No. 21-440

IN THE

Supreme Court of the United States

MIGUEL ANGEL SANTANA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the Maryland Court of Special Appeals

BRIEF OF *AMICI CURIAE* DUE PROCESS INSTITUTE, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, THE CATO INSTITUTE, AND INNOCENCE PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, it creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Since its founding, Due Process Institute has participated as an *amicus curiae* in a host of state and federal cases presenting critically important criminal legal issues. Ensuring prosecutorial accountability—squarely presented by the question raised in this case—is one of the Due Process Institute's top priorities.

The National Association for Public Defense ("NAPD") is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents state, county, and local systems through

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[1] Counsel for *Amici* provided notice to the parties of their intent to file an *amicus* brief on October 12, 2021, giving ten days advance notice. The parties have consented to the filing of this brief and attached hereto are their letters of consent. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models.

In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Innocence Project is a nonprofit organization established in 1992, which is dedicated to providing pro bono legal services to people whose actual innocence may be established through post-conviction evidence.

The Innocence Project has represented hundreds of exonerees, proving actual innocence in 192 cases with irrefutable DNA evidence. In approximately half of these cases, the exoneration litigation helped reveal the true perpetrators.

The Innocence Project is, accordingly, well familiar with how often wrongful convictions are obtained through the suppression of *Brady* information and/or the presentation of false testimony by the prosecution. Nearly three decades of exoneration data show, for example, that false jailhouse informant testimony is the leading cause of wrongful convictions. *See DNA Exonerations in the United States*, Innocence Project (lasted visited Oct. 21, 2021), https://innocenceproject.org/dna-exonerations-in-the-united-states/. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives both serve as an important check on the awesome power of the state over accused citizens and help ensure a safer and more just society. As perhaps the nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld, are regularly consulted by officials at the state, local, and federal levels.

Accordingly, the Due Process Institute, NAPD, the Cato Institute, and Innocence Project have strong interests in the issues raised in this case and fully support the grounds for certiorari identified by Petitioner.

As Petitioner has detailed, this case presents a concrete federal and state court split on an important constitutional issue, and the Maryland Court of Special Appeals' decision is on the wrong side of that split. Moreover, the subject of the falsehood—the substance of what prosecutors actually promised a cooperating witness in exchange for his or her testimony—is of critical importance, as it is one that, in our experience, is often obscured and/or concealed.

This Court's jurisprudence, and basic principles of fairness and due process, reject such a proposition.

The Due Process Institute, NAPD, the Cato Institute, and Innocence Project write separately as amici curiae only to provide additional discussion, from the perspective of the indigent criminal defense bar and the bi-partisan perspective of groups committed to the fair application of due process, about the importance of the issue and the practical implications of the Maryland Court of Special Appeals' rule if left unchecked.

SUMMARY OF ARGUMENT

Petitioner's case asks a basic but fundamental question: Will our criminal justice system permit convictions obtained through the knowing use of false testimony to stand, simply because the prosecutor has disclosed the falsity of the testimony to defense counsel? The Maryland Court of Special Appeals answered this question in the affirmative, but for decades this Court has known a very different justice system, one in which the knowing, uncorrected use of false testimony by the prosecutor could never be countenanced. And for good reason. As this Court has long recognized, the knowing use of false testimony is "as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

The manner in which the minority position, as applied by the Maryland Court of Special Appeals,[2]

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[2] As explained in the petition, there is a circuit split involving sixteen federal and state courts over what satisfies the government's obligation under *Napue* to correct material, false

undermines the integrity of the criminal justice system becomes especially acute when considering the overwhelming burdens and obstacles that the indigent defense bar encounters in striving to fulfill their constitutional and ethical duties to clients. While this case involved pro bono counsel, most defenders throughout the United States receive appointed counsel, generally public defenders. Public defenders throughout this country perform a noble and often heroic function, providing adversarial representation for the people of the United States, "one at a time." *See Kaley v. United States*, 571 U.S. 320, 358 (2014) (Roberts, J. dissenting) ("Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time."). What's more, they do so in the vast majority of criminal cases. *See, e.g.*, Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Defense Counsel in Criminal Cases* 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf (estimating that eighty-two percent of criminal defendants facing felony charges cannot afford to hire counsel).

Even a well-funded defense is at a disadvantage to the government, particularly when faced with last-minute disclosures. And unfortunately, in many jurisdictions the indigent defense bar must perform these functions despite

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testimony after it is presented. The Maryland Court of Special Appeals has adopted the minority position held by the First, Fourth, and Tenth Circuits that the government satisfies its obligation to correct false testimony by disclosing the falsity of the testimony to defense counsel. *See* Pet. for Writ of Cert. at 2–3 (Sept. 20, 2021).

overwhelming caseloads and extreme underfunding. Such conditions are simply not conducive to a rule like the Maryland Court of Special Appeals', which shifts ultimate responsibility from the prosecution, which is the party in the best position to correct the false testimony at trial, to the defense, which is the party that discovers the falsity of the testimony only after it has been heard by the fact finder. This is especially true when the false testimony involves a leniency or immunity agreement—or lack thereof—between the government and a key witness. *See Giglio v. United States*, 405 U.S. 150, 154–55 (1972). Liberty is perhaps the strongest motivating force for any witness (or for any person) and thus it is critical for jurors to hear truthful testimony about such an agreement or the lack thereof. *See* Christopher T. Robertson, D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. Pa. J. Const. L. 33, 35 (2017) (stating that "immunity or charge bargaining can be profoundly valuable to the witness, amounting to years of liberty"). On this subject, in particular, when false testimony is introduced by the prosecution, it is critical that the prosecutor correct it immediately and transparently, not shift such responsibilities to the defense. *Giglio*, 405 U.S. at 154 ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

Such a shift also threatens to divorce prosecutors from their historic obligation to seek justice, not convictions. Amici has no doubt that the problem Petitioner identifies is not the norm; most prosecutors would not think of refusing to correct false testimony. But for those prosecutors who have—and would—the consequences should be clear: any resulting conviction will be reversed unless the jury hears the truth.

The Maryland Court of Special Appeals decision undermines the long-standing principles that have governed the heightened ethical obligations that have traditionally accompanied prosecutorial powers in our system. Most importantly, this rule deprives defendants of the fairness and due process that the Constitution guarantees and that common sense requires.

Put simply, prosecutors have great power, and with that power comes a great responsibility to ensure that convictions are the product of an honest, fair, and just process. The Maryland Court of Special Appeals' rule allows prosecutors to pass that responsibility off to defense counsel and discourages prosecutors from discharging their responsibilities in an ethical, fair, and transparent manner. For these reasons, *Amici* respectfully submit that this Court should grant the petition and hold that the minority position, as applied by the Maryland Court of Special Appeals, is fundamentally inconsistent with both the integrity of the criminal justice system and prosecutors' historic role in that system.

ARGUMENT

I. THE MINORITY POSITION ADOPTED BY THE MARYLAND COURT OF SPECIAL APPEALS PLACES THE BURDEN TO DETECT AND CORRECT FALSE TESTIMONY ON THE WRONG PARTY

Prosecutors should never be permitted to obtain a conviction through the knowing use of false testimony. Under the minority's rule, a prosecutor can potentially avoid reversal by making a last-minute disclosure that places the burden on defense

counsel to correct the testimony. Such a rule is inconsistent with the fundamental guarantees of fairness and due process. First, it places the burden on the defense, including underfunded public defenders, to correct a prosecutor's knowing use of false testimony, and is thus much less likely to be effective in ensuring the integrity of criminal trials. Second, this rule enables—and incentivizes—a prosecutor to circumvent the duty to correct false testimony and sends a message that that the knowing use of false testimony will have no consequences whatsoever. This is a prescription for injustice.

This is particularly true when the false testimony involves a leniency or immunity agreement or lack thereof between the government and its key witness.[3] In 1972, this Court ordered a new trial when the government failed to disclose a promise of leniency to its key witness, without whom "there could have been no indictment and no evidence to carry the case to the jury." *Giglio*, 405 U.S. at 154. The Court found that due to the importance of the witness's credibility, the jury was "entitled" to know of the agreement, the nondisclosure of which "justifies a new trial irrespective of the good faith or bad faith of the prosecution." *Id.* at 153–55 (internal citations and quotations omitted); *see also United States v. Bagley*, 473 U.S. 667, 690–91 (1985) ("[E]vidence of [a key] witness' possible bias simply may not be said to be irrelevant, or its omission harmless.").

The prosecutor's ability to grant leniency or immunity is "perhaps the most prevalent, troubling,

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[3] One of the "undisputed facts of the case" is that out of thirty-six government witness, Brawner was the only witness to identify Petitioner as involved in the crime at issue. *See* Pet. for Writ of Cert. at 5, 19.

and uncontrollable category of abusive exercise of prosecutorial power." Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 Temp. L. Rev. 887, 928 n.197 (1998). Even without being "explicit and outrageously coercive," the promise of freedom in exchange for testimony has the ability to affect that testimony, particularly when negotiation occurs outside of judicial supervision. *Id.*; Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 V. and L. Rev. 1, 35 (1992) ("A promise of leniency in exchange for cooperation surely enhances . . . [the] natural tendency to lie."). The prosecutor's ability to influence testimony must be checked by requiring full disclosure of agreements or their absence to the court and jury, and by correction of such information when the prosecutor knows that what the jury has heard is false. *See id.* at 33 (stating that a defense counsel's summation that a witness may give false testimony "when their liberty may depend on it . . . is not a substitute for a charge by the court").

To be sure, *Amici* do not believe that defense counsel will acquiesce to a prosecutor's knowing use of false testimony or will forego serious efforts to correct it. Indeed, *Amici* have no doubt that defense counsel will vigorously attempt to correct false testimony when they know about it or when they learn enough to suspect it. But, as demonstrated below, defense counsel will often be in a poor position to do so.

A defense lawyer will nearly always be in the dark when a prosecutor knowingly presents false testimony. And exposing such errors is often difficult or impossible because indigent defense systems

around the country, which are responsible for representing the majority of criminal defendants, often suffer from inadequate resources and unreasonably high (sometimes shockingly high) caseloads. These factors suggest that the current system, in which the duty to correct remains with the prosecutor, is the much more effective and fair one. The minority's misguided rule, if anything, makes it more likely that criminal trials and convictions will be tainted with unfairness and characterized by injustice, regardless of the defendant's resources. In situations where indigent defendants are represented by underfunded and often overworked public defenders, this result is all but certain.

The defense bar cannot—and should not—bear the burden of combating false testimony that the prosecution has already admitted is false. By excusing a prosecutor's knowing use of false testimony when the prosecutor has disclosed its falsity to only the defense attorney, the minority position places the burden on the wrong party and devalues the ethical obligations prosecutors must uphold when seeking a conviction.

Put simply, the minority position's rule enables prosecutors to say, "yes, I knowingly used false testimony to mislead jury, but I'm not responsible for telling them that." Shifting the burden to defense attorneys leaves the defense attorney with little ability to distinguish for the jury between testimony that is disputed and testimony that the prosecutor agrees is false. The minority's approval of these last-minute disclosures also allows prosecutors an option that keeps the jury from learning the truth, but protects against reversal of any resulting conviction. Under the *Napue* due process protections, a

prosecutor who fails to affirmatively correct false testimony before the jury must show beyond a reasonable doubt that the false testimony could not have impacted the outcome. *U.S. v. Agurs*, 427 U.S. 97, 103 (1986). Under the minority rule, however, a prosecutor's last-minute disclosure to the defense but not the jury shifts the focus of any failure-to-correct error to the defense, and would presumably be reviewed under the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 669 (1984). This higher standard for reversal makes it more likely that convictions based on uncorrected false evidence would be allowed to stand. Due process and basic guarantees of fairness require much more.

A. The indigent defense bar is chronically underfunded across the United States.

Public defense systems suffer from chronic underfunding. For example, in 2009 alone, 37 states experienced significant shortfalls in public defense by mid-year. *See* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 59 (Apr. 14, 2009) ("*Justice Denied*"), https://constitutionproject.org/documents/justice-denied-america-s-continuing-neglect-of-our-constitutional-right-to-counsel/. These budgetary shortfalls have caused many public defender offices to drastically reduce funding, staff, and resources. *See id.* at 59–60.

On average, spending on prosecution is three times higher than on public defense. *See* William D. Lawrence, *The Public Defender Crisis in America:* Gideon*, the War on Drugs and the Fight for Equality*, 5 U. Miami Race & Soc. Just. L. Rev. 167, 177 (2015).

In fact, in 2008, spending on prosecution and corrections overshadowed spending on public defense by a ratio of 14:1. *See id.* at 178. Similarly, a study of Kentucky's funding in 2005 found that spending on indigent defense tallied $56.4 million, while prosecutorial spending on indigent cases alone amounted to $130–$139 million. *Justice Denied* at 61. Likewise, a study in California found that, in 2006–2007, indigent defense services were underfunded by at least $300 million. Further exacerbating this problem, the funding gap between prosecution and indigent defense in California grew 20% between 2003–2004 and 2006–2007. *See id.*

Because jurisdictions across the country suffer from comparable resource disparities and excessive workloads, the implications of the Maryland appellate court's ruling are far-reaching. Yet another stark illustration of the public defense crisis comes from Missouri, which ranks 49th in state funding for public defense. In the face of crippling staff shortages, the Director of the state public defense system appointed then-Governor Jay Nixon to serve as indigent defense counsel. Matt Ford, *A Governor Ordered to Serve as a Public Defender*, The Atlantic (Aug. 4, 2016), https://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/. While largely a symbolic gesture, the move was a public cry for help by a system facing crisis-level funding deficits and unmanageable caseloads.

Ultimately, the dire situation facing public defender systems—as evidenced by underfunding and extraordinary caseloads—has led public defense lawyers to repeatedly seek relief from the courts. *See, e.g.*, *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *Pub. Def. v. Florida*, 115 So.

3d 261 (Fla. 2013); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 599–601 (Mo. 2012); *Simmons v. State Pub. Def.*, 791 N.W.2d 69, 89 (Iowa 2010). It is also an unmistakable sign that public defenders face difficult obstacles when striving to ensure the fairness and integrity of the criminal justice process. The Maryland Court of Appeals' rule increases the likelihood that these difficulties will become insurmountable, and that no remedy will exist when a prosecutor knowingly uses false testimony to secure a conviction.

B. Crushing caseloads prevent thorough investigation by the indigent defense bar.

The American Bar Association standards call for reasonable caseloads for indigent defense counsel, acknowledging explicitly that the quality of defense suffers significantly as caseloads increase. *See* Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of A Public Defense Delivery System* 3 (Feb. 2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf. Yet in many jurisdictions, workloads are so onerous that the right to counsel exists merely in the abstract. *See* Christopher Campbell, Ph.D., *et al.*, *Unnoticed, Untapped and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 Behav. Sci. & L. 751, 753 (2015).

For example, in Brevard County, Florida, the 18 public defenders handling felony cases each worked 433 felony cases, nearly tripling the 150-case limit suggested by the National Association of Chief Defenders decades ago and rising to three times the standard suggested by recent workload studies in

other jurisdictions. *See* Andrew Ford and J.D. Gallop, *Public Defenders Struggle to Stay Ahead: Brevard's Public Defender Face Long Days, Low Pay, and an Overwhelming Caseload ("Brevard Public Defenders")*, Florida Today (Jul. 12, 2014), https://www.floridatoday.com/story/news/local/2014/07/12/public-defenders-struggle-to-stay-ahead-ofcaseloads-and-stress/12569621/; Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 Ohio State J. Crim. L. 403, 423 (2017). Public defenders handling misdemeanors had 810 cases per attorney, which is double the recommended 400 misdemeanor cases per attorney. *See* Ford and Gallop, *Brevard Public Defenders.* And in Dade County, Florida, average caseloads rose in recent years from "367 to nearly 500 felonies and from 1380 to 2225 misdemeanors." *Justice Denied* at 68. What's more, these skyrocketing caseloads occurred in the face of a 12.6% budget reduction. *See id.*

These crushing caseloads have led defenders in some jurisdictions to refuse additional cases. *See also Justice Denied* at 68 (describing response in 2006, when six misdemeanor attorneys in Knox County, Tennessee, had to handle "over 10,000 cases, averaging just less than one hour per case.").

To make matters worse, staffing levels are also on unequal footing, with state prosecutors typically enjoying more—and higher paid—staff than public defense institutions. *Id.* at 61–63. For example, prosecutors in Cumberland, New Jersey, have over seven times the investigative staff on hand than do their indigent defense counterparts. *See id.*

Beyond legal staffing, the public defense bar has far fewer critical support services than prosecutors, even though prosecutors have built-in

investigative support in law enforcement agencies. *See id.* Prosecutors also benefit from state and federal resources such as crime labs, expert witnesses, and special investigators. *See id.* In contrast, public defenders must often carve resources from already emaciated budgets for these functions or seek prior approval from the court, which is often denied. *Id.* These disparities demonstrate that the deck is stacked against indigent defense counsel who strive to provide effective assistance to criminal defendants and ensure the fairness of a criminal trial. The minority's rule makes it more likely—if not certain—that public defenders will be unable to achieve these salutary objectives.

The rule adopted by the Maryland Court of Special Appeals is a dangerous and misguided legal standard that makes unfairness in the criminal justice process more likely and unaccountability in the prosecution of criminal defendants all but certain. The burden of correcting false testimony should be placed on the shoulders of the attorneys who, by definition, know the testimony is false and are constitutionally charged with a duty to seek justice: prosecutors.

II. EXCUSING PROSECUTORS' INTRODUCTION OF FALSE TESTIMONY UNDERMINES PROSECUTORIAL ETHICS

The minority position as adopted by the Maryland Court of Special Appeals not only threatens the integrity of the trials infected by the knowing presentation of false testimony, but also sends a larger message that threatens to infect the entire criminal justice system. After all, the integrity of the criminal justice system depends, in large part, on

public faith in the integrity of prosecutors. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is fair to say that the average jury . . . has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."). Indeed, prosecutors make important decisions every single day about who gets charged, who gets prosecuted, who goes to jail, and who goes free. For this reason, the Court has said for a century that United States attorneys are not mere advocates but servants of justice. *See id.*; *Matter of Kurtzrock*, 192 A.D.3d 197, 219 (N.Y. App. Div. 2020) ("Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all.") (citations omitted). The high ethical standards imposed on prosecutors by our adversarial system are particularly important when a defendant is indigent and relies on public defense for representation. The minority position allows prosecutors to evade these standards at their convenience and to prioritize the securing of convictions over the necessity of ensuring justice.

A. The criminal justice system imposes high ethical standards on prosecutors because they are servants of the law.

Prosecutors have a special role in the United States criminal justice system. As the Court explained in *Berger v. United States*, a federal 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[.]" 295 U.S. at 88. The prosecutorial role—and therefore duties—is distinct

from the defense attorney's role. A defense attorney in the criminal justice system is an officer of the court, but not a "servant of the law" in the "peculiar" and "definitive" sense that a prosecutor is. *Id.* In short, prosecutors are obligated to seek justice, not convictions at any cost. *See McMillian v. State*, No. 610, 2021 WL 3788950 (Md. Ct. Spec. App. Aug. 26, 2021) ("[T]he State should not just be in the business of obtaining guilty verdicts . . . . [T]here is a special role played by the American prosecutor in the search for truth in criminal trials.") (internal quotations and citation omitted).

The ethical standards for prosecutors and criminal defense attorneys reflect this difference. Because a prosecutor serves the public and has no individual client, her duty is that "justice shall be done." *Id.* In contrast, a criminal defense attorney's duty is to her client, protecting the client's legal rights in a complex system. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also* Criminal Justice Standards for the Defense Function, § 4-1.2 (Am. Bar Ass'n 4th ed.). In essence, our adversarial system depends on both the advocacy of defense counsel and the independent duty of the prosecutor to seek justice.

Moreover, as officers of the court, both defense counsel and prosecutors owe duties of candor to the court, but the nuances of those duties differ because of the prosecutorial powers in the adversarial system. Specifically, while ethical standards recognize that defense counsel's duty of candor must be "tempered" in some cases by "competing ethical and constitutional obligations," the prosecution has no such competing interest. *Compare* Criminal Justice Standards for the Defense Function, § 4-1.4 (Am. Bar Ass'n 4th ed.) *with* Criminal Justice Standards for the

Prosecution Function, § 3-1.4 (Am. Bar Ass'n 4th ed.). Thus, prosecutors have a "heightened" duty of candor, precisely because of their role as a servant of the public. *See Id.* This duty of candor prohibits prosecutors from making statements of "fact or law, or offer[ing] evidence, that the prosecutor does not reasonably believe to be true[.]" *Id.* § 3-1.4(b). Likewise, prosecutors have further ethical duties to correct false evidence or testimony when they have introduced it. *Id.* § 3-6.6(c). The minority position transforms this duty from mandatory to optional with no consequences—except for criminal defendants.

At bottom, prosecutors have an unflagging duty to seek justice, and "[i]t is as much [their] duty . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. The minority position disregards these principles and makes it more, not less, likely that prosecutors will use "improper methods calculated to produce a wrongful conviction." *Id.*

B. Permitting prosecutors to knowingly use false testimony undermines prosecutorial ethics and contributes to a culture of corruption.

Lowering the standards imposed on prosecutors threatens the integrity of the criminal justice system because prosecutors will have limited consequences and the behavior will become normalized. And "[w]ith each misstep" by the Government, "the public faith in the criminal-justice system further erodes" and "the likelihood grows that a reviewing court will be forced to reverse a conviction or even dismiss an indictment, resulting in wasted resources, delayed justice, and individuals guilty of crimes potentially going unpunished." *United States v. Nejad*, 487 F. Supp. 3d 206, 225–26 (S.D.N.Y. 2020).

Studies of state prosecutorial discipline show that only a handful of prosecutors have been disciplined for misconduct, despite courts reversing convictions and ordering new trials for misconduct many more times. *See* Samuel R. Gross, et al., Nat'l Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecturos, Police and Other Law Enforcement* at 119 (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (concluding that "[p]rosecutors are hardly ever disciplined for misconduct that contributes to false convictions" and explaining that "[w]e know of some discipline for prosecutors in 4% of exonerations with prosecutorial misconduct"); Shawn Musgrave, New England Ctr. for Investigative Reporting, *Scant Discipline Follows Prosecutors'*

Impropriety in Massachusetts, (Mar. 6, 2017), https://www.wgbh.org/news/2017/03/06/scant-discipline-follows-prosecutors-impropriety-in-massachusetts (describing 120 reversed convictions since 1985 in Massachusetts, but only two prosecutors publicly disciplined since 1980); Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (Apr. 3 & 5, 2013), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody (describing 30 reversed convictions in New York City, but only one prosecutor publicly disciplined).

Given these facts, if the minority position is upheld, no regularly enforceable remedy for the use of false testimony will exist, and no mechanism will exist to deter prosecutors from intentionally and knowingly using false testimony to secure a conviction. Thus, such a standard will degrade prosecutorial ethics, compromise the reliability of criminal verdicts, and undermine appellate courts' capacity to correct resulting injustice—all at the expense of indigent criminal defendants. *Cf. United States v. Olsen*, 737 F.3d 625, 631–32 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of reh'g en banc) ("When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.").

Importantly, while most prosecutors will not use false testimony, the change in standard will

nonetheless affect their behavior, whether intentionally or not. Behavioral economics shows that standards can institutionalize poor individual and organizational behavior. When an individual sees an institution tolerating behavior in another, then the individual will internalize that they, too, are permitted to engage in similar behavior. *See* Linda Klebe Trevino & Stuart A. Youngblood, *Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-Making,* 75 J. Applied Psychol. 378, 379 (1990). This phenomenon is pronounced where the individual rationalizes that "by serving the company's interest, they are also serving the public's interest." Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Res. in Org. Behav. 6 (2003). Further contributing to the institutional pressure to engage in bad behavior, "leniency and low frequency of formal sanctioning by governments and professional associations often makes [bad behavior] . . . rational." *Id.*

Accordingly, if the Court permits the minority rule to stand, thus excusing prosecutors from any consequences flowing from the knowing use of false testimony in the courtroom, it will normalize conduct that compromises the integrity of the criminal justice system and undermines the Constitution's guarantees of fairness and due process for all defendants, regardless of their socio-economic status. Without condemning the improper use of false testimony, the Court will signal a tacit encouragement for others to engage in this behavior. To prevent that result, this Court should grant certiorari and reverse the Maryland Court of Special Appeals' decision.

III. THE MINORITY POSITION ADOPTED BY THE MARYLAND COURT OF SPECIAL APEALS THREATENS THE INTEGRITY OF CRIMINAL TRIALS

The minority position as adopted by the Maryland Court of Special Appeal also undermines this Court's repeated admonitions that integrity requires prosecutors to ensure that convictions are not obtained through the knowing use of false testimony. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("implicit in any concept of ordered liberty," is that the government "*may not knowingly use false evidence, including false testimony, to obtain a tainted conviction*[.]") (emphasis added); *see also Mesarosh v. United States*, 352 U.S. 1 (1956); *Mooney v. Holohan*, 294 U.S. 103 (1935).

Breaking with this strong body of law, the minority position wrongly conflates two distinct dimensions of due process: (i) the right to disclosure of exculpatory evidence and (ii) the right to rely on the prosecutorial duty not to knowingly introduce false testimony. This conflation not only undermines the integrity of the trial process on the front end, by allowing false testimony to be presented to factfinders; it also hamstrings defense counsel's ability to safeguard integrity on the backend, by enforcing such a low standard for prosecutors to satisfy due process requirements. A prosecutor's disclosure to defense counsel during a bench conference provides no due process protection if the defense counsel does not have the resources, information, or capacity to convince the factfinder of the falsity of the testimony. In an adversarial system, there is a material difference between a defense attorney's allegation that the state's witness's

testimony is false, and the state's admission to the factfinder that their own witness gave false testimony.

By condoning a process that not only effectively allows prosecutors to introduce false testimony (so long as they disclosed the falsity to defense counsel), but also erects significant barriers to the correction of such errors, the minority position undermines the fundamental purpose of the criminal trial, which is "as much the acquittal of an innocent person as it is the conviction of a guilty one." *Bagley*, 473 U.S. at 692 (Marshall, J., dissenting) (citation and internal quotations omitted); *see also Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring) (characterizing the government's obligation "not to convict, but to see that, so far as possible, truth emerges" as the "ultimate statement" of the due process right to a fair trial).

By ignoring this fundamental corruption of the trial purpose and allowing a conviction based on false testimony to stand, the minority position increases the risk of constitutionally intolerable wrongful convictions. As the National Registry of Exonerations recently reported, after examining the impact of official misconduct in wrongful convictions nationwide over a thirty-year period (1989–2019), prosecutors permitted false testimony to go uncorrected in fully eight percent of the exonerations studied (186/2400). *See* Samuel R. Gross, *et al.*, The Nat'l Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* at 99 (September 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the

_Innocent.pdf (further noting that, in at least a handful of these cases, the defense knew or should have known of the perjury)*; see also* Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (Winter 2004–2005), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf; Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (finding in a comprehensive study of 200 exonerations that 18% of exonerees were convicted, in part, based on the false testimony of informants).

The burden to ensure that criminal trials fairly acquit the innocent as readily as they convict the guilty must not rest solely on defense counsel's capacity to persuade the jury that the prosecutor has knowingly introduced false testimony, especially when the prosecutor has admitted its falsity to defense counsel. This Court has already recognized that it is not defense counsel's burden alone to guard against false testimony (and should affirm as much again here). *Napue*, 360 U.S. at 269–70 ("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.") (internal quotation marks and citation omitted).

Rather, the pursuit of a fair trial must be a shared obligation among the court, the prosecution, and defense counsel precisely because "[t]he government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide [by] them." *Mesarosh*, 352 U.S at 14.

CONCLUSION

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

Respectfully submitted,

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