No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Paul Lynn Schlieve — PETITIONER

vs.

The United States of America — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Prosecutor's duty to disclose exculpatory evidence pursuant to the Fifth Amendment of the United States Constitution include disclosure of evidence that is favorable and material in the context of a case-dispositive motion to suppress evidence seized in violation of the Fourth Amendment to the Constitution of the United States.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

APPENDIX F

Schlieve v. U.S., 4:07cv293 (Ed. TX, 2010)—Order of Dismissal

APPENDIX G

Schlieve v. U.S., 4:07cv293 (Ed. TX, 2010)—Report and Recommendation of United States Magistrate Judge

APPENDIX H

U.S. v. Schlieve, No. 04-41112 (5th Cir. 2006)—Substituted Opinion on Denial of Rehearing

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The Government argued and both the district court and the appellate court held that a criminal defendant's right to exculpatory evidence pursuant to the Fifth Amendment of the U.S. Constitution and this Court's *Brady* jurisprudence does ***not*** include a right to evidence that is exculpatory exclusively with respect to the factual basis of Fourth Amendment suppression—holding instead that the Due Process clause of the Fifth Amendment applies exclusively to the evidence that is material to the jury's consideration of the ultimate question of guilt or innocence. This Court should clarify that the Due Process Clause of the Fifth Amendment, *Brady*, and its progeny require the prosecutor to disclose to a criminal defendant evidence that is material to determining whether a search and seizure were conducted in violation of the Fourth Amendment.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The report and recommendation of the United States Magistrate Judge appears at Appendix C to the petition and is unpublished.

The denial of the Petition for rehearing by the United States court of appeals appears at Appendix D.

The opinion of the United States court of appeals on its first review and remand of the underlying petition under 28 U.S.C. § 2255 appears at Appendix E.

The opinion of the United States district court on its first review and denial of the underlying petition under 28 U.S.C. § 2255 at Appendix F.

The report and recommendation of the United States Magistrate judge initially recommending denial of the petition under 28 U.S.C. § 2255 appears at Appendix G.

The opinion of the United States court of appeals on direct appeal of the underlying federal criminal conviction appears at Appendix H.

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 15, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on May 9, 2018, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> 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 offense 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.

Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Introduction

This case presents the foundational constitutional question of whether a criminal defendant's right to exculpatory evidence pursuant to the Fifth Amendment of the U.S. Constitution, as explained by this Court in *Brady v. Maryland*[1] and *Kyles v. Whitley*[2] extends to evidence that is exculpatory in the context of establishing that the seizure of case-dispositive evidence was conducted in violation of the Fourth Amendment of the U.S. Constitution.

In this case, the Government has argued, and both the district court and appellate court have affirmed, that the Government may hide evidence demonstrating that the testimony offered by police officers at a suppression hearing is false. This position of the Government, the district court, and the appellate court is incompatible with the U.S. Constitution's Fifth Amendment right to due process of law.

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[1] 373 U.S. 83 (1963).

[2] 514 U.S. 419 (1995).

The foundation of Dr. Schlieve's conviction is drugs and a gun seized during a pretextual traffic stop. There are two pieces of evidence, both dispositive to the existence of a Fourth Amendment violation, that were not timely-provided, or ever provided, to the defense:

- First, the "reasonable suspicion"[3] to detain Dr. Schlieve for almost two hours by the side of the road at pretextual traffic stop until a drug dog could be brought to the scene, was based on an alleged "tip" by a confidential informant. However, the Sheriff's jail records from a different county, finally obtained five years after trial, in spite of the government's active concealment, conclusively establish that the confidential informant was actually in jail in a different county during the time period where the testifying officers alleged that he provided the information at a location many miles away from the jail. In other words, the officers fabricated the tip out of thin air to create reasonable suspicion where none existed.

[3] See *Terry v. Ohio*, 392 U.S. 1 (1968).

- Second, at the suppression hearing, the K-9 Officer testified that the drug dog had jumped into the bed of the truck where the dog alerted of his own volition—having been driven there by the scent of narcotics—and specifically not as the result of any encouragement by the officer. However, the police traffic stop videotape, which was not provided to the defense until after the district court's denial of the motion to suppress (but before trial) clearly shows: (1) the arresting officer lowered the tailgate of the truck, thus providing access to the bed of the truck in violation of Fifth Circuit case law; and (2) the K-9 officer signaled the dog by hand motion to enter the bed of the truck, prior to the dog exhibiting a positive alert, also in violation of Fifth Circuit and this Court's case law. Having already decided the Fourth Amendment issue pretrial, the district court declined the defense's invitation to reconsider the suppression issue during trial.

The district court held, and the Fifth Circuit affirmed, that the evidence alleged by Dr. Schlieve to constitute *Brady* material was not "favorable" or "material" because:

- The sheriff's jail records were only determinative of whether there was reasonable suspicion to detain Dr. Schlieve at the traffic stop—because the jail records were not relevant to the jury's guilty verdict, had the jury seen the Sheriff's jail records, it would not have changed the verdict at trial.
- Because the jury saw portions of the traffic stop video and still voted to convict, there was no *Brady* violation with respect to the late disclosure of the traffic stop videotape.

This is not a case where the undisclosed evidence was in the nature of generally impeaching the officer's credibility. Instead, in both instances, it is evidence that clearly and convincingly demonstrates that the officer was not testifying truthfully about a material fact. Official jail records showing that a confidential informant was incarcerated is clearly incompatible with testimony that the confidential informant was at a meeting in a different county. The images on a police videotape

that directly contradict an officer's testimony about his actions eviscerates the officer's testimony on that point.[4]

Had the undisclosed evidence been available to the defense at the suppression hearing, there is no question that the outcome would have been different. The drug and gun evidence would have been suppressed and the government would have been compelled to move to dismiss the indictment.

The Traffic Stop

Dr. Paul Schlieve, Ph.D., was a "professional person." Schlieve had been a Computer Science Professor since the early 1980's. At the time of the traffic stop, Schlieve was managing a $550,000 Community Networking grant for the City of Denton, Texas. Schlieve had never been arrested or convicted for any offense. Schlieve had not received a traffic citation in 20 years.

On the evening of May 19, 2003, Schlieve departed the Pilot Point, Texas home of Sergeant Patsy Loftice, of the Denton County Sheriff's

[4] *U.S. v. Wallen*, 338 F.3d 161, 164 (5th Cir. 2004) ("Findings that are in plain contradiction of the videotape evidence constitute clear error.")

Department, driving a late-model extended-cab pickup truck owned by Gary Don Franks. Schlieve was accompanied by a single passenger, Robbie Reynolds, brother of a former Pilot Point police sergeant. Franks was not present in the vehicle.

At 8:50 pm, Schlieve was stopped for routine traffic violations by Officer James Edland in the rural Texas community of Pilot Point. A dashboard-mounted video camera in Officer Edland's police cruiser recorded the events of the traffic stop.

The Sheriff's Jail Record

In Schlieve's case, the government suppressed the Sheriff's Jail Record memorializing the incarceration and release of a purported confidential informant on May 19, 2003 (hereinafter, the "Sheriff's Jail Record"). Said document establishes that it was impossible for the alleged confidential informant to have provided the "tip" that ws foundational to the court's determination that there was reasonable suspicion to detain Dr. Schlieve by the side of the road for almost two hours while waiting for the arrival of a drug dog.

On direct appeal, the appellate court found that arresting officer Edland had reasonable suspicion to detain Schlieve at the traffic stop beyond the point where the license checks came back "clean" because:

> Edland knew that Schlieve was driving a truck owned by Gary Don Franks, a known, recently active drug dealer. Furthermore, the car had just come from a house where someone was arrested for a drug offense, and the passenger was a known criminal. This is sufficient for reasonable suspicion under Terry.[5]

The primary factor identified by the Fifth Circuit in its affirmance of the district court's denial of Schlieve's suppression motion was the same primary factor originally identified by the court below—a "tip" about Gary Don Franks. The two remaining factors cited by the Fifth Circuit merely reinforced the reasonable suspicion established by the "tip."

At the Motion to Suppress Hearing, federal agent David Scott testified that he received a "tip" from prisoner Rodney Crowley that Gary Don Franks had recently manufactured Methamphetamine and would likely have methamphetamine in his possession, when Scott

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[5] *U.S. v. Schlieve*, 2006 U.S.App. LEXIS 7158, p.9 (5th Cir. 2006).

transported Crowley from the Cooke County Jail in Gainesville, Texas, to the Whitesboro, Texas, city jail.

Officer Edland testified that he, in turn, received the "tip" from Agent Scott at a 3:00-4:00 meeting at the Whitesboro police station.

However, the Sheriff's jail record clearly establishes that Rodney Crowley was not released into federal custody by Cooke County until 5:56 pm—after the alleged meeting in Whitesboro between Edland and Scott had concluded. By 6:00 pm, Officer Edland and FBI Agent Whitten were already back in Pilot Point, Texas, to arrest Sherry Craver. The testimony of Officer Edland was incredible as a matter of law.[6] Traveling back in time, as required by Officer Edland's testimony, is not possible within the laws of nature.

Evidence that establishes that Officer Edland lied to the district court is "favorable" to Schlieve. The Sheriff's Jail Record is "favorable" to Schlieve.

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[6] *U.S. v. Freeman*,77 F.3d 812 (5th Cir. 1996) (citing *U.S. v. Alaniz-Alaniz*, 38 F.3d 788, 791 (5th Cir. 1994) ("[T]estimony can be declared incredible as a matter of law if it asserts events that could not have occurred under the laws of nature.").

Schlieve tried diligently to obtain the Sheriff's Jail Record. Immediately upon learning the identity of the purported confidential informant, Defense counsel dispatched a private investigator to obtain the document from the Cooke County Sheriff's department. However, Cooke County Sheriff's Department personnel refused to provide a copy of the document, per instructions from DEA Agent Vic Routh.

The Government does not suggest that the withheld evidence was not material in the context of Fourth Amendment suppression. Instead, the Government argued that it wasn't *Brady* material because it was only determinative of reasonable suspicion to detain Dr. Schlieve at the traffic stop and was irrelevant to the ultimate question of guilt:

> The alleged withheld evidence is not material because it is not determinative of Schlieve's guilt or innocence but of whether Edland had reasonable suspicion to continue the traffic stop on May 19, 2003."[7]

The Report and Recommendation of United States Magistrate Judge adopted this argument, holding:

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[7] *Schlieve v. United States*, Case No. 4:07cv293 (ED Tx), Brief of the United States, Document 22, p. 39. ROA 14-40577.524.

> Thus, the alleged withheld evidence is not material because it is not determinative of Movant's guilt or innocence.[8]

Lest the supplementary factors cited by the Fifth Circuit on direct appeal as a basis for reasonable suspicion get elevated beyond their due, brief consideration of those factors is in order. The "house where someone was arrested for a drug offense" was the home of Robert Loftice and his wife, Sergeant Patsy Loftice of the Denton County, Texas Sheriff's Department. The individual arrested was Sgt. Loftice's daughter, Sherry, who was arrested in the driveway of the house, prior to reaching the home itself.

The "suspicion" attached to a law-enforcement home is miniscule—even if the daughter is arrested in the driveway on a federal methamphetamine conspiracy warrant.

Although the passenger with Schlieve in the truck, Robbie Reynolds, had a criminal record, he was primarily known to police as the brother of a Sergeant in the Pilot Point Police Department. Another

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[8] *Schlieve v. United States*, Case No. 4:07cv293 (ED TX), Report and Recommendation of United States Magistrate Judge, Document 50, p. 23.

brother, Ed, was the Assistant Chief of Police of the University of North Texas. Reynolds' father was a retired Captain of the City of Denton, Texas, Police Department. Reynolds was so "unsuspicious" to the officers at the traffic stop that they didn't even ask him for identification or run a computer check for warrants and criminal history. Edland did not arrest Reynolds because, "[h]e was just a passenger in the vehicle from what I felt."

At the suppression hearing, Officer Edland never mentioned Reynolds' criminal history as a factor that he considered in his assessment of reasonable suspicion to detain Schlieve. The Government never argued Reynolds' criminal history as a factor supporting reasonable suspicion in the district court. The district court never mentioned Reynolds' criminal history in its findings of fact supporting reasonable suspicion to detain Schlieve. It was not until the Government falsely asserted to the appellate court on direct appeal that Reynolds had been arrested at the traffic stop that Reynolds' criminal history was interjected into the consideration of reasonable suspicion.[9]

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[9] *U.S. v. Schlieve*, No. 04-41112 (5th Circuit), Brief of United States, p. 7.

Reynolds' past criminal activity played no role in Edlands' analysis of reasonable suspicion regarding the continued detention of Schlieve.

Clearly, the pivotal fact in both the appellate court's analysis of reasonable suspicion, and the analysis in the district court was the "tip" about Gary Don Franks. Except, there was no "tip" about Franks. The officers made the whole thing up! The fabricated "tip" was Edland's sole basis for knowledge with respect to Franks. Edland had no knowledge of Franks' criminal history. Without the fabricated "tip," both Franks and the truck that Schlieve was driving were complete unknowns to Edland.

This Court's precedent requires that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped [i.e. Schlieve] is, or is about to be, engaged in criminal activity."[10] Once the false "tip" about Franks is redacted from the calculus of reasonable suspicion in Schlieve's case, the remaining information: 1) that Schlieve had recently visited the home of Sergeant Patsy Loftice of the Denton

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[10] *United States v. Cortez*, 449 U.S. 411, 417 (1981) (emphasis added).

County Sheriff's Department, shortly after Sgt. Loftice's daughter had been arrested for a drug offense in the driveway of the home; and 2) that the passenger in Schlieve's truck, the brother of a Sergeant on the Pilot Point police force, had a criminal record of unspecified nature comes nowhere near the minimum threshold of knowledge required to constitute "reasonable suspicion" under *Terry*. The officers had no information regarding Schlieve at the time the computer checks came back clean that would lead a reasonable officer to believe that Schlieve was engaged in any criminal activity.

The traffic stop of Schlieve should have ended when the computer checks came back clean. There was no further reasonable suspicion of criminal activity to justify the further detention of Schlieve, who should have been allowed to leave.

The lack of clear direction from this Court as to the duty of a prosecutor to disclose exculpatory evidence determinative of the factual basis of a Fourth Amendment violation has permitted aggressive prosecutors to sidestep their obligations under *Brady*.

The Traffic Stop Videotape

The Sheriff's jail record was not the only item of exculpatory evidence that the government failed to disclose prior to the suppression hearing. The materiality of undisclosed exculpatory evidence must be assessed cumulatively.[11]

Well after the Motion to Suppress had been denied, and shortly before trial, AUSA Maureen Smith provided Schlieve's counsel with one of two police video recordings of the traffic stop (the second was erased by law enforcement and never disclosed). Counsel renewed the Motion to Suppress at trial, but no additional evidence was considered by the court. Schlieve's § 2255 motion asserted that the Government's failure to provide the videotape prior to the suppression hearing was a violation of his rights pursuant to the Fifth Amendment of the Constitution.

The district court erroneously held that because the videotape was played for the jury, and the jury found Schlieve guilty, the remaining

[11] *Kyles v Whitley*, 514 U.S. 418, 436-437

elements of the *Brady* inquiry ["favorability" and "materiality"] are unmet:

> The videotape had been played for the jury. The jury assessed the testimony of witnesses, watched the videotape, and heard the remaining evidence presented, including the testimony of several coconspirator witnesses. Yet, the jury found Movant guilty. Movant also has not shown that the evidence on the videotape was material. He has not shown that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[12]

On appeal to the U.S. Court of Appeals for the Fifth Circuit, the panel reinforced the notion that *Brady* does not apply in the context of a Fourth Amendment violation concluding:

> The record fully obliterates [the *Brady*] claim, because the defense had possession of the video [at trial], *as did the jury.*[13]

This analysis was in error because in the context of a *Brady* violation affecting a suppression hearing, the appropriate assessment for *Brady* purposes, of course, is whether the nondisclosure affected the outcome of the suppression hearing.

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[12] *Schlieve v. United States*, No. 07cv293, Report and Recommendation of United States Magistrate Judge, Document 90, p. 7.

[13] *U.S. v. Schlieve*, Case No. 14-40577, Slip at 2 (5th Cir. 2018).

Assuming, *arguendo*, that reasonable suspicion of criminal activity existed to justify the almost two-hour detention of Schlieve from the time the licenses came back clean until the drug dog alerted, the drug dog's entry into the truck bed was a "search" requiring probable cause. Officer Torres's testimony at the suppression hearing was that: "Blitz went into the bed of the vehicle by himself. He was not directed to go up there. The odor drove him up to the bed of the vehicle, and he climbed up onto the tool box." Officer Torres's motive to testify in this fashion was to convince the district court that the drug dog entered the truck not as a result of law enforcement instruction (impermissible), but rather by the dog's own reaction to smelling narcotics (permissible). However, the videotape provided after the suppression hearing shows that Blitz was *not* driven into the bed of the truck by the odor of narcotics. Instead, Blitz was *directed* into the bed of the truck by Officer Torres. This distinction makes the videotape material and the failure to disclose it prior to the suppression hearing a violation of *Brady*.

Schlieve had a reasonable expectation of privacy in the interior airspace of the truck[14], including within the bed of a truck.[15]

The "plain smell" doctrine requires the smeller to be "where he lawfully has a right to be."[16] In *United States v. Jones*,[17] this Court explained that the "reasonable expectation of privacy" standard with respect to searches, articulated in Justice Harlan's concurrence in *Katz v. United States*,[18] augmented, as opposed to replaced, prior property-based Fourth Amendment jurisprudence based on the principles of common-law trespass. As Justice Scalia explained:

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[14] See *Chambers v. Maroney*, 399 U.S. 42 (1970). *U.S. v. Pierre*, 932 F.2d 377, 382 (5th Cir. 1991) ("While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusion by the police.") (quoting *New York v. Class*, 475 U.S. 106, 114-15 (1986)).

[15] *U.S. v. Grant*, 2007 U.S. Dist LEXIS 14221 (S.D.Tex. February 28, 2007) (recognizing that officers require either consent or probable cause to search the bed of a pickup truck).

[16] *U.S. v. Pierre*, 932 F.2d 377 at 383.

[17] 312 S.Ct. 945 (2012).

[18] 389 U.S. 347 (1967).

> [T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.[19]

In Schlieve's case, when Officer Edland lowered the truck tailgate and Officer Torres then *directed* the narcotics-detection dog into the interior of the bed of the truck, they committed common-law trespass, as understood in 18th-century tort law. In *Jones*, this Court found a Fourth Amendment violation where officers crawled under the motor vehicle while it was parked in a public parking lot and affixed a GPS tracking device to the vehicle undercarriage. The extent of the trespass involved in crawling under a vehicle is less extensive than the trespass resulting from lowering a vehicle tailgate and entering the interior of a truck bed. This Court's decision in *Jones* strengthens the Fifth Circuit's precedent in *Pierre* in requiring that officers, including a drug dog, refrain from common-law trespass on the "effect" of the motor vehicle while engaging in a "plain smell" dog sniff.

At the traffic stop of Schlieve, Blitz the drug dog was not constitutionally permitted to go any place that Officer Torres, his

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[19] *United States v. Jones*, 132 S.Ct. at 952 (emphasis in original).

handler, was not permitted to go. It is undisputed that Schlieve denied permission to search any part of the truck. The "probable cause" associated with Schlieve's alleged traffic violations expired when Schlieve's licenses came back clean and Officer Edland determined that no citation would be issued.[20] Therefore, neither Officer Edland, Officer Torres, nor Blitz had the authority to intrude on Schlieve's trespassory interest or reasonable expectation of privacy by opening the tailgate latch, lowering the tailgate, and entering the bed of the pickup truck. There was no legitimate pretext to authorize any of them to enter the bed of the pickup.

Blitz did not alert to the perimeter of the truck prior to entering the bed of the truck. Blitz was not driven into the bed of the truck by the odor of narcotics. Instead, as shown in the videotape, provided after the suppression motion was denied, Blitz was *directed* into the interior of the truck bed by Officer Torres. Furthermore, Blitz would not have had access to the interior of the truck bed had Officer Edland not first

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[20] *U.S. v. Brigham*, 382 F.3d 500, 510 (5th Cir. 2004) (*en banc*) (holding that traffic stops end when the computer checks come back "clean").

lowered the tailgate of the vehicle. Blitz's intrusion into the truck bed violated the Fourth Amendment:

> [T]he consensus among the courts that have addressed this question appears to be that a canine sniff that migrates from outside a car or other container to the interior does not constitute a violation of the Fourth Amendment, provided that the canine makes entry into the suspect vehicle of its own initiative and is neither encouraged into nor placed in the vehicle by a law enforcement officer.[21]

Blitz's alert, emanating from a toolbox (which contained chicken feed, but no drugs), was tainted by Blitz's unreasonable, and therefore unconstitutional, entrance into the interior of the truck bed, without first establishing the requisite probable cause for Blitz to enter the truck bed and search. The alert led to an illegal search of the truck and

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[21] *U.S. v. Hutchinson*, 471 F.Supp.2d 497, 506 (M.D.Pa. 2007); *U.S. v. Meredith*, 480 F.3d 366, 369 (5th Cir. 2007) ("Opening a vehicle's door or piercing the interior airspace constitutes a search."); *U.S. v. Winnigham*, 140 F.3d 1328, 1331 (10th Cir. 1998) (suppressing contraband discovered in a van following a canine sniff of the interior where officers opened the van's door and the dog's handler encouraged the dog to sniff the interior); c.f. *U.S. v. Stone*, 866 F.2d 369, 364 (10th Cir. 1989) ("[T]here is no evidence, nor does Stone contend, that the police asked Stone to open the hatchback so the dog could jump in. Nor is there any evidence the police handler encouraged the dog to jump in the car . . . . In these circumstances, we think the police remained within the range of activities they may permissibly engage in when they have reasonable suspicion to believe an automobile contains narcotics.").

may not form the basis for a subsequent determination of probable cause. Everything observed and seized, by either Blitz or the officers, following Blitz's entry into the truck bed, must be suppressed as the fruits of an illegal search.[22]

Officer Torres testified at the suppression hearing that Blitz was not ordered into the truck. This testimony was later found to be inconsistent with what can be seen on the videotape. Had the Government disclosed the videotape prior to the suppression hearing, as required by *Brady*, Schlieve would have had the foundation necessary to fully develop the record concerning Blitz's entry into the bed of the truck and present a fully-developed legal argument to the court. However, the nondisclosure of the videotape denied Schlieve the foundation to raise and support the issue in the district court, thereby foreclosing review of that argument on direct appeal.[23]

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[22] *Wong Sun v. United States*, 371 U.S. 471 (1963) (fruit of the poisonous tree doctrine).

[23] *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576 (5th Cir. 2010) ("The court of appeals will not generally consider evidence or arguments that were not presented in the district court."), *cert. denied*, 131 S.Ct. 1511 (2011).

REASONS FOR GRANTING THE PETITION

There is a Split in Circuit Authority

Circuit courts have split on the issue whether *Brady v. Maryland*'s restrictions apply to suppression hearings subsequent to this Court's conclusion in *United States v. Ruiz*[24] that a prosecutor does not have to disclose impeachment evidence before the entry of a guilty plea. In an unpublished opinion, the Tenth Circuit, without discussing whether *Brady v. Maryland* applies to a suppression hearing, rejected a defendant's argument that the prosecution violated *Brady v. Maryland* by failing to disclose impeachment evidence before a suppression hearing on the basis that the evidence was not impeachment evidence and not material.[25]

The United States Court of Appeals for the District of Columbia has recognized that "it is hardly clear that the Brady line of Supreme Court cases applies to suppression hearings," because "[s]uppression hearings do not determine a defendant's guilt or punishment, yet *Brady*

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[24] 536 U.S. 622 (2002).

[25] See *United States v. Johnson*, 117 F.3d 1429, 1997 WL 381926 at *3 (10th Cir. 1997) (unpublished table decision).

rests on the idea that due process is violated when the withheld evidence is 'material either to guilt or to punishment.'"[26] Without deciding the issue and in an unpublished opinion, the United States Court of Appeals for the Sixth Circuit quoted with approval this language from *United States v. Bowie*. See *United States v. Bullock*, 130 F.App'x 706, 723 (6th Cir. 2005) (unpublished) ("Whether the suppression hearing might have come out the other way, however, is of questionable relevance to the *Brady* issues at stake here."). The Fifth Circuit and the United States Court of Appeals for the Ninth Circuit held, before this Court issued its *United States v. Ruiz* decision, that *Brady v. Maryland* restrictions apply to suppression hearings. See *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) ("[W]e hold that the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) ("Timing is critical to proper *Brady* disclosure, and objections may be made under *Brady* to

[26] *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999).

the state's failure to disclose material evidence prior to a suppression hearing."), vacated on other grounds, 503 U.S. 930 (1992)). However, as demonstrated by Schlieve's case, the Fifth Circuit no longer considers its decision in *Smith v. Black* binding precedent.

The United States Court of Appeals for the Seventh Circuit held that, under its precedent and the law from other circuits, it was not "obvious" for clear-error purposes that "Brady disclosures are required prior to suppression hearings."[27]

The unsettled state of the law, combined with a lack of consensus among the circuits, make this issue ripe for consideration by this Court.

DOJ Policy is an Inadequate Protection for Constitutional Rights

In this case, the Government has argued, and both the district court and appellate court have affirmed, that the Government may hide evidence demonstrating that the testimony offered by police officers at a case-dispositive suppression hearing is false. This position by the Government, the district court, and the appellate court is incompatible

[27] *United States v. Scott*, 245 F.3d 890, 902 (7th Cir. 2001).

with the U.S. Constitution's Fifth Amendment right to due process of law and this Courts decisions in *Brady* and its progeny.

Although the *United States Attorneys' Manual* requires disclosure of evidence that "might have a significant bearing on the admissibility of prosecution evidence,"[28] the manual, however, categorizes such disclosures as "information *beyond* that which is constitutionally and legally required" to be disclosed.[29] Because criminal defendants have no ability to enforce the requirements of the *U.S. Attorneys' Manual* in the courts, its requirements may be freely ignored by aggressive federal prosecutors. Although the government, through the *U.S. Attorneys' Manual*, does not recognize that *Brady* requires the disclosure of this evidence, the fact that government policy requires the disclosure of such exculpatory evidence establishes that the government favors the disclosure of this evidence.

This case demonstrates that the guarantees of the U.S. Constitution must not be left to government bureaucrats where

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[28] U.S.A.M. § 9-5.001(C)(2).

[29] *Id.* (emphasis added).

compliance with the policy is optional and not subject to court oversight. It is important that this Court let its voice be heard on a matter that is foundational to hundreds of criminal prosecutions each year in this country.

This Case Squarely Presents the Constitutional Issue

Dr. Schlieve's case is perfectly situated for this Court to clarify its holdings in *Brady* in the context of protecting a defendant's rights under the Fourth Amendment.

This case presents no factual disputes for this court to resolve. This case presents a pure question of law. The dates on which each of the pieces of exculpatory evidence were actually delivered to, or independently obtained by the defense, are not in dispute. The dates of the motions and hearings are a matter of record.

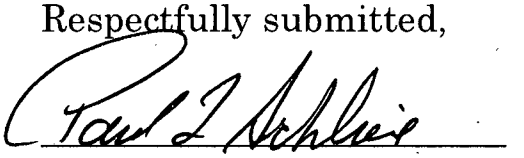
The timing of the disclosure of the videotape after the denial of the suppression hearing, yet before trial, and the defendant's independent discovery of the sheriff's jail records five years after trial, additionally allow this Court to address the impact of timing on the disclosure of *Brady* materials in the context of Fourth Amendment Suppression under two different disclosure scenarios.

Dr. Schlieve's case is the ideal foundation upon which this Court can address the intersection of the Fourth and Fifth Amendments to the Unites States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Paul Lynn Schlieve
Date: August 7, 2018