NO. _____

# In The Supreme Court of the United States

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## JESUS ALEJANDRO CHAVEZ,

*Petitioner*,

**v.**

## UNITED STATES OF AMERICA,

*Respondent.*

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**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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***Dated: August 8, 2018***

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## QUESTIONS PRESENTED

1. The Fourth Circuit contends in its decision that the Appellant failed to establish that the alleged *Brady* violation was material. Is the decision by the Fourth Circuit in direct contravention of *Wearry v. Cain*, 136 S.Ct. 1002, 1006 – 1007 (2016)? A new trial is warranted for Mr. Chavez who offered a substantial defense in this case.

2. The trial court committed error by refusing to sever Mr. Chavez's case prior to trial pursuant to his pre-trial severance motion which was later renewed in a post-trial pleading. The Fourth Circuit contends that "efficiency" justified the trial court's decision. Mr. Chavez was harmed by a large volume of evidence, gruesome in nature, that was unconnected to him and which predated his involvement in the criminal activity alleged against him in the Indictment. Does the decision by the Fourth Circuit conflict with *Zafiro v. U.S.*, 506 U.S. 534, 539 (1993) and *U.S. v. McRae,* 702 F.3d 806, 822 - 827 (5th Cir. 2012)? A new trial is warranted for Mr. Chavez who offered a substantial defense in this case.

## LIST OF PARTIES

The parties named in the caption of the case on the cover page.

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## JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). On July 2, 2018, the United States Court of Appeals for the Fourth Circuit denied Mr. Chavez's direct appeal of his criminal convictions thereby deciding this matter adversely to the Petitioner.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
> * * * *

Rule 14(a), Federal Rules of Criminal Procedure:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

## STATEMENT OF THE CASE

### I. STATEMENT OF THE NATURE OF THE CASE

This is a petition for *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit denying Mr. Chavez's direct appeal of his criminal

convictions. Mr. Chavez was prosecuted in the United States District Court for the Eastern District of Virginia, Alexandria Division. The district court had original subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The Defendant, Jesus Chavez, was charged by Third Superseding Indictment for participating in the alleged murder of Julio Urrutia. Mr. Chavez was alleged to have engaged in murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) and (2); use of a firearm during a crime of violence causing death in violation of 18 U.S.C. § 924(c) and (j)(1); and felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). As part of the Third Superseding Indictment, Mr. Chavez was joined at trial with five other defendants who were alleged to have been involved with two distinct murders and one attempted murder. All defendants were alleged to be members of, or associates of, MS-13, a Hispanic gang. Further, the Third Superseding Indictment alleged one distinct conspiracy, yet that conspiracy was not charged to Mr. Chavez, i.e., conspiracy to commit murder in aid of racketeering, Count One of the Superseding Indictment (18 U.S.C. § 1959(a)(5). Counts One through Three of the Third Superseding Indictment involve the attempt to kill D.F. in Woodbridge, Virginia on or about October 1, 2013. Counts Four and Five of the Third Superseding Indictment involve the alleged murder of Nelson Omar Quintanilla Trujillo in Fairfax County on or about October 7, 2013. Count Six of the Superseding Indictment involves the alleged murder of Gerson Adoni Martinez Aguilar in Fairfax County on or about March 29, 2014. Counts Seven through Nine of the Third Superseding Indictment involve Mr. Chavez and the alleged murder of Julio Urrutia in the City of Alexandria on or about June 19, 2014. Count Eight makes a specific allegation that Mr. Chavez

was the person who used a firearm to shoot Mr. Urrutia. Mr. Chavez is not alleged to have participated in Counts One through Six of the Third Superseding Indictment. Mr. Chavez was in the custody of the Virginia Department of Corrections from or about January 1, 2009 through June 11, 2014 (see trial stipulation, JA 5047).[1]

Prior to trial Mr. Chavez moved to sever his case from the other defendants alleging that the Government intended to offer violent and gruesome acts against his co-defendants that were likely to spillover or rub-off onto him (JA 1039). The Court denied Mr. Chavez' motion (JA 1277).

The parties proceeded to a jury trial on March 21, 2016. According to the Government, Mr. Chavez's gang name was Taliban. During the course of the trial the Government offered accomplice testimony against Mr. Chavez alleging that Chavez shot and killed Mr. Urrutia. Further, the Government offered the testimony of criminal informant nicknamed Junior, whose role was to "interpret" telephone calls among alleged gang members to include Mr. Chavez. In addition, the Government offered evidence involving cell site tracking data that placed Mr. Chavez's cell phone at or near the scene of the crime on June 19, 2014 at a time approximate to the alleged murder.

Mr. Chavez responded to the Government's case by offering a substantial defense. Specifically, Mr. Chavez established that the shooter had tattoos on both forearms but that Chavez did not have tattoos on his arms. Further, Mr. Chavez offered testimony through Mr. Cosme Gonzalez that the shooting occurred in a different fashion than alleged by the Government and was the product of a drug deal

[1] References to JA are cites to the Joint Appendix in the Fourth Circuit.

gone bad. The testimony of Cosme Gonzalez was noteworthy in that it was free of self-interest unlike the accomplice testimony offered by the Government. Moreover, the Government did not impeach Mr. Gonzalez's testimony. On May 9, 2016 the jury convicted Mr. Chavez of Counts 7 – 9. All the remaining defendants were likewise convicted of Counts 1 – 6.

Following trial Mr. Chavez filed a post trial motion via Rule 33 of the Federal Rules of Criminal Procedure alleging that a new trial was warranted (JA 6812). That motion, *inter alia*, alleged that a new trial was necessary in light of the substantial defense offered by Chavez and the unrelated and gruesome evidence offered by the Government against the co-defendants which spilled over onto Chavez. That motion was denied by the trial court (JA 6962). Mr. Chavez was sentenced on August 9, 2016. Following a final sentencing order, and while Mr. Chavez's case was on appeal, the Government revealed that one of its most important witnesses, criminal informant Junior, had lied on three (3) immigration applications (*U.S. v. Douglas Duran Cerritos*, 1:16CR104, Doc. #29; see also JA 7083). Junior was so important to the Government's case that he was described by AUSA Julia Martinez as a "hero" in closing argument (JA 6440). Noteworthy is that prior to trial the trial judge issued an expansive Order detailing information that the Government was required to disclose pretrial to Mr. Chavez's counsel concerning false statements associated with its intended trial witnesses. Such Order referenced the Government's obligations under the Rule of *Brady v. Maryland*, 373 U.S. 83 (1963) and *U.S. v. Agurs*, 427 U.S. 97 (1976).

## II. CONDENSED STATEMENT OF FACTS AS TO MR. CHAVEZ

### A. The Government's Trial Evidence

#### 1. Jose Del Cid aka Duende

Mr. Del Cid testified that Jesus Chavez, whom he called Taliban, shot and killed Julio Urrutia on June 19, 2014 (JA 5028 – 5029). He further testified that prior to the shooting Mr. Chavez obtained a handgun from Oscar, a.k.a. Slick, a.k.a. Mickey Mouse (one person) and that Del Cid and Chavez returned the gun to Oscar/Slick/Mickey Mouse following the shooting (JA 5030, 5106 - 5107). He also testified that prior to the shooting Chavez told Sixto Solano to leave the area and that following the shooting Del Cid and Chavez ran to Blanca Reyes apartment where Chavez hoped to have sex with Ms. Reyes. On cross-examination Del Cid admitted telling Detective Victor Ignacio on July 2, 2014 that he did not know anything about the death of Mr. Urrutia (JA 5100). Later he testified that he told Det. Ignacio that "Crazy Guanaco" was the one who shot the decedent, Mr. Urrutia (JA 5101). Del Cid admitted to being extremely violent having killed several people and that he attempted to shoot and kill his own mother (JA 5055 - 5061). Del Cid further admitted to having tattoos on both of his arms (JA 5109, NB - see testimony of Vidal Jimenez and Det. Buckley below in which the shooter is identified as having tattoos on both of his forearms). Finally, Del Cid's credibility at trial was significantly impeached. For example, Del Cid admitted to seeking a sentence reduction and immigration benefits from the Government in exchange for his testimony (JA 5098) and that the U.S. Attorney's Office interceded with Virginia state authorities to have several violent crimes dismissed in exchange for his testimony (JA 5097 - 5098).

**2. Genaro E. Sen Garcia aka Gatuso**

Mr. Garcia testified that he was present when Julio Urrutia was shot and killed on June 19, 2014. He claimed to have seen Mr. Chavez, whom he claimed to be Taliban, go up to an apartment prior to the shooting and then heard a gun being loaded (JA 5328). He further stated that he was engaged in a fight with the decedent when a shot came from behind him where Mr. Chavez allegedly was standing (JA 5331). During direct examination Garcia was asked by the Government to identify Mr. Chavez in the courtroom but he was unable to identify Mr. Chavez (JA 5317). On cross examination, Garcia admitted that he told Detective Victor Ignacio that he could not remember much about the shooting incident as he was under the influence of drugs at the time (JA 5373 – 5374). Further, Garcia admitted that prior to the shooting that he went into a separate building and shut the door casting doubt on his ability to hear a gun being loaded as he earlier alleged in his direct examination (JA 5387). Likewise, Garcia admitted that he told a different story to Det. Ignacio when arrested – that is, he never mentioned that he heard the loading of a weapon, (JA 5389). Finally, Garcia's credibility at trial was significantly impeached. For example, Garcia admitted to seeking a sentence reduction and immigration benefits from the Government in exchange for his testimony (JA 5419 - 5420) and that he lied to the police about the events of the shooting (JA 5391 - 5392).

**3. Vidal Jimenez**

Vidal testified that he was present on June 19, 2014 at the shooting scene with his brother, David Jimenez (JA 5464 - 5470). On July 7, 2014 Vidal identified Jesus Chavez as the shooter from a photo-spread (JA 5473). Present during the photo-spread

were Detectives Buckley and Ignacio, both of the Alexandria Police.[2] Noteworthy is that the Government did not ask Vidal to identify Mr. Chavez in the courtroom during trial. During cross examination Vidal testified that he had seen hundreds of tattoos in his lifetime (JA 5477), that his friends had tattoos (JA 5476), that he observed people in high school wearing tattoos (JA 5477), that he observed his former gang associates in the Latin Homies wearing tattoos (JA 5477), that he personally has tattoos (JA 5477) and that he was standing right in front of the shooter on June 19, 2014 (JA 5476). Vidal claimed that the lighting conditions at the time of the shooting were "fair" (JA 5477). He then testified as follows in the course of cross-examination at JA 5477 - 5478:

> Q: I believe we were in this courtroom – another courtroom – another courtroom in this building on October 20th, of 2015; is that correct?
>
> A: Yes sir.
>
> Q: And you were under oath at that time; is that accurate?
>
> A: Yes, sir.
>
> Q: You remember being asked and answered in the following manner:
>
> Question: Describe the lighting conditions for us.
>
> Answer: The lighting conditions were pretty good, actually.
>
> * * * *
>
> No trouble observing what happened?

[2] Det. Ignacio later admitted during his cross-examination that he made a noise and steered Genaro E. Sen Garcia, aka Gatuso, toward selecting Chavez from a photo spread after Gatuso was unable to identify Chavez as the shooter though he denied attempting to influence Vidal Jimenez during his viewing of the photo spread (JA 5448 – 5449)

Answer: No sir.

Do you remember being asked and answering in that manner?

A: Yes, sir.

Q: Now, you told Detective Buckley within hours after the shooting that the shooter had tattoos on both forearms; isn't that correct?

A: I don't remember.

Q: You don't remember what you said to the police officer?

A: I don't remember specifying whether he had tattoos or not.

**4. Det. Thomas Buckley**

Detective Buckley testified that he took a statement from Vidal Jimenez within two hours of the Urrutia shooting on June 19, 2014 (JA 5496 – 5497). He further testified that Vidal Jimenez told him that the shooter had tattoos on both of his forearms (JA 5497 – 5498).

**5. Detective Betts, Fairfax Police**

Detective Betts admitted on cross-examination that Jesus Chavez did not have tattoos on his arms (JA 5671).

**6. S/A Kevin Horan (JA 5525 - 5529)**

FBI agent Horan testified that a phone associated with Mr. Chavez was described by a cell tower as being in the vicinity of the murder scene between 9:20 p.m. and 10:23 p.m. on June 19, 2014.

**7. Det. Victor Ignacio**

Detective Ignacio admitted on cross-examination that he interviewed Jose Del Cid (Duende), Genaro E. Sen Garcia (Gatuso) and Vidal Jimenez in the course of his

investigation (JA 5451). Det. Ignacio admitted that Del Cid told him on July 2, 2014 that Gatuso shot Mr. Urrutia and that Gatuso took the weapon following the shooting (JA 5444 – 5445). Det. Ignacio further admitted that he [Ignacio] lied to suspects from time to time (JA 5447), that as a police officer he committed a crime involving moral turpitude (JA 5449 – 5450) and that he steered Gatuso toward selecting Jesus Chavez from a photo-spread after Gatuso was unable to identify Chavez (JA 5448 - 5449).

**8. 6/27/14 & 6/29/14 telephone transcripts (Govt. Exhibits 21-A-1 & 22-A-1 & testimony of Junior related to those transcripts)**

The Government offered into evidence two telephone transcripts purportedly related to Mr. Chavez, who the Government alleged to be "Taliban". Those calls were "interpreted" by Junior, whose real name is Jose Garcia. That testimony via direct examination is at JA 3974 – 4005. The June 27, 2014 transcript involved Del Cid (Duende) and Junior. According to Junior, in that call Duende alleges that Taliban killed Mr. Urrutia. On cross-examination about the June 27, 2014 call, Junior admits that Gatuso, Genaro E. Sen Garcia, expressed great interest in obtaining the gun used in the shooting (JA 4283 – 4284) and if necessary was willing to use violence to retrieve the gun (JA 4286).

The June 29, 2014 transcript involved Junior, Taliban, Del Cid and others. Junior admits on cross-examination that he never met Taliban and did not know how his voice sounded (JA 4288 – 4289). Moreover, Junior further admitted that in the telephone call Taliban never stated that he shot Mr. Urrutia or that he was with Del Cid or Gatuso at the time of the shooting (JA 4294, 4296). Junior further admitted that he tells Del Cid (aka Duende) that there were problems with the Urrutia shooting

(JA 4311). First, the gang did not authorize the shooting and that Urrutia was a retired gang member. Second, no notice was given to gang leadership before the shooting and, third, that the shooting occurred in territory not governed by Duende or his clique (see JA 4311 – 4318). The problems associated with the shooting provided a motive as to why Duende would blame Taliban for the Urrutia's death. In that regard Junior testified as follows at JA 4319:

> Q: So, this shooting, this murder of June 19, 2014, had lots of problems connected to it, right?
>
> A: Yes.
>
> Q: And, when there are problems, people sometimes have to pay for it, correct?
>
> A: Yes.
>
> Q: And that could be either a calenton [beating], correct?
>
> A: Yes.
>
> Q: It could be a green light?
>
> A: Yes.
>
> Q: It could be their life?
>
> A: Yes.

## REASONS FOR GRANTING THE WRIT

### I.

The Government engaged in a *Brady* violation in this cause. That is, the Government promoted one of its witnesses, "Junior", as highly important to its case by calling him a "hero" in closing argument. However, prior to trial the Government refused to examine and disclose to defense counsel Junior's immigration records in the possession of the Department of Homeland Security (DHS) despite reason for suspicion of Junior's truthfulness. Following trial, the Government obtained the immigration file of Junior from DHS and discovered that he lied on three immigration applications. The knowledge of the contents of that file should be imputed to the Government who failed to disclose to the defense prior to trial impeachment evidence in the file. The Fourth Circuit contends in its decision that the alleged *Brady* violation was not "material". Consistent with *Wearry v. Cain*, 136 S. Ct. 1002, 1006 – 1007 (2016), a new trial is warranted for Mr. Chavez who offered a substantial defense in this case.

### II.

The trial court committed error by refusing to sever Mr. Chavez's case prior to trial pursuant to his pre-trial severance motion which was later renewed in a post trial pleading. Mr. Chavez was harmed by a large volume of evidence, gruesome in nature, that was unconnected to him and which predated his involvement in the criminal activity alleged against him in the Indictment. The Fourth Circuit contends that "efficiency" justified the trial court's decision. Consistent with *Zafiro v. U.S.*, 506 U.S.

534, 539 (1993) and *U.S. v. McRae,* 702 F.3d 806, 822 - 827 (5th Cir. 2012), a new trial is warranted for Mr. Chavez who offered a substantial defense in this case.

## ARGUMENT

### I.

The Government engaged in a *Brady* violation in this cause. That is, the Government promoted one of its witnesses, "Junior", as highly important to its case by calling him a "hero" in closing argument. However, prior to trial the Government refused to examine and disclose to defense counsel Junior's immigration records in the possession of the Department of Homeland Security (DHS) despite reason to doubt Junior's truthfulness. Following trial, the Government obtained the immigration file of Junior from DHS and discovered that he lied on three immigration applications. The knowledge of the contents of that file should be imputed to the Government who failed to disclose to the defense prior to trial impeachment evidence in the file. A new trial is warranted for Mr. Chavez who offered a substantial defense in this case.

The Government engaged in a *Brady* violation concerning its "hero", Junior. To prove a *Brady* violation, a defendant must show that the evidence was (1) favorable to him; (2) material; (3) in the possession of the prosecution before trial; and (4) not disclosed to him. *U.S. v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001). *Brady's* commands do not stop at the prosecutor's door; the knowledge of some of those who are part of the investigative team is imputed to prosecutors regardless of prosecutors' actual awareness. *U.S. v. Robinson*, 627 F.3d 941, 952 (4th Cir. 2010). Moreover, there are no

hard and fast lines when it comes to imputing knowledge to prosecutors. Each case must be decided on a case-by-case basis, *Robinson*, *supra* at 952.

In the instant case "Junior" was a Government confidential informant (JA 7963). In addition, Junior was a MS gang member who admitted to committing criminal acts while being a gang member (JA 3672 - 3674, 4070 - 4071). At trial Junior "interpreted" telephone calls purportedly involving and/or concerning the defendants to include Mr. Chavez. In that regard the Government during the course of his testimony asked Junior the following question, or a close variant thereof, over 150 times when "interpreting" telephone calls: "What do you understand that to mean?" (JA 3736 – 3792; 3844 – 3892, 3900 – 4008, 4012 - 4025). This occurred over the objection of Defendant Chavez (JA 3747). Junior was so important to the Government's case that the Government described him as a "hero" in closing argument (JA 6440).

Prior to trial the Government recognized its *Brady* obligations relative to Junior by disclosing to the defense that the FBI had written a letter on behalf of Junior to an immigration judge and had otherwise worked with the Immigration Service to maintain Junior's lawful status in the United States while he worked as a confidential informant. However, during trial and thereafter, the Government maintained that, despite the request by the defense (JA 3828 - 3837; post trial pleading, District Court Doc. #928), it had no obligation to obtain the immigration file of Junior as it was in the possession of the Immigration Service which was <u>not</u> part of the prosecution team (e.g., Govt. Oppositions, JA 6841, 7083).

Following trial the Government revealed in a companion case (*U.S. v. Cerritos*, 1:16CR104, Doc. #29; see also JA 7083) that pursuant to a ruling from Judge Leonie M. Brinkema it had obtained the immigration file of Junior. Upon review of that file the Government advised the Court that Junior had lied on three (3) immigration applications filed with the Immigration Service. These lies could have been used to impeach Junior, the Government's "hero" in closing argument (JA 6440), who was critical to the Government's case.

The Government had an obligation to obtain the immigration file of Junior from the Immigration Service (DHS) prior to, and during, trial in the instant case and to reveal Junior's lies to defense counsel. This conclusion is based upon these factors:

**1.** Judge Lee issued a Pretrial Order defining the Government's *Brady* and *Jencks/Giglio* obligations (JA 1270 - 1274). That Order states, in part:

> Specifically, the Court directs the Government to comply with its obligations to promptly produce exculpatory material to each Defendant as required by Brady v. Maryland, 373 U.S. 83 (9163) and U.S. v. Agurs, 427 U.S. 97 (1976). This material includes, but is not limited to:
> 2. Any and all information of whatever form, source or nature that tends to exculpate the Defendant whether by indicating his innocence or impeaching the credibility of a potential Government witness . . .;
> 3. All information relative to informant misconduct of all witnesses who have agreed to cooperate with the Government.
>
> ******
>
> 14. Information concerning all prior testimony or statements made by any prospective Government witness and/or any Government informant in connection with this case which the witness/informant has acknowledge to be, or which the United States has reason to believe are, false.

**2.** The Government recognized, by its limited pretrial disclosure to defense counsel, that it had an obligation to turn over impeachment evidence concerning Junior and his

relationship with the FBI and the Immigration Service (DHS). For example, at JA 3834 - 3835 the Court questioned AUSA Martinez as follows after attorney Aquino requested information about Junior's immigration background:

> The Court: I had the impression that Agent Born testified that she filed an application, but she doesn't know if that was processed; is that right? For an S-Visa?
>
> Ms. Martinez: And that's a different application.
>
> The Court: Right.
>
> Ms. Martinez: And that information was disclosed to defense counsel during our Giglio disclosures. In addition to that, the government did write a letter in support of his immigration proceedings. That letter was provided, verbatim – a copy of the letter was provided to defense counsel. To the extent that the government aids this witness with his immigration proceedings, we agree completely that that's disclosable, and we have disclosed that. But a motion to get a subpoena to obtain an entire immigration file based upon a private citizen's own pursuit of obtaining a green card separate and apart from law enforcement, there's no basis for that. It's not relevant and it's a gross invasion of privacy.

**3.** The FBI worked closely with the Immigration Service (DHS) to preserve Junior's lawful immigration status in the USA so that Junior could perform services as a confidential informant (JA 3566, 3584 - 3585, 3625, 3682; JA 4116). For example, FBI Agent Brenda Born testified as follows at JA 3584 - 3585:

Q: Okay. Now, you testified that he has been given a parole or deferment action, right?

A: There was a significant benefit of parole and a deferred action. And then I had started another process that I did not complete.

Q: By "parole and deferred action", that means that the U.S. Government has told Junior they're not going to deport him back to El Salvador.

A: The significant benefit of parole was to allow him to legally remain here to work on an investigation for a limited period of time. And then the deferred action allowed us to have him remain here legally. So that was for anybody who was going through deportation or removal proceedings, for a limited time.

Q: And he was also told that you guys would try to get him an S visa, right?

A: He knew that I was working on the application, but he also knew that there was no guarantees. Because S Visas, there is a limited number of applications that are allowed.

Q: I understand that you used the word "guarantee," okay? And I understand that you are never in a position where you can guarantee someone –

A: Right.

Q: -- something, okay? But you guys made it abundantly clear that you would lobby for Junior to get this special S Visa.

> A: He knew that I was filling out the application, yes. But he also knew the limitation on the number and that it was not an FBI decision. (Emphasis added).

* * * *

Specifically, the Immigration Service (DHS) was part of the prosecution team as the FBI had no power to grant immigration benefits to Junior. Without the assistance of the Immigration Service (DHS), Junior would have been deported and unavailable to the Government at trial.

**4.** The fact that criminal informants, like Junior, are often untruthful is well known to the U.S. Attorney's Office such that a detailed investigation into his background was necessary. According to the Government, Junior was a MS 13 gang member who decided to end his relationship with the gang and serve as an informer for the FBI (JA 7963). In the course of that process Junior was paid (JA 3680), received immigration benefits for himself (JA 3682) and received immigration benefits for his family (JA 4234). According to the Government's gang expert at trial, Officer Claudio Saa, MS gang members, like Junior, who agree to cooperate with law enforcement are often untrustworthy (JA 1868 - 1872). In that regard we note the words of Judge Stephen S. Trott, Ninth Circuit Court of Appeals and former Assistant U.S. Attorney:

> Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some, "conning" people is a way of life. Others are basically unstable people. A "reliable informer" one day may turn into a consummate prevaricator the next. Stephen S. Trott, *Words of Warning for Prosecutors*, 47 Hastings L.J. 1381, 1383 (1996).

Likewise, Judge Trott stated in *U.S. v. Bernal-Obeso*, 989 F.2d 331, 331 - 334 (9th Cir. 1993):

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by Giglio to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility.

In sum, the U.S. Attorney's Office cannot get around *Brady* by keeping itself in ignorance, or by compartmentalizing information about different aspects of a case. *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984). See also *U.S. v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) – ("If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do.").[3]

[3] See also *U.S. v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005) ("As with their *Brady* obligations, this personal responsibility [of the Justice Department] cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies." quoting *U.S. v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992).

The Government's position relative to its "hero" Junior and his immigration file can best be described this way – We don't know and we don't want to know. We submit that the Government had a duty to know: (1) the Immigration Service (DHS) was a central part of the prosecution team by allowing Junior to remain in the United States and work with the FBI and the U.S. Attorney's Office; (2) Judge Lee had put the Government on notice of its *Brady* and *Jencks/Giglio* obligations which the Government recognized relative to Junior; and (3) informants such as Junior are notorious for their treachery, which is well known to the U.S. Attorney's Office and consistent with the testimony of the Government's gang expert, Officer Claudio Saa. A new trial is warranted as a result of the *Brady* violation which undermines confidence in the outcome of the trial during which Mr. Chavez offered a substantial defense, see *Wearry v. Cain*, 136 S. Ct. 1002, 1006 – 1007 (2016).

### A. The error was not harmless as Chavez offered a substantial defense.

The Government alleges Mr. Chavez to have shot and killed Julio Urrutia on June 19, 2014 (See Govt. Appeal Brief, Doc. #92, pp. 18 – 19; see also Third Superseding Indictment, Count 8, JA 1016). Noteworthy is that Vidal Jimenez, a former gang member who was highly familiar with tattoos and who had a clear view of the shooting, told Detective Buckley within two hours of the shooting that the shooter had tattoos on both of his forearms (JA 5476 – 5477; 5496 – 5498). However, Detective Betts testified that Chavez did not have tattoos on his arms (JA 5671). Moreover, the defense offered the testimony of Mr. Cosme Gonzalez who observed the decedent in an argument with a shirtless male over a drug debt (JA 5872, 1372 – 1374; 1377 – 1378).

Gonzalez stated that he observed the argument, stepped inside his apartment and within seconds heard a shot (see JA 1383). Mr. Gonzalez then looked outside his window and saw the shirtless man standing over Urrutia (JA 1384 – 1385). Mr. Gonzalez then saw the shirtless man run into the woods and hide something (JA 1386). Noteworthy is that Mr. Gonzalez was not impeached by the Government and had no motive to testify falsely.[4] Consistent with the observations of Mr. Gonzalez, Officer Michael Garcia testified that when he arrived at the crime scene he observed a shirtless male whom he later identified as David Jimenez. David was confrontational with Officer Garcia (JA 5732 – 5733).

In its decision (Appendix A, Doc. #110, p. 8 - 9) the Fourth Circuit contends that the *Brady* violation was not material as "the government had at least two eyewitnesses testify for each murder", which purportedly includes Chavez, and that the evidence of guilt was otherwise overwhelming. This simply is not a fair treatment of the evidence as to Mr. Chavez. While true that there were at least two government witnesses who were allegedly present at the Urrutia murder, one witness (Gatuso) could not identify Mr. Chavez in the courtroom upon request by the Government attorney. Moreover, when shown a photo-spread upon arrest within weeks of the shooting, Gatuso could not identify Chavez which caused Detective Victor Ignacio to make a noise and steer Gatuso to Chavez. Further, Gatuso was motivated in his testimony by a desire for a sentence reduction and immigration benefits. The second "eyewitness", Duende, also

[4] Compare Mr. Gonzalez's lack of motivation to lie to Jose Del Cid (aka Duende) and Genaro E. Sen Garcia (aka Gatuso) who both sought sentence reductions and immigration benefits in exchange for their testimony (JA 5098; 5419 – 5420). The contrast is stark.

was motivated by a sentence reduction and hope for immigration benefits. Finally, the Appeals Court failed to even acknowledge the substantial defense offered by Mr. Chavez as described above. That evidence supported the conclusion that someone other than Mr. Chavez shot and killed Mr. Urrutia. In sum, the instant case falls squarely within the contours of *Wearry v. Cain*, 136 S.Ct. 1002, 1006 – 1007 (2016) which stands for the proposition that additional impeachment evidence against an already impeached witness satisfies *Brady's* materiality requirement. Here, the additional *Brady* impeachment evidence from the DHS files could have been used by Chavez to further damage the credibility of Junior, the Government's "hero". A new trial is warranted in light of powerful defense offered by Mr. Chavez which the Court of Appeals failed to consider in its decision (Doc. #110).

**II.**

The trial court committed error by refusing to grant Mr. Chavez's pretrial Rule 14 severance motion (JA 1039, 1277). That motion was renewed following trial (JA 6812) and was denied by the Court (JA 6962). In light of that error we ask this Court to vacate his convictions because of the extremely prejudicial evidence involving Mr. Chavez's co-defendants that spilled over and rubbed-off on to Chavez. This request is grounded upon *Zafiro v. U.S.*, 506 U.S. 534 (1993) and *U.S. v. McRae*, 702 F.3d 806 (5th Cir. 2012). *Zafiro,* at page 539, charges the District Judge with policing properly joined offenses and defendants so as to allow the jury to fairly determine the validity of the allegations made by the Government:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there

> is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened.

A District Judge's decision on severance is difficult to overturn (e.g., *U. S. v. Dinkins*, 691 F.3d 358, 368 (4th Cir. 2012) and *U.S. v. Singh*, 518 F.3d 236, 255 (4th Cir. 2008). Importantly, the Fifth Circuit's position on severance is highly consistent with the Fourth Circuit both in regard to the hurdles necessary to justify severance and whether limiting instructions are sufficient to cure prejudice, see *U.S. v. McRae*, 702 F.3d 806, 822 - 823 (5th Cir. 2012). The Fifth Circuit requires a clear showing of prejudice to support severance (*McRae*, *supra*, at 823). In that regard we note the similarity between the instant case and *McRae* on the issue of severance. Reflective of the Fourth Circuit in *McRae* is the Court's assessment of the evidence at pp. 822 – 827:

> Our case law does not reflect a liberal attitude toward severance: We will not reverse a conviction based upon denial of a motion to sever unless the defendant can demonstrate compelling prejudice against which the trial court was unable to afford protection, and that he was unable to obtain a fair trial.' || *Whitfield,* 590 F.3d at 356 (quoting *United States v. Massey,* 827 F.2d 995, 1004 (5th Cir.1987))
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> * * * * * * * * * * *
>
> We really do not view this question as close in view of how the trial of this case unfolded . . . In sum, although the mere presence of a spillover effect does not ordinarily warrant severance, *United States v. McCord*, 33 F.3d 1434, 1452 (5th Cir.1994) (quoting Faulkner, 17 F.3d at 759), in these circumstances, we must conclude that Warren has cited specific and compelling instances of prejudice that resulted from joinder at trial with his co-defendants.

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> The most compelling prejudice, in our mind, resulted from the evidence, testimony, and photographs presented in connection with the government's case against McRae for the burning of Glover's body, all of which had an effect of associating Warren with the burning of Glover's body and subsequent cover-up. Especially troubling were the photographs of Glover's remains after they had been burned and the emotional testimony of Glover's family. Some of the evidence and testimony would have been inadmissible against Warren had he been tried alone, and we are convinced that the severely emotional nature of the testimony and photographs prejudiced Warren.
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> * * * * * * * * * * *
>
> Here, however, we are unconvinced that limiting instructions did, or could have cured the prejudice of the spillover effect from the government's case against McCabe for the alleged cover-up or the voluminous testimony, and evidence the government presented in connection with McRae's burning of Glover's body.

Therefore, the allegations contained in the third superseding indictment and the evidence at trial established that Mr. Chavez suffered compelling prejudice. A new trial is warranted.

**A. Violent Behavior Unrelated to Mr. Chavez Introduced at Trial**

**1. The conspiracy to murder D.F. alleged to have occurred on or about September 29, 2013 – October 1, 2013 (Counts 1 - 3 of the Third Superseding Indictment, JA 1016).**

In Count One the Government offered evidence to the jury of a plan to kill D.F. through the use of machetes and a shotgun. Those participating in the plan allegedly included co-defendant Jose Lopez Torres. The Government also alleged in Count Two that co-conspirator Jose Lopez Torres attempted to kill D.F. on or about October 1, 2013 in Woodbridge, Virginia. Further, the Government alleged in Count Three that Jose Lopez Torres possessed a short-barreled shotgun as part of the plan to kill D.F. Mr. Chavez was in jail when these events occurred (see Stipulation of the Parties, JA 5047).

**2. Murder in Aid of Racketeering (Count 4 of the Third Superseding Indictment).**

The Government offered evidence to the jury that co-defendants Jose Lopez Torres and Omar Dejesus Castillo murdered Nelson Omar Quintanilla Trujillo on or about October 7, 2013. The Government offered gruesome pictures of the body to the jury. Mr. Chavez was in jail when these events occurred (see Stipulation of the Parties, JA 5047).

**3. Accessory After the Fact of Murder (Count 5 of the Third Superseding Indictment).**

The Government offered evidence to the jury that in or about October of 2013 co-defendant Alvin Gaitan Benitez assisted co-defendants Jose Lopez Torres and Omar Dejesus Castillo by reburying the body of Nelson Omar Quintanilla Trujillo. Again, the Government offered gruesome pictures of the body to the jury. Mr. Chavez was in jail when this event took place (see Stipulation of the Parties, JA 5047).

**4. Murder in Aid of Racketeering (Count 6 of the Third Superseding Indictment).**

The Government offered evidence to the jury that on or about March 29, 2014 co-defendants Omar Dejesus Castillo, Alvin Gaitan Benitez and Christian Lemus Cerna murdered Gerson Adoni Martinez. Again, the Government offered gruesome pictures of the body to the jury.[5] Mr. Chavez was in jail when this event took place (see Stipulation of the Parties, JA 5047).

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[5] At JA 7907 - 7909 are pictures (severed head & headless body) submitted into evidence by the Government as trial exhibit #'s 88A, 90A and 90B demonstrating the grizzly evidence unrelated to Chavez and which were attached to Chavez's new trial motion, JA 6812.

### B. Racketeering Activity & Menacing Telephone Calls Unrelated to Mr. Chavez

**1.** The Government elicited testimony at trial of an assortment of racketeering activities including drug distribution and sex trafficking. Mr. Chavez was in jail when these events took place, (see Stipulation of the Parties, JA 5047).

**2.** The Government presented to the jury transcripts of several menacing telephone conversations detailing and celebrating the above murders and/or burials of the bodies and/or reburials of the bodies to include a beheading of one of the bodies, e.g., see Govt. Trial Exhibit 10A-1 (JA 7525) concerning March 31, 2014 conversation further described at JA 3856 - 3857 in which co-defendant Alvin Gaitan Benitez allegedly states:

> We were already waiting for him – he got there and I still made him light my cigarette, dog. "Light my cigarette, dude." The dude lit it up and I smoked it as we were going down. I was singing – singing – I was singing to him, "and the grass was moving, it was moving." [laughs] **I was calm, with the knife in my hand [noise] when – he's thro . . . – they knock him down – whomp – right then and there I ripped his coconut off. [laughs]** (emphasis added).

Likewise, a conversation took place on May 15, 2014 allegedly in Government Trial Exhibit 18B-1 (JA 7792) between Junior and co-defendant Christian Lemus-Cerna in which they were discussing a buried body (see also at JA 3946 - 3947):

> JR: Huh? Fuck, that one came down hard, dude. [pause] Ugh – fuck, why did it – why did that big hole form, man? Maybe it's not there, homeboy.
>
> LC: Yes, it's there, look here's all the dirt – where the deer are and all that.

JR: Oh. [pause]. Well, there's work to do here, dude – come and put more dirt, dude [noises][pause] Ugh.

LC: [UI]

**JR: The deer ate him?**

**LC: Yes, they were eating him.** (emphasis added)

Finally, on December 6, 2013 a telephone conversation allegedly took place in Government Trial Exhibit #7A-1 at JA 7476 and 7488 between Junior and co-defendant Jose Lopez Torres in which they were discussing a killing and a burial:

JL: **[chuckles] I'm telling you that these sons of a bitch, after . . . that . . . that after we dismembered, now that they have seen the Devil, because remember that . . . fuck, we don't have mercy, you know? Uh, that . . . sometimes when they're rats, you understand? We cut their heads off . . . fuck, anyone would end up scared, man.**

JR: Right, man, fuck.

JL: **Dismembered, son of a bitch, we hacked him all up in pieces. [laughs]** . . .

JR: . . . -- and now he does want, I thought the ass hole was kidding me when he told me about that, dude?

JL: No, man. **We dismembered that son of a bitch**.

JR: Huh?

JL: **We dismembered him. Two . . . two times we dismembered him. We reburied him and then we went and took him out and**

**we dismembered him and then we buried him again**. (emphasis added)

Mr. Chavez was in jail when the above conversations and the related events occurred (see Stipulation of the Parties, JA 5047).

In sum, Mr. Chavez was prejudiced by a series of highly inflammatory acts offered into evidence by the Government (i.e., murders, burials, re-burials of two bodies including pictures of decomposed bodies one of which was headless, attempted murder, menacing telephone calls, extensive drug distribution and sex trafficking of young women) which were completely unrelated to the charges against him and which predated his involvement in the criminal activity alleged against him in Counts 7 - 9. This was brought to the attention of the trial court prior to trial.

### C. The use of limiting instructions did not cure the harm suffered by Mr. Chavez.

A limiting instruction directing the jury to consider each case separately did not protect Mr. Chavez. The trial judge issued two instructions on this issue at JA 6289 and 6368 which stated:

> A separate crime is alleged against one or more of the defendants in each count of the third superseding indictment. Each alleged offense, and any evidence pertaining to it, should be considered separately by the jury. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offenses charged against that defendant or against any other defendant. You must give separate and individual consideration to each charge against each defendant.
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> The third superseding indictment names several defendants who are on trial together. In reaching a verdict, however, you must bear in mind that guilt is individual. Your verdict as to each defendant must be

> determined separately with respect to him, and solely on the evidence or lack of evidence presented against him, without regard to the guilt or innocence of anyone else. In addition, some of the evidence in this case was limited to one defendant. Let me emphasize that any evidence admitted solely against one defendant may not be considered only as evidence – may only be considered as evidence against that defendant, any may not in any respect enter into your deliberations on any other defendant.

Importantly, the efficacy of limiting instructions is in great doubt:

**1.** In 1932 Judge Learned Hand characterized limiting instructions as a mental gymnastic beyond the power of a jury to follow – *U.S. v. Nash*, 54 F.2d 1006, 1007 (2nd Cir. 1932).

**2.** In 1949 Justice Robert Jackson characterized jurors' ability to follow limiting instructions as "unmitigated fiction" – *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949).

**3.** In 1956 Judge Jerome Frank called cautionary or limiting instructions a judicial lie that damaged the decent administration of justice – *U.S. v. Grunewald*, 233 F.2d 556, 574 (2nd Cir. 1956).

**4.** In 1968 Justice William Brennan expressed concern over the effectiveness of limiting instructions – *Bruton v. U.S.*, 391 U.S. 123, 135 (1968).

> It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson v. Denno*, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

**5.** In 1987 Justice Antonin Scalia expressed similar reservations – *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).6

**6.** In 1989 Assistant Professor Daniel D. Blinka, 13 Am. J. Trial Advoc. 781, *Delusion or Despair: The Concept of Limited Admissibility in the Law of Evidence*, stated:

> As presently conceived, limited admissibility "works" only because of a legal fiction which postulates that the jury follows whatever instruction the court gives. Modern evidence law, therefore, is based to a large degree on the delusion, or illusion, that juries are able to adhere to instructions that tell them what to do with certain evidence. Despair arises because it is widely recognized that juries cannot follow these directives.

**7.** In 2007 author Peter J. Smith, *New Legal Fictions*, 95 The Georgetown Law Journal 1435, 1450 – 1451 stated:

> Courts have used so-called limiting instructions . . . for many years, and they have repeatedly defended the practice against challenges by asserting the "crucial assumption" that "jurors carefully follow instructions" . . . Yet a large body of social science research conducted over the past twenty years demonstrated that jurors' abilities to follow limiting instructions are, at best, limited.

**8.** In 2012 the Fifth Circuit in *U.S. v. McRae*, 702 F.3d 806, 827 (5th Cir. 2012) stated "Here, however, we are unconvinced that limiting instructions did, or could have cured the prejudice of the spillover effect from the government's case against McCabe . . ."

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6 *Richardson* forms the modern day basis for the presumption that jurors follow instructions and is often cited. Yet, Justice Scalia expressed doubt, not certainty, about that conclusion – see in accord Judith Ritter, *Your Lips Are Moving . . . but the Words aren't Clear, Dissecting the Presumption That Jurors Understand Instructions*, 69 Mo. L. Rev. 163, 203 (2004) – "He [Justice Scalia] candidly explains that the presumption governs, not so much because we have confidence in its truth, but because it represents a fair accommodation of the government's interest in efficiency."

**9.** In 2014 District Judge James K. Bredar stated: "The Court is skeptical as to the efficacy of limiting instructions in general, and it is especially dubious in this circumstance." (*U.S. v. Riley*, 21 F. Supp. 3d 540, 548 (D. Md. 2014).

**10.** In 2015 the Hon. Alex Kozinski of the Ninth Circuit Court of Appeals stated that the presumption that jurors follow instructions is "actually more of a guess that we've elevated to a rule of law" (Alex Kozinski, *Criminal Law 2.0*, 44 Geo.L.J. Ann.Rev.Crim.Proc. viii (2015).

**11.** In 2016 the Ninth Circuit in *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 603 (9th Cir. 2016) stated: "Third, while there is a "strong presumption that jurors follow instructions," a limiting instruction may not sufficiently mitigate the prejudicial impact of evidence in all cases."

In its decision (Appendix A, Doc. #110) the Fourth Circuit at pages 17 - 19 appears to accept the "assumption" that jurors "carefully" follow instructions without addressing the above legal authority. Further, the Fourth Circuit supports the injustice of a joint trial for Chavez by asserting "efficiency" as the basis to deny severance (Appendix A, Doc. # 110, p. 17). Here, Mr. Chavez is serving life in jail apparently for the purpose of saving court resources. In sum, the ability of the jury to follow the limiting instructions in the circumstances of the evidence presented in this case was an impossible mental gymnastic. One is hard-pressed to see how a jury hearing all the gut wrenching details of the murders and related disgusting acts coupled with the graphic photographs could possibly separate and forget all they heard and saw when reviewing the evidence against Chavez. The climate of gruesome

violence presented throughout the trial spread to the allegations against Chavez. The jury stepped into the same courtroom with the same judge, same lawyers and same defendants when it listened to the evidence against Chavez as it did for the evidence against the co-defendants. Two of the government's witnesses, Del Cid and Junior, who testified against Chavez, also testified against the other defendants specifically as to some of the more perverse and violent acts allegedly committed by those other defendants. Mr. Chavez was damaged by a large volume of gruesome evidence that was unconnected to him. The trial court should have granted a severance. A new trial is warranted.

## CONCLUSION

The knowledge of the contents of Junior's immigration file should be imputed to the Government, who failed to disclose impeachment evidence in the file to the defense. The *Brady* violation was material to Mr. Chavez, who offered a substantial and compelling defense to the charges against him. Further, Mr. Chavez was damaged by the gruesome acts of his co-defendants which were unrelated to him and which spilled over on to him during the course of trial. A new trial is warranted. We ask this Court to grant certiorari so that Mr. Chavez may have the opportunity to prove his claim.

Respectfully Submitted,

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