NO. _____

In The
Supreme Court of the United States

CHRISTIAN LEMUS CERNA, a/k/a Leopardo, a/k/a Bago, a/k/a Vago, a/k/a Gatito, a/k/a Christian Josue Lemus Alfaro,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 1, 2018

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the district court's decision to deny the renewed motion for a new trial and in refusing to conduct an evidentiary based on the government's failure to comply with *Brady* and the trial court's discovery order; to disclose impeachment evidence; and to correct known false testimony?

2. Whether the Court of Appeals erred in affirming the district court's decision not to give lesser-included offense instructions that were supported by the facts and by not giving the proffered "purpose" instruction as it relates to the elements of 18 U.S.C. § 1959?

3. Whether the Court of Appeals erred in affirming the district court's denial of Petitioner's mistrial motions when the government repeatedly presented evidence that Petitioner participated in an uncharged murder in violation of the trial court's Order prohibiting the admission of any such evidence in its entirety?

4. Whether the Court of Appeals erred in affirming the district court's decision to admit evidence that Petitioner was involved in an uncharged murder as such evidence was inadmissible under Rule 403 and 404(b) of the Federal Rules of Evidence?

5. Whether the Court of Appeals erred in affirming the district court's decision to deny a severance of defendants to Benitez, Castillo, and Petitioner where Guevara presented an irreconcilable, mutually exclusive and antagonistic

defense: advocating for the convictions of his co-defendants so that he would be acquitted?

6. Whether a mandatory sentence of life without parole violates the Eight Amendment, given Petitioner's age and relative culpability?

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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. Cerna'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.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * * *

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 case involves a blatant disregard for a person's right to Due Process. In this case, Christian Lemus Cerna, was denied a fair trial through multiple violations not only by the government attorneys but by the trial court, violating his rights under the Fifth and Eighth Amendment. Due Process was denied by the trial court repeatedly when they did not grant a mistrial when a witness and the government failed multiple times to follow the court's instructions to keep out testimony implicating the Petitioner in an uncharged murder. Due Process was further denied when the "star" witness was impeached on cross-examination and the Petitioner was not given the opportunity under *Brady* to discover more impeachable offenses that could've changed the course of the trial. Due Process was again denied when the trial court failed to sever the case after not only did a co-defendant's case theory and strategy shift the blame toward the other defendants but prejudice was clear and presence throughout. Finally, Due Process was denied when the government attorney admitted to opposing counsel that false testimony was presented and nothing was done to fix the issue.

Not only was Due Process repeatedly denied, the Petitioner's Eighth Amendment right from cruel and unusual punishment was violated when the trial court did not take into consideration the age of the Petitioner and other mitigating factors present when sentencing the Petitioner to life in prison without the possibility of parole. Alongside this lack of consideration, there exists a division and lack of uniformity between the circuits that requires guidance from this Honorable Court.

As it currently stands, defendants charged under the VICAR statute in separate circuits will receive distinct jury instructions that could result in unfair considerations.

The Petitioner, alongside five other defendants, were charged by a Third Superseding Indictment in June 2015 for participating in the alleged murder of Gerson Adoni Martinez Aguilar. This case involves a seven-count indictment charging thirteen individuals with committing a series of offenses in order to "maintain or increase" their positions within MS-13. (JA 1016). Petitioner was prosecuted in the United States District Court for the Eastern District of Virginia, Alexandria Division and a jury found the Petitioner guilty of each charge against him.

This petition for certiorari asks for the Supreme Court of the United States to review and reverse the judgment of the United States Court of Appeals for the Fourth Circuit denying Petitioner's direct appeal of his criminal convictions.

II. CONDENSED STATEMENT OF THE FACTS AS TO MR. CERNA

The case was extremely complex, with every appellant charged with either murder or conspiracy to commit murder. On September 18, 2015, approximately 6 months prior to trial, the district court entered a Discovery Order. This Order directed the government to promptly produce any and all exculpatory information as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. (SJA 1). Though comprehensive in scope, the trial court specifically ordered the government to produce:

All information relative to informant misconduct of all witnesses who have agreed to cooperate with the government; all information concerning payments and/or other incentives offered by the government in relation to any witness who has

agreed to cooperate with the government; information concerning any agreement between any witness and any local, state or federal agency made in connection with this case; information concerning any promise made to, or threat made against, any witness or potential witness by any local, state or federal agent in connection with this case; prior false statements; 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 acknowledged to be, or which the United States has reason to believe are, false; all aliases and false dates of birth known or believed to have been used by any person from whom the United States has taken a statement or who the United States intends to call as a witness in this prosecution.

On February 12, 2016, the government notified Petitioner[1] that it intended to introduce evidence under Rule 404(b) that he had participated in the murder of Nelson Trujillo a/k/a Lagrima. (JA 1506). Though others were, Petitioner was not charged with the Trujillo murder because he was a juvenile at the time of his alleged involvement. Previously, the government petitioned to transfer Cerna to the district court for the Trujillo murder but the district court denied the juvenile petition. The government appealed and the Court of Appeals for the Fourth Circuit unanimously upheld the trial court's decision.

On March 8, 2016, the trial court issued a comprehensive Opinion and Order denying the government's 404(b) Notice, explicitly prohibiting the government from introducing "*any evidence* that . . . . Cerna participated in the murder of ... Trujillo."

[1] Cruz was a party to the government's Notice before his case was resolved.

(emphasis added). The Order specifically recognized that the extreme prejudice to Cerna of admitting evidence of his alleged participation in an uncharged murder (Trujillo) while on trial for another murder (Aguilar) would deny him a fair trial. (JA 1751).

The government then filed its Motion for Admission of Redacted Transcripts and for Jury and Witness Instructions[2]. (JA 1757). First, the government asked to allow the jury to receive redacted translated transcripts of recordings that, it claimed, contained evidence regarding Cerna's involvement in both the Trujillo murder and the Aguilar murder (Count Six of the Indictment). The government averred that these translated transcripts had been redacted "to omit evidence of . . . Cerna's participation in Quintanilla Trujillo's murder" as required by the March 8, 2016 Order.

The government also moved to allow its witness to testify about Cerna's participation in Trujillo's murder by referring to Cerna as "homeboy two,"[3] ostensibly to protect his identity.

The Petitioner objected to the "redacted" transcripts, noting they remained littered with evidence that Cerna participated in Trujillo's murder. (JA 1767, 1771, 1786, 1794, 1807). The Petitioner further objected to the transcripts because, even if they could be redacted to comply with the March 8, 2016 Order, they would still show that Cerna was allegedly *involved* in the Trujillo murder. From this, the jury would necessarily infer that Cerna participated in the murder itself. Therefore, Cerna

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[2] Cerritos, also a juvenile at the time of the Trujillo murder, was a party to the Motion prior to having that charge dismissed.

[3] The government proposed identifying Cerritos with the equally prejudicial pseudonym "Homeboy 1".

argued that the evidence was also inadmissible under FRE 403 for the reasons the trial court articulated in its opinion. (JA 1767, 1771, 1786, 1794, 1807).

Cerna also objected to the pseudonym "homeboy". The government's witnesses repeatedly testified that "homeboy" is a term of art specifically used to identify active MS-13 gang members. As the only "homeboys" in the room were those sitting at the defense table, the jury would necessarily infer that Cerna was either "homeboy one" or "homeboy two". This, then, was a pseudonym in name only.

The prosecutors, their witnesses, and the attorneys for the co-defendants would not be able to abide by this restriction. The attorney for the government and her witnesses repeatedly implicated Cerna in Trujillo's murder; both by name and by barely concealed implication. Each time Cerna objected and moved for a mistrial, this objection was overruled.[4]

The first violation of the restriction came when the government witness, twice testified, that Cerna helped bury the bodies of both Aguilar (Count 6) and Trujillo (prohibited by the March 8, 2016 Order) right after they had been murdered.

Brenda Born, a supervisory agent with the FBI testified about conversations she had with Jose Aparicio-Garcia (a/k/a "Junior"), the government's criminal informant. (JA 3560-3561). "Junior" is an undocumented alien and former member of MS-13 who worked closely with the FBI primarily in exchange for immigration benefits. (JA 1997, 2016-2017, 3480, 3491, 3566). It is difficult to overstate Junior's significance and the degree to which his veracity was at issue. He was considered by

[4] The government and its witnesses repeatedly failed Cerritos as they failed Cerna and Cerritos was, in fact, granted a mistrial.

the judge and government attorneys as the star and most important witness. (JA 2960, 6440).

Junior's testimony was the only way the government was able to introduce much of the government's evidence. (JA 1953-56). Junior testified that he told Agent Born he had a meeting with the Petitioner. Agent Born then explained the meeting in her testimony, stating that "Junior was going to be meeting with Leopardo, and Leopardo was going to be showing Junior the possible locations of where the two individuals were buried. (JA 3569). A few minutes later, Agent Born again said, "he was meeting with Leopardo, and Leopardo was going to show him where they buried two bodies." (JA 3575).

It was at this point, the Petitioner moved for a mistrial as Agent Born testified that Junior was meeting with the Petitioner to show where the bodies were "buried" and not "reburied." For the Petitioner to have "buried" Mr. Trujillo would indicate the Petitioner's participation in the murder. (JA 3575). The trial court denied the motion, reasoning that Petitioner merely being present at the burial of Trujillo did not warrant a mistrial. (JA 3579).

The government's next violation of the March 8, 2016 Order, was when its witness Jose Del Cid left no doubt that Cerna was in fact "homeboy two" and that Cerna/"homeboy two" allegedly participated in the Trujillo/Lagrima murder.

AUSA Martinez elicited from Del Cid that "homeboy two" was present at a meeting when the Trujillo/Lagrima murder was planned, at the actual murder, and when they buried Trujillo/Lagrima's body after the murder. (JA 4966-4967)

AUSA Martinez then asked Del Cid for a list of the people present at the reburial of Trujillo's body[5]. Del Cid stated it was "Greñas, Lil Poison, Lil Payaso, Lil Slow, me, Tuner, and homeboy two" who were there. (JA 4973)

As mentioned above, Agent Born testified that Junior told her that Petitioner was at the Trujillo reburial (see the initial mistrial motion). Here, Del Cid does not identify Petitioner as being at the reburial, instead inserting the pseudonym "homeboy 2." So, "homeboy two" = Cerna. Counsel for Petitioner objected, asking for a mistrial, stating the witness made it obvious that "homeboy two" was the Petitioner as he mentioned everyone at the reburial by name, except the Petitioner, whom he called "homeboy two." (JA 4974).

The trial court denied the second mistrial motion, instead ordering Del Cid to identify the Petitioner by name when discussing the Trujillo/Lagrima reburial and ordered him not to say "homeboy two," reasoning "If we can simply get the witness to say Leopardo (Cerna), that will completely take away from the suggestion that the jury believes that homeboy two is Leopardo." (JA 4976, 4977, 4978).

Petitioner's third motion for mistrial came mere moments later after Del Cid again testified that "homeboy two" was present at the Trujillo reburial in direct contravention of the trial court's order. (JA 5087). Despite the trial court's own reasoning in denying the second mistrial motion, the trial court nevertheless denied the third motion (JA 5093).

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[5] Shortly after Trujillo was buried, his body was dug up and reburied.

The fourth motion for mistrial came after AUSA Martinez asked her witness the following question on direct examination: "What did Leopardo do during the Lagrima (Trujillo) murder . . ." (JA 5191). After this, there could be no doubt that Cerna was present and a participant in Trujillo's murder. Counsel for Cerna moved for a mistrial arguing, even if inadvertent, "Ms. Martinez's question certainly explicitly and implicitly told the jury that Mr. Cerna was involved in the murder of Lagrima" and that "there's simply no way the jury can't put two and two together, to figure out that the government believes that he was involved in the murder of Lagrima". (JA 5192-5193).

The Court denied this fourth motion for mistrial (JA 5197).

The audio recordings between and among the co-defendants and Junior comprised the bulk of the evidence against the defendants. This Honorable Court will note the jury received the actual transcripts of these recorded calls, unredacted and in their original form, and that these transcripts contained hours and hours of recorded conversations in which the co-defendants and Junior discussed Petitioner's role in the Trujillo murder. Petitioner objected that this flagrantly violated trial court's March 8, 2016 Order but this objection was overruled. (SJA 15). As the trial progressed, it became evident that Junior had perjured himself when testifying regarding the immigration benefits he received from government for both himself and his family in exchange for his testimony.

The prosecution team obviously knew that Junior's illegal status and pending immigration case were the primary impetus for his cooperation and the steps the

government was taking to massage the process on Junior's behalf. For instance, Junior sent FBI Agent Uribe (the Case Agent) a text asking "is everything okay? Just asking if S Visa has been submitted," to which Agent Uribe responded, "We are on it, this week, documentation has been submitted." (JA 4116-4117).

At trial, the government elicited testimony that Junior had in fact received some immigration benefits as a result of his cooperation. (JA 3862, 3566).

Junior also testified about a letter the FBI prepared and sent to the immigration judge deciding whether Junior would receive his green card. (JA 3862-63). However, under questioning by AUSA Martinez, Junior downplayed the importance of this by claiming the immigration judge "didn't get the letter." (JA 3863).

This testimony was absolutely false. As Junior reluctantly admitted under cross-examination, the immigration judge did in fact receive the letter *because he*, *Junior*, *personally delivered it*. (emphasis added) (JA 4138). Despite this obvious falsehood, the government remained silent and did nothing to correct the perjurious testimony.

Junior also testified to truthfully answering the questions on his immigration forms, which necessarily included information regarding his personal background, membership in MS-13 and criminal history (JA 4105).

Based on Junior's earlier perjury, Counsel sought access to Junior's immigration file to investigate how and whether Junior had lied during his testimony and whether and to what degree the government was complying with its *Brady*

obligations and the trial court's Discovery Order[6]. Because of this suspicion, Counsel for Chavez asked the trial court for a subpoena duces tecum. Counsel was bothered by Junior's perjury and based on his 30 years of practice, he felt there was information in Junior's immigration application that goes toward his truthfulness and veracity. (JA 3828-3830).

AUSA Martinez responded that Junior "obtained his green card separate and apart from his cooperation with the government". AUSA Martinez made this statement while knowing of the letter the FBI wrote to Junior's immigration judge as a reward for his cooperation. (JA 3833).

This response to the trial court was, therefore, false. AUSA Martinez also stated that she was "aware of no impeachment or exculpatory information beyond what has already been provided." (JA 3834). The trial court denied the requested subpoena duces tecum for Junior's immigration file. (JA 3839-3840)

As the trial progressed, it also became clear that Defendant Guevara should have been severed from the trial of Benitez, Castillo, and Cerna as he consistently and actively advocated for their guilt, often in lock step with the government. Counsel filed the initial motion for severance on April 3, 2016; and the trial court held a hearing on April 7, 2016 before subsequently denying the Motion. (JA 102-104, 2526, 3247-3270). As the prejudice continued to build, Counsel renewed the motion on April 13, 2016, which the trial court denied with a hearing. (JA 107-108, 4362). Counsel

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[6] Junior claimed to have included criminal activity in his application for a green card (JA 4194) and to have told the truth on an immigration application when it asked specifically about criminal activity (JA 4105)

filed a final joint motion for severance on April 17, 2016, upon which the trial court did not rule. (JA 109, 4584).

Petitioner responded to the case presented by the government (and Guevara) by establishing that the government witnesses were unable to agree on which defendants were present at Aguilar's murder; which actually participated in Aguilar's murder; which defendants, if any, had prior knowledge that Aguilar was to be murdered; or even whether Aguilar was murdered in order for the defendants to "maintain or increase" their position within MS-13 as required by statute. Petitioner also presented testimony indicating he had not participated in Aguilar's actual murder. (JA 5876-5877).

Prior to giving closing arguments, Petitioner asked the Court for, *inter alia*, a lesser included offense instruction for attempted murder in aid of racketeering and assault with a dangerous weapon or assault resulting in serious bodily injury in aid of racketeering, in violation of 18 U.S.C. § 1959. (JA 8165, SJA 17). Petitioner and Chavez also asked for an instruction with respect to the fifth element of each of the charges in Counts One, Two, Four, Six, and Seven of the indictment, the "purpose" element. The Court declined to give the instructions. (JA 6201-6202).

During closing arguments, Guevara joined the government in arguing that all the defendants- save himself- were guilty.

On May 9, 2016 the jury convicted all of the defendants on each charge alleged in the Third Superseding Indictment.

Following trial, the government revealed (reluctantly) that Junior had, in fact, lied under oath to the immigration authorities on at least three (3) separate occasions. (*U.S. v. Cerritos*[7], 1:16CR104, Doc. #29; JA 7083; JA 7037; JA 6872). It also became clear the government knew (or should have known) that had Junior lied under oath to the immigration authorities and did nothing to correct his testimony to the jury when he perjured himself by falsely claiming otherwise.

The government not only withheld this information in violation of *Brady* and the previously entered Discovery Order but also strenuously objected to counsels' independent attempt to access the information via subpoena duces tecum- an objection which the trial court sustained. As a result, Counsel was unable to demonstrate to the jury that Junior was a proven liar and that the government was aware (or should have been aware) of this prior offering of his testimony.

Armed with this new information, the defendants filed their Joint Motion for a New Trial or, in the Alternative, Motion to Compel Production of *Brady* Material and for an Evidentiary Hearing. Counsel specifically requested a hearing to make a record of the scope of the constitutional errors and to explore the government's awareness (or lack thereof) regarding these violations. (JA at pp 7240-41; 7245-725). This Motion was denied. (JA 7218).

At Cerna's sentencing, Counsel argued that the evidence adduced at trial demonstrated, at worst, that he was guilty of aiding and abetting murder in the second degree. Cerna also joined Guevara's objection to a mandatory sentence of life

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[7] After the trial court declared a mistrial regarding the Cerritos matter, his case was assigned to Judge Brinkema.

imprisonment without the possibility of parole as a cruel and unusual punishment in violation of the Eighth Amendment, given that the trial court was precluded from considering their ages (barely 18 and 19 respectively) when fashioning an appropriate sentence.

Lastly, all the defendants (save Chavez) objected to being sentenced prior to the trial court taking testimony on whether, and to what degree, Junior perjured himself during the trial; whether, and to what degree, the government violated its discovery and *Brady* obligations; and whether, and to what degree the government was aware of Junior's perjurious testimony and let it go uncorrected.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. The Court of Appeals for the Fourth Circuit was wrong to affirm the trial court as the Petitioner's right to Due Process was violated several times by the trial court and the government's attorneys. This case is also an opportunity not only to resolve the division regarding the "purpose" requirement in the VICAR statute between the Ninth Circuit and the Fourth Circuit but to properly instruct the lower courts on sentencing guidelines to avoid violating the Eighth Amendment.

ARGUMENT

I.

The Court of Appeals erred in upholding the district court's decision to deny the renewed motion for a new trial and in refusing to conduct an evidentiary hearing based on the government's failure to comply with *Brady* and the discovery order; to disclose impeachment evidence; and to correct known false testimony. The Fourth

Circuit contends in its decision that the alleged *Brady* violations was not "material." Consistent with *Weary v. Cain*, 136 S. Ct. 1002, 1006-7 (2016), a new trial is warranted for the Petitioner who offered a substantial defense in this case.

Under Rule 33, the district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972). "[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

"When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting the credibility falls within this general rule." *Giglio*, at 154 (quoting *Napue*, at 269). However, a new trial is not automatically required "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." *Giglio*, at 154 (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)). Rather, "[a] finding of materiality of the evidence is required under Brady, …, [and] a new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury[.]" *Giglio*, at 154 (quoting Napue, at 271).

The government violated *Brady* and *Napue* by withholding material information that constituted impeachment evidence of its star witness at the trial of

this matter and by allowing Junior's perjurious testimony to go uncorrected, testimony the government knew or should have known was false.

A. Appellants are Entitled to a New Trial based on *Napue v. Illinois*

In pursuit of justice, the United States Attorney "may strike hard blows, but he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

"A bedrock principle of due process in a criminal trial is that the government may neither adduce or use false testimony nor allow testimony known to be false to stand uncorrected." *Longus v. United States*, 52 A.3d 836, 844-45 (D.C. 2012) (citations omitted). "[A] conviction obtained through false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Under *Napue*, "the government's obligation extends to the correction of not only perjurious testimony, but also to testimony that is 'false' or misleading.'" *Longus*, 52 A.3d at 847-48 (quoting *Hawthorne v. United States*, 504 A.2d 580, 589 (D.C. 1986); *Felder v. United States*, 595 A.2d 974, 977 n.8 (D.C. 1991)).

The government's obligation to correct false or misleading testimony is not limited to testimony that bears "directly upon [the] defendant's guilt," but extends to all testimony, including that which "goes only to the credibility of the witness" – "[a] lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false

and elicit the truth." *Napue*, 360 U.S. at 269-70 (citations omitted). This obligation to correct false testimony extends not only to what the prosecutor elicits from its witness on direct testimony, but also applies to testimony elicited during cross-examination by defense attorneys. *Id.* at 269.

The underlying purpose of the prosecutor's *Napue* obligation to correct false testimony "is not to punish the prosecutor for the misdeeds of a witness, but to ensure [the] jury is not misled by falsehoods." *Longus*, 52 A.3d at 847 (quotations omitted).

This Court, in *United States v. Kelly*, 35 F.3d 929, 933–34 (4th Cir. 1994), announced the following:

> A conviction acquired through the knowing use of perjured testimony by the Government violates due process… This is true regardless of whether the Government solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected… Even if the false testimony relates only to the credibility of a Government witness and other evidence has called that witness' credibility into question, a conviction must be reversed when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury…" This is so because "[t]he 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."

As set forth in the statement of the case, it is undisputed that Junior committed perjury when he testified that the letter written on his behalf by the FBI agents supervising him was "returned" and therefore went undelivered to the immigration judge overseeing his case. As the record reflects, the aforementioned letter did fact reach its intended audience *because he*, *Junior*, *personally delivered it*. (emphasis added) (JA 4138).

Especially troubling in all of this is the government's explanation to defense counsel in the discovery process that the letter to the immigration judge "was returned undelivered." That this ruse was only discovered on cross-examination is illustrative of the tactic taken by the prosecutor in this case – which was one of allowing known false testimony by Junior to go uncorrected.

Furthermore, Junior's admission that he personally delivered the letter to the immigration judge does not absolve the government from its duty to correct the other false testimony regarding Junior's credibility, as *Napue* holds that "the fact that the jury was apprised of other grounds for believing the witness may have had an interest in testifying against the petitioner" does not turn an otherwise tainted trial into a fair one. *Napue*, 360 U.S. at 270.

It is now clear that, at best, the government allowed Junior's perjury to go uncorrected; or, at worst, the government tried to buttress his falsehood to the jury. (JA 3863-3867). Either way, the *Napue* violation is clear.

B. Appellants are Entitled to a New Trial based on *Brady*

Beyond *Napue's* requirement to correct false testimony is the affirmative duty that *Brady* places on prosecutors to search possible sources of exculpatory information, "including a duty to learn of favorable evidence known to others acting on the prosecution's behalf[.]" *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The prosecutor must also cause "files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12 (2005) (quoting *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992)). Other cases

require the prosecutor to expand its search to files of executive branch agencies. *See United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case" for Brady purposes); *United States v. Jennings* 960 F.2d 1488, 1490 (9th Cir. 1992) ("[t]his personal responsibility cannot be evaded by claiming lack of control over the files . . . of other executive branch agencies").

To establish a *Brady* violation, the defendant must show that (1) the evidence at issue is favorable to the defendant; (2) was suppressed by the government, whether willfully or inadvertently; and (3) is material. *Spicer v. Roxbury Correctional Institute*, 194 F.3d 547, 555 (4th Cir. 1999). Whether the government has met its *Brady* obligation is determined without regard to good faith or bad faith and, thus, whether the nondisclosure was the result of negligence or design is irrelevant. *Giglio*, 405 U.S. at 153-54.

Further, the *Brady* 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).[8]

Evidence is "material" within the meaning of *Brady* when there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449-469-70 (2009). A reasonable

[8] See also *In Re Sealed Case*, 185 F.3d 887, 897 – 898 (D.C. Cir. 1999) and *U.S. v. Perdomo*, 929 F.2d 967, 970 – 971 (3d Cir. 1991).

probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough "to undermine confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *See Smith v. Cain*, 565 U.S. (2012).

Again, it is undisputed that the Junior lied under oath to the immigration authorities on at least three (3) separate occasions (see *U.S. v. Cerritos*[9], 1:16CR104, Doc. #29; JA 7083; JA 7037; JA 6872) and that these lies would have been used to impeach Junior, the government's "hero" and "most significant witness" had this information been properly disclosed. (JA 2960, 6440). Moreover, it is of no moment that Junior had been previously impeached. (See *Weary v. Cain*, 136 S. Ct. 1002, 1006-07 (2016) in which the Court held that additional impeachment material against an already impeached witness could satisfy *Brady's* materiality requirement). Further, the Supreme Court instructs that the likely damage from the suppression of *Brady* evidence is best understood by reference to the prosecutor's closing argument. See also *Comstock v. Humphries*, 786 F.3d 701, 711 (9th Cir. 2015). Here, AUSA Martinez called Junior a "hero" at JA 6440 signifying his importance to the case. Thus, the documents contained in Junior's immigration file are clearly material.

Had the jury been apprised of the true facts surrounding Junior and his history of lying to the government, it might well have concluded that Junior was fabricating testimony in order to secure, or to maintain, his protected status in the United States.

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[9] After the trial court declared a mistrial for Cerritos, his case was assigned to Judge Brinkema.

Thus, the jury might have concluded that Junior would say anything to curry favor with the United States, or to continue to curry favor with the United States so that he may remain in the country. Junior was not charged with a crime, so he was not testifying in return for a Rule 35/reduction of sentence based on cooperation. Junior's "Rule 35" was his visa and/or green card and the facts surrounding that benefit are material and the lies he told in pursuit of that benefit are discoverable.

Moreover, the FBI agents who were working closely with Junior over a period of several years were in contact with the immigration authorities for the purpose of keeping Junior in the United States. It is difficult to imagine, given their close and years long involvement with Junior, that Agent Born or Uribe did not know about the lies Junior told to the immigration authorities.

In sum, 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. Further, the government was aware of this obligation as evidenced the colloquy between the trial court and AUSA Martinez, attorney Aquino requested information about Junior's immigration background. Ms. Martinez told the trial that any immigration applications in which the government aided their witness was disclosed at the Giglio disclosures but thought there was no basis for obtaining any immigration information that was done solely by the witness. (JA 3834 - 3835).

The FBI also 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 to the significant help given to Junior regarding parole and deferred action that would allow him to stay here legally and avoid deportation for a limited time. (JA 3584-85). Agent Born also testified to the efforts by the FBI to obtain an S visa for Junior; while not guaranteed, the lobbying effort was clear to Junior. (JA 3584 – 3585).

To be clear, 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.

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.[10] 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 own gang expert at trial, Officer Claudio Saa, MS-13 gang members who agree to cooperate with law enforcement are often untrustworthy (JA 1868 - 1872).

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.

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[10] See Deputy Attorney General Guidance Memo, January 4, 2010 concerning DoJ *Brady* compliance: www.justice.gov/archives/dag/memorandum-department-prosecutors.

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).[11]

The government's position relative to its "hero" Junior and his immigration file can best be described this way – We don't know and 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. A new trial is warranted as a result of the *Brady* violation which undermines confidence in the outcomes of the trial, see *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) and *Weary v. Cain*, 136 S. Ct. at 1007.

We ask this Court to grant Petitioner a new trial

C. Appellants are Entitled to an evidentiary hearing

Lastly, the Court of Appeals committed reversible error by upholding the district court's refusal to hold an evidentiary hearing on whether and to what degree there were *Napue* and *Brady* violations. The defense asked to call agents Uribe, Betts, and Born to explain what they knew about Junior's false statements in his immigration process and the perjury committed during trial. Petitioner also asked

[11] 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 court to order the government to produce for in camera review any documentation relevant to the inquiry, including but not limited to: Junior's A-file, his FBI handler's file, any 302 reports regarding contacts between Junior and the FBI concerning his S-Visa and immigration files, interviews of Junior by the FBI and the prosecution, communications between the FBI and Junior's counsel about the S-Visa process and any documentation the FBI or law enforcement had in its possession.

Counsel for Petitioner outlined in detail why an evidentiary hearing was necessary, as it had in the Motion for New Trial and Renewed Motion for New Trial. (JA 7240-41, 7244-54). Specifically, Petitioner requested an evidentiary hearing to determine whether and to what degree the government was complying with its *Brady* obligations and the Discovery Order; how and to what degree Junior had lied during his testimony; whether and to what degree was aware of these errors and allowed them to go uncorrected.

This Court should have the opportunity to fully and fairly consider our claims regarding the alleged violations. Clearly, there was perjury and misrepresentations by its star witness. An evidentiary hearing—consisting of some simple testimony and production of relevant documents—would enable the district court to consider the claims with all pertinent facts. The case should, at the very least, be remanded for an evidentiary hearing to fully develop the record.

II.

The Court of Appeals erred in upholding the district court's decision to decline giving lesser included offense instructions that were supported by the facts and erred

by not giving the proffered "purpose" instruction as it relates to the elements of 18 U.S.C. § 1959.

A. Cerna was entitled to a lesser-included offense instruction on Attempted Murder in Aid of Racketeering.

A defendant is entitled to an instruction on a lesser-included offense when applicable. *Schmuck v. U.S.*, 489 U.S. 705 (1989); *Keeble v. United States*, 412 U.S. 205, 208 (1973); Rule 31(c). The indictment need not charge the defendant with the lesser offense as a prerequisite to the jury receiving the lesser offense instruction. *U.S. v. Dhinsa*, 243 F.3d 635, 674 (2d Cir. 2001). Rather "any evidence, however weak, bearing upon the lesser included offense will suffice to create an entitlement to a lesser included offense instruction." *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993)*; United States v. Walker*, 75 F.3d 178, 181 (4th Cir. 1996); *U.S. v. Wright*, 131 F.3d 1111 (4th Cir. 1997).

It is well established that the crime of attempt is a lesser-included offense of the substantive crime. *United States v. Pino*, 608 F.2d 1001, 1003-04 (4th Cir. 1979); *United States v. Remigio*, 767 F.2d 730, 733 (10th Cir. 1985).

In this case, Cerna established that the government witnesses were themselves unable agree on which defendants were present at Aguilar's murder; of those present, which actually participated in Aguilar's murder; which defendants, if any, had prior knowledge that Aguilar was in fact to be murdered that evening; or even whether the participants murdered Aguilar in order to "maintain or increase" their position within MS-13 as required by statute.

For instance, there was significant evidence that:

Cerna wasn't at the meeting when the decision was made to murder Aguilar. (JA 4828 – 4830); Solitario stabbed Gerson before Cerna. (JA 4833 – 4834); Payaso cut off Aguilar's head and not Cerna. JA 4843. Aguilar was accused of stealing money but that the punishment for theft was a beating, not murder. JA 4825.

Further, Benitez told Junior during monitored and recorded phone calls that he acted unilaterally and alone. There was evidence and argument during direct and cross examination that Cerna did not touch the victim prior to his death and others actually committed the crime. (JA 5876-5877).

From this evidence, the jury could have reasonably included that Cerna was part of an attempt to kill or injure the victim, while others actually committed the act alone and without any participation from Cerna. Because the jury was not instructed on the lesser-included attempt instruction, the jury was unable to separate those who may have attempted or had merely formed an intent from those who committed the crime.

The trial court abused its discretion in refusing to give the requested attempt offense instruction when there was certainly enough evidence to support it. We ask this Court to grant a new trial.

B. Cerna was entitled to lesser-included offense instruction on Assault with a Dangerous Weapon or Assault Resulting in Serious Bodily Injury in Aid of Racketeering.

There is *dicta* from this Court indicating that assault can be a lesser-included offense in a homicide. *Logan v. United States*, 144 U.S. 263, 307 (1892) (dicta); *United States v. Hamilton*, 182 F. Supp. 548, 551 (D.D.C. 1960) (dicta). Further, the elements necessary for a conviction on assault resulting in bodily injury that differentiate it

from Murder are (1) an intentional assault that (2) results in serious bodily injury. *See e.g. United States v. Littlewind*, 595 F.3d 876, 884 (8th Cir. 2010) (internal quotation marks omitted). A serious injury is one that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty. 18 U.S.C. § 113(b)(2); 18 U.S.C. § 1365(h)(3) (2006).

This Court has also written on the importance of lesser-included offenses ensuring due process for defendants. *Beck v. Alabama*, 447 U.S. 625, 626 (1980). ("The unavailability of the 'third option' may encourage the jury to convict for an impermissible reason-its belief that the defendant is guilty of some serious crime and should be punished.") This impermissible scenario reasoned by the Supreme Court in *Beck* is Cerna's situation in the present case.

The D.C. Circuit's Court of Appeals, in its analysis of 18 U.S.C. § 1959, notes Congressional intention to separate violent predicate offenses for VICAR. *United States v. Mahdi*, 598 F.3d 883 (D.C. 2010). With violence being the basis for this statute and the Supreme Court acknowledging that assault could be a lesser-included offense for murder, it follows that an assault in 18 U.S.C. § 1959(a)(3) would be a lesser-included offense of murder in 18 U.S.C. § 1959(a)(1).

In this case, there was evidence to support the defense that Cerna only intended to assault Aguilar in a beating, which the government witnesses testified is customary form of internal group discipline with MS-13. The testimony at trial had many disputed facts of who was aware of the plan to kill Aguilar and when. In

addition, the government called cooperating witnesses who are affiliated with MS-13 and who were cooperating with the government in exchange for leniency. In this scenario it, the "third option" of a lesser-included offense referred to in *Beck*, serves to ensure that the jury is able to fully exercise the function.

The Fourth Circuit has no definitive case on whether VICAR – Assault is a lesser-included offense of VICAR – Murder or if assault is a lesser-included offense of murder. With dicta from the Supreme Court suggesting assault is a lesser included offense of murder, all other VICAR elements being the same between 18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 1959(a)(3), and discrepancy in sentencing, which this Court was mindful of in *Beck*, Cerna has a clear due process interest in submitting the lesser included offense of VICAR – Assault to the jury especially in light of a possible scenario similar to the one presented in *Beck*, where a juror believes the defendant to be guilty of a serious crime which was not included in the instructions.

The trial court abused its discretion in refusing to give the requested instruction. We ask this Court to grant the Petitioner a new trial.

C. The jury was not properly charged concerning the VICAR Counts of the Third Superseding Indictment

The Court of Appeals erred in not reversing the trial judge's error of refusing to give defense Instruction JAC #19 relative to the motive requirement of 18 U.S.C. § 1959. The defense instruction required the jury to find that one of the dominant purposes of the defendants in committing the alleged crimes was to gain entrance to, maintain or increase his position in the enterprise, or that the alleged murder was

committed as an integral aspect of gang membership (see *U.S. v. Banks*, 514 F.3d 959, 968 – 970 (9th Cir. 2008).

As stated in *Banks* at 968 - 970:

> We do not mean to say, however, that a defendant falls within the scope of VICAR if his desire to enhance or maintain his status in the organization had any role, no matter how incidental, in his decision to commit a violent act. To adopt such a broad interpretation would risk extending VICAR to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang; if the reach of this element were not cabined in some way, prosecutors might attempt to turn every spontaneous act or threat of violence by a gang member into a VICAR offense. The VICAR statute itself contains no indication that Congress intended it to make gang membership a status offense such that mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation. Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well.
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> *******

By limiting the statute's scope to those cases in which the jury finds that one of the defendant's general purposes or dominant purposes was to enhance his status or that the violent act was committed "as an integral aspect" of gang membership, we ensure that the statute is given its full scope, without allowing it to be used to turn every criminal act by a gang member into a federal crime.

Moreover, as stated in *Banks* at 968 - 969, this result is consistent with the legislative intent in the passage of 18 U.S.C. § 1959 (see Senate Report to § 1959 in U.S. Cong. Code & Admin. News 1984 at pages 3483 – 3485), i.e., that the violent act must be "integral" to gang membership (See also *U.S. v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994) cited in *Banks* at 969.)

The proffered instruction reads, as is relevant:

> In order to establish that the crime of violence was committed for the purpose of "gaining entrance to, maintaining, and increasing" a position in the enterprise, the Government must prove that one of the defendant's dominant purposes in committing the crime was to gain entrance to, maintain or increase his position in the enterprise, or that the murder was committed as an integral aspect of gang membership. The motive requirement is thus satisfied if the Defendant committed the violent crime, in large part, because he knew it was expected of him by reason of his membership in the enterprise, or that he committed it in furtherance of that membership.

This instruction, which is consistent with *Banks* and *Fiel*, *supra*, which canvassed authority in their sister circuits and reviewed the legislative history on the subject. Therefore, in light of this error by the Court of Appeals to reverse the trial court's refusal to give Instruction No. JAC 19, we ask this Court to grant a new trial to the Petitioner.

III.

The Court of Appeals erred in upholding the district court's denial of Petitioner's mistrial motions when the government repeatedly presented evidence that Cerna participated in an uncharged murder in violation of the trial court's Order prohibiting the admission of any such evidence in its entirety.

On March 8, 2016, the trial court issued a comprehensive Opinion and Order explicitly prohibiting the government from introducing "*any evidence* that ... Cerna participated in the murder of ... Trujillo." (emphasis added). The Order specifically recognized that the extreme prejudice to Cerna in admitting evidence of his alleged participation in an uncharged murder (Trujillo) while on trial for another murder (Aguilar) would deny him a fair trial. (JA 1751).

As the record reflects, the prosecutors, their witness and the attorneys for the co-defendants repeatedly violated this Order as the attorney for the government and her witnesses repeatedly implicated Cerna's involvement in the Trujillo murder; and when not identifying him by name, frequently alluded to his participation. Each time the government and her witnesses highlighted Cerna's involvement in the Trujillo murder, Cerna objected and moved for a mistrial. Each time, this objection was incorrectly overruled[12].

The government first violated Cerna's right to a fair trial when the government witness twice testified that Cerna helped bury the bodies of both Aguilar (Count 6) and Trujillo (prohibited by the March 8, 2016 Order) after they had been murdered. (JA 3575)

The government next violated Cerna's right to a fair trial when Del Cid listed the names of those present at a meeting during which the Trujillo murder was planned; listed the names of those present at the Trujillo murder; and listed the names of those present when they buried Trujillo's body after the murder. In listing the names, Del Cid did not mention Cerna name but rather identified Cerna by the pseudonym "homeboy two" as required by the trial judge.

Del Cid was then asked to list all the people present at Trujillo's reburial and Del Cid listed them. In listing the names, Del Cid again did not mention Cerna by name but rather identified him by the pseudonym "homeboy two".

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[12] The government and its witnesses repeatedly failed Cerritos as they failed Cerna, the result being that Cerritos was, in fact, granted a mistrial.

This was hugely problematic because the government had previously presented evidence concerning the people who had taken part in the Trujillo reburial and made a big deal of the fact that Cerna was one of them. The government, of course, made no mention of anyone identified "homeboy two." By mentioning "homeboy two" and not mentioning Cerna, Del Cid effectively drew a straight line between the two. (JA 4966-4967, 4973). By process of elimination, the jury now unequivocally knew that "homeboy two" murdered Trujillo and Cerna was "homeboy two".

The trial court recognized the seriousness of the problem but overruled the motion. Instead, he specifically instructed Del Cid to say Cerna's name when listing the people present at the Trujillo reburial. Cerna's third motion for mistrial came moments later after Del Cid testified that "homeboy two" was present at the Trujillo reburial, not Cerna, in direct contradiction to the trial court's order issued just minutes earlier, thereby cementing into the jury's head that "homeboy two" = Cerna. (JA 5087).

The fourth motion for mistrial came after the most egregious of errors- when AUSA Martinez asked her witness the following question on direct examination: "What did Leopardo do during the [Trujillo] murder . . ." (JA 5191). If there were any doubt left about whether Cerna participated in the Trujillo, it was now all gone.

Alone, any one of these errors merited a mistrial; in combination, there can be no doubt that Cerna was prejudiced by the government's explicit violation of the trial judge's Order prohibiting the government from introducing ""*any evidence* that . . . . Lemus Cerna participated in the murder of Nelson Omar Quintanilla Trujillo.". *See United States v. Barefoot*, 754 F.3d 226, 237 (4th Cir. 2014) ("It is difficult to imagine

evidence more inimical to the jury's perception of a defendant than that of participation in a murder"); *United States v. Lighty*, 616 F.3d 321, 357 (4th Cir. 2010) ("We have recognized on several occasions that the admission of uncharged murder is extremely prejudicial"); *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) ("Evidence of a murder not charged is extremely prejudicial").

Moreover, this Honorable Court will note the jury received the actual transcripts of the oft mentioned recorded calls, unredacted and in their original form, and that these transcripts contained hours and hours of recorded conversations in which the co-defendants and Junior discussed Cerna's role in the Trujillo murder. Cerna objected that this flagrantly violated trial court's Order but this objection was overruled. (SJA 15). This error alone requires the Court to vacate Cerna's convictions as it clearly deprived Cerna of his right to a fair trial.

Cerna is entitled to a new trial.

IV.

The Court of Appeals erred in upholding the district court's decision to admit evidence that Petitioner was involved in an uncharged murder when the evidence was inadmissible under Rules 403 and 404(b) of the Federal Rules of Evidence.

Federal Rule of Evidence 404(b) establishes that providing evidence of a defendant's crimes, wrongs, or other acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, 404(b) does not apply to evidence that is intrinsic to the crime charged. *See United States v. Chin*, 83 F.3d 83, 87-8 (4th Cir. 1996). "Other criminal acts are intrinsic when they are

inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *Id*. at 88.

The Court of Appeals for the Fourth Circuit has established a narrow interpretation of what evidence may be deemed "intrinsic". *See United States v. Ebert*, 1999 U.S. App. LEXIS 8453 *82 (4th Cir. 1999) (the evidence intrinsic to the crime exception "is a narrow exception...[and] not a broad license to introduce gratuitous evidence about a defendant's prior bad acts");

In its March 8, 2016 Order, the trial court rightly prohibited the government from introducing "any evidence that . . . Lemus Cerna participated in the murder of Nelson Omar Quintanilla Trujillo." The trial court erred, however, when it allowed the government to introduce evidence that Cerna was *involved* with the murder of Trujillo, even while rightly excluding evidence related to his alleged direct *participation*.

Over a series of pleadings, Cerna moved the Court to exclude any other evidence relating to the Trujillo murder, which necessarily included any evidence that Cerna dug Trujillo's grave the day prior to and in preparation for Trujillo's murder; had knowledge of how Trujillo was killed and with what weapons; how the body was treated during the burial; a description of Trujillo's body when it was dug up and reburied; and where Trujillo was ultimately reburied.

This evidence related to the Trujillo murder was not intrinsic to the Aguilar murder because it was not inextricably intertwined with the charged murder that happened months later, was not a part of the same criminal episode, and was clearly

not necessary to complete the story of the crime charged at trial. Therefore, this evidence was extrinsic and subject 404(b).

Even if admissible under Rule 404(b), evidence must still meet Federal Rule of Evidence 403's requirement that its prejudicial value not outweigh its probative value. See Fed. R. Evid. 403. In this case, the evidence noted above should have been excluded under Rule 403 given that the proposed other crimes evidence involved not just any crime but a murder. *See United States v. Barefoot*, 754 F.3d 226, 237 (4th Cir. 2014) ("It is difficult to imagine evidence more inimical to the jury's perception of a defendant than that of participation in a murder"); *United States v. Lighty*, 616 F.3d 321, 357 (4th Cir. 2010) ("We have recognized on several occasions that the admission of uncharged murder is extremely prejudicial"); *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) ("Evidence of a murder not charged is extremely prejudicial").

Evidence that Cerna was involved as described above was only minimally probative yet constituted considerable unfairly prejudicial uncharged and unadjudicated conduct that the government unduly emphasized at trial for the sole offense with which Cerna was being prosecuted. This is precisely the type of prejudicial effect that Rule 404(b) was designed to guard against. *See United States v. Hernandez*, 975 F.2d at 1041.

The trial court erred when it admitted this evidence and Cerna is entitled to a new trial.

V.

The Court of Appeals erred in upholding the district court's denial of severance of defendants to Benitez, Castillo, Cerna where Guevara presented an irreconcilable,

mutually exclusive and antagonistic defense: advocating for the convictions of his co-defendants so that would be acquitted. 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 the Petitioner who offered a substantial defense in this case.

The trial court is required to grant a severance of defendants if even one defendant cannot obtain a fair trial due to the antagonistic defense of any co-defendant. *See Johnson*, 478 F.2d at 1131. "[A]n accusation by counsel is sufficient to create an antagonistic defense" where it states the core of his client's defense and casts blame on the co-defendant. *United States v. Romanello*, 726 F.2d 172, 178 (5th Cir. 1984). This generates trial conditions "so prejudicial to the co-defendant under multiple attack [i.e., by the government and his co-defendant's lawyer] as to deny him a fair trial. *Id.* at 178 n.6 (brackets in original). *See also Fed. R. Crim. Pro 14(a).*

In opining on the importance of protecting the fair trial rights of defendants in multi-defendant prosecutions, this Court has emphasized that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *See United States v. Johnson*, 478 F.2d 1129, 1132 (5th Cir. 1973) (citing *Schaffer v. United States*, 362 U.S. 511, 516 (1960)).

Benitez, Castillo, Cerna and Guevara were all charged with Aguilar's murder and it was clear from opening statements that Guevara would be presenting a defense that was irreconcilable, mutually exclusive and antagonistic to Benitez and Cerna. (JA 51, 1016, 1028).

Benitez and Cerna previewed the evidence by emphasizing that the government would be unable to establish which defendants were present at Aguilar's murder; of those present, which actually participated in Aguilar's murder; which defendants, if any, had prior knowledge that Aguilar was in fact to be murdered that evening; or even whether the participants murdered Aguilar in order to "maintain or increase" their position within MS-13 as required by statute. *See* (JA 2154-2160) (opening statement of Benitez); (JA 2160-2178) (opening statement of Cerna); (JA 2178-2187) (opening statement of Castillo).

Guevara, giving his opening statement last, argued that the evidence that the evidence would clearly show that he was the only person on trial not a member of MS-13, that his co-defendants planned to murder Aguilar without his knowledge, and that his codefendants were present at and participated in Aguilar's murder. (JA 2188-2199). This was, to say the least, directly antagonistic to the opening statements from Benitez and Cerna.

The following day, March 31, 2016, during his cross-examination of government gang expert Sgt. Claudio Saa, Guevara's counsel argued that his co-defendants in fact planned the murder and did so without Guevara's awareness, as would be expected given his allegedly lesser position within the gang. (JA 2282-2301). This directly contradicted the cross-examinations by his codefendants which established from Sgt. Saa that blustering and false bravado is a common occurrence in these situations and that cooperating witnesses cannot be trusted when they implicate the codefendants. *See*, *e.g.*, (JA 2276-2279).

On April 13, 2016, during his cross examination of Junior, Guevara continued in his role as an additional prosecutor. (JA 4239-4262). Directly contrary to the "blustering" defenses presented by the co-defendants, Guevara's counsel elicited testimony that each defendant was a "credible source" regarding their own participation in the charged conduct. Junior testified that each defendant told him personally of their actions regarding the crimes committed while essentially exculpating Guevara. (JA 4246-4249).

Guevara's questioning of Junior, then, elicited that each codefendant had in fact confessed to murdering Aguilar. It is difficult to construct a scenario more intrinsically antagonistic that one in which a codefendant cross-examines the government's star witness with the sole goal of implicating his codefendants.

The proceeding is rife with other examples of Guevara actively advocating for his co-defendant's guilt, continuing through close arguments; these, then, are but examples.

Counsel filed one last severance motion- this one joined by all defendants, save Guevara- on April 17, 2016. (JA 109, 4584). In its response, the government recognized that the defense presented by Guevara was, in fact, irreconcilable, mutually exclusive and antagonistic to those of his co-defendants. Indeed, how could it not? Given the advantage of cross-examination, Guevara was frequently the best prosecutor in the room.

Instead, citing *United States v. Lighty*, 616 F.3d 321, 348-49 (4th Cir. 2010), the government argued that any rift was not sufficiently hostile or antagonistic enough

so as to require a severance. *Lighty*, however, illustrates exactly why the trial court erred in denying the severance.

Though the district court did not rule on this Motion at all, it is clear it committed reversible error in failing to grant a severance.

VI.

A mandatory life without parole sentence violate Cerna's Eighth Amendment rights given that he was a teenager at the time of and played a less culpable role in the offenses for which he was convicted.

Cerna was still a teenager at the time of the offenses for which he was convicted. (JA 7127-7135; JA 7136-39). A fair reading of the jury's verdict is that Cerna was- at most- found guilty of aiding and abetting murder in the second degree.[13] (See JA 3921-22; JA at 4157-63). He was sentenced to life in prison without the possibility of parole- the only sentencing option given that 18 U.S.C § 1959[14] precluded the trial court from considering his age (barely 18) when fashioning an appropriate sentence. (JA 7219-30).

Cerna at 18 was just months removed from juvenile status and from being constitutionally ineligible under *Miller* for a mandatory sentence of life without the

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[13] The jury made no formal finding as to whether Cerna was guilty of first or second-degree murder, or whether his criminal liability was under an accessory theory (called a "principle in the second degree" under Virginia law).

[14] 18 U.S.C. § 1959 draws no meaningful distinction between the degree of murder whereas, by contrast, 18 U.S.C. § 1111(b) provides that "[w]hoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life". 18 U.S.C. § 1111(b) also clearly contemplates the application of the sentencing factors set forth in 18 U.S.C. § 3553(a), which instructs judges to consider a host of factors prior to imposing a sentence that is "sufficient, but not greater than necessary". Such judicial consideration is expressly forbidden under 18 U.S.C. § 1959, putting it squarely at odds with both the Eighth Amendment, and with the mandates of 18 U.S.C. § 1111 and 18 U.S.C § 3553(a).

possibility of parole. Under the mandatory sentencing scheme, the trial court was not able to consider these factors nor any other factors such as his age, family, work history, family trauma, lack of violent criminal history, or any other elements of his general life background. A mandatory minimum punishment of life in prison without parole for Cerna under the circumstances violates each of their individual rights under the Eighth Amendment.[15]

CONCLUSION

The trial court and the government attorneys violated the Petitioner's right to Due Process and a new trial is warranted on many grounds. The Court of Appeals was wrong to uphold the trial court's decisions listed. For the reasons stated, this Honorable Court should grant the relief requested herein.

Respectfully Submitted,

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[15] The Eighth Amendment holds that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."