas & Alito, JJ., join, dissenting from denial of certiorari).

would have revealed to the jury her “highly active sexual imagination.” *Id.* at 1099. The Ninth Circuit again granted habeas relief.¹¹

Similarly, in *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001), the Seventh Circuit suggested that the admission of extrinsic evidence is required by this Court’s Confrontation Clause jurisprudence when a victim of an alleged rape had previously recanted a rape allegation. *Id.* at 591. The defendant was disallowed from introducing such extrinsic evidence, and the Seventh Circuit granted habeas relief, noting that limitations on “the use of extrinsic evidence” do not apply “to credibility attacks based upon motive or bias.” *Id.* at 593 (citation omitted). The Fourth Circuit has “adopt[ed] and affirm[ed]” a district court opinion requiring the admission of extrinsic evidence for impeachment purposes. *See United States v. Stamper*, 766 F. Supp. 1396, 1400 (W.D.N.C. 1991), *aff’d*, 959 F.2d 231 (4th Cir. 1992). The Fifth Circuit has likewise held that extrinsic impeachment evidence can be required under the Sixth Amendment. *See Kittelson v. Dretke*, 426 F.3d 306, 321-22 (5th Cir. 2005) (“[T]his excluded evidence was paramount to Kittelson’s defense.”); *see also United States v. Skelton*, 514 F.3d 433, 442-43 (5th Cir. 2008). The Supreme Court of Connecticut has also held that, under the Sixth Amendment, “[t]he same rule that applies to the right to cross-examine applies with respect to extrinsic evidence.” *State v. Wright*, 135 A.3d 1, 25 (Conn. 2016) (citation omitted).¹²

¹¹ *See also Ortiz v. Yates*, 704 F.3d 1026, 1037-38 (9th Cir. 2012); *but see Driver v. Landers*, 444 F. App’x 934, 936 (9th Cir. 2011) (holding that, because none of this Court’s past cases “concern[ed] extrinsic evidence” being used for impeachment, those cases could not support a claim for federal habeas relief); *Doughton v. Foulk*, 584 F. App’x 842 (9th Cir. 2014) (same).

¹² State supreme courts are deeply divided over the degree to which the Sixth Amendment requires the admission of extrinsic evidence for impeachment purposes. Kansas, Georgia, Indiana, Louisiana,

Other courts have reached a similar result by eliding the distinction between extrinsic evidence being *permitted* and being *required* by the Sixth Amendment. In *Bassil v. United States*, 517 A.2d 714 (D.C. 1986), for instance, the District of Columbia Court of Appeals held that the Confrontation Clause required that a defendant be allowed “to tarnish the credibility of a government witness by cross-examination or [by] direct evidence.” *Id.* at 717; *see also Grayton v. United States*, 745 A.2d 274, 281 (D.C. 2000) (holding that a defendant “certainly ha[s] the right to challenge the credibility of [the government’s witnesses] by offering extrinsic evidence to show bias”); *Coates v. United States*, 113 A.3d 564, 573 (D.C. 2015) (finding “a violation of the defendant’s Sixth Amendment right of confrontation” from the exclusion of extrinsic impeachment evidence). For this proposition, the court cited this Court’s opinion in *United States v. Abel*, 469 U.S. 45, 51 (1984), which held that the use of extrinsic evidence “is permissible to impeach a witness by showing his bias.”¹³

To the contrary, a number of lower court decisions have held that the introduction of extrinsic evidence is *not* necessary to satisfy the Sixth Amendment.

and Virginia have all held that the right to confrontation requires the admission of extrinsic evidence in certain circumstances. *See State v. Guenther*, 854 A.2d 308, 322 (N.J. 2004) (collecting cases from those states, as well as others to the contrary); *see also Banegas-Membran v. State*, 182 So.3d 865, 868-69 (Fla. Dist. Ct. App. 2016) (finding a Sixth Amendment right to introduce extrinsic evidence to show bias); *but see State v. Manning*, 973 A.2d 524, 531 (R.I. 2009) (“Ordinarily, the cross-examiner is bound by the answers of the witness and may not introduce extrinsic evidence to prove or disprove the witness’s testimony on cross-examination.”).

¹³ In *Abel*, this Court held that extrinsic evidence was admissible to impeach a *defense* witness. There, the prosecution had discredited a defense witness by testimony that all of the people involved (including the defendant and the witness) were members of a secret prison gang that was sworn to perjury and self-protection. The Court of Appeals reversed the conviction, holding that the suggestion of perjury due to membership in a perjurious organization “was impermissible.” 469 U.S. at 48. This Court reversed, noting that “[t]he Courts of Appeals have upheld use of extrinsic evidence to show bias” and that joint gang membership was probative of the witness’s bias in favor of the defendant, while the organization’s stated beliefs “impeach[ed] his veracity directly.” *Id.* at 51, 56.

For example, in *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), the First Circuit held that the trial court erred in limiting cross-examination that two girls – claiming to be the victims of sexual assaults at the hands of the defendant – had previously made false accusations against others. While agreeing that White “was entitled to explore the prior accusations on cross-examination,” the court expressly declined to “endors[e] any open-ended constitutional right to offer extrinsic evidence” of the prior accusations. *Id.* at 26. The Sixth Circuit – contrary to its later opinion in *Blackston* – similarly declined to recognize any right to extrinsic impeachment evidence in *Jordan v. Warden, Lebanon Corr. Inst.*, 675 F.3d 586, 596-97 (6th Cir. 2012) (holding that “a defendant is generally unable to establish a confrontation-clause violation where he or she is denied the opportunity to present extrinsic evidence that would impeach another witness”). *See also Boggs v. Collins*, 226 F.3d 728 (6th Cir. 2000) (holding that defendant had no confrontation right to introduce extrinsic evidence to impeach witness’s credibility). And the Seventh Circuit – also contrary to its later opinion in *Redmond* – has likewise held that “restricting the use of ... extrinsic evidence to impeach a witness’s credibility” does not “pose constitutional problems.” *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996).

The Fourth and Eighth Circuits have similarly declined to require admission of extrinsic evidence where a defendant has asserted that right. *See Quinn v. Haynes*, 234 F.3d 837, 846, 849 n.11 (4th Cir. 2000) (rejecting defendant’s claimed Sixth Amendment right to “introduce extrinsic evidence” for impeachment); *United States v. Withorn*, 204 F.3d 790, 795 (8th Cir. 2000) (no error in excluding evidence

of rape victim’s prior rape allegation when offered to impeach victim credibility); *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988) (holding that the Sixth Amendment does not require extrinsic evidence to impeach a witness’s credibility).

Overall, lower courts have had trouble “distinguish[ing] between the core values of the confrontation right and more peripheral concerns which remain within the ambit of the trial judge’s discretion.” *Dorsey v. Parke*, 872 F.2d 163, 166 (6th Cir. 1989). The “circuits are split as to whether a defendant is entitled to introduce extrinsic evidence” for impeachment purposes. *United States v. Richardson*, 793 F.3d 612, 627 (6th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1157 (2016).

The issue raised by this case is both novel and important. This Court has never held that a defendant has a Sixth Amendment right to introduce extrinsic evidence to expose material lies told by the government’s key witness at trial. In fact, “this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes” at all. *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (emphasis removed). But that is because no case has yet called for such a holding. In this Court’s past cases, the cross-examination that did occur was either so fulsome that the failure to introduce the evidence did not give rise to a constitutional problem, or so limited that the failure to allow any questioning at all was itself the Sixth Amendment violation.

Jackson, for example, involved a state prisoner seeking federal habeas relief from a sexual assault conviction. The victim (Jackson’s then-girlfriend) initially made a statement against him, then recanted, and then recanted the recantation

and testified against him at trial. *Id.* at 507. On cross-examination, the defense questioned her about her past history of filing unsubstantiated police reports against Jackson, but the trial court refused to admit the police reports about those past incidents. This Court held that the exclusion did not violate the Confrontation Clause. But, unlike here, the defense was given “wide latitude to cross-examine [the victim] about those prior incidents” and to confront her with all of the material at issue. *Id.* Thus, “[b]ringing in the reports themselves as extrinsic evidence would have added little to that record, and it is hardly a surprise that the Court found that exclusion ... fell short of a constitutional violation.” *Blackston*, 780 F.3d at 352.

On the other hand, this Court’s other past cases on the required scope of cross-examination all involved circumstances in which the defendant was disallowed from asking *any* questions about the prohibited subject. *See, e.g., Van Arsdall*, 475 U.S. at 679 (noting that “the trial court prohibited *all* inquiry into the possibility” of bias). The defendant was not just barred from introducing extrinsic evidence; he was not even allowed to ask a single question on its subject matter.

Accordingly, this case fills a critical gap in this Court’s precedent: does the Confrontation Clause require only that a defendant be allowed to ask questions, or does it also at times require the introduction of extrinsic evidence? Any recognized right to introduce extrinsic evidence would certainly embrace what happened here: the correction of material perjury by the government’s key witness. But this gap in precedent has given rise to a split between – and, in some cases, within – the circuit and state courts as to whether the Sixth Amendment requires the admission of

extrinsic evidence for impeachment. Should this Court decline review, lower courts will remain divided on this question. For this reason, certiorari should be granted.

B. The Decision Below Is Wrong.

1. Defendants Must Be Allowed to Confront Perjury by the Government's Key Witness Regarding an Issue of Fact Material to Guilt or Innocence.

“This Court’s Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination.” *Fensterer*, 474 U.S. at 18. In the latter category, this Court has recognized that restrictions on the scope of cross-examination can raise Confrontation Clause questions because such limitations can “effectively ... emasculate the right of cross-examination itself.” *Smith v. Illinois*, 390 U.S. 129, 131 (1968). A trial judge cannot impose unreasonable limitations on important areas of adversarial inquiry. “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed ... ‘to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.’” *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318).

This Court has repeatedly held that a defendant must be permitted to question a witness about their bias or motive to testify falsely. For example, in *Van Arsdall*, this Court reversed where a defendant was not allowed to cross-examine a witness over leniency he received in exchange for his testimony. 475 U.S. at 680.

And, in *Davis*, this Court reversed where the defendant was not allowed to question the government’s key witness about his probationary status, and whether his testimony was a result of “fear or concern of possible jeopardy to his probation.” 415 U.S. at 311. Bias “is always relevant as discrediting the witness and affecting the weight of his testimony.” *Id.* at 316 (citation omitted).¹⁴

If a defendant has a confrontation right to show that a witness has a motive to lie, he must have a right to show that the witness is actually lying. “[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987) (plurality opinion). Allowing a defendant to expose a contemporaneous act of perjury on a material issue of fact is necessary to vindicate the core confrontation right recognized in this line of cases: “[s]erious damage to the strength of the State’s case would have been a real possibility had [he] been allowed to pursue this line of inquiry.” *Davis*, 415 U.S. at 319. Confrontation is “even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, *might be perjurers ...*.” *Greene v. McElroy*, 360 U.S. 474, 496 (1959)

¹⁴ The twenty post-arrest records were also probative of the alleged victim’s bias and motive to curry favor with the government, as the defendant expressly argued to both the trial judge (R.A.69) and to the SJC (Defendant’s Br. at 50). The alleged victim testified that, in mid-December 2014, the government told her that it would not prosecute her for prostitution (II/155). In reliance on that informal immunity, she apparently continued to solicit using Backpage. The more she did so, the more she needed to maintain the story of victimization upon which that informal immunity was based. Mr. Dabney argued that she had fabricated her story because she was upset that he broke up with her earlier that day to be with another woman who was pregnant with his child. But these records better explained why she had *maintained* her story in the 18 months between charge and trial – she needed to keep the immunity she had been given. In closing, the prosecutor specifically argued that she had no motive to lie at trial. But, with this evidence, the jury would have seen an added motive to maintain her story. The fact that the records also directly impeached her veracity is no reason for their exclusion. “It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.” *Abel*, 469 U.S. at 56.

(emphasis added). The need for confrontation is at its apex when a key witness lies at trial about a fact material to the defendant's guilt.

In this way, this case is much like *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam). There, the defendant was accused of rape. At trial, the alleged victim testified that she was living with her mother when, in reality, she was in a relationship and living with a significant other. The defendant's theory was that the alleged victim had concocted the claimed rape to protect her relationship against the revelation of her consensual sexual encounter with the defendant. Despite her lie, the defense was foreclosed from cross-examining her about her living arrangements. On appeal, the Kentucky Court of Appeals upheld the conviction, treating the deficient confrontation as a run-of-the-mill evidentiary issue under Rule 403, much as the SJC did here. This Court reversed, holding that the limitation on the scope of cross-examination "was beyond reason," and violated the Confrontation Clause. *Id.* at 232.

So too here. In *Olden*, the jury was left with the false impression that the alleged victim lived with her mother when she really lived with a significant other. Here, the jury was left with the false impression that the alleged victim ceased using Backpage after Mr. Dabney's incarceration when, in reality, she used it five times more often in just the six weeks thereafter. There was simply no justification to exclude "cross-examination with such strong potential to demonstrate the falsity of [the witness's] testimony." *Id.* The excluded records were highly probative just by themselves: if identical criminal conduct continues (or, as here, accelerates) in a

defendant's absence, it weakens the inference that he was ever involved in it at all. *See, e.g., Commonwealth v. Keizer*, 385 N.E.2d 1001, 1004 (Mass. 1979) (similar robbery by a co-conspirator after a defendant's incarceration "is probative on whether [the defendant] participated in the first robbery, the issue at trial"). In addition, the theory that the government put before the jury – that the alleged victim only used Backpage at Mr. Dabney's urging to support him because he was unemployed – would have been severely weakened if the jury was told that she engaged in this conduct *five times more often* in the few short weeks after he went to prison, and thus could not have encouraged her or received financial support.

Even more importantly, the records were needed to expose her act of perjury. Her credibility was the heart of this case, and she lied under oath during Mr. Dabney's trial. The jury should have been made aware of the fact that the entire case turned on the word of a witness who was willing to lie to them, in the very same proceeding. But they were not. Instead, the evidence was redacted to make the lie look true, and Mr. Dabney was denied his rights to both due process and confrontation.

Much like the witness in *Olden*, the witness involved here "was central, indeed crucial, to the prosecution's case." *Olden*, 488 U.S. at 233. And the jury's verdict shows that her credibility was already on a knife's edge – Mr. Dabney was acquitted of over half of the charges against him when every charge rested on her word. *Id.* (informing its analysis by review of the jury's split verdict).

2. The Right to Confrontation Requires the Introduction of Extrinsic Evidence When a Witness Lies About a Material Fact.

The preclusion of evidence “unquestionably implicates the Sixth Amendment” where it diminishes “the defendant’s ability to confront adverse witnesses and present a defense.” *Lucas*, 500 U.S. at 149. “Where the trial court has curtailed a defendant’s cross-examination of a ‘star’ government witness – as it has done in this case – its ruling must be more carefully scrutinized.” *Dorsey*, 872 F.2d at 166. The right to introduce extrinsic evidence that exposes a material falsehood by a key government witness must be recognized as an indispensable component of a defendant’s confrontation rights. Without this evidence, effective cross-examination becomes a hollow right just when it is most necessary – when a witness lies.

During *in limine* proceedings, the judge sided with the defense – the subject of post-arrest postings was material and, in the judge’s words, “relevant to her susceptibility to be influenced by Mr. Dabney” (I/216) – and so allowed the defense to ask the question. But the witness lied in response, and the testimony that was ultimately admitted was, for Mr. Dabney, worse than if the judge had disallowed any questions on the subject: her uncontroverted testimony made it seem as though she never used Backpage without him, and that testimony was supported by the four records the judge allowed in evidence. As far as the jury knew, these were the only postings she had ever made. The judge having recognized the importance of this area of inquiry, there was absolutely no justification for letting the lie go unanswered by the authentic, stipulated records that were already in evidence and

being used by the government in its own case. By not letting the defense correct this falsehood, and then selectively redacting the records to make the lie look true, the judge let the government both suppress a truth that would weaken its case *and* bolster a lie that strengthened its case.

Confrontation requires more than the ability to ask questions. When a witness lies about a material fact, the introduction of the evidence that proves the falsehood is necessary to vindicate the defendant's right to meaningful confrontation. Otherwise, a witness could lie with impunity and the defendant would be left with no remedy to correct the false testimony. *Davis*, for example, held that a defendant has a right to question a key government witness about his probationary status. Imagine if, on remand, that witness lied and denied being on probation. Would Mr. Davis have been barred from introducing a certified copy of the witness's conviction? Would the defendant (in the words of the trial judge here) be "stuck with his answer"? Of course not. "[T]he confrontation clause would have mandated that the defendant be allowed to [admit extrinsic evidence] to impeach his denial." James B. Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. Crim. L. & Criminology 77, 90 (1990). A witness's willingness to lie cannot protect her from the exposure of her lie.

Quite the contrary. When a witness lies about a material issue at trial, exposing the truth becomes twice as important, for it both tells the jury the

underlying material facts,¹⁵ *and* that the witness is willing to lie about them in the very same proceeding in which the government is urging the jury to believe her testimony beyond a reasonable doubt. When a witness lies, the defense must be able to put the truth before the jury. As a leading scholar has recognized: “if a witness falsely denies an impeaching fact during cross-examination, ... the litigant may resort to extrinsic evidence when the impeaching fact is important.” Edward J. Imwinkelried, *Formalism Versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts That Have Not Resulted in a Conviction*, 48 Creighton L. Rev. 213, 216 (2015). Here, the trial judge recognized the importance of the impeaching fact – it undermined the government’s theory of the case and its claim of Mr. Dabney’s financial motive.

The alleged victim’s denial of any post-arrest postings stood unchallenged and uncontroverted. Without the records to expose her dishonesty, Mr. Dabney was denied the right “to expose to the jury the *facts* from which jurors ... could appropriately draw inferences relating to the reliability of the witness.” *Davis*, 415 U.S. at 318 (emphasis added). The defense needed the records “to make any such inquiry effective.” *Id.* Surely the “crucible of cross-examination” means something more than allowing a defendant to ask a single, futile question to which a witness freely lies in response. *Crawford*, 541 U.S. at 61. The limitation on cross-examination denied the defendant his “right to a meaningful confrontation with” the government’s key witness. *Davis*, 415 U.S. at 314.

¹⁵ Here, for instance, the underlying truth was that the witness had actually used Backpage five times more often after Mr. Dabney was incarcerated, when he could not have been involved and did not need financial support.

The purpose of confrontation and cross-examination is to afford the defendant “an opportunity to show that [the government’s case] is untrue.” *Greene*, 360 U.S. at 496. Mr. Dabney was denied that opportunity. Of course, what happened here was even more egregious – not only was Mr. Dabney *himself* precluded from using the extrinsic evidence, but that evidence was selectively redacted to fit the lie told by the witness and then used *by the government* to bolster the lie.

3. The One-Sided Redaction of the Extrinsic Evidence Denied Mr. Dabney a Fair Trial and Was Manifestly Unreasonable.

The right to cross-examination has clear limits. But those restrictions “may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Lucas*, 500 U.S. at 151 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). Here, there was no reasonable basis whatsoever for the limitation imposed on the defendant’s cross-examination: the Backpage records were already in evidence,¹⁶ authenticated twice over (by stipulation and by testimony), and were highly relevant to the government’s theory of the case. And, most glaringly, there was absolutely no justification for the trial judge’s decision to allow the government to use the four records that helped its case without allowing the defense to use the 20 records that exposed the lie. If the records were somehow confusing or unclear, then they *all* should have been kept out. Instead, the extrinsic evidence was, in fact, introduced and used: *by the government*, after being redacted to make the lie look

¹⁶ Limitations on extrinsic evidence are generally justified by the desire to avoid “an endless parade of distracting, time-consuming inquiries.” *Ellsworth v. Warden*, 333 F.3d 1, 8 (1st Cir. 2003) (en banc). But proving this lie would not have required a mini-trial or a “parade” of witnesses – when she lied, the proof was *in evidence*. It took more time and effort to redact it.

true. It is difficult to discern – and the government has yet to suggest – what possible countervailing interest could have justified the trial court’s decision to admit the four records that bolstered the lie and redact the twenty records that exposed it.

The unreasonableness of this limitation is self-evident. Somehow, these identical records are clear and admissible when they help the prosecution, but become confusing only when they help the defendant. That was one-sided and unfair. “[T]he limitation here was beyond reason.” *Olden*, 488 U.S. at 232.

This Court has previously held that the right to a fair trial can, in certain circumstances, carry with it the right to introduce evidence that goes directly to the issue of guilt or innocence of the charged crime. *See Crane*, 476 U.S. at 690 (excluded evidence concerned the voluntariness of a confession); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (defendant barred from cross-examining witness who had previously confessed to the crime); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (defendant barred from calling accomplice as a witness). Evidence that exposes perjury by a pivotal witness on a material issue of fact is no different. In many cases, like this one, “a defendant’s life or liberty may depend” entirely upon “[t]he jury’s estimate of the truthfulness and reliability of a given witness.” *Napue*, 360 U.S. at 269. The Constitution does not allow the government to redact admitted evidence to strengthen a lie that furthers its case. Zeal to obtain convictions must be tempered by the obligation to tell the truth.

The defense theory was that Mr. Dabney had nothing to do with his ex-girlfriend's use of Backpage. In furtherance of that theory, he intended to show that she used the website five times more often after his incarceration. Had the online solicitation happened only when he was a free man, it would have strengthened the inference that he bore some strong causal connection to it. But the converse is also true – its continuation (and acceleration) in his absence weakens that inference. The defense also intended to show that she was lying in order to curry favor with the prosecution, to retain her informal grant of immunity. *See supra* note 14. Of course, there is no telling whether the jury “would have accepted this line of reasoning had counsel been permitted to fully present it.” *Davis*, 415 U.S. at 317. But, by virtue of the witness's lie, the jury was left with the exact opposite false impression – that she *never* returned to Backpage once Mr. Dabney was incarcerated. This was a critical falsehood. “[T]he jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony which provided a crucial link in the proof of petitioner's act.” *Id.* (citation omitted).

Ultimately, the lie was never exposed. “The strength of impeachment evidence falls along a continuum. That a [witness] told lies to h[er] teacher in grade school is at one end”; that the witness told a material lie to the jury in the same proceeding is at the other. *White v. Coplan*, 399 F.3d 18, 24 (1st Cir. 2005). There is no question that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Van Arsdall*, 475 U.S. at 681. But allowing the government to prove its

case in this way – by redacting evidence to both strengthen a falsehood and conceal the truth – is simply not fair. This was “constitutional error of the first magnitude,” *Davis*, 415 U.S. at 318 (citation omitted), and Mr. Dabney will spend the next ten years of his life in prison as a result. For this reason, certiorari should be granted.

C. This Case is an Ideal Vehicle to Address the Question Presented.

This case is a particularly good vehicle to address this question for three reasons.

First, there is no question that the limitation on extrinsic evidence was prejudicial error in Mr. Dabney’s case, requiring reversal of the judgment below. The prejudicial error analysis weighs “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” *Van Arsdall*, 475 U.S. at 684. Here, the credibility of the lying witness was the heart of this case. The key evidence that corroborated her testimony was the records that were selectively redacted before their final admission. Defense counsel was able to cross-examine her, but never exposed a similar act of contemporaneous perjury. “A reasonable jury might have received a significantly different impression of [her] credibility had

[defense] counsel been permitted to pursue his proposed line of cross-examination” and expose her lie. *Id.* at 680.¹⁷

Second, there are no lingering factual issues that will impede this Court’s review of the legal merits. This case involves as clear a demonstrable falsehood as one could hope to establish – the ads were received in response to a government subpoena, the parties stipulated to their accuracy and authenticity, and they had been updated to include the witness’s brand new telephone number. The opinion below itself takes no issue with the fact that the witness lied.¹⁸ Indeed, this case is a uniquely clean vehicle in this regard – the government *cannot* argue in good faith that its witness was telling the truth because it relied upon identical records to prove Mr. Dabney’s guilt. If the records (in the prosecutor’s words) “confirmed” Mr. Dabney’s guilt, they likewise “confirmed” that the witness was lying. It would be utterly inconsistent for the government now to argue that the identical invoices mean anything other than what the trial prosecutor told the jury they meant.

There is also no factual question that the subject about which the Commonwealth’s witness lied was material to Mr. Dabney’s guilt. That was the trial judge’s express ruling: the post-arrest postings were “relevant to her susceptibility to be influenced by Mr. Dabney.” The trial judge understood the materiality of this evidence, which is why she denied the government’s motion *in limine* and allowed the defense to ask the question that provoked the dishonest response. That ruling

¹⁷ Of course, this Court could also leave the prejudice inquiry for the lower court on remand. *See, e.g., Van Arsdall*, 475 U.S. at 684.

¹⁸ At argument below, the Chief Justice of the SJC stated: “The other problem is that she lied, apparently, and the jury was left with the misimpression that she had not lied.”

was manifestly correct, and, in any event, should not be disturbed on appeal. The evidence of post-arrest postings was material in many respects: it went to her bias (*see supra* note 14), the government’s theory of the case, and its theory of financial motive. Accordingly, both factual premises in the question presented – the fact that the witness lied *and* that the lie concerned a material fact – are amply established on this record.

Third, this case arises on direct appeal rather than on habeas review. As a consequence, it provides a useful vehicle for this Court to address the issues herein, unencumbered by the limitations of AEDPA review. Indeed, such confrontation questions seem to arise often in habeas proceedings, in which relief can only be granted if a state decision is “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Thus, it is especially important that this Court resolve the divisions of authority raised by this case.

Already, “[t]he data show a material underrepresentation of state court decisions at the nation’s High Court,” and “[t]he data in more recent Terms suggests a greater disparity.” Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 Harv. L. Rev. F. 167, 169 (2018). This imbalance has consequences. “When the Court fails to engage state courts in the same way it engages the federal courts, it leaves additional space for error at the state court level.” *Id.* at 176. “The risks are particularly acute with respect to criminal law,” and diminished review uniquely “disadvantages state criminal defendants” because

their only other route to this Court comes via the narrow path of federal habeas. *Id.* at 176-77. When a clean vehicle comes on direct appeal that raises an issue that otherwise arises most often in federal habeas proceedings, it presents a particularly strong candidate for certiorari.

This issue was raised before the trial judge, in the defendant’s brief, and in a detailed petition for rehearing. Although the SJC’s opinion below was thinly reasoned, its view of the question presented is clear from its decision – if it thought Mr. Dabney had a Sixth Amendment right to introduce extrinsic evidence that exposed false testimony by the government’s key witness, it would have reversed the judgment of conviction. Instead, it regarded the correction of material perjury as an evidentiary issue within the trial judge’s discretion. This issue was both squarely presented and necessarily decided.

The extent of the analysis below is irrelevant to this Court’s review because “this Court reviews *judgments*, not opinions.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) (emphasis added).¹⁹ In a similar circumstance in the past, this Court has granted certiorari and summarily reversed when the court below did not acknowledge, “or even advert[] to, petitioner’s constitutional right to confrontation.” *Olden*, 488 U.S. at 232. On the other hand, this Court summarily reversed the SJC in a recent case where it had “professed to apply” the law, but “each step of its analysis defied” it. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1030 (2016) (Alito, J., concurring in judgment). Regardless of the extent of the lower

¹⁹ See also *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (“When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*.” (original emphasis)).

court's reasoning, an errant judgment – in a case that otherwise satisfies the criteria for certiorari – calls for this Court's review.

II. This Court Should Grant Certiorari and Summarily Reverse on the Second Question Presented Because the Government Actively Concealed False Testimony by its Key Witness.

Should this Court decline review on the first question presented, it should summarily reverse on the second. This case not only involves the failure to allow the defense to confront the government's key witness, but also includes affirmative efforts by the government to conceal the falsity of its witness's testimony. Such prosecutorial misconduct violates fundamental principles of due process, as already established in *Napue v. Illinois*, 360 U.S. 264 (1959).

In *Napue*, the principal state witness in a murder trial, who was then serving a 199-year sentence for the same murder, testified that he had received no promise of consideration from the state in exchange for his testimony. *Id.* at 265. The prosecutor had, in fact, promised consideration, but “did nothing to correct the witness’ false testimony.” *Id.* This Court reversed the defendant’s conviction, holding that “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Id.* at 269.

The government’s obligation to correct false testimony is “implicit in any concept of ordered liberty,” and “[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.* That principle – that the government may not knowingly use false evidence to obtain a

conviction – applies even when “the false testimony goes only to the credibility of the witness” because (as here) “a defendant’s life or liberty may depend” upon “[t]he jury’s estimate of the truthfulness and reliability of a given witness.” *Id.* It also did not matter “that the jury was apprised of other grounds” for disbelieving the witness in question. *Id.* at 270. In sum, “[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.” *Id.* at 269-70. *Napue* imposes an unambiguous duty upon prosecutors to correct false testimony by government witnesses. This duty reflects the principle that a prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

Since 1959, *Napue* has required prosecutors to correct government evidence that they know to be false. Here, the government did much more than fail to correct a falsehood – it actively concealed it, by manipulating the previously-admitted evidence to make the lie look true. Had the prosecutor just done nothing, the jury would have seen the truth in the admitted evidence. But the prosecutor ensured that the jurors would only see the four records that made the lie look true. And, having redacted the proof of the lie, the prosecutor then capitalized on it in closing argument, “reinforc[ing] the deception of the use of false testimony and thereby contribut[ing] to the deprivation of due process.” *DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991). Such an affirmative act of concealment, combined with

the prosecutor's exploitation of the lie in closing argument, constitutes a particularly egregious *Napue* violation.

This caused a manifest miscarriage of justice. "A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citation omitted). Prejudice is not a close question here. The issue before the jury was whether Mr. Dabney encouraged, assisted, and profited from his girlfriend's online prostitution. By her false testimony, the government was permitted to make it seem as though she never returned to Backpage after he was incarcerated. In reality, she used the site five times more often over the six weeks immediately thereafter. And the government was allowed to conceal perjury by the witness that it was asking the jury to believe beyond a reasonable doubt as to every charge. In closing argument, despite knowing that the witness had lied, the prosecutor urged the jury to believe her testimony because she had been forthright about her prostitution and had "answered [defense counsel's] questions the same way she answered [the prosecutor's]." Every charge depended on the word of this single witness, and Mr. Dabney was acquitted of six charges and convicted of five.

In short, the government's concealment and exploitation of a lie by its key witness led to a split verdict in a close case that turned entirely on the credibility of the lying witness. Such extraordinary prosecutorial misconduct calls for the extraordinary censure of summary reversal by this Court.

Whenever the government “obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law.” *Hysler v. Florida*, 315 U.S. 411, 413 (1942). This is all the more true when the government edits the evidence to actively mislead the jury into thinking the lie is true.

Whatever the scope of the government’s obligation to correct false testimony, it certainly cannot take affirmative steps to keep the truth from the jury and oppose repeated defense efforts to tell the jury the truth. Prosecutors must correct lies, not conceal them. Without this Court’s intervention, Mr. Dabney will lose his liberty for the next decade after a trial that violated his most basic constitutional rights.

At its core, a trial is a search for truth. What happened in this case “prevent[ed] ... a trial that could in any real sense be termed fair,” *Napue*, 360 U.S. at 270, because the knowing use of false testimony “corrupt[s] ... the truth-seeking function of the trial process,” *United States v. Agurs*, 427 U.S. 97, 104 (1976). This case asks this Court to set an irreducible constitutional floor: the government cannot conceal material perjury by its key witness. This Court has an “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160 (1988). The use of false testimony “invites disrespect for the integrity of the court,” *id.* at 162, undermining the public confidence on which our justice system depends. There must be zero tolerance for

convictions obtained in this manner. This Court should grant certiorari to make clear that it will not abide convictions obtained on the word of lying witnesses.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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