No. _____

In The

Supreme Court of the United States

JUNAIDU SALJAN SAVAGE,
a/k/a James Kamara,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), defendants requesting *in camera* review for potential required disclosures in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963) of specific evidence possessed by the prosecution must demonstrate beyond a plausible showing that the evidence in question, which they have no ability to review, would, in fact, contain material and favorable evidence.

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The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix ("App.") 1-29) is reported at 885 F.3d 212 (4th Cir. 2018). The oral ruling of the district court denying petitioner's motion compel *Brady* disclosures is unreported. (App. 45.)

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 12, 2018. A petition for rehearing and rehearing *en banc* was denied on April 9, 2018. (App. 36.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution states in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. After a six-day trial in the United States District Court for the District of Maryland, a jury convicted petitioner, Mr. Savage, for conspiracy to commit bank fraud under 18 U.S. C. § 1349 and two counts of aggravated identity theft under 18 U.S.C. § 1028A, and on October 18, 2018, Mr. Savage was sentenced to 87 months in prison. (App. 30-35). The evidence at trial centered on a scheme to access bank accounts at Capital One, in which Jayad Conteh, a Capital One employee, would obtain confidential customer information and then one or more co-conspirators would call and change the account holders' contact information, order checks, and then cash those checks. Ms. Conteh was convicted of having participated in this scheme and was the sole witness to identify Mr. Savage as another conspirator.

Prior to Mr. Savage's trial, Ms. Conteh met with the government on four occasions after her conviction: November 14, 2013, September 17, 2015, March 2, 2016, and March 5, 2016. It was during these meetings that Ms. Conteh first identified petitioner as a conspirator in the scheme. The government represented to Mr. Savage that no agent summaries or reports were generated for these meetings, but on March 3, 2016, the government produced a summary of what were believed to be inconsistent statements made by Ms. Conteh over the course of its meetings with her based on attorney notes. (App. 41-42.)

During Ms. Conteh's testimony at Mr. Savage's trial, she indicated that at the meetings with the government she contacted numerous people, both allegedly involved in the scheme and ancillary to it, on recorded phone calls. She contacted Mr. Savage, but also contacted her boyfriend, other friends, and even family members in a somewhat desperate, but unsuccessful, attempt to elicit incriminating statements from anyone, including Mr. Savage. During some of these calls, including to Mr. Savage, she falsely represented, *inter alia*, that she needed money to pay a lawyer. During one of these calls, Mr. Savage agreed to provide her with approximately $3,000 to pay for the lawyer. However, none of this information, including other potentially favorable witnesses whom Ms. Conteh contacted and other non-impeachment based exculpatory evidence, was provided in the government's disclosures to the defense.

At Mr. Savage's trial, Ms. Conteh initially denied having an agreement to cooperate with the government in place during these meetings, only admitting it

after she was presented with a copy that she acknowledged signing. In March 2016, just before Mr. Savage's trial, she signed another cooperation agreement in which she again agreed to cooperate in exchange for the possibility of the government filing a motion to reduce her sentence if she provided substantial assistance in the investigation. However, Ms. Conteh and the government admitted that she had breached her agreement, thus eliminating the government's obligation to her. Ms. Conteh admitted that she had lied to the government and her defense counsel about, *inter alia*, her receipt of profits from the scheme. She initially maintained she had not received any money from the scheme, but then admitted to the government that she had received $5,000 less than a week before petitioner's trial. Her false statements thus eliminated the government's obligations under the agreement, although it did not preclude its discretionary action to reward Ms. Conteh despite the breach. The government informed the defense about Ms. Conteh's inconsistent statements regarding her receipt of stolen money in a letter on March 5, 2016.

2. Therefore, on the eve of his trial, Mr. Savage knew that Ms. Conteh's testimony to the government contained a long string of inconsistencies touching every aspect of his alleged involvement, culminating in the revelation two days before trial that she had lied consistently about receiving money from the scheme. However, the government had merely isolated some of these inconsistencies, withdrawn any color or context, and refused to disclose anything else Ms. Conteh said at these meetings, including a high-level summary. Mr. Savage thus moved on

the first day of trial for the government to produce any further material required to be disclosed under this Court's precedent in *Brady v. Maryland*, 373 U.S. 83 (1963), including contemporaneous notes taken during its interviews with Ms. Conteh. The Assistant United States Attorney responded that no such materials existed except for his personal, handwritten notes from the meetings, on which the disclosed list of inconsistent statements was based. In describing Ms. Conteh's testimony at these meetings, he noted that, in addition to the lie about receiving money, Ms. Conteh's testimony was riddled with "inconsistencies all the way through." (App. 42.)

Based on these representations, petitioner then requested the disclosure of these notes because the disclosures provided by the government so far only contained "bits and pieces" of Ms. Conteh's inconsistencies, with no color or context, and lacked any other exculpatory information, such as potential witnesses Ms. Conteh called and what they did or did not say regarding Mr. Savage's involvement in the scheme or Ms. Conteh's description thereof. In opposition to this motion, the government merely represented that the notes were simply government counsel's recollections of what Ms. Conteh had said, and, as such, they were not statements required to be turned over under the Jencks Act, 18 U.S.C. § 3500, and did not contain any additional *Brady* material. The trial court, in turn, accepted the government's representations that Ms. Conteh "didn't affirm any of the representations in those notes," and determined that they did not require disclosure under the Jencks Act, conducting no independent review. It made no comment about potential *Brady* disclosures in refusing to review the notes and denied petitioner's motion as moot. (App. 39-45.)

As the trial progressed, Ms. Conteh was the government's only percipient witness. She was the sole witness to identify Mr. Savage as having participated in the scheme. While Mr. Savage's involvement in the conspiracy, generally, was potentially corroborated by a video recorded of Mr. Savage apologizing to Ms. Conteh's family for her conviction, there was no such corroborating evidence for the aggravated identity theft convictions. Indeed, Ms. Conteh was the only witness to conclusively identify Mr. Savage's voice as the one on two calls recorded by Capital One, which were the sole basis for convicting Mr. Savage of aggravated identity theft. Further, at sentencing, several enhancements that were applied to Mr. Savage's sentence, including for sophisticated means and leadership role, were based entirely on Ms. Conteh's uncorroborated testimony. The investigation, trial, conviction, and sentencing of Mr. Savage thus rested upon Ms. Conteh's word, which before and during trial had proven deeply inconsistent, at best.

3. The Court of Appeals for the Fourth Circuit affirmed petitioner's conviction in a published opinion entered on March 12, 2018. As is relevant to the question at issue here, the Fourth Circuit held below that Mr. Savage failed to make a plausible showing that the files contained evidence that is material and favorable to the defense to require an *in camera* inspection under *Brady*. The court denied that Mr. Savage could "assume" the notes contained other inconsistencies in Ms. Conteh's testimony, despite the government's representation that other inconsistencies in her testimony existed, and that these

other unknown inconsistencies could potentially undermine Ms. Conteh's credibility so as to affect the outcome. Mr. Savage's arguments were, according to the court below, "pure speculation lacking any specificity, and . . . insufficient to support a finding of materiality under *Brady* or to require an *in camera* review." (App. 12.) Mr. Savage's request was indeed specific in that he requested only one document or set of documents pertaining to the government's single-most crucial witness. Further, the court below did not address Mr. Savage's argument that the notes may plausibly contain other exculpatory information unrelated to inconsistencies, given that the government had only disclosed Ms. Conteh's inconsistent statements with no further context or information from the meetings. (App. 12-13.)

4. The petitioner sought rehearing and rehearing *en banc* on the lower court's decision regarding in camera review but was denied on April 9, 2018. (App. 36.)

REASONS FOR GRANTING THE PETITION

The federal courts of appeal are openly divided on the showing a defendant must make to trigger *in camera* review for potential required disclosures under *Brady*, both internally and amongst each other. Notably, the general trend has been towards increasing conflation between (i) the required showing to secure *in camera* review, where the defendant has no ability to review the contents of the requested evidence but has a plausible reason to believe it might contain *Brady* material, and (ii) the requirements for proving an actual *Brady* violation has occurred, where defendants are aware of the content of the specific evidence that

the government has withheld and are advocating for a new trial. Where they conflate the two analyses, the federal courts' decisions directly contradict this Court's precedent in *Pennsylvania v. Ritchie* and exacerbate a larger trend of erosion of defendants' procedural due process rights. *Brady* issues are relevant in almost every criminal trial, and therefore a definitive ruling from this Court would restore a proper balance between protecting defendants' due process rights and preventing undue judicial burden.

I. The Federal Courts of Appeal Increasingly Contradict This Court's Precedent and Conflict with Each Other on the Showing Required to Trigger *In Camera* Review for Potential *Brady* Disclosures.

A. This Court's Precedent

This Court's precedent in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) serves as the basis upon which the jurisprudence for *in camera* review of potential Brady material is founded. In *Ritchie*, the defendant was charged with several offenses centering on the sexual assault and abuse of his thirteen-year-old daughter. Because his daughter was the main witness against him, he sought her entire confidential file from Pennsylvania's Children and Youth Services agency ("CYS"). The Pennsylvania Supreme Court ordered the file to be turned over directly to the defendant.

In its analysis, this Court first noted the government's well-established "obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment," citing both *Brady* and *United States v. Agurs*, 427 U.S. 97 (1976). *Ritchie*, 480 U.S. at 57. A *Brady* violation, which results in a new trial, only exists if the government fails to disclose material

evidence, and evidence is only 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" such that it "undermine[s] confidence in the outcome." *Id.*

This Court acknowledged that, in Ritchie's case, "it is impossible to say whether any information in the CYS records may be relevant" because the evidence had not been reviewed. *Id.* Under the requirements in *Brady*, Ritchie would have been forced to argue why the files he requested were material and favorable without any specific information about what they contained. This Court admitted that this argument required "mere speculation that the file 'might' have been useful to the defense." *Id.* Ritchie made his best case, speculating that the requested records "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." *Id.* at 44. While this argument was admittedly vague, it was not implausible; the records, after all, pertained to the main witness against him and could not be dismissed as entirely irrelevant.

This Court agreed with Ritchie and rejected the argument that Ritchie was not entitled to disclosure because he did not make a "particularized showing of what information he was seeking or how it would be material." *Id.* at 58 n. 15. While Ritchie must still "first establish[] a basis for his claim that it contains material evidence," this Court found that a particularized showing was not necessary, although "the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure." *Id.* This Court in *Ritchie* also cited *United States v. Valenzuela-Bernal*, 458 U.S. 858,

867 (1982), which held that in cases where a defendant had no access to a witness who is unavailable—in this case because he was deported—he must make a "plausible showing of how their testimony would have been both material and favorable to his defense" to establish a *Brady* violation. The plain language of this part of the precedent, which is frequently cited by lower courts, is slightly unclear, in that it requires the defendant to demonstrate that the witness's testimony *would* have been both material and favorable, *i.e.* that a *Brady* violation did in fact occur, but allows this showing to be merely *plausible* because the witness is no longer available. *Ritchie* is even a step removed from *Valenzuela-Bernal* because the issue is not whether a violation occurred, but rather whether specific materials should be reviewed *in camera*, and thus this Court applied an even less stringent standard, allowing for speculation that the evidence "might" be material. However, some lower courts, as discussed below, have cherry picked this language and thus conflated the two separate issues.

Ultimately, this Court held in Ritchie's favor and required the court below to review the CYS file *in camera* for potential *Brady* material. *Id.* at 58. It drew the line, however, at permitting the defense to have unfettered access to files, noting that the "right to discover exculpatory evidence does not include the unsupervised authority to search through the [government]'s files." *Id.* at 59. It settled upon the happy medium of requiring judicial review of the files, instead of opening the doors to the defense or refusing to at least consider the files for potential *Brady* disclosures because the defendant could not articulate their materiality with particularity.

Therefore, *Ritchie* provided a pathway where, in cases where the defendant has no ability to access evidence, but suspects it may contain evidence required to be disclosed under *Brady*, the defendant may request *in camera* review of the evidence. A particularized showing of how the evidence is material and favorable is not required, indeed because it would be "impossible" for the defendant to know. There needs to be some basis for the request, but it can be based on "mere speculation" and can refer to how the evidence "might" or "may have" a material impact for the defense. Further, the specificity with which the defendant identifies the files should also be considered, which prevents fishing expeditions or general discovery of the prosecution's files. In cases like *Ritchie*, where the defendant identifies one key witness and one specific set of files that *could* contain material and favorable evidence, the defendant is "entitled" to *in camera review* by the trial court to know with certainty. *Id.* at 61. Essentially, *Ritchie* struck a balance by requiring specificity in the scope of the request, thus preventing general discovery attempts by the defendant, and allowing speculation as to the materiality and favorability of the content of the evidence, given the defendant's inability to review the evidence.

B. Conflation and Confusion in Federal Courts of Appeal

All the federal courts of appeal have applied this Court's precedent in *Ritchie* when considering a defendant's request to remand a case for *in camera* review of purported *Brady* material. At least at one point in time, nine circuits have considered the issue with fidelity to this Court's precedent—requiring the defendant

to make a plausible showing that the material he or she requested for review might contain *Brady* information. This plausibility they rightly considered to be a factor of: (1) the specificity with which the defendant identified evidentiary files responsive to their request and (2) the material impact those evidentiary files might have had on the outcome of the trial or sentencing, had the allegations as to their contents' materiality and favorability been true. Accordingly, given that defendants could not possibly know the contents of the documents they suspected contained potential *Brady* material, most federal courts of appeal have followed this Court's precedent by not requiring specificity regarding the evidence's materiality, allowing for speculation when necessary. Herein, a balance was achieved.

At least five circuits, including the Fourth Circuit in the case below, have significantly departed from *Ritchie* by conflating it with precedent for establishing *Brady* violations or otherwise restricting their interpretations of *Ritchie* so tightly that they have virtually eliminated defendants' ability to access the protections this Court provided.

(a) Ritchie's *Precedent: Properly Functioning in Federal Courts of Appeal*

Where federal courts of appeal have applied the precedent in *Ritchie*, they have preserved a healthy balance between defendants' procedural due process rights and avoiding judicial burden and expansion of the rule into general discovery.

Courts rightfully deny remand for *in camera* review in the cases characterized as overly broad "fishing expeditions." *See, e.g.*, *United States v. Pou*, 953 F.2d 363 (8th Cir. 1992) (denying remand for *in camera* review where the

defendant's request was overly broad in requesting review of the prosecution's entire case file simply because prior *in camera* review had revealed other withheld *Brady* material); *United States v. Prochilo*, 629 F.3d 264 (1st Cir. 2011) (refusing to remand for *in camera* review where the defendant requested disclosure of the witness's "entire relationship with the government" and finding that he must "identify[] specific materials he wanted the court to inspect *in camera* . . ."); *United States v. McKinney*, 758 F.2d 1036, 1052 (5th Cir. 1985) (refusing to require *in camera* review of the entire investigation file for potential *Brady* material).

Courts of appeal have also properly denied requests for *in camera* review where it was entirely implausible or impossible for the requested evidence to be material. *See*, *e.g.*, *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (denying remand for *in camera* review of transcripts from wiretap of the home of the key witness's mother *after* the index indicated there were no conversations with the witness, but noting that before it became clear that the key witness did not participate on any of the call, the defendant "made a strong *Brady* argument"); *United States v. Dabney,* 498 F.3d 455, 459 (7th Cir. 2007) (denying remand for *in camera* review where requested evidence could not possibly be material to defense because "given [defendant's] own admission to possessing the firearm, there is no serious possibility that disclosure of the complaints—whatever their content—would have led to a different verdict"); *Dietrich v. Smith*, 701 F.3d 1192, 1197 (7th Cir. 2012) ("Therefore, the trial court rightly concluded that no *in camera* review of [witness's] counseling records was necessary because even if the files contained the exact

information [defendant] speculated existed, that information was first and foremost immaterial and cumulative at best.").

Alternatively, in cases where defendants requested review of a properly narrow set of evidence, some federal courts of appeal have adhered to this Court's precedent by requiring *in camera* review where defendants made a plausible, but not necessarily specific, showing that the evidence *could* contain material, favorable evidence. If it was plausible that a request could turn up *Brady* material under this standard, then the courts felt obligated by the due process concerns underlying *Ritchie* to remand a case for *in camera* review of the requested material, even where materiality was speculative or inconclusive. *See, e.g.*, *United States v. Rosario-Peralta,* 175 F.3d 48 (1st Cir. 1999) (granting remand for *in camera* review where defendant specified its request to location logs of a particular time, location, and there was a "possibility" that the logs could differ from testimony of key witnesses); *United States v. Kiszewski*, 877 F.2d 210, 215-16 (2d Cir. 1989) (granting remand for *in camera* review of personnel files for two key witnesses which "may have been helpful for impeachment purposes" and where the court did "not know whether the information, if disclosed, might have created a reasonable probability that the outcome of the trial would have been different"); *United States v. King*, 628 F.3d 693 (4th Cir. 2011) (noting that a "defendant cannot demonstrate that suppressed evidence would have changed the trial's outcome if the Government prevents him from ever seeing that evidence" and requiring *in camera* review of grand jury testimony from a key witness, who did not testify at trial, where the defendant

showed it "*could* contain materially favorable evidence") (emphasis added); *United States v. Gaston*, 608 F.2d 607 (5th Cir. 1979) ("The instant case is distinguishable because Gaston requested specific documents and the uncontroverted evidence did not so conclusively establish guilt as to render the undisclosed requested material moot."); *Piggie v. Cotton*, 344 F.3d 674 (7th Cir. 2003) (requiring *in camera* review where "the record . . . does not demonstrate with any degree of certainty that the tape lacked exculpatory value or was otherwise irrelevant" and "suggests, at least, that the tape was not inculpatory"); *Anderson v. United States*, 788 F.2d 517 (8th Cir. 1986) (requiring *in camera* review of tapes of conversations with a government witness where the defendant did not have specific knowledge of the contents of the requested evidence, even where the files were "voluminous" but related to the key witness); *Exline v. Gunter*, 985 F.2d 487, 490-91 (10th Cir. 1993) (requiring *in camera* review where the defendant "made an equally strong, if not more specific, offer of proof that the records 'may be necessary' to the determination of his guilt or innocence than did Ritchie"); *Miller v. Dugger*, 820 F.2d 1135 (11th Cir. 1987) (requiring *in camera* review of grand jury testimony of a witness where the defendant was unable to describe the testimony, it would conflict with either the trial testimony or deposition testimony and thus there was no "speculation as to the possible usefulness").

(b) Courts of Appeal Depart from Ritchie *Resulting in Problematic Precedents*

Outside of the Fourth Circuit in the case below, at least four circuits have, on occasion, strayed far from the standard established in *Ritchie* in ways that seriously

undermine defendants' procedural due process rights—either by entirely ceding to the unsupported representations of the prosecutor or by conflating the analysis for *Brady* violations with that of *in camera* review requests.

The Sixth Circuit has essentially abdicated the regulation of *Brady* material to the prosecutors. *See United States v. Hernandez*, 31 F.3d 354, 361 (6th Cir. 1994) (holding that, in the absence of "some indication of misconduct" by the government, the district court is not required to conduct an *in camera* review to verify the government's assertion that it has disclosed all relevant *Brady* material); *United States v. Carmichael*, 232 F.3d 510 (6th Cir. 2000) ("where the prosecutor clearly represents to the district court that all *Brady* material has been disclosed to the defendant, there exists *no basis* to require an in camera review by the district court.") (emphasis added). The court in *Carmichael* was palpably struggling with the imprecision of this standard, but felt obligated to maintain the court's precedent in *Hernandez*. 232 F.3d 510 at 517. In *Carmichael*, the court explained, "[a]lthough we do not believe that it would be a satisfactory solution to force district judges to scrutinize large volumes of sealed materials whenever defense counsel request that they do so, we nevertheless have serious misgivings about the breadth of the rule announced in Hernandez." *Id.* It then identified the crux of the issue, noting, "[a]fter all, it is difficult to conscientiously conclude that the government has met its obligations under *Brady* without seeing the materials that the government concededly did not disclose." *Id.* Indeed, the *Carmichael* court's misgivings about the overly stringent rule in *Hernandez* have been demonstrated by the lopsided

outcomes in the Sixth Circuit. A review of the precedent uncovered only one case in which the Sixth Circuit has required a remand for *in camera* review, in the rare case where the defense counsel was able to dig up actual proof of non-disclosure well after trial through Freedom of Information Act requests. *See*, *United States v. White*, 492 F.3d 380 (6th Cir. 2007). Indeed, *White* required *in camera* review only where the *Brady* violation had already been established by the defense.

For its part, the D.C. Circuit has made both errors—it has granted prosecutors complete discretion over an issue that *Brady* cautioned should be the prerogative of the court, and it has conflated the standard for *in camera* review of material with that for finding a per se *Brady* violation. *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) ("Although the defendant has pinpointed specific files, he has not identified exculpatory evidence [that the prosecution] withheld . . . so the case calls for the usual prosecutorial rather than judicial examination.") (internal citations omitted).

The Seventh Circuits and Ninth Circuits have similarly applied analyses more closely resembling those for *Brady* violations, when they should have conducted analyses for *in camera* review for potential Brady information under this Court's precedent in Ritchie. For example, in *United States v. Mitchell*, the Seventh Circuit denied *in camera* review of presentencing reports for three key witnesses because "[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial." 178 F.3d 904, 907 (7th Cir. 1999). The defendant requested a limited

set of specific documents pertaining to only three key witnesses, which hardly seems like the fishing expeditions *Ritchie* sought to avoid. The defendant also noted that the presentencing reports "may have turned up impeachment information, such as inconsistent or false statements . . . and/or information concerning the criminal records of the witnesses." It seems highly plausible that such information, if it existed, would be material and favorable to the defendant, especially since criminal records of witnesses are generally turned over to the defense as a matter of course. However, the Seventh Circuit improperly rejected the defendant's argument as to why the files could contain material and favorable evidence as "[m]ere speculation" and citing the judicial burden if district court judges were required to "review the presentence reports of all witnesses when there is no particular indication that the reports contain *Brady* material." *Id.* at 908. However, the defendant did not request review for "all witnesses" but selected three specifically who would be most likely to have material, favorable evidence and pointed to information typically provided by the prosecution but to which the defense did not have access.

The Seventh Circuit further confused the issue by holding that "[m]ere speculation that a government file may contain Brady material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial" because "[t]here is no indication that the presentence reports of [the three key witnesses] contain undisclosed *Brady* material." *Id.* Apparently, the Seventh Circuit confused the request for *in camera* review—for which this Court allows

"mere speculation" as to whether the evidence may contain undisclosed *Brady* material—with an argument that a *Brady* violation actually occurred and necessitating a new trial. The conflation of the two issues caused the court to deny review which this Court's precedent in *Ritchie* likely would have granted, given the specificity of the scope of the request and the plausible indication that some exculpatory may have not been turned over by the prosecution. While a broader request might have imposed undue burden on the judiciary, such a request could be properly denied and this limited request provided an important check on prosecutorial discretion. The Seventh Circuit's misinterpretation of *Ritchie* thus raises serious procedural due process concerns, in addition to muddying the jurisprudence on this issue. *See also United States v. Lucas*, 841 F.3d 796, 808 (9th Cir. 2016) (holding that, to trigger *in camera* review, the defendant "must either make a showing of materiality under Rule 16 or otherwise demonstrate that the government improperly withheld favorable evidence").

The instant case provides this Court an opportunity to clarify the rule in *Ritchie* and to correct the federal courts that have lost sight of the role of *in camera* review as a preliminary guarantor of defendants' due process rights.

II. The Fourth Circuit's Precedential Decision in the Case Below Conflicts with This Court's Precedent and Creates an Impossible Requirement for Defendants.

Like the Sixth, Seventh, Ninth, and D.C. Circuits, the Fourth Circuit's holding in petitioner's case misapplies this Court's precedent in *Ritchie* and conflates the analysis for *Brady* violations with that for *in camera* review for

potential *Brady* material. Further, the rule set by the Fourth Circuit below would set an impossible requirement if extended for defendants who must now somehow prove with specificity the materiality and favorability of evidence they have never seen.

The Fourth Circuit concluded that Mr. Savage's argument regarding the potential favorability and materiality of the government attorney's notes "is pure speculation lacking any specificity, and is insufficient to support a finding of materiality under Brady or to require an in camera review." (App. 12.) Here, the confusion between the two very different requirements is apparent. Under this Court's precedent, the petitioner was not required to support a finding of materiality under *Brady*, as he would if he were attempting to prove a *Brady* violation. Instead, he merely needed to show that the specific evidence plausibly could be material. The vast difference between showing that evidence is, in fact, material and that it plausibly could be so is critical in cases where defendants cannot possibly know the contents of the evidence with specificity. The Fourth Circuit was thus correct that Mr. Savage's showing was insufficient to support a finding of materiality under *Brady*. However, it improperly lumped in its finding that this showing was also insufficient to require an *in camera* review, merely because petitioner could not demonstrate materiality with "specificity."

The Fourth Circuit's confusion of these two issues is apparent throughout its analysis and its decision to deny remand for review. Given that Ms. Conteh's testimony was the only support for the two aggravated identity theft convictions,

was potentially critical for the conspiracy conviction, and represented the sole piece of evidence for several sentencing enhancements, the chance that additional inconsistencies or other entirely unknown exculpatory evidence might undermine the outcome at trial or sentencing is more than plausible. Further, it seems beyond belief that no other exculpatory evidence was generated at Ms. Conteh's four meetings with the government other than a few inconsistent statements by Ms. Conteh. It is improper for the trial court and the court below to ignore the extremely high likelihood that exculpatory information from the meetings was possibly not provided in the government's meager disclosures, such as the names of other potential witnesses contacted in recorded phone calls by Ms. Conteh or denials of Mr. Savage's involvement or Ms. Conteh's description thereof. Mr. Savage pointed the court to these insufficiencies, but it was ultimately the court's role, not petitioner's, to establish whether this material actually existed.

The Fourth Circuit also states that Mr. Savage cannot "assume the government attorney's notes contain other inconsistencies in Conteh's testimony because . . . of the government's admissions that there were 'inconsistencies all the way through' their meetings with Conteh and 'other things were discussed' in the meetings." (App. 12.) We agree, but no assumption is required to make a plausible showing to trigger *in camera* review. Instead, under the precedent of this Court, Mr. Savage only needs to show, as he does here, that the notes could contain or might contain undisclosed materially favorable statements. Any showing beyond the one made by petitioner—in which he cited the government's own admission that

the provided disclosures did not contain all of the discrepancies in Ms. Conteh's testimony and pointed to the complete lack of disclosure of other exculpatory evidence—would be impossible unless petitioner had specific knowledge of the content of the notes. Petitioner did not ask the Fourth Circuit to assume that the notes contained exculpatory evidence, but rather provided a plausible reason why the notes could contain such information, at which point the court had the duty to confirm or refute that allegation itself.

While Mr. Savage could not state with specificity whether the notes contained material, favorable evidence, he was specific with the scope of his request. The Fourth Circuit thus erred in finding that his request was "pure speculation lacking any specificity." (App. 12.) Indeed, he very specifically requested only one set of documents—the prosecutor's contemporaneous notes from its four meetings with Ms. Conteh—relating to a key witness on whose credibility at least two counts of his conviction, if not all counts, and several sentencing enhancements rested entirely.

The Fourth Circuit's precedential decision thus conflicts with this Court's precedent, which requires specificity related to the scope of the documents requested for review but not necessarily to whether the content is actually material and favorable. As with other courts of appeal that have muddled the two issues, the reasoning and holding below essentially create a requirement that defendants must establish that a *Brady* violation did in fact occur to secure *in camera* review for potential *Brady* material. The conflation of these standards is particularly clear

here, where the lower court started by finding that petitioner's showing was insufficient to establish materiality under *Brady* and then concluding abruptly and unclearly that the showing was also insufficient to sustain *in camera* review. The two analyses are completely separate and should be maintained as such, or there is a risk that the important intermediary step of providing judicial review for *Brady* material will be eliminated entirely, leaving prosecutors essentially unchecked in their decisions to not disclose evidence as long as the defendant cannot know its contents with specificity.

III. This Decision Contributes to the Erosion of Defendants' Procedural Due Process Rights.

The Fourth Circuit's decision below contributes to a precarious trend in criminal cases. Defendants do not have a general right to discovery in criminal cases, but federal law and this Court's precedent provide limited avenues to information possessed by the government to ensure a full and fair trial as required by the Fifth Amendment. *Brady* represents one of several critical required disclosures, as well as the Jenks Act, 18 U.S.C. § 3500, and *United States v. Giglio*, 405 U.S. 150 (1972). While these provisions provide a solid basis for ensuring defendants' procedural due process rights, prosecutors can, and often have, circumvented and shorted them. The resulting meager disclosures, such as those in the instant case, show the erosion of procedural protections for criminal defendants, which could be tempered and remedied by a decision by this Court to clarify the scope and terms of *Ritchie*.

In the case below, the government ensured that there were no Jencks Act materials from its meetings with Ms. Conteh by avoiding recording or having her affirm any statements, and the only documentation from the meetings—the prosecutor's notes—allegedly did not contain substantially verbatim statements.[1] Further, the government provided no FBI 302 report, formerly a standard means of memorializing meetings with witnesses for the defense, or other high-level summary of the meetings. *See, e.g.*, Memorandum from Benjamin B. Wagner, U.S. Attorney, to the Criminal Division (Aug. 24, 2012) ("Although a FBI 302 (report of interview) of the witness is generally not considered to be a statement within the meaning of the Jencks Act . . . it is the office's policy generally to produce such reports as if they are Jencks Act statements."), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/cae_discovery_policy.pdf.

Instead, the government merely listed a few of Ms. Conteh's statements that directly conflicted with information she provided at earlier meetings, while noting that the summaries did not include other statements that were potentially exculpatory, nor did they contain all of the inconsistencies. Through this strategy, the prosecution selected for itself the quality and quantity of impeachment information that would be conveyed to the defense regarding Ms. Conteh, with no oversight or independent review. To "'cast[] the prosecutor in the role of an

[1] At no point did the trial court or the Fourth Circuit respond to petitioner's argument that the prosecutor's notes may contain substantially verbatim statements subject to disclosure under the Jencks Act.

architect of a proceeding . . . does not comport with standards of justice' . . . and [s]uch a prosecution is also inconsistent with the role of the government lawyer in our legal system." *United States v. Ford*, 550 F.3d 975, 991 (10th Cir. 2008) (Gorsuch, C.J., dissenting) (quoting *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963)).

The circumvention of disclosure requirements and lack of judicial oversight is a trend seen throughout federal criminal law and exacerbated by the federal court of appeals' line of reasoning in recent cases involving requests for *in camera* review for *Brady* material. *See, e.g.*, Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 141 (2012) (examining the "modern tendency of courts to excuse prosecutors from disclosing exculpatory evidence that would otherwise be subject to disclosure under *Brady*" if the defense could have discovered the evidence through due diligence); Jason Kreag, *The* Brady *Colloquy*, Stan. L. Rev. (Sept. 2014) (highlighting the "growing recognition that *Brady* violations are rampant" and the responsibility of judges to address them), https://www.stanfordlawreview.org/online/the-brady-colloquy/; Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1541-43 (2010) (explaining the high number of *Brady* violations and the "wide berth" provided to prosecutors by *Brady's* materiality standard). The impossible requirement imposed on defendants to explain with specificity how evidence, which they have not been able to review, is material and favorable is no better than deferring to prosecutors entirely regarding *Brady* disclosures. None of the courts maintaining this

requirement have explained how defendants could possibly make such a showing. Indeed, defendants cannot.

This Court recognized the very impossibility of establishing materiality when the defendant has no access to the evidence and required review where a defendant identified one specific set of documents relating to a key witness and could only speculate as to the content's materiality. This rule may result in a marginal increase in judicial responsibility in administering the act, but there is no evidence that it has been an overwhelming burden in the courts where it is faithfully applied, and ultimately prosecutors should be incentivized to provide more fulsome disclosures, as envisioned by *Brady*, *Giglio*, and the Jenks Act.

IV. This Case Is an Excellent Vehicle for Resolving the Conflict.

At this time, all of the federal courts of appeal have weighed in on this issue with increasingly conflicted results. In the case below, the scope of the request is limited to one document pertaining to government meetings with the only percipient witness. The content is more than plausibly material, as the witness, in the government's own words, had inconsistencies throughout her testimony and a major lie, but the paucity of the government's provided disclosures left open a wide possibility that more exculpatory information would be in the requested notes. Therefore, the case below represents an opportunity to set more clear limits on the showing necessary for the evidence's materiality and favorability to trigger *in camera* review, without otherwise expanding *Ritchie*. As *Brady* is relevant to all federal criminal cases, an immediate decision by this Court would be timely.

CONCLUSION

The Court should grant this petition for a writ of *certiorari* to the court of appeals.

Respectfully submitted,

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