

No. ____

IN THE
Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do defendants bear the burden of proving they “would” have been acquitted, rather than “could” have been acquitted, in order to obtain a new trial for convictions procured with perjury, an issue as to which the Courts of Appeals are in conflict?

2. When convictions rely on charges later dismissed by the court due to perjury by a key government witness, may the court deny defendants their right to a new trial by jury based on its own factual findings, in light of *United States v. Booker*, 125 S. Ct. 738 (2005), and *Washington v. Recuenco*, cert. granted, 126 S. Ct. 478 (2005)?

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PETITION FOR WRIT OF CERTIORARI

Robert T. Mitrione and Marla A. DeVore respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment below.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 13a-29a) is reported at 357 F.3d 712. The opinion of the district court (App. 52a-61a), which vacated most but not all convictions, is unreported. The opinion of the district court (*id.* at 30a-34a), which denied a motion for partial dismissal of the indictment, is reported at 160 F. Supp. 2d 993.

This Court granted, on sentencing grounds, defendants' prior petition for a writ of certiorari. This Court vacated the

judgment and “remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Booker*,” in a decision reported at 125 S. Ct. 984 (2005) (App. 12a). On remand, the court of appeals issued an unreported opinion that remanded to the district court to “tell us whether the additional discretion afforded by *Booker* would affect the defendants’ sentences” (App. 10a-11a) (citing *United States v. Booker*, 125 S. Ct. 738 (2005)). The trial judge then issued an unreported opinion holding that she would have imposed the same sentences on defendants under *Booker* (App. 2a-9a). On August 26, 2005, the court of appeals affirmed in an unreported decision (*id.* at 1a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 26, 2005 (App. 1a). This timely petition for a writ of certiorari was subsequently filed by November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST., AMEND. VI.

STATEMENT OF THE CASE

Petitioners Robert Mitrione, M.D., and Marla DeVore were convicted for mail fraud concerning a mere \$25 claim and for false claims entailing only \$50.25, for a grand total of only \$75.25. On this meager jury-determined amount defendants were sentenced to 23 and 15 months, respectively, in prison. Petitioner Mitrione’s office had submitted the \$75.25

in charges to the Medicaid program; his wife Marla DeVore worked in the office.

The primary defense was lack of intent to defraud. To prove criminal intent, the prosecution relied on the testimony of a member of the prosecutorial team, Ms. Deanna Statler. Yet her testimony was a complete lie, as found later by the court:

Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital **was false to a dramatic degree.**

App., *infra*, 55a (emphasis added).

Specifically, the prosecutor proved criminal intent by claiming that a remarkable 28% of defendants' invoices were for undocumented services, and that such percentage was far higher rate than the amount of missing bills for services rendered (9%). App., *infra*, 63a. Included in Ms. Statler's false testimony was her claim that she would have allowed only 14% of defendants' bills (Statler Tr. at 2311). Ms. Statler's false testimony was designed to disprove carelessness as the cause of the poor documentation, and to prove intent to defraud the government. The prosecutor emphasized this in his closing argument to the jury:

Deanne [sic] Statler, you heard from her regarding the percentage, the fact that three times more bills were sent out when no service was provided than otherwise.

Court of Appeals (C.A.) App. 193.

The prosecution drove the point home further with the jurors:

The Public aid auditor [Ms. Statler] says she looked through hundreds of records and no treatment notes [and the] benefits paid, 28 percent. No treatment notes, 9 percent. Those are the numbers that should matter

If you look at all the records as this Public aid auditor [Ms. Statler] did, and you come up with three times more billed than not billed, accident? Be kind of weighted a little more evenly if it were an accident, wouldn't it?

C.A. Record Doc. 279, p. 2716; *see also* App., *infra*, 57a. This was the prosecution's primary evidence of fraudulent intent, and the jury returned convictions against defendants on most charges on September 13, 2001.

The prosecutor, Assistant U.S. Attorney (AUSA) Patrick Hansen, personally prepared the false trial exhibit 20B that graphically illustrated defendants' alleged fraud. App., *infra*, 63a. In the post-trial hearing, Ms. Statler confirmed the integral role played by the prosecution in connection with the false testimony:

Q. [D]id Mr. Hansen then prepare Exhibit 20B?

A. Yes, he did.

Q. And prior to the time that you testified . . . you talked to Mr. Hansen about his preparation of Exhibit 20B, correct?

...

A. Yes, he showed it to me.

C.A. App. 95. Ms. Statler further confirmed that prosecutor Hansen "had done the chart on his computer." *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 55a-57a.

Ms. Statler's post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with the AUSA Hansen. C.A. App. 15 ("I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators."). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly

from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

After finding the key government testimony to be completely false, the trial judge overturned most of the counts of conviction, including the foundational counts 1 and 2, and the government did not retry them. The trial judge did not overturn the foregoing Counts 12 (mail fraud) and 14 (false claims), however, even though these counts expressly incorporated and relied upon count 2, which in turn incorporated count 1. App., *infra*, 48a, 50a; *see also id.* at 28a. Counts 12 and 14 required proof of criminal intent, for which the prosecution relied heavily on Ms. Statler's false testimony.

Counts 12 and 14 addressed services performed by an assistant (Walter Woods) aiding in the therapy of mental patients. The jury convicted defendants on these counts amid the broader, false testimony of fraud presented by Ms. Statler and allegations of improperly billing for an assistant (sometimes allowed as "incident to" or "substitute" billing). The district court held that Ms. Statler was a material witness on some substitute billing charges: "I also find that Ms. Statler was a material witness on the charges related to substituted billing" *Id.* at 58a. But the district court denied a request to overturn the convictions on counts 12 and 14.

On February 9, 2004, the appellate decision below affirmed the convictions only by overturning the 75-year-old standard of *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), and creating a newly permissive rule for perjury:

Today, we overrule *Larrison* and adopt the reasonable probability test. In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the

perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) **would probably have led to an acquittal** had it not been heard by the jury.

App. at 22a (emphasis added). The court then applied this test broadly even to where the perjury was by a government employee and member of the prosecutorial team, as Ms. Statler was.¹

Defendants raised its arguments below concerning perjury and, in a supplemental brief, requested relief under *Blakely v. Washington*, 542 U.S. 296 (2004). This Court granted defendants' petition without reaching the perjury issues, vacated the judgment below and "remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Booker*." 125 S. Ct. 984 (2005). The Seventh Circuit subsequently remanded to the trial judge for an opinion on "whether the additional discretion afforded by *Booker* would affect the defendants' sentences." App. 11a.

Without even holding a hearing, the trial judge on remand declared that she would have sentenced defendants to the exact same 23 and 15 months in jail, based on the proven amount of only \$75.25, by using the Sentencing Guidelines as advisory rather than mandatory. App. 2a-9a. On appeal of the resentencing, the Seventh Circuit affirmed. *Id.* at 1a. Defendants timely reassert their arguments for overturning

¹ In affirming the convictions, the federal court below treated a mere physicians' handbook as having the power of law, despite Illinois case law denying its enforcement for failure to be promulgated pursuant to the Administrative Procedure Act. *See Sheen v. Illinois Dep't of Public Aid*, Case No. 86-MR-30 (Ill. 10th Cir. Dec. 4, 1987) (reprinted at C.A. App. 29).

the convictions based on perjury in this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

“The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.” *Mesarosh v. United States*, 352 U.S. 1, 9 (1956). But here the prosecution relied heavily on perjury by a government employee who was directed by the prosecutor. The court below recognized the impact of the perjury in dismissing, post-trial, most of the counts of conviction. App. 2a-9a. “[A]ll perjured relevant testimony is at war with justice.” *In re Michael*, 326 U.S. 224, 227 (1945).

For 75 years the Seventh Circuit adhered to a rigorous deterrent to the government’s use of perjury in criminal trials, a standard that still governs in the Fourth and Sixth Circuits and, under various circumstances, in other Circuits also. Under this traditional test as restated by the court below, defendants convicted through the use of perjury are entitled to a new trial if the “jury *might* have reached a different verdict” in the absence of the perjury. App. at 21a (emphasis in original). This venerable approach deterred governmental use of perjury, protected the right to a jury trial by defendants, and safeguarded the integrity of judicial process.

The decision below instead adopted a new test that is permissive of prosecutorial perjury, and which enabled affirmance of the convictions at bar. Lacking real proof of criminal intent in defendants’ disorganized medical office, the prosecution had resorted to false testimony to convict. On appeal, defendants’ convictions on a small billing dispute could only be affirmed by diluting the standard for perjury, in contravention of 75 years of precedents in the Seventh Circuit, current law in at least four other Circuits, and Supreme

Court holdings. The court below adopted a newly permissive test that denies a new trial whenever defendants failed to prove that the perjury “would *probably* have led to an acquittal had it not been heard by the jury.” *Id.* at 22a (overturning *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), emphasis in original). Defendants were then not even given an opportunity to meet that new test in this case.

This Court has never shifted the burden to a defendant seeking a new trial to prove that he would *probably* have obtained an acquittal in the absence of perjured governmental testimony. Such shifting is clearly inappropriate where, as here, the perjury was by a member of the prosecutorial team. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 272 (1959) (“[T]he false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be *Reversed*.”). Moreover, it is inconsistent with this Court’s ruling in *Booker* for a court to speculate on whether a jury would have found guilt. *United States v. Booker*, 125 S. Ct. 738, 748 (2005).

The implications of the new standard pronounced below are catastrophic for the integrity of the criminal justice system, at the expense of the right to trial by jury. As shown below, a writ of certiorari is necessary here to resolve the conflict between the decision below and the other Circuits and this Court.

I. THE CIRCUITS ARE EXPRESSLY DIVIDED OVER THE STANDARD FOR A NEW TRIAL BASED ON PERJURY BY A GOVERNMENT WITNESS.

The Seventh Circuit expressly disagreed with the Fourth and Sixth Circuits, and implicitly disagreed with other Circuits, in adopting and applying a permissive rule for government use of perjury. This issue has fully percolated among all the Circuits and is best presented here for

resolution by this Court: the perjury is clear and undisputed, having already necessitated dismissal of nearly all counts of conviction against defendants. By adopting a more permissive standard for perjury the court below affirmed the remaining counts of conviction, amounting to only \$75.25 in alleged fraud.

The Seventh Circuit conflicted with other Circuits and contravened precedents of this Court. Most recently in *Banks v. Dretke*, this Court has emphasized its intolerance of deception by the prosecution, reiterating that defendants need not prove that they would have been otherwise acquitted in order to obtain relief. *See Banks, quoted infra* Part I.B. Perjury undermines the integrity of legal process, and this Court has consistently favored new trials to reduce the scourge of conviction-by-lies. The Seventh Circuit ruling to the contrary must be reversed.

A. The Decision Below Squarely Presents the Conflict by Expressly Disagreeing with the Fourth and Sixth Circuits, and also Conflicting with Many Other Circuits in the Scope of the Permissive Standard.

The Seventh Circuit decision expressly conflicts with the Fourth and Sixth Circuits concerning convictions based on perjury, thereby compelling resolution by this Court. The Seventh Circuit decision also implicitly conflicts with the First and Ninth Circuits, and departs from the Second and D.C. Circuits in application of its permissive rule. The Seventh Circuit changed the standard for a new trial for perjury from whether the “jury *might* have reached a different verdict” to a requirement that defendant prove that the perjury “would *probably* have led to an acquittal had it not been heard by the jury.” App. at 21a, 22a (emphasis in original). The Seventh Circuit also implicitly expanded the scope of its permissive test to all situations except where the prosecutor

demonstrably knew about the perjury beforehand, thereby allowing perjury where, as here, the prosecutor at least negligently permitted it. *See id.* at 22a.

The decision below declares its conflict with the Fourth Circuit, which adhered to the traditional *Larrison* test in *United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000). The Fourth Circuit follows the same standard for veracity that was originally in place during defendants' trial here. Specifically, a new trial must be granted if false, material and surprising testimony was used to convict and the jury *might* have reached a different conclusion. *See id.* at 318. Only by rejecting this traditional test *ex post facto* was the Seventh Circuit able to affirm defendants' convictions.

Defendants' right to a new trial depended on the happenstance of venue. Had they been convicted in the Fourth rather than Seventh Circuit, then they would have obtained a new trial under the traditional test. The Fourth Circuit *Lofton* decision cited longstanding precedent in its jurisdiction that its courts do not tolerate perjury, and defendants ambushed by it need not prove innocence to obtain a new trial. *See, e.g., United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (rejecting any relaxation of the traditional *Larrison* rule). Yet the court below allowed perjury that the Fourth Circuit would not.

The Seventh Circuit also conceded its conflict with the Sixth Circuit which, like the Fourth Circuit, adheres to *Larrison*. *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950) (stating that the test requires a new trial if "the jury might have reached a different conclusion"). Where, as here, the government witness recants her testimony after trial, the Sixth Circuit has recently reiterated the need to apply the *Larrison* "might have" test. *See United States v. Willis*, 257 F.3d 636 (6th Cir. 2001).

In *Willis*, the Sixth Circuit affirmed a district court's grant of a new trial and emphasized that the *Larrison* standard must apply to "situations in which a material witness for the government recants his testimony after the trial." *Id.* at 644. That Circuit maintained that "in more recent cases, we have recognized the [*Larrison* and *Gordon*] test's continuing applicability in criminal cases, and we have applied the test to new trial motions in the civil context." *Id.* (citing *Gordon, supra*). In direct conflict with the Sixth Circuit, the court below completely rejected the *Larrison* test even where the key prosecution witness, Ms. Deanna Statler, was found by the trial judge to have testified falsely. App. at 55a-56a. The Seventh Circuit also departed from the Eighth Circuit. *See United States v. Peterson*, 223 F.3d 756, 763 (8th Cir. 2000), *cert. denied*, 531 U.S. 1175 (2001) (inquiring whether "a reasonable likelihood exists that the perjured testimony could have affected the jury's judgment").

The decision below further conflicts with other Circuits in its application. The perjury here was presented by a member of the prosecution team and the prosecutor plainly should have known that the testimony was false. Yet the court below declared that if "the government did not knowingly present the false testimony," then it would not be held to the traditional *Larrison* rule. App. at 22a. The court thereby shifted to defendants the unjustified burden of proving actual knowledge rather than recklessness or negligence by the prosecutor in utilizing perjury. The courts below even denied defendants' motions for an opportunity to satisfy this new test. This permissiveness towards perjury amid prosecutorial negligence conflicts directly with the Ninth Circuit, which adheres to the *Larrison* test where the prosecution negligently allowed the introduction of perjured testimony. *See United States v. Krasny*, 607 F.2d 840, 844-45 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Chisum*, 436 F.2d 645 (9th Cir. 1971).

In the case at bar, the perjury was by a prominent member of the prosecution team. Ms. Statler testified falsely about data she discussed with the prosecutor AUSA Patrick Hansen. He told her what he wanted from the data and he supplied her with a sample spreadsheet. C.A. App. 15. Using his spreadsheet, she entered one or two of the files and then showed it to prosecutor Hansen to ask if that was what he was looking for. *Id.* at 15-16. Ms. Statler met with the prosecution team in order to prepare the false trial exhibit (20B), *id.* at 20-21, and then commit perjury. This was perjury by a member of the prosecutorial team, triggering the traditional *Larrison* test even in Circuits that have departed from it in other contexts.

The prosecutor AUSA Patrick Hansen personally prepared the false trial exhibit 20B that graphically and falsely illustrated defendants to have engaged in fraud. App., *infra*, at 63a; C.A. App. 95 (quoted in *Statement of the Case, supra*). Ms. Statler confirmed that prosecutor Hansen “had done the chart on his computer.” *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 55a-57a.

Ms. Statler’s post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with AUSA Hansen. C.A. App. 15 (“I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators.”). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

As a member of the prosecution team who took instructions from the prosecutor, Ms. Statler’s knowledge is plainly imputed to the prosecution. Her perjury was the prosecution’s perjury, and it destroys integrity to allow the perjury-

based convictions to be sustained. See *United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) (“The phrases—‘reasonable likelihood’ ‘could have affected’—‘mandate a virtual automatic reversal of a criminal conviction.’”); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (prosecutorial knowledge of perjury requires “a virtual automatic reversal of a criminal conviction”).

This colorable claim that the government knowingly used perjury to convict defendants would have also prompted a new trial in the First Circuit. The First Circuit held that a colorable claim of government knowledge requires it to “ask whether there is any reasonable likelihood or probability that the proffered evidence that [a witness’s] testimony was false could have affected the jury’s judgment.” *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001). The decision below directly conflicts with that “could have” test.

The overturning of the 75-year-old *Larrison* test provides this Court with its best opportunity to resolve the conflict among the Circuits and clarify the standard for perjury. The court below weakened the safeguards against use of perjury in prosecutions. Full review here is necessary to restore consistency and integrity in criminal justice, and to deter prosecutorial use of perjury.

B. The Seventh Circuit Test Conflicts with Rulings of This Court.

The decisions below conflict with this Court’s rejection of prosecutorial deception in an analogous situation. *Banks v. Dretke*, 124 S. Ct. 1256 (2004). There the defendants suffered from the concealment of exculpatory *Brady* material and perjured testimony by government witnesses, and sought relief on that basis. The Court reiterated its holding in *Kyles v. Whitley* that “the materiality standard for *Brady* claims is met when ‘the favorable evidence could reasonably be taken

to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 1276 (quoting *Kyles*, 514 U.S. 419, 435 (1995)). “A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” 124 S. Ct. at 1276 (quoting *Kyles*, 514 U.S. at 434-435).

The decisions below directly conflict with this Court’s precedents. Ms. Statler’s truthful testimony would have been that an audit of defendants’ records did not indicate any scheme to defraud. Instead, she presented false inculpatory evidence in order to prove a scheme to defraud and fraudulent intent. Her testimony plainly cast the whole case in “a different light” and under *Banks* and *Kyles* the burden of proof does not shift to defendants to “demonstrate” that otherwise “there would not have been enough left to convict.” *Id.* Yet that is precisely what the court below required in permitting prosecutorial perjury unless defendants can prove that the jury would have acquitted them.

When other transgressions occur at trial, this Court does not shift the burden to defendants to prove innocence. *See, e.g., Fahy v. Connecticut*, 375 U.S. 85 (1963). The constitutional standard for erroneous admission of evidence, for example, does not require defendants to show they probably would have been acquitted in its absence. “We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of **might have** contributed to the conviction.” *Id.* at 86-87 (emphasis added). The test promulgated by the court below to allow perjury conflicts with this Court’s high solicitude for integrity in prosecutions.

Similarly, the decision below conflicts with this Court’s holding in *Mesarosh v. United States*, 352 U.S. 1 (1956).

There this Court considered convictions for conspiracy under the Smith Act. A key government witness had apparently testified untruthfully in a similar way in analogous proceedings. This Court declared that the witness' "credibility (had) been wholly discredited." *Id.* at 9. This Court concluded that it would be "unreasonable" to find that "the witness . . . testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely . . . about a plan by different members of the Communist conspiracy to assassinate a United States Senator." *Id.* at 13 (footnote omitted).

A majority of this Court in *Mesarosh* thought a new trial was required due to this perjury, even though it did not even occur in the same proceeding. This Court has reiterated its intolerance of perjury in similar cases. "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited . . ." *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956). Where, as here, the credibility of a key government witness has been "wholly discredited," a new trial is warranted. The court below contravened this Court's precedents in holding otherwise.

This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added, citations omitted). That knowledge is imputed to prosecutors where, as here, the falsity of the testimony is known by a member of the prosecution team. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on

the government's behalf in the case, including the police.” *Kyles*, 514 U.S. at 437.

The Seventh Circuit below violated these principles in limiting a new trial to where the prosecutor was shown to have actually known about the perjury. App., *infra*, 21a (“absent a finding that the government knowingly sponsored the false testimony”). This Court has rejected a test of actual knowledge in the analogous context of favorable evidence. “But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Where, as here, the deception is by a member of the prosecutorial team, it is “inescapable” that a new trial is warranted. See *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (“[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice’” and “whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.”) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

This Court has never required defendants victimized by perjury to prove that they would have been otherwise acquitted in order to win a new trial, and the decision below is at odds with this Court’s precedents.

C. There is Heightened Urgency to Deter Perjury in Criminal Trials in Light of the Increasingly Permissive and Conflicting Standards.

High profile examples of perjury in federal court abound. “In a dramatic twist in the Martha Stewart case, federal prosecutors last week charged a government witness with lying on the stand. . . . Now here’s a thought: Maybe one of these days we’ll discover the truth.” Lisa Stein, “The Big

Lie(s),” *U.S. News & World Report* 18 (May 31, 2004). In contrast, state courts are more vigilant at addressing and deterring the use of perjury in prosecutions. *See, e.g., Yates v. State*, 171 S.W.3d 215 (Ct. App. Tex., 1st Dist. 2005), *appeal denied*, 2005 Tex. Crim. App. LEXIS 1926 (Tex. Crim. App., Nov. 9, 2005) (overturning a denial of mistrial in the Andrea Yates case because “there is a reasonable likelihood that Dr. Dietz’s false testimony could have affected the judgment of the jury”).

Federal appellate courts are besieged with convictions procured by perjury, yet have only conflicting standards to apply. The First Circuit has encountered perjury by prosecution in at least three different cases in the past six years. *See United States v. Gonzales-Gonzales*, 258 F.3d 16 (1st Cir. 2001); *United States v. Joselyn*, 206 F.3d 144 (1st Cir. 2000); *United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999). Its relative tolerance of prosecutorial perjury may have increased the occurrence there.

Amid the uncertainty in the proper standard, perjury runs amok. The Fourth Circuit has faced an epidemic of perjury in prosecutions challenged on appeal, including at least five appellate cases in the last six years on this issue. *See United States v. Maynard*, 77 Fed. Appx. 183 (4th Cir. 2003); *United States v. King*, 71 Fed. Appx. 192 (4th Cir. 2003); *United States v. Gullett*, 62 Fed. Appx. 554 (4th Cir.), *cert. denied*, 124 S. Ct. 498 (2003); *United States v. Roberts*, 262 F.3d 286 (4th Cir. 2001), *cert. denied*, 535 U.S. 991 (2002); *United States v. McGrady*, 1999 U.S. App. LEXIS 2395 (4th Cir.), *cert. denied*, 528 U.S. 855 (1999). In *King*, the perjury was so overwhelming that “in thirty years of practice and ten on the bench, [the trial judge] had never had ‘less confidence’ in a verdict.” 71 Fed. Appx. at 194. The Fourth Circuit’s response has been adherence to the traditionally rigorous test rejected by the court below.

Had defendants been convicted in most other Circuits—or even in their own Seventh Circuit earlier—then they might have obtained a new trial. Defendants’ incarceration and deprivation of a new trial is purely a product of happenstance of venue. This lottery effect of the conflict in the Circuits is confounding judges, corroding historic deterrence of perjury, undermining the integrity of prosecutions, and eroding public confidence in justice. See Brian Murray and Joseph C. Rosa, “He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness,” 27 *N.E. J. on Crim. & Civ. Con.* 1 (Winter 2001).

The permissive approach towards perjury allows it to grow like a cancer amid the confusion about the proper standard. The Fifth Circuit struggled with the uncertainty to conclude only that it “arguably” adheres to the same probability standard for evidence of perjury as with other newly-discovered post-trial evidence. *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989). Sixteen years later, the standard is even murkier. In the absence of a clear rule as a bulwark against the use of perjury by prosecutors, false testimony will only increase.

The medley of standards governing prosecutorial perjury stands in stark contrast to the exclusionary rule, which flatly prohibits the use at trial of much evidence improperly seized. See *Weeks v. United States*, 232 U.S. 383, 392 (1914). The deterrence effect of the exclusionary rule is woefully lacking with respect to perjury in prosecutions. The decision below allows prosecutors to close their eyes to blatant perjury by key government witnesses. But reward should not greet negligent conduct. The Seventh Circuit is in error in condoning such negligence here and its possible effect on the outcome, in contrast to the other Circuits and holdings of this Court. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 272 (1959) (reversing a conviction obtained by perjury because it “may have had an effect on the outcome of the trial”).

Integrity in prosecutions has eroded amid the uncertainty about the standard governing post-trial discovery of perjury. The traditional *Larrison* rule served the judiciary and public well in protecting defendants' right to a jury trial and deterring perjury, but the newly permissive standard adopted below eliminates that safeguard. There is heightened importance to reestablishing a clear and effective deterrent to the use of perjury by the prosecution.

II. THE COURT BELOW DEPRIVED DEFENDANTS OF THEIR RIGHT TO TRIAL BY JURY, AS CLARIFIED BY *UNITED STATES V. BOOKER*, BY AFFIRMING CONVICTIONS DESPITE DISMISSAL OF UNDERLYING CHARGES.

The trial judge substituted her factual findings for that of the jury by dismissing charges, for taint of perjury, while sustaining other charges which expressly relied on the dismissed charges. The jury returned convictions, *inter alia*, on Counts 1, 2, 12 and 14. But Counts 12 and 14 expressly relied upon and incorporated Count 2, which in turn expressly relied upon and incorporated Count 1. App., *infra*, at 48a, 50a. It is impossible for the judge to determine how much the jury relied on its findings of guilt for Counts 1 (for both defendants) and 2 (for defendant Mitrione) in assessing wrongdoing for Counts dependent on 1 and 2, and her factfinding deprived defendants of their right to trial by jury within the meaning of *United States v. Booker*, 125 S. Ct. 738 (2005).

The appellate court below expressly found that the convicted counts incorporated the vacated counts:

Here, the defendants were convicted of one count of mail fraud and one count of filing false claims. **These counts adopted parts of counts 1 and 2**, which charged the defendants with devising a scheme to defraud the

Medicaid and Medicare programs of the State of Illinois and the United States.

App., *infra*, 28a (emphasis added). The appellate court even relied on this incorporation in affirming a longer sentence for defendants. *Id.* at 28a-29a. Counts 12 and 14 cannot stand alone, and expressly depended on the schemes alleged and ultimately dismissed in Counts 1 and 2. The trial judge found defendants guilty when the issue is within the sole province of the jury under *Booker*.

A. The Decision Below Deprived Defendants of Their Right to Trial by Jury by Substituting the Court’s Factfinding for the Jury’s.

“The Constitution gives a criminal defendant the right to demand that a jury find him guilty of **all the elements** of the crime with which he is charged.” *United States v. Gaudin*, 515 U.S. 506, 511 (1995) (emphasis added). Defendants properly obtained dismissal of Counts 1 and 2, which were essential to establishing *mens rea* for Counts 12 and 14, yet the trial judge refused to vacate the convictions on Counts 12 and 14. She usurped the role of the jury by denying a new trial, and denied defendants their right to an impartial determination by the jury of their alleged criminal intent. U.S. CONST., AMEND. VI. This Court held in *Agurs* that a conviction must be overturned because of the government’s knowing use of perjured testimony if there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” 427 U.S. at 103. *See also Chambers v. Mississippi*, 410 U.S. 284 (1973) (defendant is denied a fair trial when certain hearsay is excluded or a state’s rule against impeaching a witness prevents defendant’s use of a prior confession).

Count 12, for mail fraud, requires a jury finding of specific intent to defraud, beyond reasonable doubt; Count 14, for false claims, requires similar scienter. The Statler testimony

was the primary evidence of *mens rea*, and was found by the court, post-trial, to be utterly false. Defendants have a right to a trial by an impartial jury, free from taint of perjury, on these counts. The remaining evidence on the mere \$75.25 is more consistent with mistake than fraud, and thus cannot establish guilt as a matter of law beyond a reasonable doubt. The trial judge cannot make her own factfinding concerning guilt without depriving defendants of their Sixth Amendment right to a jury trial. See *United States v. Booker*, 125 S. Ct. 738, 748 (2005).

It is well-established that a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it is not possible to know the basis of the jury's decision. See, e.g., *United States v. Sawyer*, 85 F.3d 713, 730-31 (1st Cir. 1996) (“When a jury has been presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand.”); cf. *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (reversing a conviction where “there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case”). This unconstitutional infirmity is presented here: the only remaining counts expressly incorporate and are intertwined with counts 1 and 2, upon which the jury convicted defendants due to false testimony. The trial judge found that counts 1 and 2 cannot be sustained. Nor can other counts utilizing them be sustained either. See *Williams v. United States*, 500 F.2d 105, 108 (9th Cir. 1974) (reversing a perjury-based conviction because “[a] conviction based substantially upon tainted evidence cannot stand”).

B. This Court Should Resolve the Ambiguity and Conflict Concerning Application of *Booker* to Tainted Verdicts.

The decision below conflicts with another decision in the Sixth Circuit applying *Booker* to analogous facts. *See United States v. Rohira*, 355 F. Supp. 2d 894 (N.D. Oh. 2005). There, as here, the defendant was convicted of health care billing fraud based on unjustified estimates by a government witness. There, as here, the defendant moved for a new trial on this basis.

In *Rohira*, the trial court granted defendant a new trial through application of *Booker*:

The prosecution called FBI Special Agent Graupmann to testify about the amount of financial loss caused by the defendant's alleged billing fraud; through a dubious method discussed below, he estimated the loss at over \$ 1 million. Under *Booker* and *Blakely*, that is a fact that must be admitted by the defendant or expressly found by the jury beyond a reasonable doubt before it may be used to help convict him or to increase his sentence.

Rohira, 355 F. Supp. 2d at 900 (citing *Blakely v. Washington*, 542 U.S. 296 (2004), footnote deleted). This ruling follows directly from *Booker*, yet the decision below conflicts with both *Booker* and *Rohira* in denying a new trial.

In addition, the decision below conflicts with the interpretation of *Booker* as a structural requirement that cannot be overlooked as “harmless error.” *See Washington v. Recuenco*, 110 P.3d 188, *cert. granted*, 126 S. Ct. 478 (2005) (“*Blakely* Sixth Amendment violations . . . can never be deemed harmless because to do so would be to speculate on the absence of jury findings”) (citing *Washington v. Hughes*, 154 Wn.2d 118 (2005)). Even if this Court reverses *Recuenco* and adopts a “harmless error” test for jury findings, the burden of proof should never shift to the defendant to

prove that he would have been acquitted in the absence of the error. Yet under the erroneous reasoning below, a judge may uphold a jury finding as long as the defendant fails to prove that, in the absence of the error, he would have been acquitted.

The *Larrison* standard for reviewing perjury is consistent with *Booker*, and a “harmless error” application of *Booker*. In overturning *Larrison*, the decision below impermissibly allows judges to substitute their findings for that of the jury when perjury taints the verdict.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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