No. 20-326

In the Supreme Court of the United States

MITCHELL J. STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's claim that the government presented false testimony did not entitle him to a new trial, where the court found that petitioner failed to identify any materially false testimony and that the defense had the means and opportunity to challenge the alleged misstatements at the time they occurred.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 964 F.3d 1313. An earlier opinion of the court of appeals (Pet. App. 24a-67a) is reported at 846 F.3d 1135.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2020. The petition for a writ of certiorari was filed on September 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; three counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; three counts of wire fraud, in violation of 18 U.S.C.

1343 and 2; three counts of securities fraud, in violation of 18 U.S.C. 1348 (2006) and 18 U.S.C. 2; three counts of money laundering, in violation of 18 U.S.C. 1957 (2006) and 18 U.S.C. 2; and one count of conspiring to obstruct justice, in violation of 18 U.S.C. 371. 4/8/15 Am. Judgment 1. The district court denied petitioner's motions for a new trial, Pet. App. 68a-69a, and it sentenced petitioner to 204 months of imprisonment, to be followed by two years of supervised release, 4/8/15 Am. Judgment 2-3. It also imposed restitution and forfeiture. *Id.* at 5-6. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 24a-67a. This Court denied certiorari. 138 S. Ct. 556 (2017) (No. 17-250).

While petitioner's appeal was pending, he filed another motion for a new trial in the district court. On remand, the court denied petitioner's new-trial motion, Pet. App. 22a-23a, and the court sentenced petitioner to 150 months of imprisonment, to be followed by three years of supervised release; imposed a reduced restitution order; and reimposed the same forfeiture order. 8/29/18 Am. Judgment 2-3, 5-6. The court of appeals affirmed. Pet. App. 1a-21a.

1. Petitioner served as legal counsel for Signalife Inc., a publicly traded company that manufactured electronic heart monitors. 18-13762 Gov't C.A. Br. 5. Petitioner engaged in a scheme to inflate the price of Signalife stock artificially by creating the false impression of sales activity for the company. Pet. App. 27a. Petitioner's wife at the time was the largest single Signalife shareholder, and petitioner therefore stood to gain directly from the stock's inflated price. *Id.* at 27a n.3. Petitioner also caused the company to make fraudulent cash payments to himself and others on the basis of

sham consulting agreements and to issue stock to third parties so that those parties could sell their stock and funnel the proceeds back to petitioner. 18-13762 Gov't C.A. Br. 5. In addition, petitioner conspired to obstruct an investigation by the Securities and Exchange Commission (SEC) into Signalife, by testifying falsely and arranging for another individual to testify falsely in order to conceal the fraudulent scheme. *Id.* at 14; 14-15621 Gov't C.A. Br. 23-25.

a. Over the course of three weeks in September and October 2007, petitioner sent three press releases to John Woodbury, Signalife's securities lawyer, with instructions to publish them. Pet. App. 27a-29a. Taken together, the press releases stated that Signalife had sold approximately $5 million worth of products. *Ibid.* Woodbury lacked any independent knowledge of the truth of the statements in the press releases; he nevertheless published them because petitioner had told Woodbury that petitioner and Signalife's Chief Executive Officer, Lowell T. Harmison, had been traveling together visiting potential clients, and Woodbury believed that the purported sales were the fruits of those efforts. *Id.* at 27a-28a. According to Woodbury, the $5 million in sales reported in the press releases was a "huge deal" for Signalife because it would now be viewed as a "big revenue generating company." 18-13762 Gov't C.A. Br. 11 (brackets and citation omitted).

Woodbury later asked petitioner for additional information regarding the sales described in the press releases. Pet. App. 28a. In response, petitioner sent Woodbury three purchase orders, which petitioner claimed that Harmison was "now fulfilling." 18-13762 Gov't C.A. Br. 11 (citation omitted). The first purchase order, dated September 14, 2007, purported to reflect

an order by a company called Cardiac Hospital Management (CHM) for $1.93 million worth of product and noted a $50,000 deposit. Pet. App. 28a. The signature block showed "'Cardiac Hospital Management'" and contained "an illegible signature" without a corresponding printed name. *Id.* at 28a-29a. The second and third purchase orders, dated September 24, 2007, and October 4, 2007, purported to reflect sales to a company called IT Healthcare. *Id.* at 29a. One purported to reflect a sale of products at a cost of $3.3 million and noted a $30,000 deposit, and the other purported to reflect a sale with a "net due" amount of $551,500. *Ibid.* None of the purchase orders included a shipping address. 18-13762 Gov't C.A. Br. 11.

Petitioner enlisted the help of his personal assistant, Martin Carter, and a Signalife contractor, Ajay Anand, to maintain the appearance that the fake purchase orders were genuine. Pet. App. 26a-27a, 29a. For example, petitioner gave Carter a template to create fictitious letters requesting shipment-address changes—one for IT Healthcare, and another for CHM. *Id.* at 29a. Carter then drafted a letter, ostensibly from a person named Yossie Keret of IT Healthcare, requesting that products be delivered to an address in Israel that Carter had made up. *Ibid.* Carter also prepared a letter appearing to come from CHM that asked for products to be delivered to an address in Tokyo, Japan. *Ibid.* This letter purportedly was signed by "Toni Nonoy." *Id.* at 29a-30a. Carter in fact had "never spoke[n] with Yossie Keret, Toni Nonoy, or anyone at IT Healthcare or CHM; indeed, he had no idea whether the companies or the individuals actually existed." *Id.* at 30a. Carter believed, however, that petitioner had fabricated these names. *Ibid.*

On another occasion, at petitioner's request, Carter provided petitioner with two numbers that he could use as fax numbers for purchase-confirmation letters that would purportedly come from Keret and Nonoy. Pet. App. 30a. Subsequently, Carter, acting at petitioner's direction, fabricated a letter from Keret purporting to cancel IT Healthcare's orders and sent it to Woodbury. *Ibid.* Petitioner also sent Carter to Japan with a sealed envelope in a plastic bag, instructing him to mail the envelope back to the United States while wearing gloves and then return home the same day. *Ibid.* At petitioner's request, Carter also asked his friend Timothy Cutter, a landscaper in Ohio, to accept delivery of some boxes from Signalife, to create the impression that Signalife was actually moving products. 14-15621 Gov't C.A. Br. 21. Cutter accepted a shipment of 20-25 boxes of heart monitors and stored them in his basement for several months until Carter retrieved them and shipped them back to Signalife. *Ibid.*

Anand provided similar assistance to petitioner. Pet. App. 30a. Petitioner once asked Anand to travel to Texas to mail two IT Healthcare purchase orders to Signalife. *Ibid.* When Anand asked whether the purchase orders were real, petitioner responded that it did not matter. *Ibid.* Anand declined to help, but he subsequently agreed to a request from petitioner to draft two letters that would appear to come from Keret on behalf of IT Healthcare. *Ibid.* The first letter requested a shipping address change to an Israeli address, and the second canceled IT Healthcare's order. *Id.* at 30a-31a. Anand sent the letters to petitioner and Harmison. *Id.* at 31a.

b. Acting with the assistance of Carter and Anand, petitioner also misappropriated money and stock from

Signalife. Pet. App. 31a. In January 2008, at petitioner's direction, Carter executed an agreement with Signalife to provide consulting services, none of which he actually provided or was capable of providing. *Ibid.*; 18-13762 Gov't C.A. Br. 6 (citing evidence that Carter first met petitioner in 2005 while working as a handyman). Pursuant to that agreement, petitioner funneled money and Signalife stock from Signalife through Carter to himself. Pet. App. 31a.

Petitioner also directed Carter to buy and sell Signalife stock and to transfer most of the proceeds to petitioner. Pet. App. 31a. Likewise, at petitioner's direction, Anand established "The Silve Group," ostensibly to sell Signalife products in India, which in fact sold only one unit (in Mexico). *Ibid.* Petitioner nonetheless arranged for Signalife to pay Anand more than one million shares for his work, *ibid.*, and Anand kicked back payments to petitioner through wires, checks, and cash, 18-13762 Gov't C.A. Br. 8-9.

c. Woodbury, who oversaw the drafting of Signalife's filings with the SEC, Pet. App. 29a, described the three fake sales to CHM and IT Healthcare in a number of SEC filings using language that petitioner had approved and vetted, 18-13762 Gov't C.A. Br. 12. Petitioner reviewed and commented on drafts of the company's SEC filings and was intimately involved in the drafting process. *Ibid.*

In 2009, the SEC initiated an investigation into Signalife. Pet. App. 32a. As part of that investigation, petitioner testified before the SEC on four separate dates in 2009 and 2010. 14-15621 Gov't C.A. Br. 23. During his testimony, petitioner falsely stated (among other things) that he was not familiar with CHM and IT Healthcare; that he never had direct communications

with The Silve Group and did not know who owned it; that he was unfamiliar with the names Toni Nonoy and Yossie Keret; that he had "never really been involved in public filings" with the SEC; and that it was "undisputed" that he did not receive money from Signalife. *Id.* at 23-24 (citations omitted).

In 2010, after Carter was contacted by the SEC, he met with petitioner at a restaurant. 14-15621 Gov't C.A. Br. 24. At petitioner's direction, Carter took detailed notes on a placemat about what petitioner wanted Carter to tell the SEC. *Ibid.* Many of the details written on the placemat, which Carter repeated during his SEC testimony, were false. *Ibid.*

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; three counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; three counts of securities fraud, in violation of 18 U.S.C. 1348 (2006) and 18 U.S.C. 2; three counts of money laundering, in violation of 18 U.S.C. 1957 (2006) and 18 U.S.C. 2; and one count of conspiring to obstruct justice, in violation of 18 U.S.C. 371. Indictment 1-17.

a. Following a hearing pursuant to *Faretta* v. *California*, 422 U.S. 806 (1975), the district court granted petitioner's motion to represent himself at his trial. Pet. App. 33a. The trial lasted two weeks. *Ibid.*

Among the government witnesses were Carter and Anand.[1] They described in detail the efforts they undertook at petitioner's behest to make the CHM and IT

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[1] Carter pleaded guilty to conspiracy to commit mail fraud, wire fraud, and obstruction of justice. 14-15621 Gov't C.A. Br. 24 n.14. Anand pleaded guilty to obstructing an SEC proceeding. *Ibid.*

Healthcare purchase orders appear to be legitimate and to misappropriate company assets and funnel the proceeds back to petitioner. See 14-15621 Gov't C.A. Br. 10-23.

Woodbury also testified and described, *inter alia*, his preparation of the press releases touting the sham CHM and IT Healthcare sales and his work with petitioner in preparing what turned out to be false and misleading SEC filings for Signalife. 14-15621 Gov't C.A. Br. 6-9. Woodbury testified that, when he was preparing Signalife's interim SEC report for the nine months ending September 30, 2007, "[he] got all [his] information [about the CHM and IT Healthcare purchase orders] from [petitioner]." 5/7/13 Trial Tr. 96; see 14-15621 Gov't C.A. Br. 52.

Tracy Jones, the executive assistant to Harmison (Signalife's CEO), testified about (among other things) petitioner's control of Signalife and his demands to be paid, without submitting invoices, for legal services he purported to have provided. 14-15621 Gov't C.A. Br. 5-6. Jones also described issuing company stock and making large wire transfers of cash to Carter and Anand at petitioner's direction. *Id.* at 13, 15, 17-18. Finally, Jones testified that she considered the CHM and IT Healthcare orders to be "phantom purchase orders because she never received any backup or anything on them." *Id.* at 51 (brackets and citation omitted).

b. Near the end of the trial, petitioner attempted to introduce into evidence a copy of an October 24, 2007, email from Jones to a Signalife board member, Norma Provencio, that Provencio had forwarded to Woodbury. Pet. App. 44a; 18-13762 Gov't C.A. Br. 15. The subject line of Provencio's email to Woodbury stated, "[Fwd: Emailing: Tribou Payment]"; and the body contained

Provencio's note that read, "Attached is the $50K deposit on the 9-14 purchase order." Pet. App. 44a (citation omitted; brackets in original). The exhibit also included a photocopy of the referenced September 27, 2007, check for $50,000 to Signalife and a deposit slip. *Ibid.*; D. Ct. Doc. 292-3, at 2 (Dec. 9, 2013). The check appeared to have been signed by Delores Tribou and drawn from an account shared with her husband, Thomas Tribou, *ibid.*, who had earlier entered into consulting and marketing agreements with Signalife, 14-15621 Gov't C.A. Br. 37 n.17. The check displayed the CHM purchase-order number on the memo line, along with the words "Tribou & Assoc." Pet. App. 44a (citation omitted).

Petitioner sought to use the email and check to support the inference that the CHM purchase order, which called for a $50,000 deposit, was not fraudulent. Pet. App. 44a-45a. The government objected to the admission of the check and the email on the ground that the email's contents were hearsay. *Id.* at 45a. The district court sustained the objection and noted that petitioner had failed to authenticate the document. *Ibid.* Although the court allowed petitioner to recall Signalife's custodian of records and provided petitioner with additional guidance as to how petitioner might admit the exhibit, petitioner was unsuccessful in authenticating the email and check, which were not admitted into evidence. 14-15621 Gov't C.A. Br. 38. Petitioner also elected not to call Thomas Tribou as a witness, Pet. App. 45a, even though the government offered to arrange and finance Tribou's travel so that Tribou might testify, 14-15621 Gov't C.A. Br. 39-40. Nevertheless, the court suggested that the parties consider the following stipulation: "On or about September 27th, 2007, an individual named

Thomas Tribou paid Signalife $50,000 for goods he expected to receive." Pet. App. 45a. Petitioner accepted this stipulation, which was presented to the jury. *Ibid.*

During his closing argument, petitioner argued based on the stipulation concerning Tribou's $50,000 payment that the CHM purchase order was not fraudulent. 14-15621 Gov't C.A. Br. 42. In rebuttal, the government asserted that the CHM purchase order was "fake" and that Tribou's signature on the CHM purchase order and $50,000 payment did not establish otherwise. *Id.* at 42-43 (citation omitted). While not contesting the existence of the $50,000 payment, the government observed, among other things, that CHM, not Tribou, was listed as the purchaser on the CHM purchase order; that Tribou's contracts with Signalife did not mention CHM; and that petitioner had denied in his SEC testimony knowledge of a connection between Tribou and CHM. See *id.* at 42; 5/20/13 Trial Tr. 117-118.

The jury found petitioner guilty on all 14 counts. Pet. App. 33a; 8/29/18 Am. Judgment 1.

c. Petitioner filed a series of post-trial motions, including motions for a new trial in which he asserted (among other things) that the government had committed numerous discovery violations and had engaged in prosecutorial misconduct by making false statements to the district court and the jury and that a number of government witnesses, including Woodbury and Jones, had testified untruthfully. 14-15621 Gov't C.A. Br. 32; see, *e.g.*, D. Ct. Doc. 281, at 3 (Oct. 31, 2013). The district court denied the motions, which it described as "baseless" and "offensive." Pet. App. 68a.

The district court sentenced petitioner to a total of 204 months of imprisonment, to be followed by two

years of supervised release. 4/8/15 Am. Judgment 2-3. It also ordered restitution and forfeiture. *Id.* at 5-6.

3. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 24a-67a.

As relevant here, the court of appeals rejected petitioner's contention that allegedly false statements by the prosecutor and purportedly false trial testimony by a number of witnesses violated *Giglio* v. *United States*, 405 U.S. 150 (1972).[2] The court concluded that petitioner had "failed to identify * * * any materially false testimony on which the government relied, purportedly in violation of *Giglio*." Pet. App. 25a-26a. Although petitioner "identifie[d] several categories of statements he contend[ed] were false," the court explained that "none of them support[ed] a *Giglio* violation, and [that] only two merit[ed] discussion: (1) statements the prosecutor made to the court and during his closing argument regarding Thomas Tribou and (2) testimony of Ms. Jones and Mr. Woodbury about the bogus purchase orders." *Id.* at 43a. Petitioner's contention that both categories of statements were false was premised on the October 24, 2007, email and $50,000 check that he had unsuccessfully sought to have admitted into evidence. See *id.* at 44a-45a, 49a.

The court of appeals rejected petitioner's contention that the prosecutor had made a false statement when he "told the jury [in his closing argument] that the CHM purchase order was 'all made up' and 'fake.'" Pet. App. 47a

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[2] The court of appeals also rejected petitioner's claims that the government had failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), Pet. App. 39a-41a; that the district court abused its discretion in denying his requests for a hearing on his post-trial motions and for additional discovery, *id.* at 50a; and that cumulative error warranted reversal, *ibid.*

(citation omitted). The court explained that, even if Thomas Tribou's signature appeared on the CHM purchase order and he paid Signalife $50,000, "[t]he fact that [petitioner] obtained Mr. Tribou's signature and check does not rule out the possibility that [petitioner] also fabricated the purchase order." *Id.* at 47a-48a. "Indeed," the court observed, "the government made this argument in its rebuttal, stating that regardless of any signatures [petitioner] obtained, the purchase orders were fake." *Id.* at 48a. "Moreover," the court continued, "the record contained overwhelming evidence that [petitioner] fabricated supporting documentation for the purchase orders and used arbitrary names for companies and individuals supposedly purchasing Signalife products." *Ibid.*

The court of appeals also rejected petitioner's contention that the prosecutor had made two false statements to the district court, without the jury present, during the discussion of the October 24, 2007, email and Tribou check. Pet. App. 45a-47a. The prosecutor had stated to the district court that, if Tribou were called to testify, he would state that he "never received any product and was not a Signalife reseller." *Id.* at 45a. The court of appeals explained that this statement was not false because, although Tribou had told SEC investigators that he signed the CHM purchase order, his SEC testimony "in no way indicates [that Tribou] would have testified that he actually received Signalife products" or that he "considered himself a Signalife reseller." *Id.* at 45a-46a. As the court of appeals observed, and petitioner did not dispute, the government advised the district court that "Tribou likely would testify that he had no connection with CHM and that he agreed to [petitioner's] request to sign a blank purchase order." *Id.* at 45a n.11. The court of appeals likewise concluded that the prosecutor did not lie when

he advised the court that Tribou claimed to be "unfamiliar with Tribou & Associates," a name that appeared on the $50,000 check. *Id.* at 46a. Although Tribou had previously said that he was familiar with the name, the court explained that "a prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *Id.* at 46a-47a (quoting *United States* v. *McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010), cert. denied, 562 U.S. 1270 (2011)). The court of appeals also rejected petitioner's contention that the prosecutor's statement was material, observing that the district court's ruling that the check and the email were inadmissible was made before the prosecutor's statement. *Id.* at 47a.

Finally, the court of appeals addressed petitioner's claims that Jones had "lied when she characterized the three purchase orders as 'phantom purchase orders' simply because she lacked supporting documentation" and that Woodbury had "lied when he said he got all his information about the purchase orders from [petitioner]." Pet. App. 49a. Petitioner contended that those statements were untrue because Jones and Woodbury had both received the October 24, 2007, email attaching the $50,000 Tribou check. *Ibid.* The court, however, did not find that Jones or Woodbury had testified falsely. And it determined that the "allegedly false testimony" did not violate *Giglio* because "the record show[ed] that [petitioner] located the email and the check before trial and even produced them to the government," and because the prosecutor had not "capitalized" on the challenged testimony during the trial. *Ibid.* "In the absence of government suppression of the evidence," the court stated, "there can be no *Giglio* violation." *Ibid.* (citing *Ford* v. *Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008), cert.

denied, 559 U.S. 906 (2010); *DeMarco* v. *United States*, 928 F.2d 1074, 1076-1077 (11th Cir. 1991)).

The court of appeals separately concluded that the district court erred in calculating petitioner's Sentencing Guidelines range, vacated his sentence, and remanded the case for resentencing. Pet. App. 51a-63a.

4. Petitioner filed a petition for a writ of certiorari seeking review of the court of appeals' decision, contending that the court had "accepted that the government knowingly used false, material testimony to convict" him and that the Due Process Clause does not "excuse[] the government's knowing use of false testimony where the government does not also suppress evidence indicating that the testimony was false." 17-250 Pet. i.

The government opposed further review, arguing both that the court of appeals' decision was correct and that this Court should defer consideration of petitioner's contention because a final judgment had not yet been entered. 17-250 Br. in Opp. 13-24. This Court denied certiorari. 138 S. Ct. 556 (No. 17-250).

5. While petitioner's first appeal was pending, he filed another motion for a new trial in the district court, "press[ing] the same argument he had made on appeal: that the government made or allowed the admissibility of material misstatements in violation of his due process rights." Pet. App. 6a. Petitioner cited statements that the government made during appellate proceedings, which he characterized as newly discovered evidence buttressing his false testimony claims. *Ibid.*

Almost two years after filing that new-trial motion—more than a year after the court of appeals had rejected petitioner's due-process claims, and five years after the verdict—petitioner supplemented the motion with a declaration from Thomas Tribou stating (among other

things) that Tribou had signed a Signalife purchase order that was "blank except for the number of units and the cost" and that Tribou's wife signed the $50,000 check and wrote the purchase-order number in the memo section. D. Ct. Doc. 529-1, at 1 (May 16, 2018); see Pet. App. 6a, 15a; 18-13762 Gov't C.A. Br. 21-22.

The district court denied the new-trial motion. Pet. App. 22a-23a. Following a resentencing hearing, the court imposed a revised sentence of 150 months of imprisonment, to be followed by three years of supervised release. 8/29/18 Am. Judgment 2-3. The court imposed a reduced restitution order and reimposed the same forfeiture order. *Id.* at 5-6.

6. The court of appeals affirmed. Pet. App. 1a-21a.

With respect to petitioner's "attempts to relitigate alleged due process violations," the court of appeals observed that "[t]he mandate rule and the law of the case doctrine bar[red]" the court "from revisiting th[at] claim." Pet. App. 2a, 7a. The court noted that it "had already heard and squarely rejected [petitioner's] argument that the government knowingly relied on false testimony." *Id.* at 14a.

The court of appeals rejected petitioner's argument that his claim fell within any exception to the law-of-the-case doctrine. The court determined that the exception for newly discovered evidence did not apply because the "only new evidence" on which petitioner relied on appeal, the Tribou declaration, was "untimely." Pet. App. 15a. The court explained that Federal Rule of Criminal Procedure 33(b)(1) requires that a new-trial motion based on newly discovered evidence be filed within three years of the verdict. Pet. App. 15a. And the court observed that the Tribou declaration had been brought

to the district court's attention two years after the filing of the new-trial motion and five years after the verdict.

The court of appeals additionally found the Tribou declaration to be "immaterial" because it "does not speak to the government's theory of the case," namely, "that [petitioner] fabricated details within the purchase orders at issue." Pet. App. 15a-16a. The court observed that "Tribou concede[d] in his declaration that the order form he filled out remained 'blank except for the number of units and the cost.'" *Id.* at 16a.

The court of appeals further determined that petitioner's claim did not fall within the exception for "manifest injustice." Pet. App. 16a. The court explained that, "[f]or most of the statements at issue, the [prior] panel could not find sufficient evidence that the government knowingly relied on false testimony in the first place." *Ibid.* "For the small subset of statements that remain," the court continued, "the panel determined, after citing to our binding precedent, that [petitioner] failed to show how the government either suppressed or capitalized on allegedly false testimony." *Ibid.* And the court found no grounds for reconsidering those determinations, because they were neither "clearly erroneous" nor "manifestly unjust." *Id.* at 16a-17a.

The court of appeals also affirmed petitioner's sentence. Pet. App. 7a-13a, 17a-21a.

ARGUMENT

Petitioner contends (Pet. 13-26) that the court of appeals applied an erroneous standard in rejecting his claim that the government relied on the purportedly false testimony of Jones and Woodbury to secure his conviction. The court correctly rejected petitioner's false-testimony claim, and its decision does not conflict

with any decision of this Court or another court of appeals. This Court has previously denied petitions for writs of certiorari presenting similar claims, including a prior petition filed by petitioner in this case raising substantially the same claim he raises now. 138 S. Ct. 556 (2017) (No. 17-250); see also *Villanueva-Rivera* v. *United States*, 553 U.S. 1019 (2008) (No. 07-9021). The same course is warranted here.

1. Citing this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), the court of appeals properly recognized in its earlier decision that a prosecutor's knowing use of materially false testimony, or his knowing failure to correct materially false testimony of a government witness, violates due process. Pet. App. 42a-43a; see *Napue* v. *Illinois*, 360 U.S. 264, 269-272 (1959). The court also correctly recognized that false testimony is "material" if "there is any reasonable likelihood that [it] could have affected the judgment." Pet. App. 42a (citation omitted); see *ibid.* (explaining that "[t]he could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt" (citation omitted)); *United States* v. *Bagley*, 473 U.S. 667, 679 n.9 (1985) (opinion of Blackmun, J.). The court of appeals properly found no violation of that established prohibition in this case. Pet. App. 25a-26a, 41a-51a; see *id.* at 14a-17a.

a. Petitioner's assertion that the court of appeals "twice acknowledged that the government knowingly relied on false testimony" is incorrect. Pet. 20 (emphasis omitted). In its 2017 opinion, the court explicitly determined that petitioner "failed to identify * * * any materially false testimony on which the government relied, purportedly in violation of *Giglio*." Pet. App.

25a-26a. That determination plainly encompassed the challenged testimony of Jones and Woodbury, which was the only allegedly false testimony discussed in the court's opinion. See *id.* at 49a-51a. And in its subsequent opinion in the present appeal, the court left its prior ruling unchanged, noting that the prior panel "already heard and squarely rejected [petitioner's] argument that the government knowingly relied on false testimony." *Id.* at 14a; see *id.* at 16a (referring to "*allegedly* false testimony" (emphasis added)).

In asserting (Pet. 21-22) that the court of appeals found that the challenged testimony of Woodbury and Jones was material, petitioner takes a statement made by the court that references only Jones (not Woodbury) out of context, see Pet. App. 49a. In the statement petitioner cites, the court simply observed that Jones's testimony "that she received no backup for the purchase orders" was more significant than her reference to "'phantom purchase orders.'" *Id.* at 49a & n.13. It did not declare that, for purposes of evaluating the due process claim, the testimony was material either with respect to Jones's entire testimony or to the trial as a whole. *Id.* at 49a.

b. The court of appeals' factbound determination that petitioner failed to show that the government relied on materially false testimony is correct and does not warrant this Court's review.

Petitioner contends that, because Jones and Woodbury both received the October 24, 2007, email with the Tribou check attached, Jones testified falsely when she described the purchase orders as "'phantom purchase orders'" and stated that she "'never received any backup or anything on them,'" and Woodbury testified falsely when he said that "petitioner was the sole source

for the information in the press releases." Pet. 7 & n.1 (citation omitted); see Pet. 21. Petitioner, however, cannot demonstrate that those statements were false, much less "perjured." *E.g.*, Pet. 2 (citation omitted). The record supports Jones's characterization of the purchase orders as "phantom purchase orders." With respect to Jones's statement concerning "backup," no evidence exists that she received any supporting documentation for the two IT Healthcare purchase orders. And in the absence of a clear connection between CHM and Thomas Tribou, Jones may not have considered the email and check to be bona fide "backup" for the CHM purchase order.

Similarly, no sound basis exists for finding that Woodbury lied when he stated that, in preparing Signalife's SEC filing for the third quarter of 2007, he "got all [his] information from [petitioner]." 5/7/13 Trial Tr. 96. Petitioner identifies no evidence that Woodbury relied on any other information in preparing that filing. Although Woodbury had received the email and check, he may not have considered them in connection with the filing; and even if he did consider them, Woodbury may not have viewed them as independent of the information he received directly from petitioner. Nor is there any reason to conclude that the prosecution should have considered the challenged testimony to be false. The prosecutors were aware that Thomas Tribou had denied having any connection with CHM; that petitioner had Tribou sign a blank purchase order; and that Tribou doubted he had written the purchase-order number on the check. Pet. App. 45a-46a & n.11.

In any event, any inaccuracy in the challenged testimony of Jones and Woodbury was not material. Acknowledgment that Jones and Woodbury received the

October 24, 2007, email and check could not have supported a plausible inference that the purchase orders were non-fraudulent. The email and check say nothing about the counts relating to the two fraudulent IT Healthcare purchase orders. And for the CHM order, while the email and check provide evidence that Thomas Tribou made a $50,000 payment to Signalife in exchange for goods Tribou expected to receive, the jury learned that fact through the parties' stipulation following petitioner's unsuccessful attempt to authenticate and introduce the email and check into evidence and his refusal to accept the government's offer to arrange for Tribou to testify at trial regarding any connection he had to CHM or the CHM purchase order. Acknowledgment by Jones and Woodbury that they saw the email and check would not have established that CHM existed, that CHM had any connection to Tribou, or that an entity called CHM made the purchase purportedly reflected in the purchase order. The court of appeals thus properly found that the prosecutor did not lie when he called the CHM purchase order "all made up" and "fake" in his closing argument. Pet. App. 47a-48a (citation omitted).

As the evidence showed and the government emphasized during its rebuttal closing, CHM, not Thomas Tribou, was listed as the purchaser on the purchase order; Tribou's contracts with Signalife did not even mention CHM; and, of particular significance, petitioner himself expressly denied in his SEC testimony knowledge of any connection between CHM and Tribou. See 14-15621 Gov't C.A. Br. 42; 5/20/13 Trial Tr. 117-118. And as the court of appeals correctly found (Pet. App. 48a), the record contains "overwhelming evidence that [petitioner] fabricated supporting documentation for the purchase orders"—including letters requesting

shipping address changes and containing "arbitrary names" and made-up addresses—and caused those letters to be sent to Signalife, all in an effort to maintain the false impression that the purchase orders were genuine. There is no reasonable likelihood that the jury would have viewed the CHM purchase order as non-fraudulent based on acknowledgement by Jones and Woodbury that they received the October 24, 2007, email and the Tribou check, much less that it would have concluded that petitioner's broader scheme involving the creation of numerous fictitious documents, fake addresses, and fictitious people, was not fraudulent.

c. Petitioner contends (Pet. 22) that materiality "is not an element of a false evidence claim." But he acknowledges (*ibid.*) that, even if it is not, such a claim is reviewed for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967). And "[t]he Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' and a rule 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Bagley*, 473 U.S. at 679 n.9 (opinion of Blackmun, J.) (quoting *Chapman*, 386 U.S. at 24). The outcome of petitioner's challenge to his conviction thus does not turn on the precise formulation or terminology used to evaluate his claim.

In contending (Pet. 21) that the challenged testimony constitutes reversible error, petitioner fails to address the extensive evidence detailing his fraudulent scheme, see, *e.g.*, pp. 7-8, *supra*. He relies instead on

two pieces of peripheral evidence that do nothing to undermine the verdict. First, he asserts that "Signalife received down payments for one of the sales made to IT Healthcare." Pet. 21 (citing Gov't Ex. 123, at 1). It is by no means certain that any individual gave Signalife a $12,500 deposit on the $564,000 purchase order. See 14-15621 Gov't C.A. Br. 8 n.4. Petitioner relies on a one-sentence reference in a "[t]entative and [p]reliminary" memorandum prepared by Signalife to establish this point. Gov't Ex. 123, at 1 (emphasis omitted). In any event, any such deposit that it might have received, like the $50,000 check provided by Tribou, would not undermine the "overwhelming evidence" demonstrating the fraudulent nature of the purchase orders. Pet. App. 48a.

Petitioner also relies on his assertion that Carter, his personal assistant, "lied to petitioner in connection with Signalife's sales efforts." Pet. 21; see Pet. 8 (citing 5/13/13 Trial Tr. 45). That assertion, however, rests on a single sentence in Carter's testimony in which he agrees that he tried to "impress" petitioner when he told him that his father-in-law was a doctor in the Philippines who "had contacts in Asia." 5/13/13 Trial Tr. 45. That testimony likewise does nothing to diminish the abundant evidence that petitioner, using Carter and others, masterminded the elaborate fraud upon which the charges on which he was convicted were based.

2. Petitioner contends (Pet. 22-26) that the court of appeals erred in its further statement that he could not establish a violation of *Giglio* based on the allegedly false testimony of Jones and Woodbury because he himself possessed the October 24, 2007, email and the Tribou check before and during trial but nonetheless failed

to challenge or clarify the testimony. That contention lacks merit and does not warrant further review.

a. Contrary to petitioner's contention (Pet. 22), nothing in *Napue* or in this Court's other decisions suggests that a defendant is entitled to a new trial where, as here, the defense had the means and opportunity to challenge purportedly false testimony at the time of its admission but did not object or attempt to challenge or clarify the testimony through cross-examination.[3]

Since *Napue*, the courts of appeals that have directly addressed the issue have held that, absent certain extenuating circumstances, "there is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." Pet. App. 43a (quoting *Routly* v. *Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994) (per curiam), cert. denied, 515 U.S. 1166 (1995)) (brackets omitted); see *United States* v. *Mangual-Garcia*, 505 F.3d 1, 10-11 (1st Cir. 2007), cert. denied, 553 U.S. 1019 (2008); *United States* v. *Helmsley*, 985 F.2d 1202, 1205-1208 (2d Cir. 1993); *United States* v. *Harris*, 498 F.2d 1164, 1170 (3d

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[3] Petitioner asserts (Pet. 8) that he "discovered" the October 24, 2007, email and check, "in the government's voluminous pretrial disclosures," only after Jones and Woodbury had testified. As the court of appeals observed, however, that assertion contradicts the record. "In fact," the court noted, "the record shows that [petitioner] located the email and the check before trial and even produced them to the government." Pet. App. 49a. Moreover, petitioner has not affirmatively stated that he was unaware of the existence of the $50,000 check, or that he was unaware that the $50,000 check had been provided to Signalife. Indeed, given that petitioner is the one who dealt directly with Thomas Tribou and obtained his signature on the "blank purchase order" that became the purported CHM purchase order, *id.* at 45a n.11, such claim would not be credible.

Cir.), cert. denied, 419 U.S. 1069 (1974); *United States* v. *Meinster*, 619 F.2d 1041, 1045-1046 (4th Cir. 1980); *United States* v. *Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Lochmondy*, 890 F.2d 817, 822-823 (6th Cir. 1989); *Evans* v. *United States*, 408 F.2d 369, 370 (7th Cir. 1969); *United States* v. *Crockett*, 435 F.3d 1305, 1317-1318 (10th Cir. 2006); *United States* v. *Iverson*, 648 F.2d 737, 738-739 (D.C. Cir. 1981) (statement of Greene, J., respecting denial of rehearing).[4]

The courts have based that general rule on the settled, common-sense proposition that "[a] defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create." *Harris*, 498 F.2d at 1170 (citation omitted); see

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[4] Courts have recognized that the general principle precluding a defendant from challenging false testimony to which he failed to object may be relaxed where "the defendant was prevented 'from raising or pursuing the [*Napue*] issue' at trial by 'circumstances essentially beyond his control.'" *Mangual-Garcia*, 505 F.3d at 11 (quoting *Iverson*, 648 F.2d at 739 (statement of Greene, J., respecting denial of rehearing)); accord *Ross* v. *Heyne*, 638 F.2d 979, 986 (7th Cir. 1980) (recognizing exception to waiver rule where defense counsel, unbeknownst to defendant, failed to correct false testimony because of conflict of interest). Courts, including the court below, have also relaxed the principle where the prosecution not only failed to correct perjured testimony, but also affirmatively capitalized on it. Pet. App. 43a (citing *DeMarco* v. *United States*, 928 F.2d 1074, 1076-1077 (11th Cir. 1991), and *United States* v. *Sanfilippo*, 564 F.2d 176, 178-179 (5th Cir. 1977)). None of those circumstances is present here. Although petitioner suggests (Pet. 17 n.4) that the prosecutor did capitalize on the allegedly false testimony, the court of appeals correctly reached the opposite conclusion. Pet. App. 49a. The government did not argue that the $50,000 check did not exist or even that there was no $50,000 deposit on the CHM purchase order, and "the prosecutor never mentioned Ms. Jones's statement that she received no backup for the purchase orders." *Id.* at 49a & n.13.

Evans, 408 F.2d at 370 (a defendant "cannot have it both ways" by withholding objection to false testimony, "gambling on an acquittal," and then raising the issue on appeal "after the gamble fails" (citation omitted)). And this Court has recognized the need to enforce rules that protect against that type of gamesmanship by a criminal defendant. See *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) ("[T]he contemporaneous-objection rule prevents a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." (internal quotation marks omitted)); *Davis* v. *United States*, 411 U.S. 233, 241 (1973) (construing former Federal Rule of Criminal Procedure 12's waiver rule for the untimely filing of certain pretrial motions).

Petitioner contends (Pet. 24-25) that the court of appeals "mistakenly merged the government's duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to provide exculpatory evidence with its distinct duty under *Mooney* [v. *Holohan*, 294 U.S. 103 (1935),] and *Napue* not to knowingly introduce false evidence" and, as a result, wrongly concluded that the government's compliance with its obligations under *Brady* necessarily relieved it of its "separate, wholly independent duty to refrain from seeking convictions through false evidence." Petitioner is mistaken. *Brady* and *Napue* both involved information that was not available to the defense at trial. See *Brady*, 373 U.S. at 84; *Napue*, 360 U.S. at 265. The Court in *Brady* described *Napue* as an "extension" of the rule from *Mooney* about when "nondisclosure by a prosecutor violates due process," and viewed all three decisions as involving application of the same principle.

Brady, 373 U.S. at 86-87 (citing *Napue*, 360 U.S. at 269).[5]

That principle, the Court has explained, "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87 (citing *Mooney*, *supra*); see *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). That principle does not support petitioner's approach, under which a defendant who possesses independent evidence can simply choose not to present it to the factfinder of truth and falsity—the jury—and instead rely on it to ask a court after the fact to find that a witness lied and the government knew about it.[6]

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[5] Although petitioner acknowledges (Pet. 25) that, "[w]hen the government improperly withholds evidence under *Brady*, but a defendant obtains that evidence through other means before trial, the trial itself is ultimately unaffected because the defendant is fully able to present the evidence in his defense," he asserts that, if "the government resorts to false testimony," that "necessarily distorts the trial." But the Court has never held that false testimony necessarily renders a trial unfair or that it requires automatic reversal. Indeed, *Napue* itself establishes that, even when the government knowingly uses perjured testimony, relief is unwarranted if there is no "reasonable likelihood [that the false testimony could] have affected the judgment of the jury." 360 U.S. at 271.

[6] Petitioner contends (Pet. 25-26 n.6) waiver is not at issue because he challenged the testimony of Woodbury and Jones in post-trial motions and on appeal. But the waiver occurred earlier, when petitioner chose not to raise a "contemporaneous[] objection" to their testimony at the time they gave it or, indeed, at any time during trial, when the court could have taken corrective action if necessary. *Puckett*, 556 U.S. at 134-135; see Fed. R. Crim. P. 51(b).

The logic of the Court's decision in *Giglio* is that the disclosure of impeachment evidence to the defense can alter the result of a trial in the defendant's favor by allowing the defense to use the information to contest the veracity of the government's witnesses before the jury. See 405 U.S. at 154. A defendant who in fact possesses all the relevant information, but fails to make use of it, cannot later complain that he did not receive a fair trial. Cf. *Briscoe* v. *LaHue*, 460 U.S. 325, 333-334 (1983) ("[T]he truth-finding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." (citation and internal quotation marks omitted)).

b. The court of appeals correctly identified (Pet. App. 41a-43a) the due-process standard applicable to this case.[7] In applying that standard, the court properly considered the defendant's access to the October 24, 2007, email and Tribou check in concluding that petitioner was not entitled to a new trial. *Id.* at 49a-50a.

Contrary to petitioner's assertion (Pet. 24), the court of appeals did not hold that the defense's possession of information demonstrating the purported falsity of testimony always forecloses relief. Rather, as petitioner acknowledges (Pet. 17 n.4), the court expressly recognized (Pet. App. 43a, 49a) that capitalization by the prosecution on testimony it knows to be false can warrant relief despite the availability of such information to the defense. Other decisions demonstrate that the

[7] The court of appeals correctly recognized that the materiality standard applicable to false testimony claims is "more defense-friendly than *Brady*'s." Pet. App. 42a (citation omitted); see *Bagley*, 473 U.S. at 679 n.9 (opinion of Blackmun, J.).

Eleventh Circuit will also take into account other extenuating circumstances, such as witness evasion or other barriers to exposing false testimony, when they arise in particular cases. See, *e.g.*, *United States* v. *Alzate*, 47 F.3d 1103, 1110-1111 (1995) (granting new trial where prosecutor's actions precluded defendant from exposing false statement during trial).

3. Petitioner cites (Pet. 14-16) several decisions in which lower courts have granted relief on false-testimony claims despite the defense's knowledge of the falsehood. But contrary to petitioner's assertion (*ibid.*), those decisions do not conflict with the decision below.

Unlike this case, each of the cases cited by petitioner in which relief was granted involved testimony or statements that the court considered to be materially false. See *United States* v. *LaPage*, 231 F.3d 488, 491 (9th Cir. 2000); *United States* v. *Foster*, 874 F.2d 491, 495 (8th Cir. 1988); *People* v. *Smith*, 870 N.W.2d 299, 305 (Mich. 2015); *State* v. *Yates*, 629 A.2d 807, 809 (N.H. 1993); *State* v. *Brunette*, 501 A.2d 419, 423-424 (Me. 1985); *People* v. *Lueck*, 182 N.E.2d 733, 733-734 (Ill. 1962).

Moreover, most of those cases also involved extenuating or other distinguishing circumstances that are not present here. See *LaPage*, 231 F.3d at 490 & n.5 (granting relief where the defense attempted to impeach false testimony but the witness thwarted that effort by "play[ing] games" with his prior testimony and where "prosecutor attempted to bolster [the witness's] credibility in his closing argument in chief by arguing that [he] was a credible witness"); *Foster*, 874 F.2d at 495 (granting new trial where prosecutor compounded witnesses' false testimony regarding immunity by persuading district court to give false answer to jury ques-

tion on same issue); *Yates*, 629 A.2d at 810 (finding defense's failure to correct did not undermine the claim where "prosecutor would have likely objected"); *Brunette*, 501 A.2d at 422 (granting relief where, despite defense objection, trial court's evidentiary rulings did not cure the presentation of the false testimony); *Smith*, 870 N.W.2d at 306-307 (granting new trial where prosecutor not only failed to correct testimony, but also repeatedly capitalized on it and "sought to transform testimony that might have been merely confusing on its own into an outright falsity").[8]

For similar reasons, the cases petitioner cites (Pet. 18) in which courts have "eschew[ed]" a "bright-line rule" and considered "'various factors'" in determining whether a due process violation has occurred, where the defense had the means and opportunity to challenge purportedly false testimony, do not squarely conflict with the court of appeals' decision. See *ibid.* (citing *United States* v. *Freeman*, 650 F.3d 673, 678-682 (7th Cir. 2011); *Jenkins* v. *Artuz*, 294 F.3d 284, 294-295 (2d Cir. 2002); *Gomez* v. *Commissioner of Corr.*, No. SC 20089, 2020 WL 3525521, at *8 (Conn. June 29, 2020); and *Hawthorne* v. *United States*, 504 A.2d 580, 591-593 (D.C. 1986), cert. denied, 479 U.S. 992 (1986)). Indeed, as discussed above, the views of both courts of appeals whose decisions petitioner cites as illustrative (the Second and Seventh Circuits) are closely aligned with the court of appeals here. See pp. 23-24, *supra*; *Freeman*,

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[8] The court in *Smith* expressly acknowledged that "a defendant can waive a claim of error under *Napue*" but declined to decide whether there was a waiver on the facts before it because "the prosecution ha[d] never argued in the course of th[e] appeal that the defendant waived his *Napue* objection." 870 N.W.2d at 306 n.7.

650 F.3d at 681 ("[W]e also weigh whether the defendants had an adequate opportunity to expose the false testimony on cross-examination.").[9] Petitioner thus fails to demonstrate a conflict among the lower courts that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020

[9] In another decision cited by petitioner (Pet. 3), the Ninth Circuit asserted that "the state has a constitutional duty to correct false testimony given by its witnesses, even when the defense knows the testimony was false but does nothing to point out such falsity to the jury or judge." *Soto* v. *Ryan*, 760 F.3d 947, 968 (2014), cert. denied, 576 U.S. 1025 (2015). But the court went on to reject the defendant's claim on the ground that the testimony in question did not create a "material[ly] false impression." *Id.* at 969. The court thus did not directly address whether the defendant's knowledge of the claimed falsity of the issue would have prevented the court from granting a new trial.