No. 03-1668

In the Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Each petitioner was found guilty by a jury on multiple criminal charges involving Medicaid and Medicare fraud. Based on newly discovered evidence that a prosecution witness had committed perjury at trial, the district court granted petitioners' subsequent motion for a new trial on most of the counts of conviction. The court denied the motion, however, with respect to two of the counts of conviction, on the ground that the perjured testimony was unrelated to those charges. The questions presented are as follows:

1. Whether the district court erred in denying petitioners' motion for a new trial with respect to two of the counts of conviction.

2. Whether petitioners' convictions on mail fraud and false claim charges should be reversed because those counts incorporated by reference allegations concerning the scheme to defraud that were contained in counts of the indictment as to which the district court granted petitioners' motion for a new trial.

3. Whether the conduct underlying the two counts of conviction that the district court allowed to stand, which involved the submission of reimbursement claims for services that were performed by a non-physician assistant, violated either state or federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 357 F.3d 712. The opinion of the district court (Pet. App. 18a-22a) is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2004. A petition for rehearing was denied on March 25, 2004 (Pet. App. 50a). The petition for a writ of certiorari was filed on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioners

were found guilty of conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); mail fraud, in violation of 18 U.S.C. 1341 (Mitrione: Counts 2, 3, 5, 10-12; DeVore: Counts 3, 5, 10-12); filing false claims, in violation of 18 U.S.C. 287 (Mitrione: Counts 6, 9 and 14; DeVore: Counts 4, 9, and 14); and health care fraud, in violation of 18 U.S.C. 1347 (Count 15). See Pet. App. 23a-39a (indictment).[1] Petitioners subsequently filed a motion for new trial based on newly discovered evidence. The district court denied the motion as to Counts 12 and 14, but granted it as to the remaining counts. The government elected not to retry petitioners on the charges as to which a new trial had been granted. With respect to Counts 12 and 14, petitioner Mitrione was sentenced to 23 months of imprisonment, to be followed by three years of supervised release. Petitioner DeVore was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. Each petitioner was ordered to pay restitution in the amount of $11,255.65. The court of appeals affirmed. *Id.* at 1a-17a.

1. Mitrione, a psychiatrist, and DeVore, his office manager, were indicted on charges of fraud in connection with their receipt of payments under the Medicaid and Medicare programs. The alleged fraud involved billing for services that were not provided (ghost billing), overstating services that were provided (upcoding), and billing for services performed by others while declaring that the services were provided by Mitrione personally (substitute billing). Pet. App. 1a.

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[1] Petitioner Mitrione was acquitted of one count of mail fraud and one count of filing false claims. Petitioner DeVore was acquitted of counts of mail fraud and two counts of filing false claims. The government dismissed one mail fraud count.

In the early 1990's, Mitrione established a psychiatric practice in Springfield, Illinois. The following year, he applied to become a Medicaid provider with the Illinois Department of Public Aid (IDPA), which administers the Medicaid program in Illinois. Mitrione agreed to comply with Illinois Medicaid policies set forth in the applicable medical assistance handbooks. One such policy was that physicians could be paid under Illinois Medicaid only for psychiatric services personally provided by the physician and that services rendered by a psychologist or social worker were not reimbursable. Pet. App. 2a-3a.

Mitrione was also enrolled as a provider with the Medicare Part B system, which (like Medicaid) is a "fee for service" program. Unlike Illinois Medicaid, Medicare allows providers under certain circumstances to obtain reimbursement for psychological services that are performed by delegees rather than by the physician personally. Medicare regulations require, *inter alia*, that those services be performed under the direct supervision of the physician. The Medicare manual states that, in order to fulfill the "direct supervision" requirement, a physician must be present in the same office so that he can intervene if an emergency arises. Even if a physician is present, the Medicare rules do not allow payment for the services of unlicensed mental health providers. Pet. App. 3a.

In September 1994, Mitrione brought DeVore into his practice as a new officer manager. Petitioners instituted a policy of billing IDPA for services performed by nonphysicians, while causing their billing clerks to substitute Mitrione's name for that of a nonphysician on the claim forms sent to IDPA. DeVore reviewed the claims before they were sent to Medicare, IDPA, or various insurance companies. Pet. App. 3a-4a.

In 1995, Mitrione hired nonphysicians to provide counseling services to his practice's clients. Mitrione provided medication management, and he referred the patients to the counselors for individual psychotherapy. Medicaid and Medicare paid less for medication management sessions than for more time-consuming psychotherapy sessions. Mitrione and DeVore repeatedly billed Medicare for lengthy psychotherapy sessions when only medication management services were actually provided. That conduct formed the basis for the "upcoding" charges in the indictment. See Pet. App. 5a; Gov't C.A. Br. 13.

Mitrione hired Terry Goff, an unlicensed intern working on his advanced psychology degree, and Walter Woods, a drug and alcohol counselor. Although neither Woods nor Goff was licensed to provide mental health services, both were assigned to counsel Medicaid patients. Petitioners billed for the services provided by Woods and Goff as though Mitrione had either provided or directly supervised those services. That conduct formed the basis for the substitute billing charges set forth in Counts 12 and 14 of the indictment. Pet. App. 5a-6a.

Petitioners also submitted claims to IDPA and Medicare for services that were not rendered at all—conduct that formed the basis for the "ghost billing" charges. DeVore instructed Goff to document telephone sessions with clients (which were not reimbursable by IDPA and Medicare) as if they were face-to-face sessions, and then bill for those sessions. IDPA and Medicare also refused to pay for missed or cancelled appointments; DeVore billed for sessions when the records established that the session did not occur. Additionally, IDPA would not pay for two services on a single date. When clients saw both DeVore for counsel-

ing and Mitrione for medication management on the same date, DeVore instructed her billing clerks to bill as if the client had been seen by Mitrione on two different dates. Gov't C.A. Br. 14-15.

2. Before trial, petitioners moved for a partial dismissal of the indictment. They argued that all references to substitute billing as a fraudulent billing scheme should be struck from the indictment because substitute billing did not violate state or federal law. Pet. App. 18a. Petitioners contended that a handbook provision (Section A-210.7 of IDPA's Medical Assistance Program Handbook) cited in Count 2 of the indictment (see Pet. App. 29a), which states that reimbursement for psychiatric services is available under Illinois Medicaid rules only for services personally provided by the physician who submits the bill, did not have the force of law.

The district court denied the motion to dismiss. Pet. App. 18a-22a. The court agreed with petitioners that the handbook is an interpretive document and does not have the force of law. *Id.* at 19a. The court determined, however, that the relevant handbook provision reflected a correct interpretation of the Illinois Administrative Code, which is legally binding. *Id.* at 19a-20a. Based on its analysis of the pertinent Illinois Administrative Code provisions, the court concluded that, "[f]or Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision." *Id.* at 20a.

3. The jury found petitioners guilty on the majority of the charges contained in the indictment, including the substitute billing charges set forth in Counts 12 and 14. Petitioners subsequently filed a motion for a new trial, based upon newly discovered evidence that

Deanna Statler, an IDPA auditor who had testified as a rebuttal witness for the government, had committed perjury at trial.

The district court granted the motion with respect to all counts of conviction except for Counts 12 and 14. See Pet. App. 8a-9a, 40a-49a. After concluding that Statler had given false testimony, the district court turned to the question "whether Ms. Statler was a material witness for the Government at trial." *Id.* at 44a. The court held that Statler was a material witness with respect to the ghost billing and upcoding charges. The court explained that "[t]he defense to these charges was that the [petitioners] were inept and ignorant of proper billing procedures and made many mistakes in billing, but that these mistakes were not intentionally made or made with the intent to defraud." *Ibid.* The court found that Statler's rebuttal testimony was a significant part of the government's efforts to refute that defense. *Id.* at 44a-45a. The court concluded that "as to the ghost billing and upcoding charges the verdicts might have been different" if Statler had not testified or if the jurors had known that her testimony was false, *id.* at 45a, and on that basis it granted the motion for a new trial on those charges, *id.* at 46a. The district court denied the motion for a new trial with respect to Counts 12 and 14, however, finding that Statler's testimony "did not go to those two counts." *Id.* at 47a; see *id.* at 46a-48a.

4. The government declined to retry petitioners on the counts as to which the district court had granted the motion for a new trial. Petitioners appealed their convictions and sentences on Counts 12 and 14 of the indictment. The court of appeals affirmed. Pet. App. 1a-17a.

a. The court of appeals first observed that, in determining whether post-trial evidence of perjury by a government witness entitles a criminal defendant to a new trial, the Seventh Circuit has traditionally used the test it adopted in *Larrison* v. *United States*, 24 F.2d 82 (1928). Pet. App. 9a. Under the *Larrison* test, a new trial is granted in such cases if, without the false testimony, "the jury *might* have reached a different conclusion." *Larrison*, 24 F.2d at 87; see Pet. App. 9a. The court of appeals explained that the *Larrison* test "puts [the Seventh Circuit] at odds with other circuits which, absent a finding that the government knowingly sponsored the false testimony, require a defendant seeking a new trial to show that the jury would *probably* have reached a different verdict had the perjury not occurred." *Ibid.* (citing cases). The court overruled its prior decision in *Larrison* and adopted the reasonable probability test used by the majority of other circuits. See *id.* at 10a.

b. Applying the reasonable probability standard, the court of appeals affirmed the district court's denial of petitioners' new trial motion with respect to the substitute billing counts. Pet. App. 10a-11a. The court explained that "Statler was really not a material witness with respect to the substitute billing counts" because "Statler did not testify about the propriety of substitute billing or the [petitioners'] knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding." *Id.* at 10a. The court also rejected petitioners' contention that Statler's testimony might have affected the verdict on the substitute billing counts by diminishing petitioners' overall credibility in the eyes of the jurors. The court explained that the government had "presented substantial evidence that the [petitioners] knew they were en-

gaging in impermissible substitute billing." *Ibid.* Based on its review of the trial record, the court "d[id] not believe that the jury would have probably reached a different verdict on the substitute billing counts had Statler's testimony not been presented." *Id.* at 10a-11a.

ARGUMENT

1. Petitioners contend (Pet. 9-19) that the Court should grant review to resolve a conflict among the circuits on the standard for granting a motion for a new trial based on evidence of perjury by a government witness. The Fourth and the Sixth Circuits, relying on the Seventh Circuit's decision in *Larrison*, have held that a new trial should be granted in such cases if, without the false testimony, the jury "might" have reached a different conclusion. See *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (adopting *Larrison* standard); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949) (adopting *Larrison* standard), cert. denied, 339 U.S. 935 (1950); see also *United States* v. *Roberts*, 262 F.3d 286, 293 (4th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Willis*, 257 F.3d 636, 642-645 (6th Cir. 2001). Every other circuit to consider the issue, including the Seventh Circuit in this case, has held that a new trial is warranted only if the new evidence would probably produce a different verdict. See Pet. App. 10a-11a; *United States* v. *Petrillo*, 237 F.3d 119, 123 (2d Cir. 2000); *United States* v. *Williams*, 233 F.3d 592, 593-595 (D.C. Cir. 2000); *United States* v. *Huddleston*, 194 F.3d 214, 217-221 (1st Cir. 1999); *United States* v. *Sinclair*, 109 F.3d 1527, 1531-1532 (10th Cir. 1997); *United States* v. *Provost*, 969 F.2d 617, 622 (8th Cir. 1992), cert. denied, 506 U.S. 1056 (1993); *United States* v. *Krasny*, 607 F.2d 840, 844-845

(9th Cir. 1979), cert. denied, 445 U.S. 942 (1980). In a recent unpublished opinion, the Fifth Circuit also declined to apply the *Larrison* rule, noting that the Seventh Circuit in this case had overruled *Larrison*. *United States* v. *Owens*, 96 Fed. Appx. 199, 200-201 (2004).

The Fourth and the Sixth Circuits initially adopted the *Larrison* standard before this Court's holding in *United States* v. *Agurs*, 427 U.S. 97, 103 (1976), that convictions based on the knowing use of perjured testimony may be overturned only if there is a "reasonable likelihood" that the false testimony affected the verdict. Accord *Kyles* v. *Whitley*, 514 U.S. 419, 433 n.7 (1995). Since *Agurs*, no court of appeals has adopted the *Larrison* standard. Even before the Seventh Circuit's overruling of *Larrison* in this case, there had been "an unmistakable trend toward use of the probability standard" among the courts of appeals. *Huddleston*, 194 F.3d at 220. As the Seventh Circuit observed in *United States* v *Mazzanti*, 925 F.2d 1026, 1029 (1991), "[t]he difference between *Larrison* and the more general formulation has become, over the years, more and more elusive, and * * * the differences in practical application are indeed becoming difficult to discern." This Court has recently denied other petitions for a writ of certiorari presenting the question whether the *Larrison* test or the probability standard is appropriate in these circumstances. See *Germosa* v. *United States*, 531 U.S. 1080 (2001); *Williams* v. *United States*, 529 U.S. 1131 (2000). There is no reason for a different result here.

Contrary to petitioners' contention (Pet. 11), moreover, there is no reason to suppose that petitioners would have been granted a new trial on the substitute billing counts even if the court of appeals had applied

the *Larrison* standard. Consistent with *Larrison* (which was binding precedent within the Seventh Circuit at the time of the district court's ruling), the district court framed the relevant inquiry as "whether the verdicts *might have been different* either without the trial testimony of Ms. Statler, or if the jury had known that part of Ms. Statler's testimony was false." Pet. App. 45a (emphasis added); see *id.* at 48a (district court states that it is "giving the benefit of the doubt to the [petitioners] in any instance where a charge was based in whole or in part on evidence where the verdict might have been influenced by the false testimony"). Applying that standard, the district court granted petitioners' motion for a new trial with respect to most counts of conviction, but denied the motion with respect to the substitute billing charges contained in Counts 12 and 14. See *ibid.* Nothing in the court of appeals' opinion suggests that the Seventh Circuit would have granted petitioners more extensive relief if it had applied the *Larrison* standard.

Petitioners also argue (Pet. 12-13) that the *Larrison* standard should apply in this case because Statler was a "member of the prosecution team." Petitioners did not advance that claim below, however, and the lower courts therefore had no occasion to address it. In any event, the fact that Statler discussed her testimony and the accompanying trial exhibit with government counsel (see Pet. 13) does not establish that Statler—an auditor with the Illinois Department of Public Aid—was a member of the prosecution team, such that knowledge of her perjury could be attributed to the government.

Petitioners also contend (Pet. 14) that the test used by the court of appeals in this case conflicts in principle with the materiality standard applied by this Court

when the prosecution has concealed exculpatory material in violation of the rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court found, however, that government counsel "did not knowingly put false testimony on at trial," Pet. App. 46a, and petitioners did not contest that finding on appeal. The government's lack of prior knowledge of the pertinent newly discovered evidence distinguishes this case from *Brady* and its progeny.

Even under the *Brady* standard, moreover, petitioners would not be entitled to relief. This Court has held that undisclosed exculpatory or impeachment evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The Court has explained that "[a] 'reasonable probability' of a different result is * * * shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). In this case, Statler's perjury does not undermine confidence in the guilty verdicts on the substitute billing counts, because, as the courts below correctly found, Statler was not a material witness with respect to those counts.[2]

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[2] Petitioners contend (Pet. 15) that the practical effect of the standard applied by the court of appeals was to require them to demonstrate that, without Statler's testimony, "there would not have been enough left to convict" on the substitute billing counts. That is incorrect. Requiring the defendant to show that the jury's verdict would *probably* have been different if perjured testimony had been excluded is not the same as requiring proof that no reasonable jury *could* have found the defendant guilty without the false testimony. Petitioners' reliance (Pet. 15-16) on *Mesarosh* v.

2. Petitioners argue (Pet. 20-24) that the reversal of their convictions on Counts 1 and 2 rendered their convictions on Counts 12 and 14 fundamentally unfair because the latter counts incorporated by reference the scheme to defraud alleged in Counts 1 and 2. That claim lacks merit and does not warrant this Court's review.

Counts 12 and 14, which charged petitioners with mail fraud and health care fraud, incorporated by reference paragraphs 1 through 13 of Count 1 (conspiracy to defraud the United States) and paragraphs 1 through 8 of Count 2 (mail fraud). See Pet. App. 28a, 36a, 38a. The incorporated portions of those counts provided background information concerning the Medicaid and Medicare programs, and set forth the factual averments regarding the scheme to defraud those programs (an essential element of mail fraud). The fact that certain general background facts were relevant to many of the charges contained in the indictment does not undermine the lower courts' determination that Statler's testimony bore only on the ghost billing and upcoding charges, not on the substitute billing counts.

Petitioners also invoke the principle that "a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it

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United States, 352 U.S. 1 (1956), is also misplaced. In *Mesarosh*, this Court granted the defendants a new trial when the government acknowledged on appeal that its informant-witness had given false testimony in similar cases. See *id.* at 8-9. In *Mesarosh*, however, this Court found that "it cannot be determined conclusively by any court that [the witness's] testimony was insignificant in the general case against the defendants." *Id.* at 10-11. Here, by contrast, both the district court and the court of appeals found that Statler's testimony was not germane to the substitute billing charges.

is not possible to know the basis of the jury's decision." Pet. 20. That rule is irrelevant to this case. Petitioners do not contend that the jury was improperly instructed, nor do they suggest any other ground for inferring that the jury relied on an erroneous *legal* theory. Petitioners' contention (Pet. 23-24) that they were deprived of their right to trial by jury also lacks merit. A properly instructed jury considered the relevant evidence and found petitioners guilty on the substitute billing charges. Petitioners' request for a new trial based on newly discovered evidence necessarily required the courts below to determine what verdict the jury would likely have reached if it had not relied on Statler's perjured testimony. Nothing in this Court's decisions suggests that the district court and court of appeals invaded the jury's province by engaging in that inquiry.

3. Petitioners contend (Pet. 24-30) that federal Medicare regulations mandate reimbursement when a physician allows an assistant to perform a covered service and that such regulations preempt the Illinois Medicaid regulations that proscribe billing for psychiatric services rendered by anyone other than the physician who submits the charges. That claim lacks merit and does not warrant further review.

The Medicaid program established in 1965 by Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals. See, *e.g.*, *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in his administration of the Act. See 42 U.S.C. 1396a (2000 & Supp. I 2001); *Wilder*, 496 U.S. at

502; *Rivera*, 477 U.S. at 157. Thus, a State participating in the Medicaid program must provide reimbursement for physicians' services. 42 U.S.C. 1396a(a) (2000 & Supp. I 2001), 1396d(a)(5).

As this Court has made clear, however, "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal* v. *Doe*, 432 U.S. 438, 444 (1977). Rather, the Act requires only that a state Medicaid plan establish "reasonable standards * * * for determining * * * the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX]." *Id.* at 441 (quoting 42 U.S.C. 1396a(a)(17)). As the Court observed in *Beal*, the statutory language "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Id.* at 444.

"For Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision." Pet. App. 20a; see *id.* at 13a. That standard is a reasonable means of ensuring that public funds are not expended for psychiatric services performed by persons who lack adequate qualifications. Nothing in federal law prevents the State from limiting Medicaid reimbursement in that manner.

Petitioners also argue (Pet. 25-26) that, because the Medical Assistance Program Handbook published by the Illinois Department of Public Aid does not have the force of law, petitioners' non-compliance with the standards set forth in the handbook cannot form the basis for criminal liability. As the courts below correctly rec-

ognized (Pet. App. 13a, 19a-21a), however, the handbook correctly construes Section 140.413 of the Illinois Administrative Code, title 89 (1997 & Supp. 2004), which is legally binding. Section 140.413 requires that, in order to obtain reimbursement for psychiatric services under the Illinois Medicaid program, a physician must perform the services personally rather than delegating their performance to a member of his staff. Because petitioners do not challenge that interpretation of the Illinois Administrative Code, the precise legal status of the handbook is irrelevant to the proper disposition of this case.

Finally, the specific billings that underlay Counts 12 and 14 of the indictment were for services that would not have been reimbursable even under federal regulations governing the Medicare program. Those billings involved Woods's leadership of a support group for survivors of sexual abuse on November 14, 1996, when petitioners "were either in Texas or had just returned home from Texas and were not in the office." Pet. App. 46a-47a. Although federal Medicare regulations permit reimbursement for some psychological services performed by non-physician subordinates, the services performed by Woods on that date would not have been reimbursable under the Medicare rules, both because no physician was present in the office at the time, and because Woods was not licensed to provide the mental health services that leadership of the support group entailed. See *id.* at 3a, 5a-6a, 46a-47a. Petitioners are therefore wrong in asserting that "Medicare mandates reimbursement where, as here, the physician in his discretion used this assistant." Pet. 25. The impropriety of the relevant billings even under the Medicare rules further undermines petitioners' contention that

the application of state law in this setting subjected them to unfair surprise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2004