NO._____

IN THE SUPREME COURT OF THE UNITED STATES

SIMONE SWENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTIONS PRESENTED

Prior to trial in this federal prosecution for alleged adoption fraud, the district court dismissed the indictment with prejudice based on its finding that "the integrity of this prosecution has been destroyed" and its findings that the prosecutor: (1) had failed to disclose exculpatory and impeaching police reports and related documents in her file for years; (2) had failed to do her job and to supervise the case agent and investigation and did not know what she was doing; (3) was unaware of what evidence was in the government's possession because of her purposefully selective choice to review only a portion of the evidence based on her theory of the case; (4) had repeatedly misrepresented that all discovery had been turned over to the defense, which showed that she was not credible and could not be trusted to tell the truth; (5) had turned over supplemental records only when the defense had found out what the government had, causing repeated delay; and (6) despite the obligation to investigate the case completely, had relied on the government's witnesses to filter their own documents and select what they as interested party laymen considered to be relevant.

Without showing any deference to the district court's findings or view of the evidence, the Fifth Circuit reversed the district court's dismissal of the indictment.

The questions presented are:

1. Did the Fifth Circuit enter a decision in conflict with Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993), by reviewing the district court's order dismissing the indictment with prejudice for a violation of Brady v. Maryland, 373 U.S. 83 (1963), and for prejudice instead of reviewing the district court's order for structural error, where the district court's dismissal was based on its finding that "the integrity of this prosecution has been destroyed" by the government's pattern of misconduct?

2. Did the Fifth Circuit enter a decision in conflict with Berger v. United States, 295 U.S. 78, 88 (1935), Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Hastings, 461 U.S. 499, 505 (1983), by reinstating the indictment where the district court found that the integrity of the prosecution had been destroyed by the government's failure to produce exculpatory evidence, its false statements to the court, and its misconduct that allowed private parties to selectively pick and choose the evidence to be used by the prosecution, which resulted in the permanent loss of other evidence?

3. Did the Fifth Circuit enter a decision in conflict with Anderson v. Bessemer City, 470 U.S. 564 (1985), by failing to show deference to the district court's findings of fact and credibility determinations and by ignoring the evidence supporting them when it reinstated the indictment based on its own global determination of the facts?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Simone Swenson respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on July 3, 2018.

OPINIONS BELOW

On July 3, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion reversing the district court's dismissal of the indictment with prejudice. See United States v. Swenson, 894 F.3d 677 (5th Cir. 2018). The Fifth Circuit's opinion is reproduced as Appendix A to this petition. The district court did not enter a written order or opinion dismissing the indictment with prejudice. However, the district court's Opinion on Reconsideration denying the government's request to reconsider the dismissal of the indictment with prejudice, United States v. Swenson, Case No. 4:15-cr-00402, Dkt. No. 101 (S.D. Tex. Feb. 24, 2017), is reproduced as Appendix B to this petition.

JURISDICTION

On July 3, 2018, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows: "In all criminal prosecutions, the accused shall enjoy the right . . .to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> (c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:
>
> (1) the evidence or material is subject to discovery or inspection under this rule; and
>
> (2) the other party previously requested, or the court ordered, its production.
>
> (d) Regulating Discovery.
>
> (1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.
>
> (2) Failure to Comply. If a party fails to comply with this rule, the court may:
>
> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Fed. R. Crim. P. 16(c) & (d) (bold typeface omitted).

STATEMENT OF THE CASE

A. The Indictment.

On July 29, 2015, the petitioner, SIMONE SWENSON, was charged by indictment with two counts of wire fraud and two counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1343. ROA.14-25. The indictment alleged that, from January of 2013 to January of 2014, Ms. Swenson operated the Sans Pareil adoption service and perpetrated a scheme to defraud by matching multiple adoptive families with the same birth mother. ROA.14-15.

The manner and means alleged were that Ms. Swenson: (1) did not proceed with adoptions until fees and expenses were paid; (2) charged fees without explanation; (3) rarely verified if birth mothers were actually pregnant; (4) was unavailable and did not return calls for long periods of time, if at all; (5) rarely provided invoices or receipts for families' payments; and (6) double matched birth mothers with multiple adoptive families, using misrepresentations later to get out of the double match. ROA.15-16.

The acts in furtherance of the fraud principally alleged were that Ms. Swenson: (1) double matched the Steffen/Moriarty and Schrock families with birth mother, Tammy Parker, who ultimately placed her child for adoption with Caring Adoptions, ROA.17-19; (2) double matched the Neidrich and Cuschieri families with birth mother, Ashley Smolt, ROA.20-21; and (3) double matched the Carlson and the Ruysser families with birth mother, Brandy Parsons. ROA.21-23.

B. Defendant's Search for Evidence Pretrial.

Defense counsel, who was appointed on January 14, 2016, received discovery from previously retained counsel and, on March 23, 2016, received discovery from the government, which consisted of all FBI 302 reports, Ms. Swenson's statement to the FBI, and three stacks of e-mails. ROA.252, 491.

On August 5, 2016, defense counsel filed three similar motions for a subpoena duces tecum, the first of which requested that GoDaddy.com, LLC, the host of Ms. Swenson's simones@sanspareil.org e-mail account, produce all e-mails from January 1, 2013, to January 1, 2014, and the other two of which requested that T-Mobile and Yahoo! Inc. produce Ms. Swenson's cell phone records and yahoo.com e-mails, respectively, from January 1, 2013, to January 1, 2014. See ROA.440-45, 449-453, 457-60. The GoDaddy.com subpoena motion, similar to the other two motions, explained that "[t]he emails referenced in the Indictment are selected portions of long strings of conversations in which both the prospective adoptive families and Ms. Swenson replied back and forth on certain topics" and that the subpoenaed e-mails were required "to determine the contents of the full and complete conversations had between Ms. Swenson and the families." ROA.441; see also ROA.450, 458. The court granted all the three motions. ROA.465-66, 468-69, 471-72.

On August 23, 2016, the court scheduled trial for February 7, 2017. ROA.73. On December 23, 2016, defense counsel sent the prosecutors an e-mail to confirm that she had "made all discovery requests required under the federal rules and applicable case law" and formally requesting, among other things, statements of the defendant, exculpatory and

impeaching evidence, and evidence of bias or a motive to lie. ROA.2618-19. On December 27, 2016, the government moved for reciprocal discovery stating that it had complied with Ms. Swenson's request for disclosure under Fed. R. Crim. P. 16(a)(1). ROA.74. On December 30, 2016, Ms. Swenson responded that she did "not agree that the United States has fully complied with Rule 16." ROA.483-84. The court set the government's disclosure date for January 17, 2017, and the defendant's disclosure date for January 23, 2017. ROA.84, 483-84. The court set a pretrial conference for January 23, 2017, ROA.83.

When the government filed its exhibit list, Ms. Swenson filed objections arguing, among other things, that the exhibits containing sanspareil.org e-mails had not been authenticated and were incomplete e-mail strings with messages missing. ROA.104-10. The objections also noted that the defense had learned via its subpoena for the sanspareil.com e-mail account that GoDaddy.com did not have data for the account because the account was no longer in service. ROA.105 n.1. Subsequently, the only new item produced by the government in its discovery, in addition to the discovery produced on March 3, 2016, was a set of e-mails the government had received from Yahoo. ROA.254. The defense, however, already had these e-mails. ROA.254.

Ms. Swenson complied with the court's discovery order on January 18, 2017, by producing to the government a disc containing 735 pages of e-mails, 4,439 pages of phone records, 3,594 pages of receipts, and copies of all of Mr. Swenson's files related to individuals named in the indictment. ROA.254 & n.2.

C. The Pretrial Conference on January 23, 2017.

At the pretrial conference on January 23, 2017, defense counsel discussed her objection to the problematic nature of the sanspareil.org e-mails, explaining that her "understanding [wa]s the government has received these emails directly from the families and allowed them to make their selection of what was relevant" and that "[t]he government apparently never tried to get it [i.e., the sanspareil.org account] back when they were doing this investigation." ROA.326. Defense counsel also explained that her "larger problem with completeness of the Sans Pareil.org emails is there are whole parts of these strings missing that the defense and I believe the government has not even had access to" and that this was "another reason that I am waiting until, or think that they should be proven up at trial." ROA.326.

The government tried to shift its discovery obligations to Ms. Swenson, but the court responded that the government had the responsibility to marshal the e-mails and evidence and would receive no greater latitude based on the loss of evidence. ROA.331-32. The prosecutor interjected that she "just didn't want the court to think we are hiding evidence or trying not to produce things." ROA.332.

Defense counsel returned to the objection that the government had delegated to its witnesses its responsibility to review the evidence and mentioned that the government had just produced new additional e-mails and had found a new witness who was a former Sans Pareil employee and had an enormous amount of information on her computer from her employment there. ROA.333. Defense counsel added that "we are now today in receipt, I think, of more emails; that after they have interviewed their witnesses the witnesses said,

oh, wait, I have an email to address that problem in the case ment [sic] or whatever it may be." ROA.333. Counsel noted that the government had not produced the employee's computer, but had only produced what the witness "thought was relevant." ROA.333.

The court asked the prosecutor why she had not asked the witnesses for every email and document related to this case and sorted them herself, and it expressed concern with allowing witnesses to decide what is relevant and not provide the other documents. ROA.334-35. When the court admonished that the government may well be withholding exculpatory evidence, the government offered the excuse that it had just received the e-mails from the new witness. ROA.334. The court responded that the prosecutor's late preparation was not the court's problem given that the case was opened July 29, 2015. ROA.334.

The prosecutor responded that the new witness's FBI 302 report and all FBI 302 reports had been produced to the defense while commenting: "Discovery has not been an issue in this case. I am very open. I give everything to defense counsel as soon as I get it, Your Honor. I make copies for everyone." ROA.335. The court asked how the prosecutor could know that the e-mails were representative and that there is nothing that might work to Ms. Swenson's benefit. ROA.337. When the prosecutor began discussing the production of Ms. Swenson's Yahoo account rather than the sanspareil.org account, the court told her that doing one thing right was not sufficient and that the government knew that there was an account available and did not get it. ROA.337.

The prosecutor stated that the technical reason why the sanspareil.org account could not be subpoenaed was due to the lack of a domain name. ROA.337-38, 340. The prosecutor insisted that the government had provided everything to the defense and that it

was still getting things to the defense two weeks before trial and was not "hiding anything." ROA.338. When the court asked why it took until two weeks before trial to get the defense evidence, the government excused this by saying that witnesses kept finding things. ROA.338.

Given the unavailability of the sanspareil.org e-mails, defense counsel noted that the government could at least have obtained the e-mail accounts of the witness families to recover some of those e-mails. ROA.339. When the government restated that it was "unable to" obtain the sanspareil.org account, the court told it that it was "able to at the time," that it was not going to allow the government to use piecemeal evidence when it "certainly could have subpoenaed all the records from all of the witnesses whom you are using," and that "it's not a game of figure out what's missing before trial." ROA.340-41.

The court asked the prosecutor why she had not subpoenaed the new witness's computer to look at all of the e-mails on it. ROA.341. The prosecutor responded that she was "not sure why we didn't actually get her computer because her testimony was sufficient, which is what I need –" ROA.341. The court again told the prosecutor that the government "can't do that, that it was obliged to investigate it completely, not decide what's sufficient," and that its selective method of investigating the evidence and relying on interested parties was depriving the defense of records. ROA.342. The court questioned why the government would rely on the memory of a witness who was an employee from June 2013 to September 2013 without checking her e-mails, especially since the witness was not an attorney. ROA.342.

The court ordered that the e-mails of the new employee witness be produced.

ROA.343. Defense counsel added that the problem also was with the e-mails of the families and noted that the government had just added two exhibits that day, Exhibits 41 and 42, which she had not previously received and which had been newly forwarded to the government. ROA.344. When the government disputed this and defense counsel insisted that the exhibits were new, the court asked the government: "Where did they come from?" The government requested "[o]ne second" and then needed to take a break. ROA.345.

When the proceedings were reconvened, the government did not answer the court's question about where the e-mails in its exhibits had come from. ROA.345. Instead, it offered to obtain search warrants for the six families' e-mails. ROA.345. Defense counsel expressed her concern about "what's been retained over the last three []or four years if we now are going directly to the families as opposed to the providers," and the court noted that the defense was expressing a valid concern. ROA.347. The government said it would get the e-mails on the provider's server via a subpoena and an urgent request. 347-49. The court asked the defense if this was satisfactory, and defense counsel responded that it was "in terms of we would like the universe of information," but that it was "unsatisfactory if we have to push the trial, which we are prepared for and my client wants to resolve." ROA.349.

The court then asked the government: "What about cell phones and text messages?" The prosecutor responded: "Your Honor, that's not part of our case." ROA.350. In response to a different question by the court, the prosecutor stated that she did not know what the whole record would show, and the court responded: "That's the whole point. Ignorance is not a good basis for going on with this." ROA.350-51.

Defense counsel commented that she agreed with the court that the phone records were relevant and also pointed out that the indictment itself accused Ms. Swenson of not returning phone calls frequently enough and also alleged that the families could not contact her. ROA.351-52. At that point, the court realized: "So evidence of phone calls is relevant." ROA.352.

The prosecutor responded that it was "very hard to subpoena also [sic, cell?] phone calls on a land line. That's assuming everyone has a cell phone, and that's assuming everyone texts." ROA.353. The court told the prosecutor that it was important to find out what media the six families had available to them and instructed her to find "how many of them have cell phones and texts." ROA.353. The court agreed with the defense that a spoliation instruction might be in order if it was determined after cross examination that the government did not obtain certain evidence. ROA.354.

When the government mentioned an additional trial witness, the defense noted it had not been informed of that witness. ROA.358-59. The government also mentioned that it might add yet another former employee of Sans Pareil as a witness who it had just learned of from another employee on Friday. ROA.360. The court asked whether the government had subpoenaed tax documents to see who was on the payroll of Sans Pareil, and the government responded that it had not. ROA.360.

D. The January 24, 2017, In-Chambers Pretrial Conference.

At the second pretrial conference, the court made clear to the government that it should immediately comply with its constitutional and rule-based discovery obligations. ROA.255; see also ROA.137.

E. The Government's Document Dump On Friday, January 27, 2017.

On January 29, 2017, defense counsel filed a motion for a continuance, reciting that on Friday, January 27, 2017, the government had produced new documents containing exculpatory information. ROA.192. As described in defense counsel's subsequently filed pleading, after the close of business, the government had produced an expandable folder about three to four inches thick. ROA.256. Defense counsel's subsequent pleading described these documents in detail while providing to the court as exhibits the newly produced documents and explaining why the documents were exculpatory as follows. See ROA.251-72; see also ROA.1604-2546 (Exhibits 1-3).

The new documents produced by the government included: (1) e-mails to and from the adoptive parents and Ms. Swenson and to others, many of which the defense had never seen, never had access to, and had no knowledge of; and (2) statements by victims that were inconsistent with their statements in FBI 302 reports. ROA.256. The expandable folder containing the documents given to the defense was labeled "Documents received from Annise Neidrich 1/2014." ROA.258. Inside the folder were documents from three different adoptive parents: (1) a set of documents on a CD labeled "Dropbox files received from Maggie Steffen on 2/14," ROA.1604-1972; (2) a set of documents in a pink manila folder labeled "Documents received from Kathleen Ruysser 2/2014," ROA.1973-2189; and (3) the remainder of the documents, which appeared to be from Annise Neidrich. ROA.258, 2190-2546.

The first set of documents, which is over 365 pages in length, contained a lengthy written statement made by prospective parents Margaret Steffen and Kathleen Moriarty

describing their entire history of contact with Ms. Swenson. ROA.258. In that statement, they describe their initial contact with Ms. Swenson and specific contacts by Ms. Swenson and her agency concerning Jerrell and Tammy, who was expecting a baby, on November 4, 2013, and by phone and other means on June 5th, 13th, and 25th, September 30th, October 23rd and 29th, and November 1st of 2013. ROA.1605-10. In addition, this statement expressly stated that Ms. Swenson's agency gave to Tammy Parker Ms. Steffen and Ms. Moriarty's phone number on October 3, 2013, and that Ms. Steffen and Ms. Moriarty had a phone number for Ms. Parker on her intake form and obtained an additional phone number for her when she called them on October 3, 2012. ROA.1607-08.

Moreover, the statement recites a number of other phone calls that Ms. Steffen and Ms. Moriarty had with Tammy Parker and shows that Mr. Swenson's agency sent Ms. Steffen and Ms. Moriarty Tammy Parker's medical records. ROA.1607-10. This statement contradicts, if it does not totally refute, the indictment's allegations that contact with prospective families was little to none and that birth mother's pregnancies were not verified. See supra text, at 5. In addition, the parties agreed that Tammy Parker was defrauding Ms. Swenson by working with another adoption agency and receiving living expenses from both agencies. ROA.259; see also ROA.493-94. However, the ability to show this through statements made by Ms. Moriarty and Ms. Steffen changed the strategy of the defense and pointed out that, had the defense been given this exhibit much earlier in the case, it could have tried to obtain phone records and text messaging records between Ms. Parker and Ms. Steffen and Ms. Moriarty. ROA.259-60. Before January 27, 2017, the defense had not seen this statement. ROA.258.

In addition, the written statement of Ms. Steffen and Ms. Moriarty contradicts the FBI 302 report that was drafted on February 4, 2014. See ROA.806. First, the FBI 302 report states that Ms. Swenson denied Ms. Steffen and Ms. Moriarty's request to speak with Tammy Parker by phone. ROA.806. Second, the FBI 302 discusses events that occurred in June and July of 2013 and then skips to events occurring on November 1, 2013, omitting all of the contacts that Ms. Steffen and Ms. Moriarty had with Ms. Swenson and Ms. Parker between those dates, which were contained in Ms. Steffen's and Ms. Moriarty's written statement. ROA.806-07. And, as dates on the discovery and in the FBI 302 show, the agent was provided Ms. Steffen's documents at the latest on February 4, 2014, via her Dropbox account. ROA.809; see also supra text, at 14-15.

On January 27, 2017, the government also newly produced a set of documents labeled "Documents received from Kathleen Ruysser 2/2014," which is over 215 pages in length. ROA.260; see also ROA.1973-2189. The e-mails in these documents show Ms. Ruysser's contacts with third parties regarding her experience with Ms. Swenson and her agency concerning Ms. Ruysser's match with the birth mother "Brandy." ROA.260; see, e.g., ROA.1977, 1979, 1981, 1986, 1989, 1993-95, 1997-2002, 2005, 2017, 2012, 2023, 2061, 2063, 2069, 2072, 2075, 2077, 2079, 2083, 2085, 2088-90, 2093, 2095, 2097, 2099, 2102, 2014, 2106, 2108, 2113, 2121, 2133, 2155, 2157-58, 2161, 2165, 2169. They also show that Ms. Ruysser had contact with Brandy's mother during key time frames and that she knew that Brandy had experienced a miscarriage, which negated any belief by Ms. Ruysser that she continued to be matched with Brandy's baby. ROA., 260; see ROA.2093, 2095, 2097, 2099, 2102, 2104, 2106; see also ROA.2157. They thus are exculpatory.

ROA.261. They also contain the names of individuals with knowledge of the events that the defense could have investigated. ROA.261.

The remainder of the newly produced documents, which is over 350 pages in length, appear to be from Annise Neidrich. See ROA.258, 261, 2190-2558. This stack of documents contains Ms. Neidrich's summary of all potential individuals who she believed possessed relevant information about Ms. Swenson, as well as their contact information and Ms. Neidrich's thoughts on questions that the FBI could ask them. ROA.2191-2197 It also contains a sonogram for a pregnant birth mother, which contradicts the indictment's allegation that Ms. Swenson rarely verified whether the birth mothers were actually pregnant. ROA. 261, 2239-41; see also supra text, at 5.

These documents also contained e-mails that the defense had never seen, several of which are exculpatory. ROA.261-62. For example, these documents contain many e-mails that support Ms. Swenson's defense that she had good reason to doubt whether Ms. Neidrich could afford the match to begin with and to question whether she would send a check on a tight deadline, and they also show that Ms. Swenson reduced Mr. Neidrich's fees and was flexible with payment deadlines. ROA.262, 2334-2338, 2360, 2413, 2440-41, 2442, 2445, 2524, 2535. The exculpatory nature of this information demonstrates the prejudice that was suffered by the defense from government's failure to subpoena, and the loss of, the sanspareil.org account. ROA.262.

Moreover, Ms. Neidrich's materials contain her typed statement showing that she was directly contacted by birth mother Kaliesha, who told Ms. Neidrich that she had changed her mind about going through with the adoption. ROA.2199. This evidence cuts

directly against the indictment's allegation that Ms. Swenson found a way through lies and misrepresentations to get out of the double matches once money had been wired to her account by adoptive families. See supra text, at 5.

F. The January 31, 2017, Pretrial Conference.

At the beginning of the pretrial conference, defense counsel withdrew her motion for a continuance, stating she was ready to go to trial. ROA.375. According to the defense, the motion was withdrawn because it believed this would be the last disclosure from the government, because it had had little time to digest how prejudicial the latest disclosure was, and because it was choosing to put its best foot forward at trial. ROA.263.

When defense counsel reurged her objection to the relevance of each of the government's e-mails and to the entire sanspareil.org e-mail account because the e-mails were incomplete and piecemeal, having been selected by the adoptive parents for the government based on their view of relevance, the court requested that defense counsel draft a "strong" spoliation instruction against the government. ROA.391-92. Later in the proceeding, the defense stated, without contradiction from the government, that it thought that everything had been exchanged and that there were no surprise issues. ROA.395.

G. The Government's February 3, 2017, Disclosure of Police Reports (in its Possession for Years) Only After the Defense Discovered One of Them.

On the Friday before trial, as a result of investigation, defense counsel received a police report containing a complaint that Ms. Swenson had made to the Montgomery County Sheriff's Office in 2013. See ROA.2599-2616. That report showed that, on December 6, 2013, a Sherriff's Office detective had turned over the investigative file to the

federal case agent in this case. ROA.257; see, e.g., ROA.748. In a subsequent pleading filed in this case, the prosecutor stated that the case agent had sent the report to her on October 23, 2014, but she had forgotten about the case agent's e-mail and had failed to produce the report in discovery. See ROA.495.

Once the report was discovered, defense counsel contacted the prosecutor about it, and the prosecutor e-mailed her that report and four more reports, two of which had been filed by the purported victims in this case. ROA.257, 496. The prosecutor's e-mail included an e-mail from the case agent stating: "As you know, he [apparently someone from Montgomery County] sent several of these reports, all with different report numbers. She [meaning defense counsel] asked for a specific report and provided the report numbers. And that's what I [the agent] gave to you [the prosecutor]. Do you want me to forward all the reports he sent me?" ROA.264 (quoted, without dispute from the government, in defendant's pleading) (emphasis added but bracketed materials in original except that names have been replaced with each person's role in the proceeding).

The report containing the complaint Ms. Swenson filed on November 16, 2013, states that Tammy Parker and Jerrell Singleterry had made an agreement with San Pareil regarding the adoption of the child they were expecting, had been matched with an adoptive family and been provided with living expenses, but had made a similar agreement with a different adoption agency and received expenses from that agency as well. ROA.2602. Ms. Swenson also complained that Ms. Parker and Mr. Jerrell had changed their phone numbers and not returned calls and that her agency had lost almost $20,000 in expenses. ROA.2602. The police report also contains a signed written statement by Ms. Swenson and

documentary evidence apparently provided by her at the time. ROA.2603-16.

Two of the additional police reports belatedly provided by the government contained complaints made by adoptive parents who were to be government witnesses at trial. ROA.264. The exculpatory and impeaching nature of the information in these reports was described in defense counsel's subsequent pleading as follows. See ROA.264-67. One report, made on November 30, 2013, containing Ms. Neidrich's complaint, contains a claim by her to have sent her payment on a different date than the date on the actual check that the government submitted as an exhibit and on a different date than she purports to have mailed it in the e-mails previously turned over to defense counsel. ROA.265; compare ROA.2238 (check dated September 18, 2013) with ROA.2251 (statement in report that check was sent September 16, 2013). The alleged double match hinges on whether Mr. Neidrich paid the fee for the match in a timely manner, and Ms. Neidrich's inconsistent statements are at least impeaching and arguably exculpatory. ROA.265. The defense did not previously have this statement. ROA.265. The exculpatory nature of this information again demonstrates the prejudice suffered by the defense from the government's failure to subpoena, and the loss of, the sanspareil.org account. See supra text, at 16-17.

One of the additional police reports turned over by the government contained the complaint of another adoptive parent, Ms. Steffen, who the government intended to call as a witness at trial. ROA.265. Ms. Steffen stated in the report that "she had good communication between both Simone and the prospective birth mother." ROA. 265; see also ROA.2563. This statement is contrary to the statement in the FBI 302 report, which

indicates that Ms. Swenson denied Ms. Steffen's initial request to speak with Ms. Parker and mentions no other conversations between Ms. Steffen and Ms. Parker. ROA.256; see also ROA.806-07. The statement also is a different version from the statement provided by Ms. Steffen to the FBI. Compare ROA.1615-16, with ROA.2577-28. It also showed that, after the government had received Ms. Steffen's report with her statement on December 6, 2013, it had drafted its FBI 302 report to exclude all of the contacts that Ms. Steffen had with Ms. Parker and Ms. Swenson between July and November in order to fit the indictment's theory that adoptive families had a difficult time contacting Ms. Swenson and birth mothers. Compare supra text, at 5 (allegations in indictment) and ROA.806-07 (FBI report), with ROA.775-80 (statement accompanying police report).

H. Ms. Swenson's Motion to Dismiss and the Lack of a Government Response.

After defense counsel received the new reports and accompanying documents from the government on Friday, February 3, 2017, she filed a motion to dismiss the indictment based on the government's violations of its constitutional obligations to produce exculpatory and impeaching evidence and its obligations under Fed. Rule Crim. P. 16 and the district court's order. In the motion, counsel described the sequence by which she notified the government of Ms. Swenson's Montgomery County report, which the government had received in December of 2013, and of the government's subsequent production of that report and additional police reports that the defense had never seen. See ROA.200-01; see also supra text, at 18-20. The motion explained that the police report showing that Ms. Swenson had filed a complaint for fraud against Ms. Parker and the material within the report were exculpatory because they rebutted a number of claims in

the indictment. ROA.200 n.1. The motion also explained that the report additionally was evidence rebutting any claim of recent fabrication at trial. ROA.200 n.1. In light of the sequence of events and the government's constitutional and rule-based violations, the motion asked the court to dismiss the indictment. ROA.201-03. The government did not file a response to this motion.

I. The February 6, 2017, Hearing on the Motion to Dismiss.

At the beginning of the hearing, the court asked if the government had a response to the motion. ROA.406. When the prosecutor claimed that she became aware of the Montgomery County police report on Friday, the court asked why the report was not part of the government's investigation. ROA.406. The prosecutor stated that the case agent had sent her the reports two or three years ago, that she did not remember opening the e-mail or downloading the documents, and that "I never had them in my file." ROA.407. The court responded that she did have the documents in her file once they were under her control. ROA.407.

The prosecutor claimed that the newly produced statements of family members were repetitious and that the police report showing Ms. Swenson's fraud complaint against Ms. Parker was nothing new to the defense and had nothing to do with the indictment. ROA.407. The court began to explain why a police report showing that Ms. Swenson did not know what Ms. Parker was doing and told law enforcement that Ms. Parker was misleading everyone would be exculpatory, but the prosecutor cut the court off stating: "Your Honor, the Defendant is charged with sending e-mails and getting money for –" ROA.408. The court informed the prosecutor that it knew the charge and that it was the

court, not the prosecutor, who determines what evidence was exculpatory and admissible. ROA.408. When the government insisted that the defense knew that Tammy Parker was "a scammer," the court responded: "It is a contemporaneous statement by the party to the case whom you have chosen to indict and not produce the stuff." ROA.408-09.

The court mentioned that there was "another defensive use of this" that it was not going to suggest in case no one had thought of it. ROA.409. Defense counsel reiterated that she made a request for Ms. Swenson's police report when she learned of it, and it turned out that the agent had five other police reports with statements, which were produced to her on Friday, even though they had been forwarded to the FBI in 2013. ROA.410.

Defense counsel also mentioned that the government had a sixth report too large to be produced on Friday via e-mail, but that it was going to be produced to the defense that day in court. ROA.411. When the court asked about this, the prosecutor stated that the report was of a family member who was not being used at trial, but that she did not get the file until Friday. ROA.411. The court responded that it was the prosecutor's job to make sure she has everything she or the case agent possesses. ROA.411. The court noted that the case was a year and a half old and had been under investigation for three years. ROA.411.

The prosecutor said that she had "been an open book," never tries to keep anything back, got evidence as she got it, and sometimes did not get everything. ROA.412. The court responded: "You're supposed to know what you're doing. You're supposed to be the one thinking of stuff" and telling the case agent what to do. ROA.412. Defense counsel pointed out that the newly produced reports for the government's trial witnesses were impeaching because they contained statements contrary to their statements in the FBI 302 reports and

that she did not know of the existence of these reports until Friday. ROA.413.

After discussion regarding the court's concern that this large file had not yet been produced, the court asked about that file and received the following response:

> THE COURT: Did you even rummage around in this too-large-to-e-mail file to see what might be in there?
>
> [PROSECUTOR]: Well, not the police report file, Your Honor, because, again, I was not aware of it, but it [sic] did my own investigation and created my own theory of the case.

ROA.414. When the prosecutor told the court that she had not interviewed this person and only had interviewed the witnesses in the indictment, the court stated that that was the problem and expressed concern about the prosecutor's selective and "circular" choice of witnesses and evidence. ROA.414.

Before taking a recess, the court asked the following question and had the following discussion with the prosecutor:

> What else is out there that you misplaced or didn't think was relevant so you didn't check it at all?
>
> [PROSECUTOR]: Nothing at this point, Your Honor.
>
> THE COURT: That's what you told me twice before. It turned out within days not to be true.
>
> [THE PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: It's like your bank robber telling me at his third sentencing that he's really sorry and now he understands it was wrong.

ROA.415.

After a recess, the court mentioned precedent addressing "the inventiveness of the government in not doing what it is supposed to do," such as "giv[ing] officers' reports but not witness statements, and then . . . giv[ing] witness statements but not other things." ROA.415. The court noted that interested parties, like the government, were not allowed to decide that exculpatory evidence is not really exculpatory. ROA.416. Finding that the case had been continued far too many times due to the defense's "trying to get supplemental records once they found out what the government had," the court refused to extend the case further and dismissed the indictment with prejudice. ROA.417. The prosecutor did not object to the dismissal with prejudice. ROA.418. On February 6, 2017, the court entered its order dismissing the indictment with prejudice. ROA.232.

J. Motion for Reconsideration, Responses, and Denial of the Motion.

On February 8, 2017, the government filed a motion for reconsideration claiming that there had been no violation of Brady v. Maryland, 373 U.S. 83 (1963), focusing solely on the police reports produced on the Friday before trial and arguing that no Brady violation occurred because it gave the defense the reports before trial. ROA.234-39. The government claimed that Ms. Swenson's written statement against Ms. Parker in the police report had no value. ROA.237 n.1. And, it argued that the proper remedy for the prosecutor's inadvertent mistake was a continuance. ROA.238-39.

On February 15, 2017, defense counsel filed a response to the government's motion for reconsideration, explaining at the outset why a dismissal with prejudice was the proper remedy:

> Over the course of four pre-trial conferences, the government represented that it had turned over all the evidence. Each time, within days, the government turned over new evidence including exculpatory and impeaching materials. If the defense had from the beginning the evidence it received during the last week before trial, its preparation of this case would have been entirely different. In short, the entire landscape of this case changed in the ten days before trial. Not only would the defense's strategy have been completely different, but it would have spent time finding other documents and evidence for its case in chief at trial.
>
> The government's pattern of failing to disclose evidence, and its current unwillingness to accept that its failures were material and prejudicial demonstrates that the integrity of this prosecution has been destroyed. The Court recognized exactly this when it entered both its oral and written orders dismissing the case. A continuance cannot be the remedy when a continuance will not solve the problem.

ROA.252-53.

The response then discussed the timeline of events in this case and the documents that the government had finally disclosed on January 27, 2017, and on February 3, 2017 (provided to the court as exhibits), and it explained how the documents were exculpatory and impeaching and how the defense had been prejudiced by the government's actions. ROA.252-70. Following this discussion, the response concluded as follows: "Here, the government's repeated misrepresentations as to its compliance with its discovery obligations and its continued unwillingness to take responsibility for its misconduct has irreversibly undermined the integrity of the prosecution against Ms. Swenson. Dismissal was appropriate." ROA.271.

On February 17, 2017, the government filed a response to Ms. Swenson's reply and a supplemental motion for reconsideration, setting out its theory of the case and summarizing the discovery that it had produced to the defense on March 23, 2016.

ROA.490-92 & n.3. The government repeated its explanation for having failed to obtain the complete sanspareil.org email account and the e-mails within it, stating that the case agent "was unable to retrieve" those e-mails because she "did not know how to retrieve e-mails from a 'org' e-mail account and was uncertain to whom she would direct a subpoena." ROA.492. The government also noted in a footnote that Exhibit 10, which was attached to its response, was a sample of items the defense already had in its possession. ROA.492 n.4.

The government then gave its account of the pretrial hearings, asserted that the defendant had notice that Ms. Parker was a "fraudster," ROA.492-49, and claimed that the FBI 302 reports produced to the defense prior to February 3, 2017, were "consistent with" the witness statements found in the Montgomery County Sheriff's Office reports. ROA.496. As shown above, the FBI 302 report on Ms. Steffen omitted a significant number of contacts between Ms. Swenson and Ms. Parker. See supra text, at 14, 19-20. The government also asserted that the witness statements in the police reports were "almost identical" to the statements that were produced on January 27, 2017. ROA.496.

The government then repeated its claims that there had been no Brady violation because Ms. Swenson's police report was not favorable to the defense, any discrepancies between each newly produced adoptive mother's statements and previously produced statements were immaterial, those statements had now been produced, and Ms. Swenson had suffered no prejudice. ROA.496-99. The government concluded that there were only four items at issue here, two witness statements, Ms. Swenson's statement in the police report, and the police report with other witness statements. ROA.499. According to the

government, the failure to produce these was "inadvertent." ROA.499.

With permission of the court, defense counsel filed a surreply pointing out that "Government Exhibit 10'" was actually "a copy of what the defense provided to the government on January 18, 2017, as reciprocal discovery." ROA.278 (footnote omitted).

On February 27, 2017, the district court entered its opinion on reconsideration finding as follows:

> The United States had this case for over three years. Half of that time was spent investigating Simone Swenson before the indictment was filed on July 29, 2015. Over the course of four pretrial conferences – within ten days of trial – the government represented that it had turned over all evidence. Each time it later disclosed new evidence of exculpatory and impeachment materials.
>
> The government conveniently forgot that it had in its possession (a) correspondence between the adoptive parents and Swenson, (b) police reports from 2013 filed by Swenson and adoptive parents – two of whom the government intended to call as witnesses at trial, and (c) statements by adoptive parents that were inconsistent with the Federal Bureau of Investigation's reports. Despite its obligation to investigate the case completely, the government relied on its witnesses to filter their own documents and select what they as interested party laymen considered to be relevant.
>
> Because the integrity of this prosecution has been destroyed, the government's motion for reconsideration is denied.

ROA.281.

K. The Government's Appeal, and the Fifth Circuit's Opinion.

On February 28, 2017, the government filed a notice of appeal. ROA.286. On July 3, 2018, the United States Court of Appeals for the Fifth Circuit reversed the district court's dismissal of the indictment with prejudice and remanded for further proceedings. See United States v. Swenson, 894 F.3d 677 (5th Cir. 2018). In its opinion, the Fifth Circuit

superficially noted that: (1) the government had allowed its witnesses to select the evidence, see id. at 680 & n.2; (2) the e-mail evidence produced by the government by way of its witnesses "consisted of incomplete e-mail strings that contained missing messages," id. at 680; (3) on January 27 (about 11 days before trial), "the government dumped a large number of documents on defense counsel," that the defense believed were exculpatory, including prior e-mails of witnesses and other documents with labels showing the government had received them in 2014, id.; and (4) "on February 3, only a few days before trial was set to begin, as a result of her own investigation, defense counsel learned of the existence of a police report that Ms. Swenson had made . . . regarding Swenson's allegations that one of the birth mothers had committed fraud," and when defense counsel contacted the prosecutor, the prosecutor sent defense counsel that report and additional police reports, id. at 681.[1] Finding merely that "the government had made some missteps," id. at 685, the Fifth Circuit reversed the district court's dismissal of the indictment. Id. at 685-86.

[1] The Fifth Circuit's opinion also found a statement that the district court had made about federal agents in the audience at a court hearing to be sexist and used that to conclude that the court had held the prosecutor's sex against her (notwithstanding that Ms. Swenson and her lead district court counsel are females). Compare id. at 681 & n.3, 685, with ROA.409-12.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Fifth Circuit has entered a decision in conflict with the decisions of this Court by failing to review for structural error and failing to defer to the district court's findings of fact – including its finding that the government's pattern of misconduct destroyed the integrity of the prosecution – and to the district court's authority and discretion to dismiss an indictment with prejudice either for prosecutorial misconduct that violates the Due Process Clause or for other reasons under its supervisory powers.

A. Introduction.

In the present case, the district court found that government engaged in repeated and flagrant prosecutorial misconduct that destroyed the integrity of the proceedings – in other words, that deprived Ms. Swenson of her right to due process and to effective assistance of counsel. And, the district court's findings were fully supported by the government's repeated failure to abide by its constitutional and rule-based obligations to produce documents to the defense, as well as its false statements to the court and its reliance on lay witnesses to select the government's evidence, which led to the loss of crucial e-mail responses in chains of e-mail communications in a prosecution alleging that Ms. Swenson had failed to keep in touch with the adoptive parents who were witnesses.

As discussed below, this Court has recognized that when the "waters of justice" have been "polluted" and the integrity of the proceedings have been destroyed, there is structural error that deprives a defendant of the right to fundamental fairness. Moreover, this Court has recognized that a district court judge plays a unique and significant role in reaching findings of fact and making credibility determinations and in protecting the fundamental fairness of the trial proceedings by exercising the court's supervisory powers.

In this case, the Fifth Circuit ignored precedent of this Court and reversed the district court's dismissal of the indictment with prejudice while reviewing for a violation of Brady v. Maryland, 373 U.S. 83 (1963), and for prejudice despite the district court's finding that the integrity of the proceedings had been destroyed. The Fifth Circuit's decision is in conflict with this Court's case law requiring review for structural error. The Fifth Circuit also reversed the district court's dismissal without any respect for or deference to the district court's authority, findings, or discretion, based on its own global findings of fact. Because the Fifth Circuit entered a decision contrary to this Court's decisions on the integrity of the proceedings and structural error, as well as on the proper role of the prosecutor, the defendant's constitutional rights, the supervisory powers of the district court, and the deference owed to a district court's findings, this Court should grant certiorari.

B. This Court Should Grant Certiorari Because the Fifth Circuit's Decision Is Contrary to this Court's Precedent in Light of the Fact that the District Court Determined that the Prosecutorial Misconduct Destroyed the Integrity of the Proceedings.

Having observed the prosecutor's purposeful misconduct and the repeated deprivation of Ms. Swenson's constitutional rights, the district court made the following express and implied findings of fact and credibility choices at the February 6, 2017, hearing and in its orders dismissing the indictment: (1) the prosecutor had the 2013 undisclosed police reports and related documents in her file and under her control for years; (2) the 2013 undisclosed police reports and related documents were exculpatory and impeaching; (3) the prosecutor had not done her job, had failed to supervise the case agent and investigation, and did not know what she was doing; (4) the prosecutor was unaware of

what evidence was in the government's possession because of her purposefully selective choice to review only a portion of the evidence based on her theory of the case and her view of what was relevant; (5) the prosecutor's repeated misrepresentations that all discovery had been turned over to the defense showed that she was not credible and could not be trusted to tell the truth, "like your bank robber telling me at his third sentencing that he's really sorry and now understands it was wrong"; (6) the prosecutor had turned over supplemental records only when the defense had found out what the government had, causing repeated delay; (7) "[o]ver the course of four pretrial conferences – within ten days of trial – the government represented to the court that it had turned over all evidence[, and] [e]ach time it later disclosed new evidence of exculpatory and impeachment materials"; (8) "[t]he government conveniently forgot that it had in its possession (a) correspondence between the adoptive parents and Swenson, (b) police reports from 2013 filed by Swenson and adoptive parents – two of whom the government intended to call as witnesses at trial, and (c) statements by adoptive parents that were inconsistent with the Federal Bureau of Investigation's reports"; (9) "[d]espite its obligation to investigate the case completely, the government relied on its witnesses to filter their own documents and select what they as interested party laymen considered to be relevant"; and (10) "the integrity of this prosecution has been destroyed." See supra text, at 20-27.

The district court's finding that "the integrity of this prosecution has been destroyed" is a crucial in this case. In Brecht v. Abrahamson, 507 U.S. 619 (1993), while distinguishing between structural errors and trial errors, this Court noted "the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one

that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceedings as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." Id. at 638 n.9; see also United States v. Bowen, 799 F.3d 336, 351-53 (5th Cir. 2015). This type of error is "'assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis. The integrity of the trial, having been destroyed, cannot be reconstituted by the appellate court.'" Cupit v. Whitley, 28 F.3d 532, 538 n.16 (5th Cir. 1994) (quoting Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994)).

The first reason that this Court should grant certiorari is that the Fifth Circuit's decision completely ignores the analysis in Brecht and the district court's findings on the destruction of the integrity of the proceedings and instead analyzes the prosecution's pattern of misconduct under Brady and for prejudice. See United States v. Swenson, 894 F.3d 677, 683-84 (5th Cir. 2018). In this regard, the Fifth Circuit's opinion breezes over the district court's findings and relies on its own view of the facts that the prosecution delayed producing, but did not suppress, evidence. See id. The Fifth Circuit instead should have focused on the district court's findings, which hinged on the prosecution's untruthfulness and misconduct, making it impossible to trust that the prosecution was playing or could play its proper role under the Constitution. And, the Fifth Circuit's opinion never discusses or analyzes the district court's findings that the prosecution allowed its witnesses to select the evidence to be used by the prosecution and thereby allowed other crucial evidence in the form of e-mails to be lost forever. See supra text, at 20-28.

This leads to the second reason why this Court should grant certiorari: the decision of the Fifth Circuit fails to defer to the district court's findings of fact and credibility determinations and thus is contrary to Anderson v. Bessemer City, 470 U.S. 564 (1985). In Anderson, this Court made clear that an appellate court may not reverse a lower court's finding of fact simply because it would decide the case differently, but may only do so "'if the reviewing court based on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. at 573 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). The Court also made clear that a court of appeals "oversteps the bounds of its duty" if "it undertakes to duplicate the role of the lower court." Id. "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." Id. at 574. Moreover, this Court left no doubt about the rationale for an appellate court's duty of deference:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" Wainwright v. Sykes, 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

Id. at 574-75 (parallel citations omitted).

The Fifth Circuit entered a decision in conflict with Anderson by failing to show deference to the district court's findings of fact and credibility determinations and drawing its own inferences from those facts. The Fifth Circuit never considered most of the district court's findings on the pattern of prosecutorial misconduct leading to the loss of evidence, and it instead relied on its own global view of the facts finding merely that the production of evidence was "delayed." See Swenson, 894 F.3d at 683-84. In fact, nowhere does the Fifth Circuit's opinion even apply Anderson's standard of review in any analysis of the district court findings of fact. See id.

This Court also should grant certiorari because the Fifth Circuit entered a decision in conflict with Berger v. United States, 295 U.S. 78, 88 (1935), Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Hastings, 461 U.S. 499, 505 (1983), by reinstating the indictment where the district court found that the integrity of the prosecution had been destroyed by the government's failure to produce exculpatory evidence, its false statements to the court, and its misconduct that allowed private parties to selectively pick and choose the evidence to be used by the prosecution, which resulted in the permanent loss of other evidence.

This Court had made clear that the Constitution embodies an "overriding concern with the justice of finding guilt." United States v. Agurs, 427 U.S. 97, 112 (1976).[2] Moreover, the Due Process Clause guarantees the right to a trial that encompasses the tenets of fundamental fairness. See, e.g., Rivera v. Illinois, 556 U.S. 148, 158 (2009); see also In

[2] Overruled on other grounds as stated in United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir. 1986).

re Murchison, 349 U.S. 133, 136 (1955). This Court, moreover, has recognized that the prosecutor has a unique obligation to ensure the fundamental fairness of the trial proceedings: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); see also Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803 (1987) (same).

It, therefore, is fundamental error to turn the power of the prosecution over to an interested private party. See Young, 481 U.S. at 805-14. In fact, "[g]iving the victim a formal role in a jury trial introduces an inquisitorial aspect to the adversarial system that prevails in the United States . . . Our Founding Fathers rejected the inquisitorial system of criminal justice of continental Europe, and instead adopted the adversarial system of England." Scott P. Boylan, Coffee from A Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution, 4 U.C. Davis J. Int'l L. & Pol'y 103, 105-06 (1998)) (footnote omitted). Nor can a prosecutor delegate to others the obligation to review and disclose exculpatory evidence. See, e.g., Kyles v. Whitley, 514 U.S. 419, 438 (1995).

The Constitution's "overriding concern with the justice of finding guilt," Agurs, 427 U.S. at 112, and the due process guarantees of a trial that encompasses the tenets of fundamental fairness, See, e.g., Rivera, 556 U.S. at 158; see also In re Murchison, 349 U.S. at 136, also are encompassed in a criminal defendant's constitutional rights, as well as in a

defendant's rights under the federal rules. For example, "the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (internal quotation marks and citation omitted). "The core of this right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" Kansas v. Ventris, 556 U.S. 586, 590 (2009) (quoting Michigan v. Harvey, 494 U.S. 344, 348 (1990)). Moreover, a defendant's due process rights are violated when the prosecution suppresses evidence that is favorable to the defense and is material either to guilt or to punishment, "irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87.

The fundamental fairness of a federal criminal proceeding also is protected by the supervisory power of a federal court: "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1943).[3] A federal court, therefore, may formulate procedural rules to implement a remedy for violation of recognized rights, to preserve the integrity of a jury trial and any conviction that might result, and to deter government misconduct. See United States v. Hastings, 461 U.S. 499, 505 (1983). In other words, a federal court may use its supervisory powers to deter government misconduct so that it does not become an accomplice to such misconduct and to guard against the "[p]ollution" of the "waters of justice." Mesarosh v. United States,

[3] Modified on other grounds by statute as noted in Corley v. United States, 556 U.S. 303, 322 (2009).

352 U.S. 1, 14 (1956); see also United States v. Payner, 447 U.S. 727, 744 (1980).

Lower courts also have recognized that a district court may dismiss an indictment with prejudice based on the government's misconduct. See, e.g., United States v. Chapman, 524 F.3d 1073, 1084-85 (9th Cir. 2008). For example, in Chapman, the Ninth Circuit affirmed the district court's dismissal of the indictment with prejudice finding the following:

> . . . In this case, the failure to produce documents and to record what had or had not been disclosed, along with the affirmative misrepresentations to the court of full compliance, support the district court's finding of "flagrant" prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense. We note as particularly relevant the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and yet it did nothing to ensure it had provided full disclosure until the trial court insisted it produce verification of such after numerous complaints from the defense.

Chapman, 524 F.3d at 1085.

In the present case, however, the Fifth Circuit reversed the district court's dismissal of the indictment with prejudice even though the district court's conclusions were fully supported by its findings that the prosecutor (a) had failed to abide and was incapable of abiding by her role as a minister of justice, (b) had violated Ms. Swenson's constitutional rights by her misconduct, and (c) could not be trusted to carry her role and observe Ms. Swenson's rights and the court's own orders, all to such a flagrant degree that it had destroyed the integrity of the prosecution. See supra text, at 20-27. Here, the district court's dismissal of the indictment with prejudice was warranted in order to implement a remedy for the prosecutor's repeated violation of Ms. Swenson's constitutional rights and the

court's discovery order, to avoid proceeding with a jury trial whose integrity had been polluted and destroyed, and to deter the government's misconduct. See Hastings, 461 U.S. at 505; see also Mesarosh, 352 U.S. at 14. And, the Fifth Circuit's decision forcing Ms. Swenson to trial in the face of this violation of fundamental fairness is contrary to this Court's decisions in Berger, Brady, and Hastings as the following discussion shows.

First, the government repeatedly violated Ms. Swenson's constitutional rights and the court's discovery order throughout the course of the proceedings by misrepresenting that it had complied with its rule-based and constitutional discovery obligations. See generally Lockhart, 506 U.S. at 368; Brady, 373 U.S. at 87; Ventris, 556 U.S. at 590; Fed. R. Crim. P. 16(a)(1)(E). Even though the case agent received Ms. Swenson's Montgomery County police report and related materials in December of 2013 and sent them to the prosecutor shortly thereafter, the prosecutor did not produce them until after the close of business on the Friday before trial in February of 2017 and only in response to the request of the defense after it had discovered that they existed. Moreover, after the government received the Montgomery County investigative materials in 2013, it drafted an FBI 302 on Maggie Steffen that omitted all of the exculpatory material contained in the Montgomery County materials and turned that FBI 302 report, but not the Montgomery County reports and materials, over to the defense. And, when the defense found out about Ms. Swenson's Montgomery County police report and requested it, the response that the case agent sent to the prosecutor shows that the prosecutor knew about other reports, that only Ms. Swenson's report had been forwarded in response to the defense's request, and that there was doubt about whether the prosecutor wanted the other reports forwarded.

Furthermore, the Montgomery County reports and investigative materials changed the entire nature of the defense, showing that Tammy Parker had defrauded both Ms. Swenson and the adoptive family and that Ms. Swenson had pursued criminal charges against her contemporaneously for the fraud. See, e.g., United States v. Luffred, 911 F.2d 1011, 1015 (5th Cir. 1990) (holding defendant may introduce reverse evidence under Fed. R. Evid. 404(b)). The Montgomery County reports and materials also supplied a defense against Ms. Steffen's allegations about lack of contact with the birth mother and a defense to Ms. Neidrich's claims because they showed that she had defaulted with regard to her financial responsibilities.

The government also violated the court's discovery order and Ms. Swenson's constitutional rights by producing a mass of e-mails and statements by adoptive family members well after the court's discovery deadline and eleven days before trial, on January 27, 2017. These materials clearly were exculpatory and impeaching as they contradicted witness statements in the FBI's 302 reports and provided evidence rebutting the allegations in the indictment. Even at the January 23, 2017, pretrial conference, almost a week after the government's court ordered disclosure date, the government produced two new exhibits and admitted that it still was adding witnesses and documents to the evidence in this case. Furthermore, when the defense noted that the government's two new exhibits had not previously been produced to the defense and the court asked where the exhibits had "come from," the government avoided answering the question and instead changed the topic. And, when the court asked whether the government had sought out and reviewed cell phone records and text messages, the government falsely asserted that "that's not part of our

case," with the court only realizing later that "evidence of phone calls is relevant" after defense counsel pointed out the indictment itself accused Ms. Swenson of not returning phone calls.

All the while, the prosecutor kept representing to the court that she had turned over all of the evidence in this case and did not want the court to think she was hiding anything and alternatively, when those statements were shown to be false, representing that she had made a mere mistake, that she had not been aware of the documents, or that there had been no Brady violation. Not only does the case agent's message to the prosecutor, which shows that the prosecutor knew about the other reports, put a lie to the prosecutor's pleas of innocence, but so do the statements made by the prosecutor herself at the hearing on the motion to dismiss.

On the day before trial at the pivotal hearing to determine whether the indictment should be dismissed based on the prosecutor's conduct, the court asked the prosecutor whether she had reviewed the police report contained in the witness file that her case agent was holding in court in her presence. The prosecutor told the court that she was unaware of the police report, but that she had her own theory of the case and had done her own investigation. There is nothing that could have more starkly demonstrated for the court that the prosecutor's claims of ignorance and inadvertence were due to her purposeful choice to look at what she chose to look at and let her constitutional and discovery obligations to be damned. Indeed, the court's question in response to the prosecutor comment – "What else is out there that you misplaced or didn't think was relevant so you didn't check at all?" – shows that a light bulb finally went off in the court's head shining a ray of understanding

that it had been the prosecutor's purposeful and selective choices all along that had infected the integrity of the collection and production of evidence in this case.

This key realization by the court also was the capstone of the court's concern throughout the proceedings that the prosecutor had no understanding and was incapable of abiding by her unique role as a representative "of a sovereignty whose obligation to govern impartially is . . . compelling . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done," while "refrain[ing] from improper methods calculated to produce a wrongful conviction." Berger, 295 U.S. at 88. The facts and the court's comments throughout the proceedings show that the court lost faith that the prosecutor had the ability and understanding "to make certain that the truth [wa]s honored to the fullest extent possible," United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988) (citation omitted), and to recognize that the proceeding was "a quest for the truth" and that, "[i]f it happen[ed] that the government's original perspective on the events" proved to be inaccurate, that was in the interest of both the government and the defendant. Id.

At the very first pretrial conference, the court had to make clear to the prosecutor – when she attempted to shift the government's discovery burden to Ms. Swenson – that it was the government's responsibility to marshal the evidence and that its loss of evidence did not give the government any greater latitude. When the court learned that the government had produced only piecemeal strips of e-mails unrelated to each other, it expressed its grave concern with allowing interested witnesses to decide what is relevant and to withhold other documents, as well as its concern that the government itself had not reviewed evidence to determine whether the evidence was representative of the e-mails in

existence.[4] In essence, the court's concern from the outset and throughout the proceeding was that the prosecutor had delegated her solemn obligations to seek the truth and to review and disclose the evidence to private interested parties and had converted the proceeding into an inquisition rather than an adversarial proceeding contemplated by the Constitution and conceived by the Founders. See Scott P. Boylan, supra at 105-06; see also Kyles, 514 U.S. at 438; cf. Young, 481 U.S. at. 805-14.

In addition, when questioned by the court about why the government had not subpoenaed the sanspareil.org e-mail account when it existed, the prosecutor told the court that it was a technical problem that resulted from the fact that the e-mail account ended in ".org." and thus the "lack of, as she said, the domain name." See ROA.337-38, 340. The government repeated that explanation in its response to Ms. Swenson's reply and supplemental motion for reconsideration. The explanation, however, rings hollow in light of the fact that the FBI knows, as do lawyers and members of the general public, how to open up the hidden header attached to an e-mail in order to find the Internet service provider (ISP) and domain name.[5] And, when the court asked whether the government had sought

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[4] Indeed, the Fifth Circuit itself has expressed similar concerns with using selective portions of evidence in the related context of tape recorded evidence, stating that "it breaks the flow of the conversation thus decreasing the usefulness of the evidence" and "permits the jury to speculate erroneously as to what was said in the deleted portion." United States v. Bright, 630 F.2d 804, 814 n. 16. In fact, in Bright, the court stated that it was not unaware of the problems caused by selective deletion of conversations "and thus would be extremely reluctant to order them." Id. at 814.

[5] See, e.g., United States v. Loera, 182 F. Supp. 3d 1173, 1225 (D.N.M. 2016) (FBI agent's search warrant affidavit discussed message header containing the Internet protocol (IP) address and revealing that the message was posted from a news server owned by Innovative Technology, Ltd., an Internet service provider (ISP)), appeal filed, No. 17-2180 (10th Cir. Oct. 16, 2017); Ceglia v. Zuckerberg, No. 10-CV-00569 A(F), 2013 WL 1208558, at *17 (W.D.N.Y. Mar. 26, 2013)

out and reviewed cell phone records and text messages, the government falsely asserted that "that's not part of our case," with the court only realizing later that "evidence of phone calls is relevant" after defense counsel pointed out the indictment itself accused Ms. Swenson of not returning phone calls.

As the discussion progressed during the first pretrial conference, the court expressed additional serious concerns about the prosecutor's understanding of and ability to carry out her role to seek justice and pursue the truth: (1) the court had to make clear to the prosecutor that doing one thing right was not sufficient to satisfy her responsibility; (2) it asked why the prosecutor had not subpoenaed the computer of a new witness who was an employee of Sans Pareil for a few months in 2013 and had e-mails on her computer, to which the prosecutor responded that she was not sure why but that the witnesses testimony was sufficient and that was "what I need"; (3) the court responded that the prosecutor was obliged to investigate completely and wondered why the prosecutor would rely on a memory from 2013 rather than to check the witness's e-mails; and (4) in response to the

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(unpublished) (examination of internet headers of StreetFax e-mails confirmed that e-mails were sent and received through servers used by Adelphia (Ceglia's internet service provider for his Ceglia@adelphia.net internet account)."), aff'd, 600 Fed. Appx. 34 (2d Cir. 2015) (unpublished); Florida Family Ass'n, Inc. v. Sch. Bd. of Hillsborough Cty., 494 F. Supp. 2d 1311, 1318 (M.D. Fla. 2007) ("McBryar sent Graber three or four e-mail messages. According to Graber, upon receiving the e-mails, he looked at the e-mails' internet header and discovered that the e-mails were coming from the same IP address and had the domain name of indiachildren.org.") (record citations omitted); see generally wikiHow to Read Email Headers, available at https://www.wikihow.com/Read-Email-Headers (last visited on November 2, 2017) (describing the contents of e-mail headers and how to read them); Analyzing E-mail, available at https://www.oasis-open.org/khelp/kmlm/user_help/html/analyzing_email.html (last visited Nov. 2, 2017) (discussing e-mail header of an e-mail sent from a .org e-mail address to a .com email address); cf. 15 U.S.C.A. § 7704(a)(1)(A) (prohibiting materially misleading header information in a commercial e-mails, including an originating e-mail address, domain name, or Internet Protocol address obtained by means of false or fraudulent pretenses).

prosecutor's failure to obtain and review phone records, the court told the prosecutor that "[i]gnorance is not a good basis for going on with this." At the pretrial conference on the next day, the court again made clear to the government that it needed to comply immediately with its constitutional and rule-based discovery obligations.

After the government produced on January 27, 2017, the previously undisclosed huge mass of exculpatory and impeaching documents, the prosecutor stood mute in court at the January 31, 2017, pretrial conference as defense counsel (naively) stated that she believed this would be the last disclosure from the government. Of course, at that very moment, the prosecutor was still sitting on the Montgomery County police reports and investigative materials that she only later produced when defense counsel uncovered that one of those reports had been in the prosecution's possession since late 2013.

At the hearing on the motion to dismiss on February 6, 2017, the prosecutor again demonstrated to the court that she had no understanding of her role in the federal criminal justice system and thus was incapable of carrying out that role. After repeated admonishments and warnings, the prosecutor stood before the court making excuses for the repeated violations of the court's discovery order and Ms. Swenson's constitutional rights, stating: (1) she only became aware of the Montgomery County report on Friday; (2) it had been e-mailed to her by the agent two or three years ago, but she did not remember opening the e-mail or downloading the documents; (3) despite receiving the e-mail and the documents two to three years ago, she took the position that "I never had them in my file"; and (4) the reports contained nothing new and had nothing to do with the indictment. Among other responses by the court, it told the prosecutor that the reports were in her file

because they were under her control, that it was up to the court, not her, to decide want was exculpatory, that it was her job to make sure that the materials were turned over whether they were in the case agent's or her possession, and that she was supposed to know what she was doing. And, as discussed previously, the court had an epiphany that it had been the prosecutor's purposeful and selective choices all along that had infected the integrity of the collection and production of evidence in this case after the prosecutor responded that she had not reviewed the police report in the file her agent was holding because she had her own theory of the case and had done her own investigation.

Having observed the prosecutor's purposeful misconduct and the repeated deprivation of Ms. Swenson's constitutional rights, the district court made the following express and implied findings of fact and credibility choices at the February 6, 2017, hearing and in its orders dismissing the indictment: (1) the prosecutor had the 2013 undisclosed police reports and related documents in her file and under her control for years; (2) the 2013 undisclosed police reports and related documents were exculpatory and impeaching; (3) the prosecutor had not done her job, had failed to supervise the case agent and investigation, and did not know what she was doing; (4) the prosecutor was unaware of what evidence was in the government's possession because of her purposefully selective choice to review only a portion of the evidence based on her theory of the case and her view of what was relevant; (5) the prosecutor's repeated misrepresentations that all discovery had been turned over to the defense showed that she was not credible and could not be trusted to tell the truth, "like your bank robber telling me at his third sentencing that he's really sorry and now understands it was wrong"; (6) the prosecutor had turned over

supplemental records only when the defense had found out what the government had, causing repeated delay; (7) "[o]ver the course of four pretrial conferences – within ten days of trial – the government represented to the court that it had turned over all evidence[, and] [e]ach time it later disclosed new evidence of exculpatory and impeachment materials"; (8) "[t]he government conveniently forgot that it had in its possession (a) correspondence between the adoptive parents and Swenson, (b) police reports from 2013 filed by Swenson and adoptive parents – two of whom the government intended to call as witnesses at trial, and (c) statements by adoptive parents that were inconsistent with the Federal Bureau of Investigation's reports"; (9) "[d]espite its obligation to investigate the case completely, the government relied on its witnesses to filter their own documents and select what they as interested party laymen considered to be relevant"; and (10) "the integrity of this prosecution has been destroyed." See supra text, at 20-27. The facts fully support these findings, and, at the very least, the Fifth Circuit's opinion failed to address why the district court clearly erred in making each of these findings of fact and the credibility determinations that underlie its conclusions.

As set out above, the district court's findings show deliberate and especially egregious constitutional and rule-based violations combined with a pattern of prosecutorial misconduct that so infected the prosecution as to warrant dismissal with prejudice because the integrity of the proceedings had been destroyed. As discussed, the district court found that the prosecution had repeatedly failed to turn over exculpatory and impeaching materials, had relied on interested parties to filter the evidence for the government, and had thereby destroyed the integrity of the prosecution. These findings demonstrate that the

prosecution has made it impossible for Ms. Swenson to defend herself in accordance with the requirements of the Sixth Amendment's right to the assistance of counsel and in accordance with the Due Process Clause and thus has undermined the fundamental fairness of the proceedings.

"The civilized conduct of criminal trials cannot be confined within mechanical rules." McNabb, 318 U.S. at 346 (internal quotation marks omitted). In accordance with the Constitution and its role within it, the district court here relied on its "learning, good sense, fairness and courage," id. at 346-47, to find that the repeated prosecutorial misconduct had violated Ms. Swenson's constitutional rights and destroyed the integrity of the prosecution.

For the foregoing reasons, this Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, petitioner Simone Swenson prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: October 1, 2018

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By H. Michael Sokolow
H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

UNITED STATES of America, Plaintiff–Appellant

v.

Simone SWENSON, Defendant–Appellee.

No. 17-20131

United States Court of Appeals, Fifth Circuit.

FILED July 3, 2018

Background: Defendant was charged with mail fraud and wire fraud in connection with her operation of adoption agency. The United States District Court for the Southern District of Texas granted defendant's motion to dismiss the indictment and denied the government's motion for reconsideration. Government appealed.

Holdings: The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

(1) government's delayed disclosure of documents did not violate *Brady*;

(2) government's violation of discovery deadlines did not warrant dismissal of indictment; and

(3) there was no prosecutorial misconduct justifying dismissal of indictment.

Reversed and remanded.

1. Criminal Law ⇐1149

When a dismissal of indictment is predicated upon the district court's supervisory powers, the Court of Appeals reviews only for an abuse of discretion.

2. Criminal Law ⇐1158.1

Court of Appeals reviews any factual finding from the district court, including credibility determinations, only for clear error.

3. Criminal Law ⇐1158.1

A factual finding is "clearly erroneous" only if, based on the entirety of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐1139, 1158.24

Court of Appeals reviews a district court's determination on a *Brady* claim de novo, but defers to factual findings underlying the district court's decision.

5. Constitutional Law ⇐4594(1)

Under *Brady*, the government violates a defendant's due process rights if it withholds evidence that is favorable to the accused and material to the defendant's guilt or punishment. U.S. Const. Amend. 5.

6. Criminal Law ⇐1991

Brady rule applies irrespective of the good faith or bad faith of the prosecution.

7. Criminal Law ⇐1999

Brady extends to impeachment evidence as well as exculpatory evidence.

8. Criminal Law ⇐1991

To prevail on a *Brady* claim, 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.

9. Criminal Law ⇐2007

If a defendant received *Brady* material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have or should have been.

10. Criminal Law ⇐2007

Mere speculation that a trial might have gone differently is insufficient to show prejudice from a tardy disclosure of *Brady* material.

11. Criminal Law ⇐2007

Government's delayed disclosure of documents to defendant in fraud prosecution did not violate *Brady*; defendant's argument that she would have changed her trial preparation and strategy if she had received the documents at the beginning of the case was speculative, continuance of trial would have solved most of the problems created by the delayed disclosure, and defendant likely could have used the evidence effectively at trial even absent a continuance.

12. Criminal Law ⇐2008

The usual remedy for a *Brady* violation is a new trial.

13. Criminal Law ⇐627.8(6)

A district court commands broad discretion when deciding whether to impose sanctions for discovery violations.

14. Criminal Law ⇐627.8(6)

Before employing discovery sanctions, a district court must carefully weigh several factors: (1) the reasons why disclosure was not made; (2) the amount of prejudice to the opposing party; (3) the feasibility of curing such prejudice with a continuance of the trial; and (4) any other relevant circumstances.

15. Criminal Law ⇐627.8(6)

If the district court decides to sanction a party for discovery violations, it should impose the least severe sanction that will accomplish the desired result, that is, prompt and full compliance with the court's discovery orders.

16. Criminal Law ⇐627.8(6)

Government's violation of discovery deadlines in fraud prosecution did not warrant dismissal of indictment with prejudice; although district court chose to dismiss indictment because granting a continuance would cause "too much delay," defendant was not in custody during pretrial proceedings and had already asked for four continuances, and district court did not explain why one more continuance, the first requested by the government, would cause too much delay.

17. Criminal Law ⇐1986

Whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed for prosecutorial misconduct only where the defendants' case has been unfairly prejudiced.

18. Criminal Law ⇐1986

The supervisory authority of the district court includes the power to impose the extreme sanction of dismissal with prejudice only in extraordinary situations and only where the government's misconduct has prejudiced the defendant.

19. Criminal Law ⇐1986

Dismissal of an indictment with prejudice is a rare result because, even in the face of prosecutorial misconduct, there is a public interest in having indictments prosecuted.

20. Criminal Law ⇐2008

Government's delayed disclosure of documents to defendant in fraud prosecution did not amount to prosecutorial misconduct justifying dismissal of indictment; there was no indication that prosecution intentionally withheld documents or acted in bad faith, and while prosecution did miss discovery deadline, the documents were given to defendant before trial, and a

continuance would have remedied any prejudice.

21. Criminal Law ⇐1991

A prosecutor cannot delegate the duty to review exculpatory evidence.

Appeal from the United States District Court for the Southern District of Texas

Eileen K. Wilson, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff–Appellant.

Marjorie A. Meyers, Federal Public Defender, Charlotte Anne Herring, Evan Gray Howze, Assistant Federal Public Defender, H. Michael Sokolow, Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant–Appellee.

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

We decide whether the district court abused its discretion by dismissing an indictment with prejudice because the prosecution missed pretrial discovery deadlines, mistakenly withheld some relevant documents until the eve of trial, and committed other errors that led the district court to conclude the "integrity of the prosecution ha[d] been destroyed." We reverse the dismissal order and remand for further proceedings.

FACTS AND PROCEEDINGS

The government indicted Simone Swenson, the owner and operator of an adoption agency, for fraud because, on multiple occasions, she matched two prospective families with the same birth mother as a means to secure funds from both prospective families.[1] According to the indictment, once Swenson received the required fees from the adoptive families, she would avoid contact with them. And "she would find a way, through lies and misrepresentations, to get out of the double matches."

Swenson retained counsel and pleaded not guilty to the charges. She was released on bond, and she has not been in custody since August 2015.

Swenson's investigation generated many documents, rendering the case fact intensive. Swenson's retained counsel sought an initial continuance because she was "not prepared to proceed to trial." Soon thereafter, Swenson apparently could no longer afford her privately retained counsel, who withdrew from the case. The office of the Federal Public Defender was appointed to represent her. Swenson's new counsel asked for a second continuance because she was new to the case and had not yet received the discovery from the prosecution. Swenson then sought, and was granted, two more continuances, because "defense counsel [was] still waiting to receive additional documents requested from third-parties that [were] necessary to fully investigate the case and to prepare for trial."

Trial was scheduled for February 7, 2017. The district court imposed deadlines on the parties to disclose all of their requisite discovery under Federal Rule of Criminal Procedure 16(a). The government had until January 17 to comply.

After the parties produced their documents, but before the pretrial conference, defense counsel expressed concerns about

1. The government charged her with two counts of mail fraud and two counts of wire fraud and gave notice of criminal forfeiture. *See* 18 U.S.C. §§ 1341, 1343.

the prosecution's discovery. By way of background, some of the claims in the indictment stated that, to perpetuate her fraud, Swenson "was always available and responsive to prospective adoptive families prior to receiving agency fees." However, once she "received the necessary fees from the adoptive families, she was unavailable and would not return phone calls for long periods of time, if at all." To prove these claims, the prosecution sought access to the email communications between the victimized families and Swenson. The prosecution wanted to subpoena the email provider—"sanspareil.org"—but was having trouble because of the domain name.[2] Oddly, having encountered this difficulty, the prosecution's solution was to ask the victimized families to search their own accounts and send anything they thought was relevant. Swenson objected that these emails had never been authenticated and that the prosecution's production consisted of incomplete email-strings that contained missing messages.

On January 23, the district court held the first (of four) pre-trial hearings to discuss the indictment, motions in limine, exhibits, and discovery. Defense counsel explained her concern that the prosecution was allowing the victimized families and witnesses to decide whether evidence was relevant. The district court agreed with the defense that this was problematic because the prosecution was abdicating its duty to determine whether exculpating evidence existed. The prosecutor attempted to mollify the district court by explaining that she "just didn't want the court to think we are hiding evidence or trying not to produce things" and "[d]iscovery has not been an issue in this case. I am very open. I give everything to defense counsel as soon as I get it, Your Honor. I make copies for everyone." The prosecutor later reiterated that she was not "hiding anything." The district court ordered the prosecutor to subpoena *all* of the emails. And the prosecution offered to obtain search warrants for the families' and witnesses' emails. The defense agreed to this plan, but stated that it was ready for trial and did not wish to wait any longer.

On January 24, the parties had a second pretrial conference in the district court's chambers, and he signed the search warrants that had been discussed in the first pretrial conference. There is no transcript of this proceeding, but—according to defense counsel—the district court "made clear to the government that it should immediately comply with its constitutional and rule-based discovery obligations."

A few days later, on January 27, the prosecution dumped a large number of documents on defense counsel. These documents included emails from the victimized families, which contained messages that Swenson believed are inconsistent with the families' statements in FBI reports. There was also a set of documents labeled "Dropbox files received from Maggie Steffen on 2/14" and another set labeled "Documents received from Kathleen Ruysser 2/2014." Swenson believed that many of these documents contained exculpatory material.

On January 29, defense counsel moved for a continuance in light of the data dump. The parties held another pretrial conference with the district court on January 31. Despite receiving the large data dump a few days before, defense counsel withdrew her motion for a continuance, stating she was ready for trial. Defense counsel further stated that she believed that she had

2. Swenson's brief includes a footnote explaining that it is not difficult to find the Internet service provider and domain name of .org addresses.

received all the documents from the government.

Then, on February 3, only a few days before trial was set to begin, as a result of her own investigation, defense counsel learned of the existence of a police report that Swenson had made to the Montgomery County Sheriff's Office regarding Swenson's allegations that one of the birth mothers had committed fraud. Specifically, the report stated that the birth mother had agreed with Swenson to give up her baby and receive living expenses, but the birth mother had made the same agreement with a different adoption agency.

Defense counsel contacted the prosecutor, who emailed her that report, along with four more reports, two of which had been filed by victimized families. Swenson claimed that these reports also contained at least impeaching, if not exculpatory material, including one statement from a victim explaining that "she had good communication between [Swenson] and the prospective birth mother." Swenson argued that this statement directly refutes an FBI report that indicates Swenson denied the victim's initial request to speak with the birth mother. These documents also showed that, after receiving the victim's report, the FBI report had been redrafted to exclude all of the contacts that the victim had with Swenson and the birth mother to fit the indictment's theory that the victimized families had a difficult time communicating with Swenson and the mothers.

Swenson immediately moved to dismiss based on violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Federal Rule of Criminal Procedure 16, and the district court's discovery order. The government did not file a response to the motion.

On February 6, the day before trial was supposed to begin, the parties had a hearing before the district court regarding the motion to dismiss. The government delivered yet another file of documents that had been too large to deliver via email on Friday. The district court asked the prosecution if it had a response to the motion to dismiss and why Swenson's police report was not a part of the government's investigation. The prosecutor explained that the reports were part of the investigation, and that she had received them years before. The prosecutor apologized. She explained: "It is my mistake, Your Honor. I don't ever remember opening the e-mail or downloading the documents." The prosecution urged, however, that the reports were "repetitious" and the fact that Swenson had been scammed by a birth mother had nothing to do with her double-matching scheme.

The district court excoriated the prosecution for the mistake: "You're supposed to know what you're doing. You're supposed to be the one thinking of stuff." The district court then apparently attributed her mistake to her sex: "It was lot simpler when you guys wore dark suits, white shirts and navy ties.... We didn't let girls do it in the old days." [3] After discussing the newly produced evidence, the district court asked: "What else is out there that you misplaced or didn't think was relevant so you didn't check it at all?" The prosecutor tried to assure the district court that she was not intentionally withholding any information: "I have been an open book. I never try to keep anything back." When asked if she had searched the too-large file

3. At oral argument, Swenson's counsel contended that the record is ambiguous and perhaps the district court was speaking not to the prosecutors, but to other women present at the hearing. Regardless, such comments are demeaning, inappropriate, and beneath the dignity of a federal judge.

that the prosecution delivered to the defense that morning, the prosecutor said no because she had not been aware of it. But she stressed that she "did [her] own investigation and created [her] own theory of the case."

The district court then pronounced that "the government has had this case for three years. That should be more than enough." Noting the 79 docket entries, the district court decided: "So, I could continue the case for the purpose of allowing the government to prepare its case and to share the information it has.... A continuance, however, would be too much delay. This is not a particularly complicated case, and there is no reason to extend it farther. The case will be dismissed." Upon prompting by defense counsel, the district court clarified that the dismissal was with prejudice, reasoning that "to crank it up and take another three years is unacceptable."

After the hearing, the district court entered a short written order dismissing the case with prejudice: "The law is insistent on full disclosure. The court could continue the case—for the fifth time—to allow the United States to prepare and share its information; but, because the United States has had this case for three years, that would be too much delay. The indictment is dismissed with prejudice."

The government filed a motion for reconsideration, arguing that there was no *Brady* violation, explaining that the newly revealed evidence was not helpful to the defense or new information, and requesting that the district court grant a continuance rather than dismiss the case with prejudice. Swenson responded, arguing that "[t]he government's pattern of failing to disclose evidence, and its current unwillingness to accept that its failures were material and prejudicial demonstrates that the integrity of this prosecution has been destroyed."

Finally, the district court issued an "Opinion on Reconsideration," which—in its entirety—stated as follows:

> Over the course of four pretrial conferences—within ten days of trial—the government represented that it had turned over all evidence. Each time it later disclosed new evidence of exculpatory and impeachment materials.
>
> The government conveniently forgot that it had in its possession (a) correspondence between the adoptive parents and Swenson, (b) police reports from 2013 filed by Swenson and the adoptive parents—two of whom the government intended to call as witnesses at trial, and (c) statements by the adoptive parents that were inconsistent with [FBI]'s report. Despite its obligation to investigate the case completely, the government relied on its witnesses to filter their own documents and select what they as interested-party laymen considered to be relevant.
>
> Because the integrity of this prosecution has been destroyed, the government's motion for reconsideration is denied.

The government appealed.

Standard of Review

[1–3] When a dismissal is predicated upon the district court's supervisory powers, we review only for an abuse of discretion. *See United States v. Garrett*, 238 F.3d 293, 297–98 (5th Cir. 2000). And we review any factual finding from the district court, including credibility determinations, only for clear error. *See United States v. Cordova-Soto*, 804 F.3d 714, 718 (5th Cir. 2015). "A factual finding is clearly erroneous only if, based on the entirety of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*

[4] We review a district court's determination on a *Brady* claim de novo, though we defer to factual findings underlying the district court's decision. *United States v. Cessa*, 861 F.3d 121, 128 (5th Cir. 2017).

Discussion

When denying the prosecution's motion for reconsideration, the district court expressed several concerns about the government's conduct. It worried about the last minute disclosures, the government's retention of material the district court considered exculpatory until prompted by the defense, and the government's reliance on the victim/witnesses to determine what materials were relevant. Although Swenson contended that the prosecution's conduct violated *Brady* and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the district court did not discuss, cite, or rule on that issue. Instead, looking to the prosecution's missteps, the district court concluded that "the integrity of this prosecution has been destroyed."

On appeal, the government argues that its conduct did not violate *Brady* and the district court abused its discretion when it dismissed Swenson's indictment with prejudice. Swenson urges us to affirm the district court, contending that the prosecution's missteps supported the dismissal with prejudice. None of Swenson's arguments or the district court's concerns supports dismissing the indictment with prejudice.

I. No *Brady* Violation

[5–8] Under the familiar *Brady* standard, the government violates a defendant's due process rights if it withholds evidence that is favorable to the accused and material to the defendant's guilt or punishment. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. This rule applies "irrespective of the good faith or bad faith of the prosecution." *Id.* And it "extends to impeachment evidence as well as exculpatory evidence." *Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). To prevail on a *Brady* claim, "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." *United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016). The government argues that all three prongs (favorability, suppression, and materiality) weigh in its favor.

[9, 10] Whether the government can show favorability or materiality is irrelevant because here the evidence clearly was not suppressed. Under this court's case law, evidence that is turned over to the defense *during* trial, let alone *before* trial, has never been considered suppressed. *See Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008). Instead, this court has held that when a defendant challenges "the late production of impeachment evidence," the analysis "turns on whether the defendant was prejudiced by the tardy disclosure." *United States v. Morrison*, 833 F.3d 491, 508 (5th Cir. 2016). "If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been." *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985). Mere speculation that a trial might have gone differently is insufficient to show the requisite prejudice from a tardy disclosure. *See United States v. Stanford*, 823 F.3d 814, 841 (5th Cir. 2016) (It is "unwise to infer the existence of *Brady* material based upon speculation alone." (internal quotations omitted)).

[11] Swenson argues that the delay prejudiced her because "if she had received the documents at the beginning of the case, her preparation and strategy would have been entirely different." She also claims that she would have searched for other documents and evidence. This argument is too speculative. And a continuance of the trial would have solved most of these problems. Swenson was not confined, and there is no reason to think that another continuance would have caused her any difficulty. Even without a continuance, Swenson probably could have used the evidence effectively at trial. Thus, there was no suppression and no *Brady* violation.

[12] But even if Swenson could show a *Brady* violation, the usual remedy is a new trial, not dismissal with prejudice. *See United States v. Brown*, 650 F.3d 581, 588–89 (5th Cir. 2011). The district court's remedy cannot be supported on these grounds.

II. Discovery Violations Here Do Not Warrant Imposed Sanction

[13–15] A district court commands "broad discretion" when deciding whether to impose sanctions for discovery violations. *Garrett*, 238 F.3d at 298. But, before employing sanctions, it "must carefully weigh several factors." *Id.* Specifically, it must consider: "1) the reasons why disclosure was not made; 2) the amount of prejudice to the opposing party; 3) the feasibility of curing such prejudice with a continuance of the trial; and 4) any other relevant circumstances." *Id.* If the district court decides to sanction a party, it "should impose the least severe sanction that will accomplish the desired result—prompt and full compliance with the court's discovery orders." *Id.* (quoting *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. Unit B 1982)).

[16] In neither its written orders nor any of the pretrial conferences did the district court expressly consider the *Garrett* factors when fashioning a sanction for the government's failure to comport with the discovery deadline. *See* 238 F.3d at 298. Although the district court acknowledged that it "could continue the case," the district court chose dismissal with prejudice instead because "the United States has had this case for three years" and granting another continuance would cause "too much delay." But Swenson was not in custody during the pretrial proceedings. And Swenson had asked for four continuances already. The district court did not explain why one more continuance—the first requested by the government—would cause too much delay. The district court failed to impose the least severe sanction, and the government's violations of the discovery deadlines do not warrant dismissing the indictment with prejudice.

III. No Prosecutorial Misconduct or Prejudice

[17, 18] This court has stressed that "even in the case of the most 'egregious prosecutorial misconduct,' [an] indictment may be dismissed only 'upon a showing of actual prejudice to the accused.'" *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982) (quoting *United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979)). And "mere error or oversight is neither gross negligence nor intentional misconduct." *United States v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983) (internal quotations omitted). "Thus, whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed only where the defendants' case has been unfairly prejudiced." *McKenzie*, 678 F.2d at 631. In other words, "the supervisory authority of the district court includes the power to impose the extreme

sanction of dismissal with prejudice only in extraordinary situations and only where the government's misconduct has prejudiced the defendant." *United States v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988); *see also United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979).

[19] Dismissal of an indictment with prejudice is a rare result because, even in the face of prosecutorial misconduct, there is a "public interest in having indictments prosecuted." *Welborn*, 849 F.2d at 985. That said, this court has expressly declined to "foreclose the possibility that governmental ineptitude and carelessness could be so abhorrent as to warrant a dismissal with prejudice." *Fulmer*, 722 F.2d at 1196.

[20] The district court never expressly determined whether the government's conduct was motivated by bad faith. But some conclusions about the district court's reasoning can be drawn from the record. Though Swenson attempts to paint some of the district court's comments from the hearing as accusations of bad faith, it does not appear that the district court attributed ill intent to the prosecution. If anything, it seems the district court attributed the government's mistakes to the prosecutor's sex.

Reviewing the record, we found nothing to suggest that the prosecution intentionally withheld the documents or acted in bad faith. Swenson points to an email an FBI agent wrote to the prosecutor that Swenson says suggests there may have been a conscious decision to wait for defense counsel to specifically request pieces of evidence before disclosure. The email says, "*As you know*, [somebody from Montgomery County] sent several of these reports...." (emphasis added). We disagree that anything can be inferred from this innocuous message. And the prosecutor expressly acknowledged that she did not "ever remember opening the e-mail or downloading the documents."

[21] It is beyond dispute that the government made some missteps. Swenson and the district court are, of course, correct that a prosecutor cannot delegate the duty to review exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (placing the burden to discharge *Brady* obligations on the prosecutor). The government was wrong to allow the victims to decide what evidence was relevant. And the government admittedly missed the discovery deadline. But these mishaps are benign mistakes that were remedied or could have been remedied with a continuance, and "mere error or oversight is neither gross negligence nor intentional misconduct." *Fulmer*, 722 F.2d at 1195 (internal quotations omitted). Although this court has declined to "foreclose the possibility that governmental ineptitude and carelessness could be so abhorrent as to warrant a dismissal with prejudice," *id.* at 1196, the government's mistakes here did not reach an abhorrent level.

Even assuming bad faith, Swenson must show "actual prejudice" before this court could affirm the dismissal of the indictment. *See McKenzie*, 678 F.2d at 631. We are unpersuaded by Swenson's arguments that the government's missteps caused Swenson any prejudice. As discussed above, because Swenson received all of the information before trial, none of the documents was "suppressed" under the *Brady* analysis. The district court, disapproving of the government's practice of allowing the witnesses to determine what documents were relevant, signed warrants for the victimized families' emails. And the defense agreed to go to trial without a continuance to digest the new information. Although the government should not have waited until the eve of trial to produce

documents to the defense, a continuance would have remedied any prejudice.

Swenson has failed to demonstrate prejudice sufficient to support the district court's severe sanction. The district court abused its discretion when it dismissed Swenson's indictment with prejudice.

Conclusion

We REVERSE and REMAND the judgment dismissing the indictment, and we direct the Chief Judge of the Southern District of Texas to reassign this case to a different district judge. *See, e.g., Latiolais v. Cravins*, 574 F. App'x 429, 436 (5th Cir. 2014).

UNITED STATES of America, Plaintiff–Appellee,

v.

Jesus Gerardo LEDEZMA–CEPEDA, Also Known as Chuy, Also Known as Juan Ramos; Jose Luis Cepeda–Cortes, Defendants–Appellants.

No. 16-11731

United States Court of Appeals, Fifth Circuit.

FILED July 3, 2018

Background: Defendants were convicted in the United States District Court for the Northern District of Texas, Terry R. Means, J., 2016 WL 9244768 and 2016 WL 9244776, of interstate stalking, conspiracy to commit murder for hire, and tampering with documents or proceedings, and they appealed. Appeals were consolidated.

Holding: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that district court did not abuse its discretion by denying defendant's multiple motions to sever.

Affirmed.

1. Criminal Law ⇐1148

Court of Appeals reviews decision not to sever under exceedingly deferential abuse of discretion standard. Fed. R. Crim. P. 14.

2. Criminal Law ⇐622.6(1), 622.7(3)

Severance is exception, warranted only if there is serious risk that joint trial would compromise specific trial right of one defendant, or prevent jury from making reliable judgment about guilt or innocence. Fed. R. Crim. P. 14.

3. Criminal Law ⇐622.6(2, 4)

Defendants who are indicted together should generally be tried together, particularly in conspiracy cases, because joint trials promote efficiency and protect against inequity of inconsistent verdicts. Fed. R. Crim. P. 14.

4. Criminal Law ⇐1166(6)

To surmount heavy presumption that defendants who are indicted together should be tried together, defendant challenging denial of his motion for severance must show that (1) joint trial prejudiced him to such extent that district court could not provide adequate protection; and (2) prejudice outweighed government's interest in economy of judicial administration. Fed. R. Crim. P. 14.

5. Criminal Law ⇐622.6(2), 622.7(3)

Generic allegations of prejudice will not suffice to overcome presumption that defendants who are indicted together should be tried together, for neither quantitative disparity in evidence nor presence

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

United States of America, §
§
Plaintiff, §
§
versus § Criminal H-15-402
§
Simone Swenson, §
§
Defendant. §

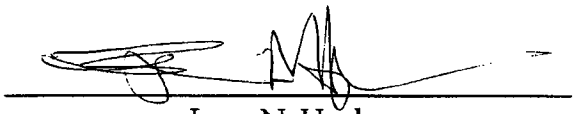
Opinion on Reconsideration

The United States has had this case for over three years. Half of that time was spent investigating Simone Swenson before the indictment was filed on July 29, 2015. Over the course of four pretrial conferences – within ten days of trial – the government represented that it had turned over all evidence. Each time it later disclosed new evidence of exculpatory and impeachment materials.

The government conveniently forgot that it had in its possession (a) correspondence between the adoptive parents and Swenson, (b) police reports from 2013 filed by Swenson and the adoptive parents – two of whom the government intended to call as witnesses at trial, and (c) statements by the adoptive parents that were inconsistent with the Federal Bureau of Investigation's reports. Despite its obligation to investigate the case completely, the government relied on its witnesses to filter their own documents and select what they as interested-party laymen considered to be relevant.

Because the integrity of this prosecution has been destroyed, the government's motion for reconsideration is denied.

Signed on February 24, 2017, at Houston, Texas.



Lynn N. Hughes
United States District Judge