No. 17-250

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
STEVEN L. LANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 846 F.3d 1135.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2017. A petition for rehearing was denied on March 16, 2017 (Pet. App. 45-46). On May 25, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 14, 2017. On July 6, 2017, Justice Thomas further extended the time to August 13, 2017, and the petition was filed on August 14, 2017 (Monday). 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 conspiracy 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 and 2; three counts of money laundering, in violation of 18 U.S.C. 1957 and 2; and one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371. Judgment 1. The district court sentenced petitioner to 204 months of imprisonment, to be followed by two years of supervised release. *Id.* at 2-3. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1-44.

1. Petitioner served as legal counsel for Signalife Inc., a publicly traded company that sold electronic heart monitors. Gov't C.A. Br. 4-5. 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. 4. 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 4 n.3. Petitioner also caused the company to make fraudulent cash payments on the basis of sham consulting agreements and to issue stock to third parties so those parties could sell their stock and funnel the proceeds back to petitioner. Gov't C.A. Br. 4-5. 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 4.

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. 4-5. 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 but published them anyway because petitioner had told him that petitioner and Signalife's Chief Executive Officer (CEO), Lowell T. Harmison, had been traveling together visiting potential clients, and Woodbury believed that the purported sales were the fruits of those efforts. *Ibid.* 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." Gov't C.A. Br. 8 (citation omitted).

Woodbury later asked petitioner for additional information regarding the sales described in the press releases. Pet. App. 5. In response, petitioner sent Woodbury three purchase orders, which petitioner claimed Harmison was "now fulfilling." Gov't C.A. Br. 8 (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. 5. The signature block showed "Cardiac Hospital Management" and contained a signature without a corresponding printed name. *Ibid.* The second and third purchase orders, dated September 24, 2007, and October 4, 2007, purported to reflect sales to a company called IT Healthcare. *Ibid.* 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. Gov't C.A. Br. 9.

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. 3, 6. 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 6. 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 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." *Ibid.* Carter had never spoken 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. *Ibid.* Carter believed, however, that petitioner had fabricated these names. *Ibid.*

On another occasion, at petitioner's request, Carter provided petitioner with two numbers he could use as fax numbers for purchase confirmation letters that would purportedly come from Yossie Keret and Toni Nonoy. Pet. App. 6-7. Later, Carter, acting at petitioner's direction, fabricated a letter from Yossie Keret purporting to cancel IT Healthcare's orders and sent it to Woodbury. *Id.* at 7. Another time, petitioner 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. 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. 7. 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 later, on petitioner's request, he agreed to draft two letters that would appear to come from Yossie Keret on behalf of IT Healthcare. *Ibid.* The first letter requested a shipping address change to an Israeli address, and the second cancelled IT Healthcare's order. *Ibid.* Anand sent these letters to petitioner and Harmison. *Ibid.*

b. Woodbury, who oversaw the drafting of Signalife's filings with the SEC, Pet. App. 6, described the three fake sales to CHM and IT Healthcare in a number of SEC filings using language that petitioner had approved and vetted, Gov't C.A. Br. 9. Petitioner reviewed and commented on drafts of the company's SEC filings and was intimately involved in the drafting process. *Ibid.*

c. Acting with the assistance of Carter and Anand, petitioner also misappropriated money and stock from Signalife. Pet. App. 7. 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.* Pursuant to this agreement, petitioner funneled money and Signalife stock from Signalife through Carter to himself.

Id. at 7-8. Petitioner also directed Carter to buy and sell Signalife stock and to transfer most of the proceeds to petitioner. *Id.* at 8. 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 made payments to petitioner through wires, checks, and cash, Gov't C.A. Br. 18.

d. In 2009, the SEC initiated an investigation into Signalife. Pet. App. 8. As part of that investigation, petitioner testified before the SEC on four separate dates in 2009 and 2010. 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. 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 conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1349; mail fraud, in violation of

18 U.S.C. 1341 and 2; wire fraud, in violation of 18 U.S.C. 1343 and 2; securities fraud, in violation of 18 U.S.C. 1348 and 2; money laundering, in violation of 18 U.S.C. 1957 and 2; and conspiracy to obstruct justice, in violation of 18 U.S.C. 371. Gov't C.A. Br. 3.

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. 9. The trial lasted two weeks. *Id.* at 10. Among the government witnesses were Carter and Anand,[1] who described in detail the efforts they undertook at petitioner's behest to make the CHM and IT Healthcare purchase orders appear to be legitimate and to misappropriate company assets and funnel the proceeds back to petitioner. See 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. *Id.* at 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]." *Id.* at 52 (second set of brackets in original; citation omitted).

Tracy Jones, the executive assistant to Harmison (Signalife's CEO), testified about, *inter alia*, petitioner's control of Signalife and his demands to be paid, without submitting invoices, for legal services he purported to have provided. Gov't C.A. Br. 5-6. Jones also told the jury about issuing company stock and making

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

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 in original; citation omitted).

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 had been forwarded to Woodbury. Pet. App. 20-21; Gov't C.A. Br. 38. The subject line of the email said, "[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. 21 (brackets in original; citation omitted). The exhibit also included a copy of the referenced September 27, 2007, check for $50,000 to Signalife. *Ibid.* The check appeared to have been signed by Delores Tribou out of an account shared with her husband, Thomas Tribou, *ibid.*, who had earlier entered into consulting and marketing agreements with Signalife, 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. 21 (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. 21. The government objected to the admission of the check and the email on the ground that the email's contents were hearsay. *Ibid.* 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,

petitioner was unsuccessful in authenticating the email and check, which were not admitted into evidence. Gov't C.A. Br. 38. Petitioner elected not to call Tribou as a witness, Pet. App. 21, though the government offered to arrange and finance Tribou's travel, Gov't C.A. Br. 39. 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. 21. 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 non-fraudulent. 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). The government observed, among other things, that CHM, not Tribou, was listed as the purchaser on the 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 (D. Ct. Doc. 248).

The jury convicted petitioner on all 14 counts. Pet. App. 10; Judgment 1.

b. Petitioner filed a series of post-trial motions in which he claimed, *inter alia*, that the government had committed numerous discovery violations and engaged in prosecutorial misconduct by making false statements to the district court and the jury, and that a number of government witnesses, including Carter, Woodbury, and Jones, among others, had testified untruthfully.

Gov't C.A. Br. 32. The district court denied the motions, which it described as "baseless" and "offensive." Pet. App. 47.

The district court sentenced petitioner to 204 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3.

3. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1-44.

a. 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. 2-3. 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 20. Petitioner's contention that both categories of statements were false was premised on the October 24,

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[2] The court of appeals also rejected petitioner's claims that the government failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), Pet. App. 15-18; 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 27; and that cumulative error warranted reversal, *ibid.*

2007, email and $50,000 check that he had unsuccessfully attempted to admit into evidence. See *id.* at 20-21, 25-26.

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. 24 (citation omitted). The court explained that, even if Tribou's signature appeared on the CHM purchase order and he paid Signalife $50,000, "[t]he fact th[e petitioner] obtained Mr. Tribou's signature and check does not rule out the possibility that [petitioner] also fabricated the purchase order." *Ibid.* "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." *Ibid.* "Morever," 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. 21-23. The prosecutor told 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 21-22. 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 22. 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 22 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 22-23. 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 23 (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 23-24.

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. 25. 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. *Id.* at 25-26. The court concluded that this "allegedly false testimony" did not vio-

late *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. *Id.* at 26. "In the absence of government suppression of the evidence," the court asserted, "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)).

b. The court of appeals concluded that the district court erred in calculating petitioner's Sentencing Guidelines range, vacated his sentence, and remanded the case for resentencing. Pet. App. 27-39.

ARGUMENT

Petitioner contends (Pet. 23-29) 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 a petition for a writ of certiorari presenting a similar claim. See *Villanueva-Rivera* v. *United States*, 553 U.S. 1019 (2008) (No. 07-9021). Further review is similarly unwarranted here.

1. Citing this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), the court of appeals properly recognized 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. 18-19; 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. 18-19 (citation and internal quotation marks omitted); see *id.* at 19 (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 and internal quotation marks omitted); *United States* v. *Bagley*, 473 U.S. 667, 679 n.9 (1985) (opinion of Blackmun, J.).

That established prohibition was not violated here because, contrary to petitioner's assertion, the court of appeals did not "accept[] that the government knowingly used false testimony to convict [him]." Pet. 2; see Pet. i, 14, 29. In fact, 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. 2-3. That determination plainly encompasses the challenged testimony of Jones and Woodbury, which was the only allegedly false testimony discussed in the court's opinion. *Id.* at 25-26. The court's factbound determination 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 he "got all [his] information from [petitioner]" in preparing certain SEC filings. Pet. 10-12 (citation and emphasis omitted). Petitioner cannot demonstrate that these statements were false, much less "perjured." Pet. 1, 2. Indeed, the record supports

Jones' characterization of the purchase orders as "phantom purchase orders." With respect to Jones' statement concerning "backup," there is no evidence that she received any supporting documentation for the two IT Healthcare purchase orders. And, given the lack of a clear connection between CHM and Tribou, Jones may not have considered the email and check to be bona fide "backup" for the CHM purchase order. Similarly, there is no basis for concluding 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]." There is no evidence that he relied on any other information in preparing that filing. Although he had received the email and check, he may not have thought about them in connection with the filing; even if he did, he 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 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. 22 & n.11.

In any event, any inaccuracy in the challenged testimony of Jones and Woodbury was not material because acknowledgment that they received the October 24, 2007, email and check could not have supported a plausible inference that the purchase orders were nonfraudulent. The email and check say nothing about the counts relating to the two fraudulent IT Healthcare purchase orders. And while the email and check provide evidence that 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. Acknowledgment of receipt of these items by Jones and Woodbury would not have established that CHM existed, that CHM had any connection to Tribou, or that CHM made the purchase purportedly reflected in the purchase order, which is why the court of appeals concluded that the prosecutor did not lie when he called the CHM purchase order "all made up" and "fake" in his closing argument. Pet. App. 24-25 (citation omitted).[3]

As the evidence showed and the government emphasized during its rebuttal closing, CHM, not Tribou, was listed as the purchaser on the purchase order, Tribou's contracts with Signalife did not even mention CHM, and petitioner expressly denied in his SEC testimony

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[3] Petitioner cites (Pet. 11 n.4) a civil complaint in which he asserts that the SEC described the CHM purchase order as "real." Although that SEC complaint alleged that Signalife contracted to sell 180 units to Tribou and that Tribou sent Signalife a check for $50,000 as a deposit, the complaint also alleged that Tribou contracted to purchase the units in his personal capacity and that the purchase order that was returned to Tribou identified the customer as CHM, "a fictitious entity that was not known to [Tribou]." Gov't C.A. Br. 43 (brackets in original) (citing Compl. ¶¶ 40, 42, *SEC* v. *Heart Tronics, Inc.,* No. 11-cv-1962 (C.D. Cal. Dec. 20, 2011) (SEC Compl.)). The complaint further alleged that when Signalife could not ship any product to Tribou, petitioner "orchestrated an elaborate scheme," including creating or causing the creation of change of address and confirmation letters purportedly sent from CHM, and instructing Carter to travel to Tokyo and to mail a letter back to Signalife "to mislead [Signalife's] officers, its auditors, and the public about the sale's continued viability." *Id.* at 43-44 (citing SEC Compl. ¶¶ 44-49).

knowledge of any connection between CHM and Tribou. See Gov't C.A. Br. 42; D. Ct. Doc. 248, at 117-118. Finally, as the court of appeals correctly determined (Pet. App. 24), 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 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.

2. Petitioner contends (Pet. 23-24) 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. 24), 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.[4] Indeed, since *Napue*, the courts of appeals that have directly addressed the issue have held that, absent certain extenuating circumstances, "'[t]here 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. 19 (quoting *Routly* v. *Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994) (per curiam), cert. denied, 515 U.S. 1166 (1995)); 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 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); *Evans* v. *United States*, 408 F.2d 369, 370 (7th Cir. 1969); *United States* v. *Iverson*, 648 F.2d 737, 738 (D.C. Cir. 1981) (per curiam). 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 and internal quotation marks omitted); see *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

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[4] Petitioner asserts (Pet. 11) that he "discovered" the October 24, 2007, email and check, "among the voluminous materials disclosed by the government," only after Jones and Woodbury had testified. "In fact," as the court of appeals noted, "the record shows that [petitioner] located the email and the check before trial and even produced them to the government." Pet. App. 26.

the gamble fails" (citation and internal quotation marks omitted)).[5]

Petitioner contends (Pet. 23-24) that the court of appeals "merged the government's duty to provide exculpatory evidence under *Brady*, with its duty not to knowingly introduce false evidence under *Napue*" and, as a result, wrongly concluded that the government's compliance with its obligations under *Brady* necessarily relieves it of its "separate, wholly independent, and previously recognized duty" to avoid knowing reliance on materially false testimony. Petitioner is mistaken. *Brady* and *Napue* both involved information that was not available to the defense at trial. See *Brady* v. *Maryland*, 373 U.S. 83, 84 (1963); *Napue*, 360 U.S. at 265. The Court in *Brady* described *Napue* as an "exten[sion]" of the rule from *Mooney* v. *Holohan*, 294 U.S. 103 (1935), 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).

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[5] Courts have recognized that this general principle 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); 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. 19-20 (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.

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*). Thus, whether a claimed nondisclosure involves the failure to correct false testimony or the suppression of other information, the defendant's entitlement to relief turns on whether, "in the context of the entire record," the result of the proceeding might have been different had the information been disclosed. *Turner* v. *United States*, 137 S. Ct. 1885, 1894 (2017) (quoting *United States* v. *Agurs*, 427 U.S. 97, 112 (1976)).[6]

Whether it is framed as an issue of waiver or one of materiality, the availability to the defense of information that could be used to challenge allegedly false

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[6] Petitioner contends (Pet. 24) that when "the government has improperly withheld evidence under *Brady*, but a defendant obtains th[e] same evidence through other means before trial, the defendant is fully able to present the evidence in his defense," and that "even though the government has unquestionably breached its constitutional obligation, the trial itself is ultimately unaffected." According to petitioner (*ibid.*), "[t]hat is simply not true with respect to the government's resort to false testimony," which, he contends, "necessarily distorts the nature of the trial itself." Petitioner is mistaken. To begin with, this Court's decisions make clear that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). That is so even if the defendant does not obtain the information in question through other means. Moreover, 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.

testimony is among the circumstances that bear on the analysis. Indeed, 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 possess 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 truthfinding process is better served if the witness' 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).

The court of appeals correctly identified (Pet. App. 15, 18-19) the due-process standard applicable to this case.[7] And 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. Contrary to petitioner's assertion (Pet. 24), the court did not hold that the defense's possession of information demonstrating the purported falsity of testimony always forecloses relief. Rather, as petitioner acknowledges (Pet. 25), the court expressly recognized (Pet. App. 19, 26) that capitalization by the prosecution on testimony it knows to be false can warrant relief despite the availability of

[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. 19 (citation omitted); see *Bagley*, 473 U.S. at 679 n.9 (opinion of Blackmun, J.).

such information to the defense. Other decisions demonstrate that the Eleventh Circuit will also take into account other extenuating circumstances, such as "witness eva[sion]" or other barriers to "expos[ing] the * * * lie," when they arise in particular cases. Pet. 28 (citation omitted); see, *e.g.*, *United States* v. *Alzate*, 47 F.3d 1103, 1110-1111 (11th Cir. 1995) (granting new trial where prosecutor's actions precluded defendant from exposing false statement during trial).

b. Petitioner cites (Pet. 3) 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. Most significantly, 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). Moreover, each 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'] 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 question on same issue); *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] *Yates*, 629 A.2d at 810 (finding defense's failure to correct did not undermine his claim where "prosecutor would have likely objected").[9] Petitioner thus fails to demonstrate a conflict among the lower courts that warrants this Court's review.

3. Finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) ("We generally await final judgment

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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.

[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, 135 S. Ct. 2845 (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.

in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for a writ of certiorari).

In addition to resentencing, see D. Ct. Doc. 517 (Oct. 12, 2017), petitioner recently filed a motion in the district court alleging violations of *Brady* and seeking additional discovery, including on the issues raised in the petition. D. Ct. Doc. 510, at 8-9 (Aug. 15, 2017). The government has responded to the motion, which remains pending. D. Ct. Doc. 511 (Aug. 29, 2017).

"[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. That general practice enables the Court to examine cases on a full record, prevents unnecessary delays in the trial and appeals process, and allows the Court to consider all of the issues raised by a single case or controversy at one time. Following the district court's disposition of the case on remand, petitioner will be able to raise the claim raised in his petition—together with any other questions that may arise on remand—in a single petition for a writ of certiorari seeking review of the final judgment against him. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment.). The Court should not depart from its usual practice of declining to grant certiorari before entry of a final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
STEVEN L. LANE
Attorney

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