No. 20-326

In the

Supreme Court of the United States

MITCHELL J. STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Petitioner's conviction rests on false evidence introduced by the Government. The Eleventh Circuit affirmed that conviction only because it parted company with several other courts to hold that the Government may use false testimony to secure criminal convictions as long as it discloses evidence of the falsity to the defendant.

Faced with this disagreement over a vitally important constitutional protection, the Government engages mostly in obfuscation. Its efforts, however, fail at every turn. The facts and procedural history of this case squarely raise the constitutional question presented. The Government misreads the decisions that are in conflict with the decision below on that issue. And the Government is unable seriously to defend the decision below. It invents a due process rule that turns on "certain extenuating circumstances," BIO 23, but that made-up rule lacks any toehold in constitutional text, history or precedent. It is not even clear what the Government's rule means.

This Court's intervention is badly needed. The Court should grant certiorari and reverse.

1. *Vehicle*. It is telling that the brief in opposition puts most of its energy into avoiding the question presented, arguing instead that the testimony at issue was neither false evidence nor "material." BIO 17-22. Unfortunately for the Government, the Eleventh Circuit has already acknowledged that the evidence was false, and the Government's harmless-error argument provides no reason to deny review.

a. The Eleventh Circuit explained that the Government "knowingly relied on false testimony" with respect to a "subset of statements"—namely, the testimony of Jones and Woodbury that they received no back-up for the CHM purchase order. Pet. App. 16a. The court of appeals rejected petitioner's due process challenge to the Government's use of that false evidence solely on the ground that he "failed to show how the government either suppressed or capitalized on" it. *Id.*

Ignoring this acknowledgment and reasoning, the Government recites the Eleventh Circuit's statement in the introduction of its prior opinion that petitioner had "failed to identify . . . any materially false testimony." BIO 17-18 (quoting Pet. App. 25a-26a). The Government contends that remark "plainly encompassed" the testimony of Jones and Woodbury. BIO 18. But the Eleventh Circuit's actual analysis of that testimony in its first opinion *nowhere* held it was truthful. *See* Pet. App. 49a-50a. To the contrary, the Eleventh Circuit took for granted that the testimony was false. *See id.* Lest there be any doubt, the court of appeals made clear in its follow-up decision—that is, the decision that petitioner now asks this Court to review—that this "subset" of the Government's evidence was indeed false. *Id.* at 16a.

b. Much as the Government tries to obscure the legal standard that governs relief for false-evidence violations, it cannot—and does not—dispute that the introduction of false evidence "requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." BIO 17 (citation omitted); *see also* BIO 21. Before

Chapman v. California, 386 U.S. 18 (1967), this Court described that standard in terms that bespoke a "materiality" requirement. *See United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (opinion of Blackmun, J.) (tracing evolution of the standard). Like some other lower courts, the Eleventh Circuit still uses the "materiality" shorthand today in the context of false-evidence claims. *See, e.g.*, Pet. App. 42a. The Government uses the same shorthand here. BIO 19. But the use of that label should not mask two critical things: (i) due process is violated *whenever* the Government knowingly introduces false evidence, and (ii) a conviction must be reversed when the Government transgresses this rule unless it carries its burden of showing that the error was harmless beyond a reasonable doubt. *See* Pet. 22.[1]

With the proper framework firmly in mind, it is plain that the Eleventh Circuit has never found the Government's introduction of the evidence at issue to be harmless. If anything, the Eleventh Circuit has found the opposite, describing Jones's false "statement that she received no backup for the purchase orders" as "the material aspect of her testimony." Pet.

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[1] This framework for assessing false-evidence claims stands in sharp contrast to the due process rubric established in *Brady v. Maryland*, 373 U.S. 83 (1963), for assessing evidence-suppression claims. The latter folds "materiality" into the due process framework itself and defines "materiality" in substantially more demanding terms than the *Chapman* standard. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 289-90 (1999) (*Brady* claim fails even where evidence that was suppressed was "prejudicial in the sense that" its admission "might have changed the outcome of the trial").

App. 49a n.13. At any rate, this Court's "normal practice" when confronted with harmless-error arguments is to resolve the question presented and then "remand th[e] case to the" court below "to consider in the first instance whether the [particular] error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999). The Government offers no reason to depart from that practice here.[2]

2. *Split*. Earlier this year, the Connecticut Supreme Court explained that federal courts of appeals and state courts of last resort are "fragmented" over "whether due process is offended if the state knowingly presents the false testimony . . . but also discloses the truth regarding that [testimony] to defense counsel." *Gomez v. Comm'r of Corr.*, __ A.3d __, 2020

[2] The Court can rest assured that petitioner will be able to show prejudice on remand. *See* Pet. 21. The Government acknowledges that some evidence indicates Signalife received payment for another of the three purchase orders. BIO 22. That renders Jones and Woodbury's false testimony about CHM critical: If Signalife received payment on two of the three purchase orders, the Government's case against petitioner is much weaker. Pet. 21. Contrary to the Government's retort (BIO 20), the stipulation about Tribou's check did not cure the false testimony. The stipulation was read to the jury more than a week after Jones and Woodbury testified. *Compare* DE247, at 71:8-10 (stipulation on May 16); *with* DE240, DE241 (Jones and Woodbury testimony on May 7 and 8). And it informed the jury only that Tribou "paid Signalife $50,000 for goods he expected to receive," without connecting his check to the CHM order, Pet. App. 45a—a point the prosecution highlighted in its rebuttal closing argument, DE248, at 113:15-115:18. Finally, while the Government relies on Carter's testimony to bolster its case, BIO 7-8, 21-22, it is undisputed that Carter received a lenient sentence for his testimony, Pet. 8, and had already proven an unreliable witness because he lied in his testimony to the SEC, BIO 7.

WL 3525521, at *7 (Conn. June 29, 2020). The Government offers no meaningful rebuttal to this reality.

a. Given that the Eleventh Circuit did *not* find that the evidence in this case was truthful or "immaterial," it is no answer to say—as the Government does—that the cases the cited at Pet. 14-16 are distinguishable on the ground that the evidence in those cases was "materially false," BIO 28. Again, the question presented here is whether the Due Process Clause excuses the Government's knowing use of false testimony in a criminal prosecution when the prosecution divulged evidence during discovery indicating that the testimony was false. Pet. i. The Eleventh Circuit says yes. But the cases cited at Pet. 14-16 say no, holding that a due process violation occurs even with disclosure.

The Government makes no further (and, therefore, no genuine) attempt to distinguish *People v. Lueck*, 182 N.E.2d 733 (Ill. 1962). Nor could it. The Illinois Supreme Court held there that the prosecution's use of false evidence violated the defendant's due process rights, *id.* at 733-34, even though "the fact that false testimony was being given was known to the defense at the time of trial, and the means of combatting the false testimony were available at the trial," *id.* at 734 (Hershey, C.J., dissenting). This holding alone—which would have required a reversal here—confirms the existence of a conflict on the question presented.

The Government tries to distinguish the rest of the group of cases discussed at Pet. 14-16 on the basis that they all "involved extenuating or other distinguishing circumstances," BIO 28-29. But that attempt fails as well. The words "extenuating circumstances"

appear nowhere in any of these decisions. Instead, those courts all held categorically that "[t]he fact that defense counsel was also aware of the" falsity of the Government's evidence "but failed to correct" it "is of no consequence." *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988); *see* Pet. 14-16 (discussing other cases).

In any event, the circumstances in those cases were no more "extenuating" than here. For example, the defendant in *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000), tried to impeach the false testimony, but was unable to do so because defense counsel did not ask the lying witness the right question. *Id.* at 490 & n.5. Likewise here, petitioner tried to impeach Jones and Woodbury, but he was unable to do so because the Government objected on hearsay grounds. Pet. App. 45a. And here, as in *LaPage*, the Government relied on the false testimony during its closing arguments. *See* Pet. 8-9; *LaPage*, 231 F.3d at 490. If anything, the circumstances in *LaPage* were *less* problematic than here: In *LaPage*, the prosecutor "conceded" to the jury "that [the witness] had lied," 231 F.3d at 490-91, but the Government made no such concession before petitioner's jury.

Similarly, the Government says that *State v. Yates*, 629 A.2d 807 (N.H. 1993), involved "extenuating circumstances" because the prosecution "would have likely objected" to any attempt to cross-examine the lying witness. BIO 29. But the prosecutor in petitioner's case *did* object to petitioner's effort to introduce evidence of the falsity of the Government's proof. Pet. App. 45a.

b. The Government fares no better suggesting (BIO 29-30) that petitioner would not necessarily have prevailed under the multi-factor approach that certain other courts use to analyze false-evidence claims. As the petition explains, the "most important" factor under the multi-factor approach is "whether the truth ultimately is revealed to the jury." *Gomez*, 2020 WL 3525521, at *8; *see* Pet. 18-19. There was no such disclosure here. *See* Pet. 18-19. Accordingly, the Government does not even try to distinguish *Gomez* or *Hawthorne v. United States*, 504 A.2d 580, 591-93 (D.C. 1986)—once again effectively conceding the existence of a conflict on the question presented.

The Government notes that in *United States v. Freeman*, 650 F.3d 673, 678-82 (7th Cir. 2011), the Seventh Circuit "weigh[ed] whether the defendants had an adequate opportunity to expose the false testimony on cross-examination." BIO 30 (quoting *Freeman*, 650 F.3d at 681). Even if that were all *Freeman* considered, it would not distinguish that case from this one: Petitioner did not have an adequate opportunity to cross-examine Jones or Woodbury about their false testimony because the Government's hearsay objection precluded him from doing so. *See* Pet. 8. In any event, *Freeman* and *Jenkins v. Artuz*, 294 F.3d 284, 294-95 (2d Cir. 2002)—which the Government suggests is of the same ilk, BIO 29—considered a variety of factors in evaluating false-evidence claims, and petitioner would have prevailed under their multi-factor tests. *See* Pet. 18. Indeed, in *Freeman*—just as in this case—defense counsel tried to rebut the false testimony, but the prosecution's objections

"muted" that effort, and a "stipulation" to the jury "did not cure the false testimony." 650 F.3d at 681.

All told, there can be no denying that there is a three-way, deeply entrenched disagreement among the federal courts of appeals and the state courts of last resort on the question presented. This Court's intervention is sorely needed.[3]

3. *Merits*. "The most rudimentary" tenet of due process is that the prosecution may not knowingly use false evidence to obtain a conviction. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Napue v. Illinois*, 360 U.S. 264 (1959)). That being so, the Government is apparently unwilling to defend the categorical rule—adopted by some courts, *see* Pet. 17—that the prosecution may use false testimony at trial so long as it discloses evidence to the defense showing the testimony's falsity. Instead, the Government contends that the correct rule is 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.'" BIO 23 (quoting Pet. App. 43a) (emphasis added). There are two major problems with this contention.

First, the Government provides no basis in constitutional text, history or precedent for its freewheeling and wholly indeterminate "certain extenuating circumstances" test. Nor does any such basis exist. The prosecutor "has the responsibility and duty to correct

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[3] The State has apparently decided not to seek certiorari in *Gomez*. *See* Pet. 18 n.5. The 150-day period for doing so ends on November 27, 2020.

what he knows to be false and elicit the truth." *Napue*, 360 U.S. at 270. Failure to do so "prevent[s] . . . a trial that could in any real sense be termed fair." *Id.* There are no exceptions: "[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 (emphasis added).

This rule is uncompromising for good reason: Even when a defendant knows that the Government has introduced false evidence, he often cannot effectively counter it. Jurors are generally less likely to believe defense counsel than prosecutors; the evidence demonstrating falsity may be inadmissible for one reason or another; or the defendant may be unable to show the falsity of the Government's proof without waiving his Fifth Amendment rights. *See* Pet. 22-24. And the Government's "use of false testimony" threatens not only "a defendant's constitutional right to due process of law," but also "the basic integrity of the judicial proceedings." *State v. Brunette*, 501 A.2d 419, 423 (Me. 1985). Government-sponsored false evidence in criminal proceedings fundamentally undermines public confidence in its ability "to govern impartially" and ensure "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Second, the Government's reference to whether a defendant purposely "fails to object"—or, as the Government puts it elsewhere, engages in "gamesmanship," BIO 25—is beside the point in cases like this one. *Napue* claims may well be subject to waiver in certain circumstances. But the Eleventh Circuit most certainly did *not* find waiver here. The Government

never even asked it to do so (presumably because petitioner expressly *objected* to the prosecution's use of false evidence). *See* Pet. 8-9, 25-26 n.6; CA11 Gov't Br. 18-34 (2019); CA11 Gov't Br. 30-64 (2015). Instead, the Eleventh Circuit held, based on "the absence of government suppression of the evidence" of falsity, that there was "no . . . violation" of the Due Process Clause. Pet. App. 49a; *accord id.* at 16a.

That constitutional holding—free and clear of any semblance of waiver—frames the question presented. The Court should grant certiorari to answer it.

* * *

Petitioner was convicted of the federal crimes at issue here in 2013. He has now spent more than seven years seeking a new trial based on the Government's knowing reliance on false evidence to procure these convictions. In two decisions, the Eleventh Circuit has blocked petitioner's effort. And when pressed to defend the Eleventh Circuit's holding, the Government has continually bobbed and weaved—even to the point of now imagining out of whole cloth a "certain extenuating circumstances" test with no discernable boundaries (partly because it has never been enunciated in a single court decision), and no foundation in first principles.

Enough is enough. The truth matters in criminal trials. More specifically, "the rudimentary demands of justice" forbid the prosecution from deceiving the "court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Insofar as the Government is unwilling in this case to face up to the seriousness of that

prohibition, that is all the more reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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