

No. _____

**In The
Supreme Court of the United States**

PERRY WOODALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the District of Columbia
Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What must a prosecutor do to fulfill his constitutional “responsibility and duty to correct [testimony] he knows to be false,” *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959): Must the prosecutor take affirmative steps to correct his witnesses’ falsehoods, as the majority of Circuits have held; may a prosecutor simply inform the court and counsel of the false testimony and leave it to the defense to try to expose it to the jury, as a small number of Circuits have held; or may a prosecutor actively block the correction of the false testimony, as only the District of Columbia Court of Appeals has held?

2. How does the *Chapman v. California*, 386 U.S. 18 (1967), standard of harmless review apply – as this Court has strongly indicated that it does – to a violation of this Court’s pre-existing directive in *Napue* that the prosecution must correct false testimony for the trier of fact, and is it possible for the prosecution to satisfy this demanding standard in a case where the government’s evidence was weak and where the correction of the false testimony would have impeached a key prosecution witness and corroborated the theory of the defense?

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that, to counsel's knowledge, the following parties have appeared in the District of Columbia Court of Appeals in this matter:

Perry Woodall (Petitioner/Appellant)

United States of America (Respondent/Appellee)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Perry Woodall, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

On February 26, 2004, the District of Columbia Court of Appeals affirmed Mr. Woodall's conviction and sentence. *Woodall v. United States*, 842 A.2d 690 (D.C. 2004) (App 44-55). The Court of Appeals subsequently denied Mr. Woodall's timely petition for rehearing or rehearing en banc in an unpublished opinion. *See Woodall v. United States*, 99-C0-1653 (D.C. July 21, 2004) (App. 56).

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on July 21, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) & (b).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions at issue are the Fifth and Sixth Amendments to the United States Constitution. *See* U.S. Const. amend. V ("No person shall be...deprived of life, liberty, or property without due process of law"); U.S. Const. amend VI ("the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State").

STATEMENT OF THE CASE

Appellant Perry Woodall was convicted of felony murder and various related offenses in connection with the death of Samuel Yun and the attempted robbery of Mr. Yun's liquor store. On August 3, 1998, Mr. Yun was lured out of the plexiglass enclosure in his liquor store by Loraine Jackson, and then, in the course of a struggle, was shot and killed by Ms. Jackson's male accomplice. Tr. 6/22/99 at 37-43, 166-76.

According to the government, Mr. Woodall was the male accomplice. The government never tried Ms. Jackson for her involvement in the murder.¹

The prosecution's case against Mr. Woodall was thin, at best. None of the 52 fingerprints found at the scene matched Mr. Woodall. Tr. 7/8/99 at 634-35. Moreover, although the decedent's wife, Chong Yun, knew Mr. Woodall,² was in the store at the time her husband was shot, and was able to see and hear the shooter clearly, Tr. 6/22/99 at 170-74; 6/23/99 at 200-01, 210, she did not identify Mr. Woodall as Ms. Jackson's male accomplice. Apart from Ms. Yun, the prosecution called a number of other witnesses, but none of these witnesses was in the store at the time of the shooting and, for the most part, they testified only about tangential matters. Accordingly, the government's case ultimately rested on the testimony of two men – Valdez Hall and Herb Russell – who claimed to have seen Mr. Woodall in and around the store around the time of the shooting, but did not actually witness the shooting itself.³ Both suffered from substantial reliability problems.

The circumstances surrounding Mr. Hall's identification of Mr. Woodall – specifically, the extreme pressure the police placed on Mr. Hall to identify Mr. Woodall –

¹ The government eventually did charge Ms. Jackson for this crime just before Mr. Woodall's trial commenced (thereby rendering her unavailable to testify), but it unilaterally dismissed these charges immediately after Mr. Woodall's trial ended. *See* Order of Dismissal in Superior Court Case No. F-03043-99 (September 29, 1999).

² Mr. Woodall had previously been barred from the store by the Yuns, Tr. 6/22/99 at 69, 169.

³ The government presented evidence that Mr. Woodall's niece's bike was found outside of the Yun's store some time after the shooting, but Mr. Woodall, who lived near the store, told the police that he had left the bike in his back yard. Tr. 6/29/99 at 109-11, 153. Moreover, there was no testimony that the shooter tried to flee on a bike. Tr. 6/22/99 at 57-58, 6/23/99 at 295, 299-300, 314-16, 6/28/99 at 62, Tr. 7/12/99 (a.m.) at 110-11. Finally, the government never explained why someone would bring a bike to a store that he intended to rob, but not use the bike to get away.

severely undermined its reliability. Almost immediately after the shooting, Mr. Hall gave the police a description of the shooter but failed to identify Mr. Woodall in a photo array. Tr. 6/28/99 at 64-67, 154-57. When Mr. Hall went to the police station a week later to try again to make an identification, Mr. Hall selected photographs of three other individuals – none of whom was Mr. Woodall – and told the police that he did not know the man who he had seen outside the Yun’s store.⁴ Tr. 6/28/99 at 157-61, 179; 7/6/99 at 38-39, 53, 57. The police and the prosecution eventually brought Mr. Hall around to their theory of the case and persuaded Mr. Hall to say that a photograph of Mr. Woodall depicted the shooter, Tr. 6/29/99 at 27, but this “identification” took place only after they had (1) showed Mr. Woodall’s photograph to Mr. Hall, Tr. 6/28/99 at 160-61, 189-90, (2) told Mr. Hall that they thought he was lying by failing to identify Mr. Woodall, Tr. 6/28/99 at 187-89, 7/6/99 at 74-75, (3) issued a grand jury subpoena (with Mr. Woodall’s name on it) calling Mr. Hall to come the prosecutor’s office, Tr. 6/28/99 at 155, 157; Tr. 7/6/99 at 74-75, (4) suggested that Mr. Hall could expose himself to criminal charges if he continued to lie before the grand jury, Tr. 7/6/99 at 74-75, and (5) sent him to meet with a detective who was (falsely) identified to Mr. Hall as a voice stress analyst. Tr. 6/10/99 at 38-40, Tr. 7/6/99 at 75.

Herbert Russell, the prosecution’s second witness claiming to have seen Mr. Woodall outside of the Yun’s store, not only had reliability problems with respect to this accusation,⁵ but also should have been a valuable source of testimony corroborating Mr.

⁴ Later, at trial, he changed his story. See Tr. 6/14/99 at 57; 6/15/99 at 212; 6/28/99 at 155, 192-93.

⁵ Among other things, Mr. Russell made inconsistent statements about where he was at the time of the shooting, Tr. 6/24/99 at 384-88, whether the shooter’s face was covered before he entered the store, *id.* at 378, whether he could see the shooter’s face just after

Woodall's theory of the case – namely that Lorraine Jackson's son, Anthony Shank (also known as "Black"), had actually committed the murder, not Perry Woodall. *Woodall*, 842 A.2d at 703-04 (Ruiz., J., concurring) (discussing the defense theory) (App. 54-55). Prior to trial, Mr. Russell told the police that Mr. Shank had murdered before and that he was afraid of Mr. Shank. The defense sought to present this information to the jury, Tr. 6/24/99 at 418-25 (App. 2-9), but when it questioned Mr. Russell on this topic, he first tried to minimize the importance of his conversation with the police, *id.* at 424 (App. 8) ("I don't remember. I don't remember talking to . . . Detective Hamann about Shank too much at all"), and then he baldly lied. He falsely denied that he told the police that he thought Mr. Shank had shot and killed someone else:

Q: You believe he shot the guy whose nickname is Blue, correct?

A: No

Q: You don't believe that?

A: No. I don't know anything about that.

Id. at 424 (App. 8). And he falsely denied that he feared Mr. Shank:

Q: The truth is, sir, that you're afraid of Shank?

A: No, I'm not. No, I'm not.

Q: Not at all?

A: Not at all, not at all.

Id. at 425 (App. 9).

Soon after this false testimony, the prosecutor admitted to the court – outside the jury's presence – that Mr. Russell had perjured himself. Tr. 6/24/99 at 436-37 (App. 10-11; *see also* 7/6/99 at 133 (App. 15)). The prosecutor then tried to provide excuses for Mr. Russell, but these excuses only reinforced Mr. Russell's lies and made them all the more material. Among other things, the prosecutor explained that Mr. Russell had not

the shooting, *id.* at 388-91, 396-98, the number of shots he heard, Tr. 6/23/99 at 333-39; 6/24/99 at 368-71, what the shooter was wearing, Tr. 6/23/99 at 326-29; 6/24/99 at 372-76, and who he observed leaving the store after the shooting, Tr. 6/24/99 at 397-409.

told the truth because “Shank is dangerous” and because Mr. Russell was “extremely fearful.” *Id.* at 437 (App. 11). Indeed, the prosecutor accused defense counsel of “jeopardiz[ing]” Mr. Russell’s safety by attempting to question him in a “public courtroom” about his knowledge of “cases that involve murder and very dangerous people” like Mr. Shank. *Id.* at 438 (App. 12); *see also id.* at 437 (App. 11).

Although the prosecutor informed the court of Mr. Russell’s false testimony, the prosecutor did nothing to ensure that *the jury* learned the truth; to the contrary, he worked for the opposite result. The prosecutor made no effort to elicit truthful testimony from Mr. Russell himself, and objected to defense counsel’s attempts to do so. Tr. 7/7/99 at 348 (App. 21). Likewise, the prosecutor did not sponsor any direct testimony from the investigating police officer, Detective Hamann, about his discussions with Mr. Russell regarding Mr. Shank, and again, when the defense tried to cross-examine on this subject, the prosecutor vigorously objected.⁶ Tr. 7/6/99 at 132-36 (App. 14-18). The prosecutor successfully blocked an effort by the defense to submit to the jury, as a party admission, the prosecutor’s acknowledgement to the court and counsel that Mr. Russell had lied on the stand. Tr. 7/9/99 at 12-15 (App. 23-26) (defense counsel explains that the testimony

⁶ Ultimately, the defense was allowed to make some inquiries of Detective Hamann regarding Mr. Russell’s comments about Mr. Shank, but the full scope of this conversation, and thus the complete contours of Mr. Russell’s lies covering up his fear of Mr. Shank, was never decisively resolved for the jury, nor were Mr. Russell’s lies definitively identified as falsehoods. Thus, although the defense was able to elicit some testimony from Detective Hamann that the detective and Mr. Russell had discussed Mr. Shank’s involvement in another murder, the detective misleadingly blunted the impact of this concession by telling the jury “this is all hearsay.” Tr. 7/6/99 at 136-37 (App. 18-19). Moreover, on the critical issue of whether Mr. Russell had ever expressed fear of Mr. Shank to Detective Hamann, the detective actually testified that Mr. Russell was merely “cautious” and not “afraid,” thus not only failing to contradict Mr. Russell but, in fact, bolstering Mr. Russell’s lie that he had never expressed any fear of Mr. Shank. Tr. 7/6/99 at 137 (App. 19).

from Mr. Russell and Detective Hamann had not exposed the truth and that “an admission [from the prosecution] that their testimony was untruthful [would] finish[] it.”). The prosecutor also successfully blocked a defense request for a special jury instruction on witness perjury. Tr. 7/9/99 at 42-43 (App. 27-28) (prosecution argues that the instruction does not apply because Mr. Russell is not “an admitted perjurer”). Finally, in closing, the prosecutor “did not stand squarely behind what he knew to be the correct version when he last addressed the jury” but rather suggested that Mr. Russell was not afraid of Mr. Shank and that “Mr. Russell’s credibility on this issue was a question for the jury.” *Woodall*, 842 A.2d at 704 (Ruiz, J., concurring) (App. 55); *see also* Tr. 7/12/99 (a.m.) at 57; 7/12/99(p.m.) at 25-26.

The jury convicted Mr. Woodall.

Mr. Woodall’s primary argument on appeal was that the prosecution had violated its obligation under *Napue v. Illinois*, 360 U.S. 264 (1959), to correct the concededly false testimony of one of its key witnesses. In response, the government argued that it had discharged its constitutional duty in full simply by notifying the court and defense counsel of the perjured testimony of its witness, and that it was perfectly proper for the trial court to conclude that the perjured testimony had been “corrected” by defense counsel’s cross-examination of prosecution witnesses. *See* Brief for Appellee to District of Columbia Court of Appeals, dated May 23, 2003 at 18-21 (App. 36-39).

Alternatively, the government argued that even if “additional steps” should have been taken to correct the perjured testimony, the failure to do so was not reversible error. *Id.* at 22 (App. 40). On this latter point, the government asserted that it did not have to establish the harmlessness of a *Napue* error beyond reasonable doubt, pursuant to

Chapman v. California, 386 U.S. 18 (1967), but rather that it was Mr. Woodall’s “burden to establish that the false testimony affected the verdict.” *Id.* at 22 n.26 (App. 40).

The Court of Appeals effectively adopted the government’s arguments in affirming Mr. Woodall’s conviction. Although the Court of Appeals acknowledged that Mr. Russell had testified falsely at trial, it held that the prosecutor had “fulfilled his bedrock obligation under due process by apprising the [trial] court and the defense of Mr. Russell’s false denials.” 842 A.2d at 696 (App. 48).⁷ In addition, the Court of Appeals held Mr. Woodall’s focus on what the prosecutor had or had not done to ensure that the jury heard the truth was ultimately misplaced, *id.* at 697 (App. 49), and that the real question for the appellate court in determining error was whether the defense had been able to elicit an adequate factual foundation for its theory concerning Mr. Russell’s “motive . . . to accuse appellant falsely instead of Shank.” *Id.* at 699 (App. 51). Relying on defense counsel’s admittedly ineffectual cross-examination of Detective Hamann, Tr. 7/9/99 at 15 (App. 26), the court held that this motive had been “ventilated fully.” 842 A.2d at 699 (App. 51).

In addition to its determination that the prosecution had fully satisfied its constitutional obligations under *Napue*, the Court of Appeals cursorily concluded that, even if the government’s failure to correct Mr. Russell’s perjurious testimony constituted constitutional error, such an error did not warrant reversal. 842 A.2d at 699 (App. 51).

The court had at the outset of its legal analysis cited to *Chapman* to identify the standard

⁷ The Court inconsistently held, however, that the prosecutor’s objections to defense counsel’s efforts to elicit the truth on cross-examination could not have been made in “good faith” and that, “[i]n that regard,” the prosecutor “fell short” of his constitutional obligations. 842 A.2d at 697 (App. 49).

of harmless error review,⁸ *id.* at 696 (App. 48), but when it actually conducted its one-paragraph harmless error analysis, it did not refer to this Court’s precedent at all. *Id.* at 699 (App. 51). Moreover, the court never addressed, let alone rejected, the argument that the government did not bear the burden of proving this *Napue* error harmless beyond a reasonable doubt in order to avoid reversal. Instead, unencumbered by any meaningful discussion of the law or comprehensive assessment of the facts, the court held that even though “Russell was undeniably a key witness,” his identification of Mr. Woodall as the shooter was “firmly corroborated” both by the testimony of Valdez Hall (whose serious reliability problems, *see pp. 2-3 supra*, the court completely ignored), and by the testimony of two other prosecution witnesses, Hazel Evans and Rudolph Lindsey (who, as the prosecutor conceded in closing, had not even ventured to identify Mr. Woodall as someone they at observed at or near the scene, Tr. 7/12/99(a.m.) at 38-39). 842 A.2d at 699 (App. 51). Nowhere in its harmless error analysis did the Court acknowledge that Mr. Russell’s false and uncorrected denial of his fear of Mr. Shank went straight to the heart of the defense’s theory of the case that Mr. Shank, not Mr. Woodall, had shot Mr. Yun.

On May 17, 2004, Mr. Woodall petitioned for rehearing or rehearing en banc arguing that the Court of Appeals’ opinion was at odds with this Court’s jurisprudence and with the unanimous views of the federal circuits, all of which made clear that the government could not discharge its constitutional duty to affirmatively correct perjury in

⁸ Curiously, the lower court applied the standard under *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), to find harmless the trial court’s denial of the defense request to force the correction of Mr. Russell’s perjury by submitting to the jury the prosecutor’s acknowledgement of Mr. Russell’s lies as the admission of a party-opponent. 842 A.2d at 695 n.5 (App. 48).

the manner that took place in the trial court. Mr. Woodall also sought rehearing on the ground that the Court of Appeals' harm analysis was fundamentally inconsistent with the constitutional harmless error standard this Court applied in *Napue*, clarified in *Chapman* and reaffirmed in *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985). The Court of Appeals denied Mr. Woodall's petition in an unpublished decision on July 21, 2004, and this timely certiorari petition followed.

REASONS FOR GRANTING THE WRIT

Mr. Woodall's case – in which it is undisputed both that a key prosecution witness testified falsely and that the prosecutor did nothing to correct this perjury for the jury despite a defense request to do so – presents an excellent vehicle for clarifying two critically important points of law: (1) the scope of a prosecutor's affirmative constitutional "responsibility and duty to correct what he knows to be false," *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (internal citation and quotations omitted), and (2) the proper application of the standard of review set forth by this Court in *Chapman v. California*, 386 U.S. 18, 22, 24 (1967) – requiring the government to prove constitutional error harmless beyond a reasonable doubt – to uncorrected perjured testimony by a key prosecution witness. *See* Sup. Ct. R. 10 (b) & (c).

The lower court in this murder case held that the prosecutor had "fulfilled his bedrock obligation" under *Napue* simply by informing the trial court and defense counsel of the perjury of a central witness – Herbert Russell – concerning Mr. Russell's conversations with the police about his fear (and the basis there for) of the very person the defense argued was the real shooter – Anthony Shank. 842 A.2d at 696 (App. 49). According to the court, the prosecutor had no additional obligation to set the record

straight for the jury about Mr. Russell's lies about Mr. Shank, despite a defense request to do so, because defense counsel, over government objection, had managed to elicit on cross-examination some testimony that contradicted to some extent – but did not decisively establish as untrue – Mr. Russell's denials that he believed Mr. Shank to be a murderer and that he feared Mr. Shank. *Id.* at 697-99 (App. 49-51). Thus, the court below held that there was no constitutional error, even though the jury in this case was never actually informed that Mr. Russell had lied on the stand, and even though what little evidence there was calling Mr. Russell's testimony partially into question was presented not by the government but *in spite of* the government's best efforts to keep it from the trier of fact.

The lower court's extraordinarily cramped reading of a prosecutor's duties under *Napue* cannot be reconciled with the vast weight of lower court authority. Even more troubling, it is part of a minority of decisions – albeit the most extreme even in that group – by lower courts who are reinterpreting and rolling back a prosecutor's duty to ensure that a conviction does not rest on false evidence. Allowing such a development in the law to proceed unchecked can have terrible consequences; perjured testimony is among the leading causes of wrongful convictions in homicide cases.⁹ Although this Court has consistently reaffirmed that perjury at trial is not to be tolerated, it has not, since *Napue*, directly addressed what a prosecutor must do to fulfill its obligation to correct the false testimony of one of its witnesses. Further clarification and reinforcement of this duty is accordingly needed, to ensure that prosecutors continue to act as “the representative . . .

⁹ See websites of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org>; the Innocence Project at Cardozo Law School, <http://www.innocenceproject.org>; and the Center on Wrongful Convictions at Northwestern Law School, <http://www.law.northwestern.edu/wrongfulconvictions>.

of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. *See Berger v. United States*, 295 U.S. 78, 88 (1935).

In addition, review of Mr. Woodall’s case is warranted to reaffirm and reinforce the proper method of conducting harmless error analysis on appeal when indisputably perjured testimony by a government witness has gone uncorrected. This Court has strongly indicated that the stringent harmless standard of review articulated in *Chapman* applies to *Napue* violations, *see, e.g., United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985), and no Circuit court has ever challenged this direction. Nonetheless, numerous lower courts, like the Court of Appeals below, fail to conduct a proper harmless analysis under *Chapman*, either because they incorrectly place the burden of proof on the defendant instead of the government (as required by *Chapman*, 386 U.S. at 24), or because they misapprehend the nature of that burden to be something other than proof that the error was “so unimportant and insignificant” that it could be deemed “harmless beyond a reasonable doubt.” *Id.* at 22, 24. As a result, Due Process guarantees, the fundamental right to a trial by jury, and ultimately the integrity of our criminal justice system are compromised.

In making its determination that there was no reversible error in this case, the D.C. Court of Appeals failed to repudiate the government’s argument that the *Chapman* analysis was inapplicable. But even if the lower court was purporting to apply the correct *Chapman* standard (and it is not clear that it was), it apparently did not understand how this should be done. Quite simply, the court did not make the required finding under *Chapman* that the government had demonstrated that the prosecutor’s failure to correct Mr. Russell’s false testimony was so minor and tangential to the case that it could be

deemed harmless beyond a reasonable doubt – a finding that would not have been possible given the facts of this case. The fact that lower courts (and prosecutors) are so confused about the application of the *Chapman* standard to *Napue* violations is a compelling reason for this Court’s review. By granting the instant petition, this Court can clarify that the proper application of the stringent standard of harmless error analysis set forth in *Chapman* is critical to provide the maximum protection against the pernicious effect of perjured testimony.

III. Certiorari must be granted because the District of Columbia Court of Appeals’ opinion reveals a growing circuit split about the scope of the government’s duty under *Napue v. Illinois*, 360 U.S. 264 (1959), to cleanse the record of false testimony by its witnesses – a split that threatens to undermine a fundamental tenet of our criminal justice system, namely that prosecutors have an affirmative, non-delegable duty to uphold Due Process of law.

The lower court’s opinion refuses to acknowledge any governmental duty to correct, for the trier of fact, false testimony by prosecution witnesses. It is a fundamental tenet of our criminal justice system, however, that the use of perjured testimony by a prosecutor is incompatible with Due Process guarantees. *See* U.S. Const. amend. V; *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (due process violated where “a state has contrived a conviction . . . through a deliberate deception of . . . [the] jury by the presentation of testimony known to be perjured”). To prevent the use of perjured testimony in the first place and thereby to ensure that the integrity of our criminal justice system is not compromised by reliance on such tainted evidence, this Court held in *Napue v. Illinois*, 360 U.S. 264 (1959), that whenever a prosecutor determines that false testimony has been presented at trial, he has an affirmative, nondelegable responsibility not only disclose it to the court and the defense, but also to “correct” it in open court and

thereby cleanse the record for the jury. *Id.* at 270.

The recognition of this prosecutorial duty in *Napue* was a natural extension of the principle that a prosecutor, as “the representative . . . of a sovereignty” has a special, overarching obligation in a criminal prosecution to ensure “that justice shall be done.” *See Berger*, 295 U.S. at 88; *see also Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1115-16 (9th Cir. 2001) (analyzing *Napue* and *Berger* as parallel lines of authority). Accordingly, this Court in *Napue* did not seek to put any arbitrary limits on a prosecutor’s duty to correct false testimony. To the contrary, the Court explained that a prosecutor bears this obligation not only when he “solicit[s] false evidence” but also when he “allows [false testimony] to go uncorrected when it appears.” 360 U.S. at 269; *cf. Miller v. Pate*, 386 U.S. 1 (1967) (prosecutor may not make arguments based on facts known to be false). Likewise, this Court has made clear that a prosecutor’s duty extends beyond evidentiary matters, *see, e.g., Alcorta v. Texas*, 355 U.S. 28 (1957), to issues of credibility. *See Napue*, 360 U.S. at 268-72 (reversible error where prosecutor failed to correct lie that witness had received no consideration from the government for his testimony); *Giglio v. United States*, 405 U.S. 150, 155 (1972) (same). Finally, this Court held that the actions of the defense do not relieve a prosecutor of his duty to correct false testimony. *See Napue*, 360 U.S. at 270 (rejecting argument that defense impeachment of government witness in other ways “turned what was otherwise a tainted trial into a fair one”). In short, this Court has made explicit that the injection of a known falsehood – whatever its form – into a trial record is incompatible with the demands of Due Process and poses such a great danger to the integrity of our criminal justice system, that a prosecutor may not turn a blind eye to it: “A lie is a lie, no matter what its subject, and, if

it is *in any way relevant* to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth” by apprising the jury of the “true facts.” *Id.* at 269-70 (internal citation and quotations omitted) (emphasis added).

The vast majority of lower courts – understanding that the object of the *Napue* rule is to prevent the “corruption of the truth-seeking function of the trial process,” *United States v. Agurs*, 427 U.S. 97, 104 (1976) – has affirmed broad application of a prosecutor’s duty to correct false testimony. *See, e.g., Shih Wei Su v. Filion*, 335 F.3d 119, 126-27 (2d Cir. 2003); *United States v. Mason*, 293 F.3d 826, 828-29 (5th Cir. 2002); *United States v. LaPage*, 231 F.3d 488, 491-92 (9th Cir. 2000); *United States v. Bontkowski*, 865 F.2d 129, 133 (7th Cir. 1989); *United States v. Foster*, 874 F.2d 491, 494-95 (8th Cir. 1988); *United States v. Rivera Pedin*, 861 F.2d 1522, 1529-30 (11th Cir. 1988); *Campbell v. Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979). In keeping with this philosophy, lower courts have generally rejected efforts to constrict in some way the prosecutor’s obligation to cleanse the record of perjury or to shift some of this burden onto the defense. *See, e.g., United States v. Alli*, 344 F.3d 1002, 1007 (9th Cir. 2003) (“Despite defense counsel’s efforts on cross-examination, the government ha[s] an independent obligation immediately to take steps to correct known misstatements of its witnesses”); *Jenkins v. Artuz*, 294 F.3d 284, 294-96 (2d Cir. 2002) (prosecutor must “correct” false evidence because “[e]ven prosecutorial silence harms defendants, who are unable to respond effectively”) (internal citation and quotations omitted); *Mason*, 293 F.3d at 829 (defense conduct “does not relieve the government of its affirmative obligation to correct false testimony”); *Northern Mariana Islands v. Bowie*, 243 F.3d at 1118, 1122 (9th Cir. 2001) (regardless of actions by defense, prosecutor has “a free

standing constitutional duty . . . to protect the system against false testimony”); *Foster*, 874 F.2d at 495 (defense failure to act “did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions”).

Against this backdrop, the lower court’s opinion stands out in two key respects. First, notwithstanding the clear mandate of *Napue* and its progeny that the prosecutor must correct false testimony for the jury, and notwithstanding an explicit request by the defense at trial that the prosecutor fulfill this duty, the lower court held that the government had adequately discharged its responsibility under *Napue* simply by disclosing the perjury of its key witness, Herbert Russell, to the court and counsel. Second, discounting completely the importance of the prosecutor’s duty as an officer of the court and representative of the sovereign to seek justice, the lower court held that the focus on what the prosecutor had or had not done was actually misplaced, because, in the court’s view, defense counsel, through cross-examination of another prosecution witness, Detective Hamann, had adequately impeached Mr. Russell.

The lower court’s decision stands out, but it does not stand alone. Rather, it is the most extreme of a minority of cases that, in similar ways, are chipping away at this Court’s decision in *Napue* and at the heretofore unquestioned special role of a prosecutor to promote and protect Due Process guarantees both before and during trial. The lower court relied on a number of these decisions, *see* 842 A.2d at 696-98 (App. 49-50), in determining that the prosecutor’s inaction did not constitute error. *See United States v. O’Keefe*, 128 F.3d 885, 894-96 (5th Cir. 1997) (prosecutor only has a duty to correct false testimony that he elicits; defense is responsible for addressing false testimony by prosecution witnesses on cross-examination); *United States v. Grosz*, 76 F.3d 1318, 1328

(5th Cir. 1996) (no violation of prosecutor’s duty to correct false testimony where defense cross-examined witness about the falsehood); *United States v. Adebayo*, 985 F.2d 1333, 1341-42 (7th Cir. 1993) (prosecutor only has a duty to correct false testimony elicited by the government on direct); *United States v. Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976) (no violation of prosecutor’s duty to correct perjured testimony where prosecutor informed the defense of the truth “at a time when recall and further exploration of these matters was still possible”); *Bruce v. United States*, 617 A.2d 986, 993 (D.C. 1992) (no violation of prosecutor’s duty to correct perjured testimony where defense was on notice of falsity because “it was at least arguably appropriate for the prosecutor to leave it to defense counsel to propose a way to protect the interests of his client”).¹⁰

Notably, the lower court in this case is in the vanguard in reaching the conclusion that there is no need for a prosecutor to correct false testimony for the trier of fact where, as here, the prosecutor actively works to keep the truth from the jury, and where the defense, after unsuccessfully attempting to expose the truth on cross-examination, affirmatively requests correction of the falsehood by the prosecutor. Indeed, there appear to be no other published decisions holding that the prosecutor’s failure to correct perjured testimony under such circumstances comports with Due Process. Consequently, this

¹⁰ In effect, these decisions and the decision by the D.C. Court of Appeals hold that a prosecutor’s duty of disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), largely supercedes the duty to cleanse the record of perjury under *Napue*. But although *Brady* and *Napue* were both derived from *Mooney v. Holohan*, 294 U.S. 103, see *Brady*, 373 U.S. at 86; *Napue*, 360 U.S. at 269, their objectives are distinct. *Brady* seeks to ensure that a defendant has the tools necessary to conduct his defense and thereby receive a fair trial, see *Bagley* 473 U.S. at 678-84, whereas *Napue* seeks to ensure that the government does not rely on perjured testimony and thereby undermine the integrity of our criminal justice system. See *Agurs*, 427 U.S. at 103.

decision both conflicts with the vast majority of lower court decisions that hold that a prosecutor has an affirmative, nondelegable duty to correct known, false testimony for the trier of fact, and sets a dangerous precedent.

Precisely for these reasons, *see* Sup. Ct. R. 10 (b), and because there are no complicated questions regarding the interplay between *Napue* and a defense counsel's duties to provide effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Woodall's case presents a perfect vehicle for this Court to review and reaffirm two basic principles: (1) the use of perjured testimony is inconsistent with the fundamental, constitutional guarantee of Due Process and with our belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair," *see Brady v. Maryland*, 373 U.S. 83, 87 (1963); and (2) the prosecutor has an affirmative, free-standing duty – separate and apart from the actions of the defense – to cleanse the record whenever it knows that one of its witnesses has testified falsely.¹¹ *See Napue*, 360 U.S. at 269-70. Since *Napue* this Court has consistently reaffirmed a prosecutor's duties to correct the false testimony but has not discussed the scope of this duty at any length. *See, e.g., Bagley*, 473 U.S. at 678-80 (referencing but not discussing scope of duty to correct); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (same); *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (same). The opinion below, and the decisions on which it relies demonstrates that lower courts (and in particular the District of Columbia Court of Appeals) will continue to issue misguided decisions erroneously constricting a

¹¹ Because the resolution of these issues may impact the conduct of every prosecutor in the country, this Court's general "reluctance to review decisions of courts of the District involving matters of peculiarly local concern," *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974), has no application to this case.

prosecutor's duties under *Napue* unless and until this Court intervenes.¹² This Court should grant the petition to realign outlier lower courts with the dictates of Due Process in this critical area of the law.

II. Certiorari is also required because the harm analysis by the court below illustrates a fundamental and pervasive lack of understanding about the proper application, in the *Napue* context, of the constitutional harmless error standard set forth in *Chapman v. California*, 386 U.S. 18 (1967).

The decision below exposes a pervasive problem: lower courts' lack of understanding about how to conduct harmless error analysis in the context of *Napue* violations. This Court has strongly indicated that a prosecutor's failure to correct known, false testimony should be analyzed under this Court's subsequent decision in *Chapman v. California*, 386 U.S. 18, 22, 24 (1967), which specifically requires that the government, in order to avoid reversal, prove that the constitutional error is "so unimportant and insignificant" that it can be deemed "harmless beyond a reasonable doubt." See *Bagley*, 473 U.S. at 679 n.9¹³ ("this court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is the equivalent to the *Chapman* harmless-error standard."); *Strickler v. Greene*, 527 U.S. 263 at 299 (1999) (Souter, J., concurring) (*Napue* "reasonable possibility" standard is the functional equivalent of *Chapman* harmless standard); cf. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) (*Chapman* standard applies to all constitutional errors on direct review). Indeed, in

¹² Because D.C. Code offenders do not have access to habeas review under 28 U.S.C. § 2254, see *Swain v. Pressley*, 430 U.S. 372 (1977), granting direct appellate review is the only means by which this Court can set the D.C. Court of Appeals back on course with respect its resolution of *Napue* claims.

¹³ *Bagley* was a plurality opinion, but a majority of the court agreed that *Chapman* should apply to *Napue* errors. See 473 U.S. at 679 n.9 (plurality), *id.* at 706-07 (Marshall, J., dissenting), and *id.* at 713 n.6 (Stevens, J., dissenting).

Bagley, the Court noted that the United States had properly conceded that it was “clear” that the *Chapman* standard for harmless error applied to the knowing use of uncorrected false testimony. 473 U.S. at 679 n.9.

The *Chapman* standard is superior to previous attempts to define harmless error analysis in that it clearly identifies both the party who bears the burden of proof – the government – and the nature of that difficult burden – harmless beyond a reasonable doubt. By contrast, the earlier, analytically less precise “reasonable likelihood” or “reasonable possibility” standard for reversal initially set forth in *Napue*, 360 U.S. at 271 (authorizing reversal if false testimony “could . . . in any reasonable likelihood have affected the judgment of the jury”), did neither, *see Strickler*, 527 U.S. at 300-01 (Souter, J. concurring) (expressing concern about the “soft edges” of the “reasonable possibility” “reasonable probability” standards), and has been construed as placing the burden on the defendant to establish some measure of harm. *See, e.g., Agurs*, 427 U.S. at 104, 112 (affirming that “reasonable likelihood” standard applies to *Napue* errors and imposing a “higher burden on the defendant” in *Brady* cases to establish materiality/prejudice when no specific request for disclosure has been made). Furthermore, applying *Chapman* – which is the most stringent standard of harmless error analysis – to *Napue* errors makes sense, because the knowing use of perjured testimony involves not only prosecutorial misconduct, but also “a corruption of the truth-seeking function of the trial process.” *See Bagley*, 473 U.S. at 680 (quoting *Agurs*, 427 U.S. at 104).

Numerous Circuit courts have followed this Court’s directive and employed the *Chapman* standard of harmless error to *Napue* violations, *see, e.g., United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *Rivera Pedin*, 861 F.2d 1529 n.13; *Brown v. Borg*,

951 F.2d 1011, 1015 n.2 (9th Cir. 1991); *United States v. Kaufman*, 783 F.2d 708, 709 (7th Cir. 1986); *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979); cf. *LaPage*, 231 F.3d at 491 (citing *Bagley* citing *Chapman*); *Tayborn v. Scott*, 251 F.3d 1125, 1131 (7th Cir. 2001) (applying *Chapman* on collateral review); *Ouimette v. Moran*, 942 F.2d 1, 11-12 (1st Cir. 1991) (same), and no Circuit court reviewing a *Napue* violation has held that *Chapman* does not apply on direct appeal. Nevertheless, perhaps because this Court has not granted review and resolved a *Napue* harmless error case post *Chapman*, a significant number of lower courts appear to be fundamentally confused about how to conduct a proper *Chapman* harmless analysis when confronted with *Napue* violations on direct appeal.

That the lower courts are confused about whether and how to apply the harmless error analysis of *Chapman* is manifested by (1) the frequent failure of courts to cite to *Chapman* and its more clearly defined “harmless beyond a reasonable doubt” standard, and their persistent citation instead to the less precise, pre-*Chapman* “reasonable likelihood” standard, see, e.g., *United State v. Rodriguez*, 162 F.3d 135, 146 (1st Cir. 1998); *United States v. Gambino*, 59 F.3d 353, 365 (2d Cir. 1995); *Adebayo*, 985 F.2d at 1341; *Foster*, 874 F.2d at 495; *United States v. O’Dell*, 805 F.2d 637, 641 (5th Cir. 1986); see also, *Mason*, 293 F.3d at 828-29 (eschewing reliance on any standard at all); (2) the improper shifting to the defense the burden of establishing some measure of harm, see, e.g., *Gambino*, 59 F.3d at 365 (“when the prosecution knowingly makes use of perjured testimony, the standard for materiality is reduced to a showing of any reasonable likelihood that the false testimony could have affected the judgment of the jury”) (internal citation and quotation omitted); *Adebayo*, 985 F.2d at 1341-42 (affirming

conviction where defendant “fail[ed]” to “show[] that [the prosecution witness’] perjury affected the judgment of the jury”); *United States v. Langston*, 970 F.2d 692, 700 (10th Cir. 1992) (in order to obtain reversal for *Napue* violation, “defendants . . . bore the burden of demonstrating that the false testimony was material”); *O’Dell*, 805 F.2d at 641 (burden on defendant to prove materiality of false testimony); *Card v. United States*, 776 A.2d 581, 602 (D.C. 2001) (“To succeed in [a *Napue*] claim, [defendants] bear the burden of establishing that . . . the false testimony could have affected the judgment of the jury”); *cf. Keys v. United States*, 767 A.2d 255, 261 (D.C. 2001) (questioning whether defendant could “establish any reasonable likelihood of prejudice” but determining that no *Napue* error had occurred); and (3) the determination by some courts that defendants raising *Napue* errors bear the distinct *Brady* burden of establishing a “reasonable probability” of a different outcome. *See, e.g., O’Keefe*, 128 F.3d at 898 (affirming conviction based in part on false testimony where no “reasonable probability” of a different jury verdict); *United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995) (applying “unitary” “reasonable probability” standard to government’s *Napue* and *Brady* violations).

The opinion of the Court of Appeals in this case is just one more example of the lower courts’ confusion. The court below never rejected – indeed, it entirely avoided – the government’s argument that *Chapman* did not apply and that it was Mr. Woodall’s burden to establish some measure of harm to justify reversal. Consequently, the court never clarified which party it believed bore the burden of proof, and it never explicitly stated that it had concluded that the government had met its burden of proving Mr.

Russell's uncorrected perjury harmless beyond a reasonable doubt.¹⁴

Such a conclusion would not have been possible, given the facts of this case. The government's case against Mr. Woodall, which the lower court vastly inflated, was weak. *See pp. 2-3 supra*. There was no physical evidence linking Mr. Woodall to the crime, and Valdez Hall, the government's only identifying witness apart from the mendacious Mr. Russell, only indicated that Mr. Woodall was the shooter after identifying three other people and after the police and the prosecution pressured Mr. Hall to identify Mr. Woodall instead. Moreover, Mr. Russell's uncorrected perjury was not simply a matter of unexposed impeachment evidence, *but see Napue*, 360 U.S. at 269-72 (reversible error where prosecution failed to correct witness' false testimony regarding bias). Mr. Russell's false denials about his conversations with the police about Mr. Shank, and specifically his false denial about his fear of Mr. Shank, went to the heart of Mr. Woodall's defense that Mr. Shank was the real shooter and that Mr. Russell had falsely implicated Mr. Woodall in the charged murder because Mr. Russell was afraid of Mr. Shank. *See, e.g., Alcorta*, 355 U.S. at 31 (reversible error where uncorrected false testimony "apart from impeaching [the] credibility [of the prosecution's key witness], tended to corroborate" the theory of the defense); *Taylor v. Lombard*, 606 F.2d 371, 375 (1979) (same). Finally, the prejudice from the prosecutor's failure to expose Mr. Russell's lies was exacerbated by the prosecutor's argument in closing, in violation of *Miller v. Pate*, 386 U.S. 6-7, that Mr. Russell's reliability was an open question for the

¹⁴ As a further indication of its confusion, the court also applied the lower *Kotteakos* harmless standard to the court's failure to grant defense counsel's request to force the prosecution to correct the false testimony of Mr. Russell by submitting the government's admission of perjury to the jury. 842 A.2d at 696 n.5 (App. 48); *see also* n.8 *supra*. Because the government's objection to this request was part and parcel of the government's *Napue* violation, it too should have been analyzed under *Chapman*.

jury, and that the jury could credit Mr. Russell’s lies. *See* 842 A.2d at 704 (App. 54-55). In short, because the prosecutor’s failure to correct its key witness’ false testimony in this weak case perverted the fact-finding function of Mr. Woodall’s trial, a fair application of the *Chapman* standard could only have led to reversal.¹⁵ *See Brecht*, 507 U.S. at 643 (Stevens, J. concurring) (noting that the “quality of the judgment with which [a harmless standard] is applied” is of the utmost importance).

This Court should intervene to reaffirm and reinforce the proper harmless analysis for *Napue* errors on direct appeal. *See* Sup. Ct. R. 10 (c). This Court has not reviewed and decided a *Napue* harmless error case since it decided *Chapman*. Even though a majority of the Court indicated in *Bagley* that it believed the law to be “clear” that the *Chapman* harmless standard applied to *Napue* cases, 473 U.S. at 679 n.9, the obvious confusion of lower courts – who are either ignoring *Chapman* entirely, or applying *Chapman* in such a way as to render it unrecognizable as such – demonstrates that further explication is required. Much like in *Kyles v. Whitley*, 514 U.S. 419, 432-54 (1995), where this Court provided needed guidance to lower courts regarding how to conduct a proper *Brady* materiality analysis, this Court could, by granting review in the instant case, explain in more detail both how to apply *Chapman* properly and why proper application of the *Chapman* harmless standard to *Napue* violations is so important.

Specifically, this Court could explain to the lower courts that it is critical to hold the line on harmless error analysis when reviewing *Napue* errors, because the act of

¹⁵ Of course, this Court, like the Court in *Napue*, is not bound by the D.C. Court of Appeals misguided harmless error analysis. 360 U.S. at 271-72 (reaffirming the “duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged . . . resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.”)

forcing the government to prove that these due process violations are harmless beyond a reasonable doubt is the final bulwark against the corruption of our criminal justice system by false testimony. *See Chapman*, 386 U.S. at 22 (“harmless error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one”). Moreover, this Court could explain that when a lower court applies a harmless standard that is not sufficiently demanding to a *Napue* violation, a defendant’s Sixth Amendment right to a jury trial is compromised as a result. In effect, the appellate court impermissibly substitutes its judgment of the defendant’s guilt for that of the jury, which was precluded from deliberating with all the true facts before it because of the prosecutor’s *Napue* violation. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (*Chapman* harmless inquiry preserves jury trial guarantee); *see also Blakely v. Washington*, 124 S. Ct. 2531, 2538-39 (2004) (jury trial right “is no mere procedural role, but a fundamental reservation of power in our constitutional structure”).

In sum, the lower court’s harmless analysis in this case – untethered to this Court’s precedent and unfounded in the facts – is illustrative of broader confusion among lower courts concerning the proper application of the harmless analysis set forth in *Chapman* to *Napue* violations. Likewise, the decision of the court below provides this Court with the perfect vehicle to address this grave problem. Accordingly, the Petition should be granted.

CONCLUSION

The lower court opinion sends entirely the wrong message about what trial and appellate courts should do when confronted with uncorrected false testimony by a key government witness and is at odds with federal precedent and the precedents of this Court. Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

PERRY WOODALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

Timothy P. O'Toole, Counsel for Petitioner, states that on October 19, 2004, he sent copies of the Motion for Leave to Proceed in Forma Pauperis, Declaration in Support of Motion, Petition for Writ Certiorari, and Appendices to Petition for Writ of Certiorari, to the Solicitor General of the United States and to Counsel for Respondent:

John Fisher, Esq.
Assistant United States Attorney
Appellate Division
555 4th Street NW
Room 8104
Washington, DC 20530

Theodore B. Olson, Solicitor General
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950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

by placing these documents in a properly addressed envelope with fully prepaid first-class postage affixed thereon, and depositing the envelope with the United States Postal Service in Washington, D.C.

Timothy P. O'Toole
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Dated October 19, 2004.