No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ATUL NANDA; JITEN JAY NANDA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of *Certiorari* to
The United States Court of Appeals
For the Fifth Circuit

Appeal Case No. 17-10721

Criminal No.: 3:13-CR-00065-M (N.D. Tex.)

PETITION FOR A WRIT OF CERTIORARI

ATUL NANDA #45946-177
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Pro se Petitioner

QUESTIONS PRESENTED

I. Are the Defendants' Constitutional Rights Under the Sixth and Fifth Amendments to Confront the Witnesses Against Them and to Due Process, Respectively, Violated When the Government Failed to Fully and Fairly Disclose the Terms of Testifying Co-Defendants' Plea Agreements, and Allowed the Witnesses to Falsely Deny the Assurances Given to Them at Trial?

II. When Facts of the Government's Failure to Disclose Favorable Terms of its Plea Agreements With Testifying Co-Defendants and These Co-Defendants' Testimony are Discovered to be Materially False After Trial, are the Defendants Entitled to a New Trial Under This Court's Precedents Set Forth in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)?

III. If the Answers to the Above Questions are in the Affirmative, are Courts of Appeals committing reversible error in Affirming the District Courts' Judgments Which Denied Motions for a New Trial in Such Cases?

LIST OF PARTIES

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

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that this Honorable Supreme Court issue a writ of *certiorari* to review the judgment below.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit is unpublished but appears at Appendix A (App. 1a) to the petition.

The Opinion and Judgment of the United States District Court for Northern District of Texas, appears at Appendix B (App. 4a) to the petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the District Court's denial of Petitioners' Motion for a New Trial, was issued on June 26, 2018. No petition for a rehearing was filed because Petitioners' could not afford to pay the attorney for it, the Appeals Court denied an extension of time for Petitioners' to file it *pro se*, and issued its mandate on July 18, 2018. However, the Petition for Writ of Certiorari is submitted in this Court within the 90-day time period for such submission; thus, the Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case, and jurisdiction is thus invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and Statutory Provisions cited herein, Appendices C through E, are:

> U.S. Const. Amend. V (Appendix C, App. 45a); U.S. Const. Amend. VI (Appendix D, App. 46a); and Fed. R. Crim. P. 33 (Appendix E, App. 47a).

STATEMENT OF THE CASE

1. Course of Proceedings in the Courts Below

On March 26, 2014, the government jointly charged Atul Nanda and his brother, Jiten Jay Nanda (collectively, the "Nandas" or "Petitioners")—along with three others, Siva Sugavanam, Vivek Sharma, and Rohit Mehra[1]— in a superseding indictment with conspiracy to commit visa fraud, in violation of 18 U.S.C. §§ 371 and 1546(a) (Count 1); conspiracy to harbor illegal aliens, in violation of 18 U.S.C. §§ 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(I) (Count 2); and wire fraud, in violation of § 1343 (Counts 3-8). The Petitioners' pleaded not guilty and proceeded to a jury trial in the United States District Court for the Northern District of Texas. Eventually the government dismissed Counts 4, 6, 7 and 8 of the indictment.

On November 12, 2015, the Nandas were convicted in a jury trial, where co-defendants Sugavanam and Sharma both testified against the Nandas for the government. During trial, the government disclosed that it had granted an "S Visa"

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1 Sugavanam and Sharma pled guilty on August 18, 2014. Mehra, although cooperated with the government, was not called to testify at trial; however, the government granted him an "S Visa" for his cooperation.

to Mehra for his cooperation, although he was not called to testify at trial. The government allowed the cooperating co-defendants to testify falsely to the jury that they neither required nor received any immigration assurances from the government for their cooperation. The written plea agreement did not mention any promised immigration favor for the testifying co-defendants, and the government took it to the jury, vouching that they were giving truthful testimony against the Nandas free of any governmental influence regarding their immigration status.

On May 4, 2016, the district court commenced sentencing of the co-defendants, sentencing each to two years' probation and ordering that they pay, jointly and severally with the Nandas, the sum of $119,038.30 in restitution. The government objected to the amount of restitution for the co-defendants because it would make them aggravated felons, thus, deportable, and the government had secretly agreed to and promised them it would structure their plea bargains so as to preclude them from being deported. To fulfill that bargain, the government sought to keep their restitution below $10,000, so as to avoid immigration's prohibition against aliens with aggravated felony remaining in the United States. As a result of the government's intervention, the district court postponed the restitution part of the co-defendants' sentencing for 90 days for the government to justify restitution below $10,000.

On July 12, 2016, the Nandas were sentenced to a total of 87 months' imprisonment and three years' supervised release. They were also ordered to pay $119,038.30 in restitution and a special assessment fee of $400.00. On July 21, 2016, the Nandas filed notices of appeal and took their case to the Fifth Circuit, which affirmed the judgment. *United States v. Nanda*, 867 F.3d 522 (5th Cir. 2017); *cert. denied, Nanda v. United States*, 2018 WL 1317816 (April 16, 2018).

On August 22, 2016—well after the district court directed a 90-day time period for the government to submit its justification for restitution below $10,000 for only their co-defendants—the Nandas requested that government come forward with the information. However, instead of providing any explanation of its motive in requesting the lower restitution for the co-defendants, and why it had willfully ignored the district court's directive, the government responded by threatening to increase the Nandas restitution. Separately, the co-defendants were reaching out to the Nandas, proposing that the co-defendants and the Nandas should each pay half of the Nandas' $119,038.30 restitution prior to the district court's entry of a restitution sentence against co-defendants, in an efforts to render the issue moot. Eventually, the government abandoned its threat to increase the Nandas' restitution.

On October 11, 2016, the government filed a written response to the district court's directive. In its response, the government disclosed for the first time that it had an unwritten, "mutual" agreement with co-defendants "to ensure that [they]

were not convicted of an offense that would qualify as an aggravated felony under the Immigration and Nationality Act [INA,] which would result in their immediate deportation]." (Gov't Resp., Doc. No. 362, p. 3). The jury had not heard of this arrangement; instead, the jury saw written plea agreements that did not include any immigration assurances and heard each co-defendant testify that he was not given nor promised anything regarding their immigration status. INA §§ 236(c)(1), 237(a)(2)(A)(iii), and 8 U.S.C. §§ 1226(c)(1), 1227(a)(2)(A)(iii) provide for the detention and deportation of any alien who is deportable by reasoning of having committed certain felonies, including those with greater than 12 months sentence or $10,000 in restitution. Hence, the government's efforts to ensure that the co-defendants' restitution amount is less than $10,000.

On November 22, 2016, at the co-defendants' restitution hearing, the district court mused as to how the restitution "number all of a sudden became zero" for co-defendants. Even then, the government was unforthcoming as to the unwritten promises made to the co-defendants regarding their immigration status; however, defense attorney for Sharma, Richard B. Roper, III, then confirmed that the government had promised the co-defendants that they would not be convicted of an aggravated felony in order to prevent their deportation. The government and co-defendants requested the district court to include language in the co-defendants' judgments specifying that restitution sentence were not tied to the particular

victims set forth in their superseding indictments and their plea agreements, but rather on restitution claimants not identified therein.

On February 8, 2017, the district court amended the co-defendants' judgments, as requested by the government and co-defendants, to state that "there is no restitution related to the offense of conviction charged in the Superseding Information[; but] solely to relevant conduct." (Doc. Nos. 377, 378 and 379, p. 4). Amazingly, this was the same court which, two months earlier, mused as to how the restitution "number all of a sudden became zero" for the co-defendants.

On February 23, 2017, while the appeal was pending, however, the Nandas filed a motion for new trial ("MNT") in the district court. The district judge conducted a hearing on June 20, 2017 (Appendix B), and denied the motion, even after finding that she "was unhappy [about] that restitution tail and how it was handled" (App. 42a). The Nandas appealed; and, on June 26, 2018, the Fifth Circuit affirmed the district court's judgment (Appendix A), finding that, "even if we were to assume there was undisclosed impeachment evidence or false testimony, there is no reasonable likelihood that it affected the verdict." (App. 2a).

Petitioners' hereby file this Petition for a Writ of *Certiorari* because, contrary to the lower courts' findings, the evidence was underwhelming, and there is [*a*] reasonable likelihood that the undisclosed impeachment evidence/false testimony would have affected the verdict, were it disclosed to the jury.

2. Statement of the Facts

a. Introduction

Petitioners' owned and operated Dibon Solutions, Inc. ("Dibon"), an information technology consulting company based in Texas. Dibon provided computer programing consultations to outside clients and was essentially a "technology staffing company" for its clients. Most of the services were provided at the clients' locations although Dibon had an in-house division located in Carrollton, Texas, called Revenue Technology Services ("RTS"). Dibon had approximately 200 consultants and RTS had up to 20 workers at one time. Most of the consultant workers were non-United States citizens, primarily Indian nationals with computer expertise, in the United States on H-1B visas.[2] *See United States v. Nanda*, 867 F.3d 522, 525 (5th Cir. 2017).

b. The Undisclosed Impeachment Evidence and False Testimony

As shown *ante*, pp. 3-6, on February 23, 2017, after the discovery of the undisclosed impeachment evidence and false testimony, the Nandas filed the underlying MNT, accompanied by a Memorandum in Support ("MNT Memo."), alleging that:

- By failing to disclose the most critical terms of two testifying co-defendants' plea agreements, and then soliciting false testimony regarding same, the government violated the Nanda Defendants' Sixth Amendment rights

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2 The H-1B visa program allows individuals with specialized knowledge, who have attained a bachelor's degree or higher degree (or its equivalent) in a specific specialty to enter into occupation in the United States.

ensuring the right to fairly confront witnesses.

- The government's use of false evidence violated the Nanda Defendants' rights to due process under the Fifth Amendment.
- In the interest of justice, the Court should not countenance, but instead should remedy by ordering a new trial, the prosecutorial misconduct that has occurred in this case.

(MNT, p. 1). In the accompanying Memo., the Nandas argued that it was after trial that they learned for the first time of the undisclosed, unwritten promises which the government had made with their co-defendants, and such events have done great harm to them and the district court at trial. As became evident after trial, the government had:

> (1) entered into unwritten plea agreement terms with its most important trial witnesses;
> (2) failed to disclose those terms to the Nandas or the court;
> (3) solicited perjured trial testimony professing that such government promises did not exist;
> (4) introduced as evidence the written plea agreements which it knew did not accurately reflect all bargains;
> (5) bolstered the witnesses testimony based upon the inaccurately- or falsely-stated plea agreements; and
> (6) continued to obfuscate a clear understanding of these unfortunate events even at sentencing, prompting the court to assess that: "of all the cases I've had, this one has the most problems of any case. There's just a variety of things that are mysteries to me . . . ."

(MNT Memo., p. 1 & n. 2, *see* pp. 2-24; *see also* App. 9-18).

On April 11, 2017, the government responded that the district court should deny the motion without a hearing. (*See generally*, Gov't Opposition, Doc. No. 393, pp. 6-28).

On May 5, 2017, the Nandas filed a reply and—notwithstanding the government's urging not to hold a hearing—the district court scheduled the case for oral arguments on June 20, 2017. After hearing arguments from both the Nandas and government's attorneys, the district court addressed Petitioners' attorney, William J. Garrison, in this manner:

- THE COURT: All right. . . . I'm disinclined to go with you on this, Mr. Garrison. I understand your argument. I just don't think the facts support your argument. I don't think that this agreement is a promise. I don't think that the Government is obligated to explain the consequences of structure. But in any case, I believe that at the *limine* stage, at the least, the intended significance of this structure was well known. I don't think that the witnesses did not tell the truth as they understood the agreement and as the agreement, in fact, was.

  So from what I have heard and what I have read, I don't think that you satisfy the elements of Rule 33. I don't think that you satisfy the Fifth Amendment or Sixth Amendment claims. I don't think there's false testimony under *Napue*.[3] . . .

(App. 40a-41a). With that said, and as previously shown, the district court denied both the Motion for Post-trial Discovery and the MNT. (*Id.* at 41a). The Nandas thereafter appealed but the Fifth Circuit affirmed the district court's judgment (App. 1a-3a). This Petition for a Writ of *Certiorari* hereby ensues. Petitioners' remain incarcerated.

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3 *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

REASONS FOR GRANTING THE PETITION

I. The Defendants' Constitutional Rights Under the Sixth and Fifth Amendments to be Confronted With the Witnesses Against Them and to Due Process, Respectively, Were Violated When the Government Failed to Fully and Fairly Disclose the Terms of Testifying Co-Defendants' Plea Agreements, and, Thereafter, Allowed the Witnesses to Falsely Deny the Assurances Given to Them at Trial

Petitioners' attorney had the following interaction with the district court at the motions for post-trial discovery and new trial hearing:

- MR. GARRISON: Well, Your Honor, [it was] the restitution issue which . . . brought to light the fact that there had been a contemporaneous arrangement with the co-defendants in August of 2014, that their plea agreements would be structured in such a way as to make it that they would not be immediately deported. (App. 9a).
  It wasn't disclosed when the plea agreements were presented to Court. If you look at the plea agreements, they say nothing about an immigration benefit. In fact, they state that there is nothing promised to the defendants regarding the matter of immigration. (App. 10a).

- THE COURT: Well, that was all known to you, that their effort was - - well, you, I don't mean you yourself; I mean your clients. That was known that this structure was what it was to keep this from been an aggravated felony. (*Id.*).

The court was referring to a November 2015 pretrial conference and a motion *in limine* in which the structuring was first discussed. However, the disclosed structuring of the plea agreements was only concerning the length of sentence, which was not to exceed one year, not the amount of restitution, and neither was presented to the trial court or jury. This prompted the Nandas attorney to state:

- MR. GARRISON: . . . I understand the Court's position is why wouldn't the trial attorneys raise that issue and explore it further. The answer to that is, one, the Government filed a - - this motion *in limine* is to prevent these attorneys from inquiring about immigration consequences and, two, when the Government elicited testimony at trial, here's a question:

  > 'Now is there anything the Government has promised you with respect to your immigration status in the country in exchange for your plea agreement?'
  >
  > The answer is 'No.' (App. 13a).
  >
  > That is objectively false. The Government promised to structure their agreement in such a way that they would not be immediately deported. I don't see how one could read that and say, well, I can see how that's true. That's definitively not true. (*Id.*).

The hearing transcript is repleted with instances like the above where Petitioners' attorney pointed out a *bona fide Napue/Brady/Giglio*[4] issue and the court minimalized it:

- MR. GARRISON: So, Your Honor, in 2014, it is admitted that the Government and the attorneys for the co-defendants got together and discussed and agreed upon a structure with the specific aim that these parties wouldn't be deported immediately under the INA. Then they testify at trial that they have been promised nothing regarding their immigration status. And they further testify that there is no significance to a sentence of less than twelve months, according to their immigration status. (App. 15a-16a).

- THE COURT: . . . So I don't understand what it is that you think was promised, because nothing was promised. They couldn't promise what would happen. I had it within my power to mess up the entire deal, and I almost did it without understanding that I was.

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4 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)/*Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Apparently I imposed restitution of more than $10,000, this structure went by the wayside. (App. 16a).

- MR. GARRISON: I understand that, Your Honor. [But] *Dvorin*[5] tells us, again, among other cases, that it doesn't matter that the Court can undermine a deal. Is there a deal; that's the question. And the Court - - and the Government has admitted there was a deal. . . .

- THE COURT: What deal did the Government admit there was?

- MR. GARRISON: The Government admits that in 2014, it worked with co-defendants' counsel and intentionally structured a plea agreement to achieve a particular immigration result, to achieve a particular immigration result.

  So then at trial - - just prior to trial, you have the motion in limine. Apparently the motion in limine does, in fact, notify the Nandas' counsel that there is an issue. So what do they do at trial? They ask the witness, is there any significance to a sentence less than twelve months as it concerns your immigration status?

  No. (App. 17a).

  Is there anything that the Government has promised you regarding your immigration status?

  No.

  Those are objectively false statements - -

- THE COURT: No, they are not, Mr. Garrison. What did the Government promise - - what did the Government promise that is not reflected in the plea agreement?

  Your argument is the Government should have sent along a little note, 'In case you decide not to look at the immigration statute, a plea agreement structured in this way makes it less likely that a person will be removed.' Is that what you think had to be required?

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5 *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016).

- MR. GARRISON: No. But I will say this. I think it would be a lot more forth-coming to say the truth, which is, 'We have structured this plea agreement in such a way as to achieve a particular immigration result.'

  But here's the critical point. . . . The Government had to intervene after the fact in order to address a restitution issue in order to fulfill the promise that it had not articulated in detail. (App. 18a).

Ten pages further into the hearing transcript the district court continued its skepticism of Petitioners' otherwise clear-cut *Napue/Brady/Giglio* reversible issue:

- THE COURT: Okay. But let's cut to the chase here. If your clients know at the motion in limine stage that the plea agreement was structured in a way to

  minimize, if not eliminate, the likelihood that these defendants would be removed promptly, if at all, what is the basis for your motion?

- MR. GARRISON: So what happens next - - . . .

- THE COURT: Okay. Let's be real specific, and let's talk about - - . . . the exact wording, which isn't what you just said that it was. So let's talk about exactly what it was.

- MR. GARRISON: Yes. Your Honor, it's our Appendix page 3 and 4. Here's the question quoted. (App. 28a).

- MR. GARRISON: Okay. The question is, quote, 'Is there anything that the Government has promised you with respect to your immigration status - - . . . in the country in exchange for your testimony?'

  Answer: 'No, sir.'

  Objectively false.

  The next question - - and on Appendix Page 12-13 - -

- THE COURT: Is that your position that that answer is false?

- MR. GARRISON: Yes.
- THE COURT: What is the basis for that position?
- MR. GARRISON: I don't see how you can reconcile the fact that the Government concedes that it contemporaneously, in 2014, structured a deal to confer a particular immigration benefit and then state that the Government has promised you nothing with respect to your immigration status. (App. 29a).

After another ten pages, Petitioners' attorney eloquently reiterated what is a distinct violation of Petitioners' constitutional rights under the Sixth and Fifth Amendments to be confronted with the witnesses against them and to due process, respectively, and this Court's *trilogy* under *Napue/Brady/Giglio*, to the district judge. (*See* App. 38a-40a). As shown above, the court denied the motions for post-trial discovery and new trial, holding that: "I don't think that this agreement is a promise[; and] . . . I don't think that the witnesses did not tell the truth as they understood the agreement . . ." (App. 40a-41a).

However, the Fifth Circuit had made it clear that the focus is on "'the extent to which the testimony misled the jury,' ***not*** *whether the promise was indeed a promise. . . ."* *Dvorin*, 817 F.3d at 452 (emphasis added) (quoting *LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 735 (5th Cir. 2011) (quoting *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008))). Thus, not only did the district court constitutionally erred in denying Petitioners' MNT, the Fifth Circuit likewise contradicted the *trilogy* of *Napue/Brady/Giglio Dvorin/LaCaze/Tassin* in affirming.

II. When Facts of the Government's Failure to Disclose Favorable Terms of its Plea Agreements With Testifying Co-Defendants and These Co-Defendants' Testimony are Discovered to be Materially False After the Trial, the Defendants are Entitled to a New Trial Under This Court's Precedents Set Forth in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963); and *Giglio v. United States*, 405 U.S.150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

In *Dvorin, supra,* the defendant, Jason Dvorin, was a business customer of Pavillion Bank ("Pavillion") with multiple accounts and loans collateralized by vehicles and oil-field equipment. To alleviate his periodic cash-flow issues, Dvorin brought checks to Pavillion's executive vice president, Chris Derrington, that neither man expected would clear. Derrington nonetheless processed the checks, giving Dvorin access to the face value of the check until the checks were returned. Dvorin and Derrington maintained this arrangement from 2005 through December of 2010, during which time the bank charged Dvorin more than $19,000 in overdraft fees. The arrangement continued for five years, in part because Dvorin was able to periodically deposit large, legitimate payments into his accounts. *Dvorin*, 817 F.3d at 444.

In 2012, the government indicted Dvorin on one count of conspiring to commit bank fraud. The superseding indictment alleged that between 2005 and December 2010, Dvorin and Derrington engaged in a scheme in which they deposited checks in Dvorin's account knowing the deposited checks would not

clear. After a two-day trial, a jury found Dvorin guilty. During trial, the government elicited testimony from Derrington, who had pleaded guilty to conspiring to commit bank fraud and was awaiting sentencing. Derrington explained that he had cooperated with the government during its investigation, and that he was testifying in the hope that he would obtain some leniency in his sentencing. The prosecutor asked Derrington whether he had received any promises from the government in exchange for his testimony, and Derrington responded that he had not. The court sentenced Dvorin to 24 months of imprisonment and ordered $111,639.73 in restitution. *Id.*

Dvorin appealed, and the Fifth Circuit set the case for oral argument. While preparing for oral argument, the government's appellate counsel discovered that the trial prosecutor, Mindy Sauter, had failed to disclose Derrington's sealed plea agreement supplement to Dvorin's counsel. The plea agreement supplement stated, in relevant part, that, "[i]f in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, it will file a motion urging sentencing consideration for that assistance." *Id.* The government produced the supplement to Dvorin's counsel and agreed to an order vacating Dvorin's conviction and remanding the case for a new trial. *Id.* Dvorin's case is analogous to Petitioners', with the only difference being the government has not agreed to vacate this conviction for a new trial.

Dvorin and Petitioners case shared many similarities, thus, *Dvorin* should have dictated the outcome of this case in the Fifth Circuit. One such similarity is that they both relied on the *trilogy* of *Napue*, *Brady* and *Giglio*. *See Dvorin*, 817 F.3d at 445. Dvorin was tried a second time and, although the jury once again convicted him of conspiring to commit bank fraud, the district court found that Sauter committed *Brady*, *Giglio*, and *Napue* violations. *Id.* at 445. As in *Dvorin*, there is a degree of prosecutorial vindictiveness in Petitioners' case, where the government sought to increase the Nandas restitution in this case after they requested the government to come forward with explanation of its motive in requesting a lower restitution for the co-defendants. Instead of providing information, the government responded by threatening to increase the Nandas restitution. A "presumption of vindictiveness" applies in Petitioners' case, which should dictate a similar outcome to Dvorin for him. *See Dvorin*, *supra*, 817 F.3d at 454-457.

Likewise in *LaCaze*, Princess P. LaCaze was convicted in state court of second-degree murder and sentenced to life imprisonment. LaCaze filed a habeas petition in federal district court pursuant to 28 U.S.C. § 2254, which was denied. The Fifth Circuit then granted a certificate of appealability ("COA") on a relevant issue: whether the State withheld *Brady* material concerning a promise made to LaCaze's co-defendant. The Fifth Circuit answered in the affirmative and reversed

and remanded the case with instructions to grant the writ because the State never disclosed that it had assured LaCaze's co-defendant that his son would not be prosecuted if he agreed to make a statement implicating LaCaze. *See LaCaze, supra*, 645 F.3d at 730-735. The Fifth Circuit found that the Supreme Court has never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a *bona fide*, enforceable deal. *Id.* (citing *Napue*, 360 U.S. at 270; *Giglio*, 405 U.S. at 154-55; and *Tassin*, 517 F.3d at 778 ("A promise is unnecessary."). In fact, "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility." *Giglio*, 405 U.S. at 155. The question is "the extent to which the testimony misled the jury, not whether the promise was indeed a promise . . . ." *Tassin*, 517 F.3d at 778 (citing *Napue*, 360 U.S. At 270).

Turning to the question of materiality for the purposes of a *Brady* violation, the Fifth Circuit held that the "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, 514 U.S. at 435. Or, put another way, "whether an undisclosed source of bias—even if it is

not the only source or even the 'main source'—could reasonably be taken to put the whole case in a different light." *LaCaze*, 645 F.3d at 736 (quoting *Kyles*, 514 U.S. at 434-35; and citing *Napue*, 360 U.S. at 270 (where the Court states an undisclosed source of bias can be material even if it is not the main source of bias, and rejected the government's idea that "the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one")); *see Tassin*, 517 F.3d at 780 (holding that the jury's knowledge of other aggravating factors justifying the death sentence did not render the failure to disclose exculpatory evidence as to the other factor immaterial).

Further, the Fifth Circuit continued, materiality "is not a sufficiency of evidence test." *LaCaze*, 645 F.3d at 737 (quoting *Kyles*, 514 U.S. at 434). The state court must consider whether the undisclosed agreement "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* Using that standard in *LaCaze*, the Court found that the undisclosed assurance, which the state court held was "relevant" and "a possible motive" for Robinson's testimony, was indeed material, *id.* at 737-38; and therefore, there is a reasonable probability that disclosure of the agreement between the prosecution and Robinson would have produced a different result. *Id.* at 738 (citing *Kyles*, 514 U.S. at 435). The Fifth Circuit found that *LaCaze* bears a

striking resemblance to *Tassin*, 517 F.3d at 780, in which it granted habeas relief based on a *Brady* violation. There, as well as in *LaCaze*, the government's key witness had received "an understanding" of leniency that the prosecution failed to disclose. *Tassin*, 517 F.3d at 779-80.

As in *Dvorin*, *LaCaze* and *Tassin*, the co-defendants' testimony in this case was the only direct evidence of Petitioners' intent, and disclosure of their bias to the jury might have put the whole case in a different light. It is worthy noting that only these co-defendants' established the fact that Nandas were in-charge of the company's daily operations and "ran the show". In its opening statement, closing argument, and rebuttal, the government argued that the co-defendants had no reason to lie. In circumstances like these, where "the jury's estimate of the truthfulness and reliability of [the witnesses] may well be determinative of guilt or innocence," the failure to disclose *Brady* information is material. *LaCaze*, 645 F.3d at 738 (citing *Napue*, 360 U.S. at 269). As in *LaCaze* and *Tassin*—although they dealt with state courts' determination—the district court's determination in Petitioners' case to the contrary is, nevertheless, an unreasonable application of clearly established federal law, as set forth in the trilogy of Supreme Court's precedents, *Napue*, *Brady* and *Giglio*, as cited *supra*, and further discussed *infra*.

Based on the Fifth Circuit's disposition in its own *trilogy* of precedents, *Dvorin, LaCaze* and *Tassin*, *supra*, the district court's judgment in this case,

denying Petitioners' *Napue/Brady/Giglio* claim, should have been reversed and remanded with instruction that the lower court order a new trial. Since that did not happen, and these are questions of immense importance, this Court is called upon to reverse the bad precedent that Petitioners' case would set in the Fifth Circuit and any other circuits that may follow it.

III. Courts of Appeals are Reversibly Erring in Affirming District Courts' Judgments Which are Denying Motions for a New Trial in Cases Such as Petitioner's

The district court in *Dvorin* held that the earlier prosecution violated *Napue's* prohibition against a prosecutor knowingly using false testimony to obtain a conviction. The *Dvorin's* prosecution contended that the witness's testimony was not false (and thus she could not have knowledge that it was false), and even if it was, it was not material. Petitioners' prosecution claims the same here, and also claims that the government's secret, unwritten, "mutual" agreement with Petitioners' co-defendants "to ensure that [they] were not convicted of an offense that would qualify as an aggravated felony under the Immigration and Nationality Act" (Doc. No. 362, p. 3), was not a promise at all. The district court, in erroneously agreeing with the government's position, held that: "I don't think that this agreement is a promise" and "I don't think that the witnesses did not tell the truth as they understood the agreement . . ." (App. 40a-41a).

In respect to the first and second elements of *Napue*—that the witnesses'

testimony were false, and was known to be so by the state—Petitioners' attorney pointed out that they were undeniably established by the facts and the government's own admission. Both the district court and government are wrong in their finding that the agreement was not a promise because, regardless of whether this previously undisclosed, unwritten, "mutual" "agreement" with the co-defendants "to ensure" that their conviction would not lead to their deportation is an enforceable guarantee, under *Napue*, "'the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration.'" *Dvorin*, 817 F.3d at 452 (quoting *LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 735 (5th Cir. 2011) (quoting *Napue*, 360 U.S. at 270)); *see Giglio*, 405 U.S. at 155 ("evidence of any understanding or agreement as to a future prosecution would be relevant to credibility. . . .").

In fact, as the Supreme Court recognized in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the fact that the government's willingness to seek leniency for a defendant is not guaranteed, but "was expressly contingent on the [g]overnment's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction." 473 U.S. at 683. Thus, the focus is on "'the extent to which the testimony misled the jury,' ***not*** *whether the promise was indeed a promise. . . .*" *Dvorin*, 817 F.3d at 452

(quoting *LaCaze*, 645 F.3d at 735 (quoting *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (citing *Napue*, 360 U.S. at 270 (emphasis added)))). Here, the Nandas co-defendants' testimony that they had not received any promise from the government was at best misleading, and at worst false, in light of the government's admitted unwritten, "mutual" agreement with them "to ensure that [they] were not convicted of an offense that would qualify as an aggravated felony under the [INA]." (Gov't Response, Doc. No. 362, p. 3).

Accordingly, the district court improperly concluded that the government did not violate *Napue* in permitting the co-defendants to testify that the government had not made any promises in exchange for their testimony. Both the Fifth Circuit's and Supreme Court's trilogy of cases cited herein *Dvorin/LaCaze/Tassin* and *Napue/Brady/Giglio*, respectively, contradict the district court's decision in this case. Particularly, with respect to the third element of *Napue*—materiality—neither the district court nor the government questioned the Nanda co-defendants' testimony materiality, as both the district court and the government simply concluded that the co-defendants' testimony were not false because the agreements were not promises. The materiality standard under *Napue* is essentially identical to the analysis performed under *Brady*. Thus, for the reasons discussed *supra* and *infra*, this Court, as in *Dvorin/LaCaze/Tassin*, should conclude that the co-defendants' false statement that they had not received any promise from the

government was material and, accordingly, reverse the district court's finding that the prosecution did not violate *Napue.*

Brady prohibits the prosecution from suppressing evidence favorable to the defendant "where the evidence is material either to guilt or to punishment," *Brady,* 373 U.S. at 87, while *Giglio,* 405 U.S. at 155, applies *Brady* to evidence affecting the credibility of key government witnesses. *See Dvorin,* 817 F.3d at 450-51; *United States v. Davis,* 609 F.3d 663, 696 (5th Cir. 2010). To establish a *Brady* violation, a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material. *Brown,* 650 F.3d at 587-88. The Nandas have met the three factors of *Napue/Brady* and therefore their case must be reversed and remanded under *Giglio.*

In *Brady,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U.S. at 87. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. *See United States v. Agurs,* 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Brady* and *Agurs,* the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed

to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio*, 405 U.S. at 154. Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *See Napue,* 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"); *Bagley*, 473 U.S. at 676; *Tassin*, 517 F.3d at 781.

In *Giglio*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key government witness that he would not be prosecuted (although in Petitioners' case, the co-defendants were promised limited sentences and restitution to ensure favorable outcome in their immigration case) if he testified for the government. This Court said:

> When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .' A finding of materiality of the evidence is required under Brady. . . . A new trial is required if 'the false testimony could ... in

any reasonable likelihood have affected the judgment of the jury. . . .'

Bagley, 473 U.S. at 677 (quoting *Giglio*, 405 U.S. At 154).

As in *Bagley/Giglio*, the issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach government witnesses. The starting point, therefore, is the framework for evaluating the materiality of *Brady* evidence established in *Agurs*.

The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 679; *Agurs*, 427 U.S. at 103.

In *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the United States Supreme Court admonished prosecutors for letting statements by an informant, which they believed to be false, stand uncorrected throughout the proceedings. The Court concluded that "prosecutors represented at trial and in state

post-conviction proceedings that the State had held nothing back ... It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful." 540 U.S. at 698. Earlier *Brady* cases indicate similar concern for allowing false testimony. See, e.g., Agurs, 427 U.S. at 103 ("conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."). As in *Banks*, letting the Nanda co-defendants' testimony stand when the government had evidence it was false unquestionably violated *Brady/Giglio* and entitles the Nandas to a new trial.

Beginning with its seminal decisions in *Napue* and *Brady*, the Supreme Court established the principle that criminal convictions obtained by presentation of known false evidence or by suppression of exculpatory or impeaching evidence violates the due process guarantees of the Fourteenth Amendment. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio*, 405 U.S. at 153 (internal quotations omitted). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. The government's obligation to disclose exculpatory evidence does not turn on an accused's request. *Strickler v. Greene*, 527 U.S. 263, 280, 119

S.Ct. 1936, 144 L.Ed.2d 286 (1999). "In order to comply with *Brady*, . . . the individual prosecution has a duty to learn of any favorable evidence known to the others acting on the government's behalf." *Id.* at 281 (quotation marks omitted). Under this framework, no distinction is recognized between evidence that exculpates a defendant and "evidence that the defense might have used to impeach the Government's witnesses by showing bias and interest." *Bagley*, 473 U.S. at 676.

The Nandas need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See Kyles*, 514 U.S. at 434-35. However, once *Brady* error is established under the *Kyles* materiality standard, "there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435. This is because a reasonable probability of a different result in the proceeding "necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Thus, the clearly established Supreme Court precedents relevant to the Nandas are that their conviction must be set aside because (1) the prosecution actually knew of their co-defendants' false testimony, and (2) there is a reasonable

likelihood that the false testimony could have affected the judgment of the jury. *See Agurs,* 427 U.S. at 103. Under this materiality standard, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434; *see Giglio,* 405 U.S. at 153 ("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."); *Napue*, 360 U.S. at 269. In Petitioners' case, the stake, although not guaranteed through a written promise or binding contract, but was expressly contingent on the government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction, and is analogous to O'Connor and Mitchell in *Bagley.* 473 U.S. at 684.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, Petitioners respectfully pray that the Honorable Supreme Court grant a writ of *certiorari* for the Fifth Circuit

Dated September 18th, 2018

Respectfully submitted,

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APPENDIX A

Opinion and Judgment Of The United States Court Of Appeals For The Fifth Circuit, Affirming The District Court's Denial Of Petitioner's Motion For A New Trial, Issued On June 26, 2018 (1a-3a)