Nos. 09-CO-422, 11-CO-1676, & 12-CO-1411
Nos. 11-CO-1677 & 12-CO-1412

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

GARY GATHERS,

and

KEITH MITCHELL
Appellants,

v.

UNITED STATES,
Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
Criminal Nos. 1993 FEL 10270 & 1993 FEL 11175

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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Rule 28(a)(2)(A) List Of Interested Parties

The parties to this appeal are Gary Gathers and Keith Mitchell.

Appellant Gathers is represented by Seth Rosenthal of Venable LLP, 575 7th Street N.W., Washington, DC 20004, and Matthew Beville of Wilmer, Cutler, Pickering, Hale and Dorr LLP, 1875 Pennsylvania Avenue N.W., Washington, DC 20006. In the trial court, Appellant Gathers was represented by Mr. Rosenthal and Mr. Beville, as well as Thomas Degonia of Ethridge, Quinn, Kemp, McAuliffe, Rowan & Hartinger, 33 Wood Lane, Rockville, MD 20850 and Janai Reed, 770 5th Street N.W., Suite 1100, Washington, DC 20001. Appellant Gathers was represented by Nathan Silver, P.O. Box, 5757, Bethesda, MD, during his original trial and by Kenneth Rosenau, 1304 Rhode Island Avenue, N.W., Washington, DC 20005, during his direct appeal.

Appellant Mitchell is represented by Amit Mehta of Zuckerman Spaeder, 1800 M Street, N.W., Suite 1000, Washington, DC 20036. Mr. Mehta also represented Appellant Mitchell in the trial court. Appellant Mitchel was represented by Thomas Abbenante, 1919 Pennsylvania Avenue N.W., Suite 800, Washington, DC 20006, and Elaine Lubin during his original trial and by Kenneth Sealls during his direct appeal.

Amicus curiae National Association of Criminal Defense Lawyers is represented by Paul F. Enzinna and James P. Bair of Brown Rudnick LLP, 601 13th St. N.W., Suite 600, Washington, D.C. 20005.

Rule 28(a)(2)(B) Corporate Disclosure Statement

The National Association of Criminal Defense Lawyers ("NACDL") is a corporation organized under § 501(c)(6) of the Internal Revenue Code. NACDL has no parent corporation, and no publicly held corporation owns 10 percent or more of NACDL's stock.

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RULE 29(c)(3) STATEMENT OF THE *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the U.S. Supreme Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving the ability of criminal defendants to vindicate their rights on direct appeal and through collateral post-conviction review. As relates to the issue before the Court in this case, NACDL has an interest in ensuring the government is neither incentivized nor permitted to secure convictions based on false testimony and then avoid effective review of that violation. NACDL was granted leave to file this brief pursuant to an Order of this Court on April 17, 2013.

STATEMENT OF THE ISSUES

Amicus curiae National Association of Criminal Defense Lawyers submits this brief to address the following issues:

1. May the Due Process Clause's prohibition on the government's use of false testimony to procure a conviction be waived by a defendant?

2. Even if the Due Process Clause's protection in this regard may be waived, did the trial court apply the wrong standard to determine that defense counsel knowingly waived that protection?

STATEMENT OF THE CASE

Appellants were convicted in 1994 of first degree murder while armed, possession of a firearm during the commission of a crime of violence, and carrying a pistol without a license. Each was sentenced to imprisonment for 36 years-to-life.

Following their direct appeal, Appellants sought relief under D.C. Code § 23-110. In this appeal, Appellants challenge the Superior Court's November 29, 2011, and May 22, 2012, denials of their motions. *Amicus curiae* National Association of Criminal Defense Lawyers files this brief in support of Appellants and urging reversal, on the ground that the trial court erred in denying relief under *Napue v. Illinois*, 360 U.S. 264, 269 (1959), for due process deprivations resulting from the government's introduction and exploitation of false testimony.

STATEMENT OF RELEVANT FACTS

Appellants were convicted of the first-degree murder of Wayne Ballard, who had been a cooperating witness in the earlier trial of Appellant Gary Gathers' brother, Gregory. In the government's own words, the "most crucial piece of evidence" against the Appellants was testimony by MPD Detective Ray Crawford that during Gregory Gathers' preliminary hearing, Det. Crawford had identified Ballard, by name, as the lone eyewitness against Gregory Gathers. App. 176-77. The government described this testimony as "crucial to [its] theory of prosecution

that Ballard was executed because he was a cooperating witness," *id*. at 169-171, and argued in closing argued that Mr. Ballard's identification as a witness against Gregory Gathers was the "only reason" he was killed. *Id*. at 196.

However, as the prosecution knew, or at least should have known, Det. Crawford's testimony on this critical point was false—he had not identified Mr. Ballard at Gregory Gathers' preliminary hearing. Order at 67. Appellants learned the truth on April 30, 2010, when the government finally turned over the transcript of Gregory Gathers' preliminary hearing. The Superior Court, however, denied Appellants relief under D.C. Code §23-110, finding that they had procedurally defaulted this claim because trial counsel knew that Det. Crawford had testified falsely, and knowingly waived Appellants' due process protection for tactical reasons. *Id*. at 50.

SUMMARY OF ARGUMENT

A conviction procured through the use of false testimony is invalid under the Due Process Clause. This rule does more than protect defendants; it safeguards the very legitimacy of our criminal justice system. Justice simply cannot be done when a prosecutor knowingly—or even negligently—uses false testimony to secure a conviction. As a result, this protection cannot be waived. The prohibition against the use of false testimony is not satisfied even when a defendant has notice of the false testimony and fails to object. To the extent this Court's decision in *Bruce v. United States*, 617 A.2d 986 (D.C. 1992), is to the contrary, it should be overruled.

But even if this protection may be waived, the integrity of our criminal justice system requires that such a waiver be found only upon application of the most demanding standard; *i.e.*, where it is manifestly clear from the record that the defendant knew of the false testimony and access to the evidence necessary to expose the falsehood, but knowingly opted not to do so for tactical reasons. The record in this case fails to establish as much.

ARGUMENT

"The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Model Code of Prof'l Responsibility EC 7-13 (1983). The prosecutor's obligation to "seek justice" imposes "extraordinary duties," Charles W. Wolfram, *Modern Legal Ethics* 760 (1986), and places demands on prosecutors not applicable to other lawyers. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice?"* 26 Fordham Urban L. J. 607, 615 (1998). As the Supreme Court wrote nearly 80 years ago, the prosecutor:

> [I]s in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutor's role as the representative of the State obliges him to operate within the "bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Id*. at 84.

The obligation not to use false testimony may be the most fundamental obligation of an attorney sworn to "seek justice." Justice simply cannot be done when a prosecutor knowingly—or even negligently—uses false testimony to secure a conviction. This essential principle was plainly violated in this case. As the Superior Court held below, "[i]t is clear that (1) the prosecutor presented false testimony and (2) the prosecution knew or should have known that it was false." Order at 67.[2] And the false testimony wrongly presented by the government in this case was not insignificant. Rather, the prosecution itself described that testimony as "the most

[2] The case was tried in 1994 before Judge Kollar-Kotelly, then of the D.C. Superior Court. The order at issue on this appeal, on Appellants' motions for post-conviction relief under D.C. Code § 23-110, was issued by Judge Canan, also of the Superior Court, in 2011.

crucial piece of evidence" supporting the Appellants' convictions for first-degree murder. 5/4/94 Tr. 23-24.

But although Appellants' convictions rest squarely on critical testimony that was false—and which the government not only wrongly presented, but repeatedly and knowingly exploited, in closing argument and on appeal—the Superior Court denied them relief, adopting the government's argument that Appellants *knew* that the "most crucial piece of evidence" against them was false, and that they waived their due process right not to be convicted on the basis of false testimony. This was error for two reasons.

First, the protection against conviction based on false testimony does not only protect individual defendants; it is an essential component of our criminal justice system, the violation of which—even if accepted by an individual defendant—undermines that system's integrity. Therefore, this protection cannot be "waived;" the prosecution has an independent obligation not to use false testimony, and to correct it when it occurs. To the extent *Bruce v. United States* holds otherwise, it should be overruled.

Moreover, even if, as the Superior Court found here, this Court's decision in *Bruce* does permit waiver in certain extraordinary circumstances, those circumstances were not present here. Where, as here, a finding of such a "knowing" waiver is unsupported by the record, the Superior Court ruling threatens the very legitimacy of the criminal justice system and must be overturned.

I. The Obligation To Not Use False Testimony And To Correct Any Such False Testimony Belongs To The Prosecutor And Cannot Be Waived.

A criminal sanction is illegitimate without a factual basis, even when a defendant submits to it. As a result, the State's interest in seeing justice done is independent of, and separate from, a defendant's interest in avoiding conviction. For example, a court may not accept a guilty plea—even one knowingly and voluntarily entered by a defendant—without *independently* establishing that a factual basis exists for the plea. Fed. R. Crim. P. 11(b)(3); *see also* American Bar Association Standards for Criminal Justice: Special Functions of the Trial Judge (3d ed. 2000) 6-1.1(a) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial."). Therefore, a conviction obtained by the knowing use of false testimony is illegitimate even where there is no doubt that a defendant knowingly and deliberately chose to allow such testimony to go unchallenged. *See e.g.*, *United States v. LePage*, 231 F.3d 488, 492 (9th Cir. 2000) ("the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false"); *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988) (fact that defense counsel was aware of false testimony did not change the fact that "the prosecutor breached her duty to correct the falsehoods" before the jury).

Nearly a century ago, the Supreme Court wrote that "[i]n safeguarding the liberty of the citizen against deprivation through the action of the state," the prohibition against securing a conviction through false testimony "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan,* 294 U.S. 103, 112 (1935).

In *Mooney,* the Attorney General of California advanced essentially the same argument that the government has put forward here: that due process is violated "only where an act or omission operates so as to deprive a defendant of notice" that the prosecutor's evidence was false. *Id.* The Supreme Court soundly rejected that theory in 1935, and this Court should do the same here.

The *Mooney* Court wrote that the obligation not to use false testimony "is a requirement that cannot be deemed to be satisfied" by the fact that a defendant had "mere notice and hearing" of the violation if, as occurred here, the government "has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through the deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.* "Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.* (emphasis added).

The principle that the State may not deprive a citizen of his liberty based on a lie is "implicit in any concept of ordered liberty," and a conviction obtained using false testimony is invalid under the Fourteenth Amendment.[3] *Napue*, 360 U.S. at 269. The government's obligation not to use false testimony to procure a conviction is non-delegable, and cannot be waived—"[i]t is a requirement that cannot be deemed to be satisfied" by the fact that a defendant had "mere notice and hearing" of the violation. *Mooney,* 294 U.S. at 112. To the extent *Bruce* holds otherwise, it should be overruled.

[3] This principle is so fundamental that "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269.

II. Even If The Due Process Protection Against False Testimony May Be Waived, The Indispensable Function It Serves Requires That The Waiver Standard Be Substantially More Demanding Than The Standard The Trial Court Utilized Below.

A conviction based on false testimony is so fundamentally inconsistent with due process that a defendant should never be held to have waived his right to challenge such a tainted result, even, as the Court held in *Mooney*, when he has notice of the impropriety. *See*, *e.g., LePage*, 231 F.3d at 492; *Foster*, 874 F.2d at 495. Particularly where, as here, the prosecution affirmatively capitalizes on false evidence—for example, by emphasizing it in closing argument— this Court should follow the example of the federal courts that refuse to permit a finding of waiver even if the defense knows of the falsity. *See*, *e.g.*, *DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) (vacating conviction although defense knew of false testimony because "the prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process"); *Mills v. Scully*, 826 F.2d 1192, 1195 (2d Cir. 1987) (same). To hold otherwise would encourage prosecutors to elicit false testimony in the hopes that defense counsel would fail to object to the deception. But to the extent waiver is ever permissible, it should be strictly limited to situations where it is incontrovertible that: (i) the defense had actual knowledge that the testimony was false, (ii) the defense had access to the evidence necessary to expose the falsehood and (iii) it is apparent from the record that the defense made a strategic decision not to correct false testimony.

A. The Superior Court Misapplied This Court's Holding in *Bruce*

In finding that waiver is possible in the District of Columbia, the Superior Court relied on *Bruce* for the proposition that there can be no *Napue* violation "where both defense counsel and the court were aware" that a government witness had testified falsely. Order at 47 (citing *Bruce*, 617 A.2d at 993). But this Court's decision in *Bruce* does not support—much less compel—the

conclusion reached here. Even if the fundamental Constitutional protection against conviction by false testimony, "implicit in any concept of ordered liberty," *Napue*, 360 U.S. at 269, could be waived, the Superior Court's finding that "both defense counsel and the court were aware" of the false testimony in this case is based on insupportable inferences from the facts.

On appeal, this Court "'is not bound by the conclusions of lower courts, but [must] reexamine the evidentiary basis on which those conclusions are founded.'" *Napue,* 360 U.S. at 272 (*citing Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951)). The record shows that, contrary to the Superior Court's finding, the pretrial colloquy merely sowed confusion, and certainly did not demonstrate that trial counsel or the court knew what Crawford's prior testimony had been. It also shows that, because the government withheld the transcript of the Gregory Gathers hearing, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), trial counsel had no basis for raising a *Napue* objection when Det. Crawford testified falsely.[4]

In *Bruce*, the defendant was charged with assaulting a police officer. 617 A.2d at 988. Witnesses first claimed that the defendant had shot at the officer, but when tests showed that the gun was inoperable, and had not been fired, the prosecution changed its theory to assert that the defendant had assaulted the officer by pointing the gun at him. *Id.* at 988. There was no dispute that the results of those tests were provided to defense counsel; in fact, the prosecutor told the judge that "we're not alleging that the gun was fired at the officer," and told the jury in her opening statement that the gun was inoperable. *Id*. at 990. Thereafter, "[t]he prosecutor

[4] The Superior Court turned *Brady* on its head, adopting without citing a single case the government's argument that the Gregory Gathers preliminary hearing transcript was not "suppressed" because it was on the public record. Order at 73. There is no legal support for such an argument, because "there is no general 'public records' exception to the *Brady* rule." *Chavis v. North Carolina,* 637 F.2d 213, 225 (4th Cir. 1980); *see also Milke v. Ryan*, 711 F.3d 998, 1017 (9th Cir. 2013) ("[t]hat [exculpatory materials] were available in the public record doesn't diminish the state's obligation to produce them under *Brady*"); *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial."). Instead, the Due Process Clause imposes on the government an affirmative obligation to turn over "material evidence—including impeachment evidence—that is favorable to the accused." *Miller v. United States*, 14 A.3d 1094, 1106 (D.C. 2011) (*citing Brady*, 373 U.S. at 87).

scrupulously adhered to this position in all of her statements throughout the trial." *Id*. But when a witness later testified that the defendant had shot the gun, and that she had seen a "muzzle flash," neither the prosecutor nor the judge took any action to correct this misstatement. *Id.* at 990-91. Yet, this Court found no *Napue* violation because defense counsel "failed to introduce undisputed and readily available evidence—namely, the results of the FBI test—which would have effectively foreclosed the suggestion that Bruce had [fired the gun]." *Id*. at 992. The facts of this case are entirely different from *Bruce*.

B. Trial Counsel Did Not Know That Det. Crawford Had Testified Falsely.

Contrary to the Superior Court's ruling, *Bruce* does not compel a finding of waiver here. Rather, that case turned on its unusual facts, which were "distinguishable from *Napue* and [*Giglio v. United States*, 405 U.S. 150 (1972)] in a critical and, in [the court's] view, dispositive respect." *Id*. at 993. "In both of those cases, the prosecutor knew that the evidence was false, but the judge and counsel did not." *Id*. (emphasis added). There was ample evidence that defense counsel in *Bruce* "knew" that the government had offered false testimony. He was aware of the FBI test, knew that it favored his client, and had sufficient time to integrate it into his strategy.[5] *Id*. at 990, 993. Moreover, the prosecutor "revealed to the jury in her opening statement that the pistol was not operable." *Id*. at 990. Thus, "[i]f the prosecutor had brought the conceded inaccuracy of the testimony to the attention of the court and counsel, she would only have been telling them what they already knew." *Id*. at 993.

The facts on which the Superior Court relied in this case show nothing like the awareness exhibited by trial counsel in *Bruce*. The Superior Court held that the prosecutor's statement, "that's right," when defense counsel asked if it was true that Mr. Ballard was "not identified by

[5] In fact, defense counsel in *Bruce* affirmatively and deliberately incorporated the fact that the witness had testified falsely into his argument. *See* § II(C), *infra*.

name as the driver of that car," "established" that Mr. Ballard had not been identified by name. Order at 37-38. However, that statement was directly contradicted by the written proffer made by the prosecution that Det. Crawford would testify at trial that in the Gregory Gathers preliminary hearing, Mr. Ballard's "identity . . . was disclosed as the driver of the car [the victim] was riding in when he was shot and killed." App. 169. It was also directly contradictory to the statement made by the prosecution in the pretrial colloquy that Mr. Ballard was "identified as the driver of the car" who had cooperated with the prosecution in the Gregory Gathers' case.

The next day, at trial, Det. Crawford testified that Ballard's "name was used" at Gregory Gathers' preliminary hearing. Order at 39 (*citing* 5/5/94 Tr. 210-11). Given the information available at the time, it would have been reasonable for trial counsel to believe that Crawford had, in fact, identified Ballard by name, and any objection would be fruitless. At that point, despite the prosecutor's "that's right" statement, defense counsel had been told, both in the pre-trial colloquy and in the government's written proffer, that Crawford's testimony that he had so identified Mr. Ballard by name was accurate. The prosecutor had not provided trial counsel with the transcript of Gregory Gathers' preliminary hearing—which would have made clear that Det. Crawford had testified falsely—and despite its apparent concession the day before that Det. Crawford had not identified Mr. Ballard, the prosecution now made no effort to correct his contrary testimony. In fact, the prosecutor affirmatively exploited the false testimony, despite his clear obligation not to do so.

Moreover, Judge Kollar-Kotelly, who had been present at the pre-trial colloquy, and now heard Det. Crawford testify that he had identified Mr. Ballard by name, expressed no concern at the apparent contradiction between this testimony and the prosecutor's statements the day before. If, as the Superior Court found, trial counsel "knew" that Det. Crawford's testimony was false,

then Judge Kollar-Kotelly, who had heard and read exactly what trial counsel had heard and read, also "knew" as much. But if she did, she surely would have taken action to ensure that Appellants were not convicted on the basis of false testimony. *See Bruce*, 617 A.2d at 993 ("[o]nce she heard the problematic testimony, the judge might reasonably have called counsel to the bench and attempted to nip the problem in the bud"); *see also* ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-1.1(a) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial."). The fact that she took no action demonstrates that trial counsel had insufficient information to possess the knowledge the Superior Court has ascribed to him.

In fact, the Superior Court's conclusion that defense counsel "knew" that Det. Crawford had testified falsely stands in marked contrast to its finding that there were reasons to believe the prosecutor did not know as much. These included the possibility (1) that the prosecutor did not have the transcript of Crawford's prior testimony (although he had tried Gregory Gathers, and had been present for Det. Crawford's prior testimony); and (2) that the prosecutor "did not accurately remember all of the details of the preliminary hearing." Order at 67 n.44. In concluding that the prosecutor may not have "known" that Det. Crawford had testified falsely, the court even observed that "[t]he fact that two experienced defense counsel, as well as the trial judge, remained silent when Detective Crawford testified at trial contrary to the proffer they heard the day before also is unexplained." *Id*.

If, as the court found, these possibilities raise too many doubts to conclude that the prosecutor actually knew of the false testimony, then the same possibilities compel a conclusion that the defense also did not know, and therefore could not have waived a *Napue* claim under the narrow test set out in *Bruce*. Defense Counsel certainly did not have the transcript showing that Det. Crawford's testimony was false, and could not "remember" Det. Crawford's prior testimony, because defense counsel had not been present for it. And just as the silence of the judge and defense counsel might have lulled the prosecutor, the fact that the judge and the prosecutor who had been present for Det. Crawford's prior testimony remained silent kept defense counsel from "knowing" that *Napue* had been violated. The Superior Court, in other words, held defense counsel to a higher standard than the prosecutor who knew, or should have known, that Det. Crawford's testimony was false. This is not only contrary to the facts, but is utterly inconsistent with the fundamental constitutional protection against conviction through false testimony.

The facts of this case do not fit the demanding standard established in *Bruce*. Rather than the clear and unambiguous forensic test, and the prosecutor's clear and unambiguous statements, that defense counsel in *Bruce* had, trial counsel here had a hopelessly muddied and muddled colloquy that was contradicted by the prosecution's written proffer. Unlike *Bruce*, where the court was plainly "aware" of the impeaching evidence, 617 A.2d at 993, Judge Kollar-Kotelly herself expressed confusion about the evidence during the pretrial colloquy. Order at 38. And unlike the prosecutor in *Bruce*, who provided the FBI test results to defense counsel before trial, the prosecutor here withheld the transcript demonstrating that his witness had testified falsely, despite the fact that he had prosecuted both Gregory and Gary Gathers, and thus had firsthand knowledge of the inconsistency. *Id*. at 67. Worst, while the prosecutor in *Bruce* "revealed to the

jury in her opening statement that the pistol was not operable" and "scrupulously adhered to this position in all of her statements throughout trial," *Bruce*, 617 A.2d at 990, the prosecutor here repeated and amplified the false testimony—which he described as "the most crucial piece of evidence" supporting the appellants' convictions—in his closing argument. *See* 5/4/94 Tr. 23-24; Order at 40.

"A conviction obtained through the use of false evidence, known to be false by the prosecutor, denies a defendant liberty without due process of law." *Bruce*, 617 A.2d at 992. Therefore, even if a *Napue* claim may be waived, it may only be waived where the record makes clear that defense counsel was actually aware of the false testimony, but deliberately chose not to challenge it. *See*, *e.g.*, *Boyd v. United States*, 908 A.2d 39, 54 (D.C. 2006) (*Napue* claim waived where record showed that counsel had read transcript demonstrating that the government had presented a contrary, irreconcilable theory in trying co-defendant). Where, as here, the record is at best ambiguous, the judicial system's interest in its own integrity—which is separate from and independent of the defendant's interest in avoiding conviction—demands that this fundamental right be protected. Anything less would violate *Bruce*'s admonition that, where "only the prosecutor was aware of the deception, it was his obligation, and only his, to disclose it." *Bruce*, 617 A.2d at 993.

C. There Was No Tactical Decision To Permit The False Testimony To Go Unchallenged.

The Superior Court further misread the record in determining that "Gathers's trial strategy relied in part on the same inferences produced by Detective Crawford's testimony to advance his own defense." Order at 49. The court noted that defense counsel argued in closing that, "if [Gary] Gathers had killed Ballard because he was going to testify against his brother, Gregory Gathers, then [Gary] Gathers would not have left any witnesses—*i.e.* Lindsay." *Id*.

(*citing* 5/9/95 Tr. at 158, 175). But it defies reason to conclude that trial counsel therefore knew that Crawford's testimony had been false, rather than that he was simply making the best argument he could, based on what the government had endorsed as truthful evidence. No advocate would have deliberately chosen the argument made over one that would allow him to show that the government's key witness lied, and that the government's "most critical evidence" was untrue. Had the government not violated its obligations, any competent attorney in trial counsel's position would have made the latter argument.

The weakness of the Superior Court's conclusion is all the more apparent when this case is contrasted with *Bruce*, where this Court noted that the trial judge could have called counsel to the bench and "attempted to nip the problem in the bud," but held that the trial judge acted properly in not doing so "given the various tactical options available to Bruce's attorney." 617 A.2d at 993. In *Bruce*, defense counsel attempted to capitalize on what he—and the court and the jury—knew was a witness's inaccurate testimony, arguing that the very inaccuracy of her testimony demonstrated that witnesses may make false assumptions "about conduct based on things that they see or think they see." *Id*. at 991. From this, he suggested that the police officer was also mistaken in believing that Bruce had pointed the gun at him. *Id*. at 991 n.11. In other words, defense counsel in *Bruce* not only knew that the witness's testimony was incorrect—he told the jury as much, referring to "the muzzle flash from a gun that doesn't work"—but he affirmatively incorporated the fact that the witness had erred into his own defense. *Id*. at 991.

There was no similar affirmative decision to attempt to capitalize on inaccurate testimony in this case. The information that trial counsel had regarding Det. Crawford's testimony was, at best, highly ambiguous, and, rather than acting on its independent obligation to bring the inaccuracy to the attention of the court and defense—as the prosecution did in *Bruce*—the

prosecution in this case affirmatively exploited the false testimony. Trial counsel had not been present at Gary Gathers' preliminary hearing, and had no independent knowledge of Det. Crawford's prior testimony. Further, the government had not provided trial counsel with a copy of the transcript. Thus, as was the case in *Napue* and *Giglio*, "the defense lacked sufficient information to object." *Bruce*, 617 A.2d at 993 n.14. The trial judge, who also expressed no concern despite having been present at the pre-trial colloquy, also "had no basis for intervening *sua sponte*." *Id.*

Finally, it is clear from the argument of counsel in *Bruce* that counsel was aware of the false testimony, and that he brought it to the attention of the jury. In fact, defense counsel in *Bruce* did not, as the Superior Court suggested that trial counsel in this case did, argue from the substance of the false testimony; his argument incorporated the fact that the witness testified falsely. Thus, it is clear beyond peradventure that everyone in the *Bruce* courtroom—prosecution, defense, court and jury—knew that the witness' testimony had been inaccurate. The record in this case shows only that the prosecution knew of the falsehood.

Where, as here, "defense counsel is unable to present evidence to correct false testimony—whether because of ignorance of the facts or a judicial limitation—the government's *Napue* obligations come to the forefront." *Longus v. United States*, 52 A.3d 836, 849 n.24 (D.C. 2012) (emphasis added); *see also Bruce*, 617 A.2d at 992-93 & n. 12 (prosecutor could have "s[ought] some effective action from the court regarding . . . evidently mistaken testimony," including a request that the judge instruct the jury with regard to true facts). This is because "the prosecutor knew that the evidence was false, but the judge and defense counsel did not." *Bruce*, 617 A.2d at 993 (emphasis added). In such circumstances, "only the prosecutor can take steps to ensure that the jury is not misled, either by correcting the falsehood before the jury or by

disclosing the falsehood to the court and defense counsel and not objecting to defense counsel's efforts to correct the record."[6] *Longus*, 52 A.3d at 847 (internal citation omitted). "A different conclusion would create perverse incentives and permit the government to benefit from false testimony, especially when the source of the false testimony is a police officer." *Id.*

As the Superior Court found, "[i]t is clear that (1) the prosecutor presented false testimony and (2) the prosecution knew or should have known that it was false." Order at 67. The record shows that neither defense counsel nor the trial judge was in a position to correct the false testimony. In these circumstances, "it is "[the prosecutor's] obligation, and only his, to disclose" the inaccuracy. *Bruce,* 617 A.2d at 993. But the government in this case not only failed to correct Det. Crawford's false testimony; it affirmatively and repeatedly exploited it. To permit the government to benefit from what was not only a failure to meet its obligations, but an affirmative exploitation of that failure, where the record both fails to show that trial counsel knew of the failure, and affirmatively demonstrates that neither trial counsel nor the trial court had such knowledge, would reward improper conduct, and incentivize it in the future.

CONCLUSION

Affirming the Superior Court's Order in this case would not only be an injustice to these individual appellants; it would gravely undermine the legitimacy of our criminal justice system. The government's obligation not to use false testimony to procure a conviction "is a requirement that cannot be deemed to be satisfied" by the fact that a defendant had "mere notice and hearing" of the violation. *Mooney*, 294 U.S. at 112. To permit the state to "depriv[e] a defendant of liberty through the deliberate deception of court and jury" threatens the foundation of our

[6] This Court has previously criticized the government for failing to meet its obligation to help the jury "seek the truth" even in cases where defense counsel and the court were informed of false testimony. *See Woodall v. United States*, 842 A.2d 690, 703 (D.C. 2004) (Ruiz, J. concurring) ("[T]he prosecutor took the necessary first step in discharging that responsibility by disclosing to the trial judge and to defense counsel that Russell had testified falsely, but he did not take the further steps necessary to 'elicit the truth' for the jury.").

criminal justice system, even if the defendant is aware of the falsehood, *id.*, and the courts should not permit any defendant to waive the protection the Due Process Clause provides in this regard. But even if such a waiver is possible, waiver should be found only in the narrowest, and clearest, of circumstances, and the facts of this case do not permit a finding of knowing waiver. This Court should therefore reverse the Order of the Superior Court by making clear that a *Napue* claim cannot be waived, and certainly not under circumstances like those in this case.

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Respectfully submitted,

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I hereby certify that, on this 30th day of April 2013, I caused this Brief of National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellants to be served by electronic mail and first-class mail on the following:

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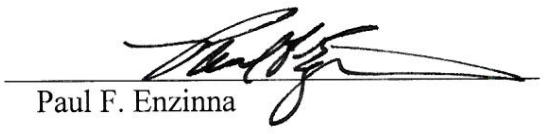

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