No. 05-657

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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QUESTIONS PRESENTED

Petitioners were 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. The court denied the new trial motion, however, with respect to two of the counts, 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 2a-9a) is unreported. A prior opinion of the court of appeals affirming petitioners' convictions (Pet. App. 13a-29a) is reported at 357 F.3d 712. A prior opinion of the district court denying a motion for partial dismissal of the indictment (Pet. App. 30a-34a) is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2005. The petition for a writ of certiorari was filed on November 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioners were convicted 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 4, 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. 35a-51a (indictment); Gov't C.A. Br. 2-3.[1] Petitioners subsequently filed a motion for new trial based on newly discovered evidence. Pet. App. 14a. The district court denied the motion as to Counts 12 and 14, but granted it as to the remaining counts. See *id.* at 52a-61a.

The government elected not to retry petitioners on the charges on 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. See Gov't C.A. Br. 3. Petitioner DeVore was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. *Ibid.* Each petitioner was also ordered to pay restitution in the amount of $11,255.65. *Ibid.* The court of appeals affirmed. Pet. App. 13a-29a.

Petitioners then filed a petition for a writ of certiorari (No. 03-1668) seeking review of the court of appeals' decision. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case

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[1] Petitioner Mitrione was acquitted on one count of mail fraud and one count of filing false claims. Petitioner DeVore was acquitted on two counts of mail fraud and two counts of filing false claims. The government dismissed one mail fraud count. Pet. App. 3a.

for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). *Mitrione* v. *United States*, 125 S. Ct. 984 (2005) (Pet. App. 12a). The court of appeals in turn remanded the case to the district court, which imposed the same sentences that it had originally imposed. Pet. App. 2a-9a. The court of appeals affirmed. *Id.* at 1a.

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 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. 13a.

In the early 1990s, Mitrione established a psychiatric practice in Springfield, Illinois. The following year, he sought to become a Medicaid provider by filing an application 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. 14a-15a.

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 satisfy 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. 15a.

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. 16a.

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. 17a; 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 pa-

tients. 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 in Counts 12 and 14 of the indictment. Pet. App. 17a-18a.

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 counseling 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. 30a. Petitioners contended that a provision of IDPA's *Medical Assistance Program Handbook* cited in Count 2 of the indictment (see Pet. App. 41a), which stated 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. 30a-34a. The court agreed with petitioners that the handbook is an interpretive document and does not have the force of law. *Id.* at 31a. The court determined, however, that the relevant handbook provision reflected a correct interpretation of the Illinois Administrative Code, which is legally binding. *Id.* at 31a-32a. 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 32a.

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 on newly discovered evidence that Deanna Statler, an IDPA auditor who had testified as a rebuttal witness for the government, had committed perjury at trial. See Pet. App. 13a-14a, 20a.

The district court granted the new trial motion with respect to all counts of conviction except for Counts 12 and 14. See Pet. App. 21a, 52a-61a. 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 56a. 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 [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 56a-57a. 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 57a, and on that basis it granted the motion for a new trial on those charges, *id.* at 58a. 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 59a; see *id.* at 52a-53a, 58a-60a.

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. 13a-29a.

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. 21a. 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. 21a. 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 22a.

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. 22a-23a. 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 [petitioners'] knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding." *Id.* at 22a. 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 [petitioners] knew they were engaging 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 22a-23a.

5. On June 16, 2004, petitioners filed a petition for a writ of certiorari (No. 03-1668) seeking review of the court of appeals' decision. On January 12, 2005, while that petition was pending, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's Sixth Amendment precedents. *Id.* at 748-756. The Court further held that the constitutional infirmity was most appropri-

ately eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for reasonableness. *Id.* at 757-769. On January 24, 2005, the Court granted the petition for a writ of certiorari in No. 03-1668, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Booker*. Pet. App. 12a.

6. On remand from this Court, the court of appeals in turn remanded the case to the district court for reconsideration of petitioners' sentences. The district court, treating the Guidelines as advisory rather than mandatory, concluded that the same sentences it had previously imposed were "necessary and appropriate" for both petitioners. Pet. App. 7a (Mitrione), 8a (DeVore); see *id.* at 2a-9a. The court of appeals affirmed, explaining that petitioners' sentences "could not be viewed as unreasonable." *Id.* at 1a.

ARGUMENT

1. Petitioners contend (Pet. 7-19) 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 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) (same), 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. 21a-22a; *United States* v. *Petrillo*, 237 F.3d 119, 123-124 (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 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. *Wall*, 389 F.3d 457, 472 (5th Cir. 2004), cert. denied, 125 S. Ct. 1874 (2005).

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 differ-

ence 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.

Moreover, contrary to petitioners' contention (Pet. 10), 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. 57a (emphasis added); see *id.* at 60a (district court states that it is "giving the benefit of the doubt to [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. 11-12) 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. 12) does not establish that Statler—an auditor with the Illinois Department of Public Aid (see Pet. App. 20a)—was a member of the prosecution team, such that knowledge of her perjury could be attributed to the government.

Petitioners also contend (Pet. 13-16) 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. 58a. Petitioners did not contest that finding on appeal, and the court of appeals decided the case on the understanding that "the government did not knowingly present the false testimony." *Id.* at 22a. The government's lack of prior knowledge of the pertinent newly discovered evidence distinguishes this case from *Brady* and its progeny.[2]

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[2] Petitioners' reliance (Pet. 13-14) on *Banks* v. *Dretke*, 540 U.S. 668 (2004), is misplaced. The Court in *Banks* simply applied the well-established standards of *Brady* and its progeny. See *id.* at 691. *Inter alia*, the Court in *Banks* reiterated that one of the "essential elements" of a *Brady* claim is that "evidence must have been suppressed by the State, either willfully or inadvertently." *Ibid.* (quoting *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999)). In this case, petitioner has offered no basis for concluding either that the federal prosecutors were aware of

Even under the *Brady* standard, 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.[3]

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the falsity of Statler's testimony, or that information showing the testimony to be false was contained in federal files.

[3] Petitioners contend (Pet. 14) that the practical effect of the standard applied by the court of appeals was to require them to demonstrate that, without Statler's testimony, the evidence would not have been legally sufficient to support a conviction 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. 14-15) on *Mesarosh* v. *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 could not 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

2. Petitioners also argue (Pet. 19-23) 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 8 of Count 2 (mail fraud), which in turn incorporated paragraphs 1 through 13 of Count 1 (conspiracy to commit health care fraud). See Pet. App. 35a-40a, 40a-41a, 48a-49a, 50a-51a. The incorporated portions of those counts provided background information concerning the Medicaid and Medicare programs, and set out the factual allegations 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 is not possible to know the basis of the jury's decision." Pet. 21. 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.

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that Statler's testimony was not germane to the substitute billing charges.

Petitioners' contention (Pet. 19-23) 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 Statler's perjured testimony had not been admitted into evidence. 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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