No. 18- _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

UNITED STATES OF AMERICA,

Respondent,

v.

MATTHEW DAVIS,

Petitioner

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

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the Government failed to properly discharge its obligations under *Brady v. Maryland*, when it produced an exculpatory chart prepared by an unnamed witness within the voluminous 3500 material of another witness without identifying it as *Brady* material, and whether the Government's conduct warrants the vacation of petitioner's sentence.

2. Whether the testimony in a subsequent trial by the unnamed witness who prepared the exculpatory chart and who testified Petitioner was a mere friend of the family and did not include him among the conspirators constitutes newly discovered evidence warranting the vacation of petitioner's sentence.

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

Petitioner Matthew Davis petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit, *United States v. Davis*, 17-810-cr, 715 Fed. Appx. 107 (2d Cir. Mar. 23, 2018), is Appendix A to this petition. The Second Circuit's order denying panel rehearing and rehearing en banc is Appendix B to this petition. The Memorandum Decision and Order of the U.S. District Court for the Southern District of New York, dated March 21, 2017, is Appendix C to this petition. The judgment of the U.S. District Court for the Southern District of New York, dated October 29, 2015, is Appendix D.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on October 29, 2015. It denied a motion for a new trial on March 21, 2017. The Second Circuit had

jurisdiction under 28 U.S.C. § 1291, rendered its decision March 23, 2018, and denied a timely petition for rehearing and rehearing en banc on August 23, 2018.

RELEVANT STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rules of Criminal Procedure, Rule 33

Rule 33. New Trial

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
>
> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

STATEMENT OF THE CASE

This case arises from an appeal following a denial of a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Petitioner was sentenced to 240 months of imprisonment and 10 years of supervised release, based on a judgment of conviction entered on October 29, 2015, in the United States District Court for the Southern District of New York after a two-week trial before the Honorable Katherine B. Forrest, United States District Judge, and a jury.

Procedural History

Matthew Davis was arrested on March 11, 2014, on a sealed complaint, unsealed on March 12, and indicted on May 8, 2014, and charged, in addition to forfeiture allegations, with four counts: narcotics conspiracy, murder-for-hire conspiracy and substantive charges plus firearms charges in connection with the prior two counts. Trial date of March 30, 2015 was set on December 5, 2014. An amended prior felony information describing a January 30, 2002 New York State narcotics conviction was filed on January 20, 2015, as was Superseding Indictment S2 14 Cr. 296 (KBF) which added a Count Five additional firearms count pertaining to the same September 10, 2010 murder-for-hire. The indictment upon which the case was tried, S3 14 Cr. 296 (KBF), was filed on March 3, 2015 and added yet another Count, Count Six, murder in connection with a drug crime thus even further enhancing the likelihood of a possible sentence of life imprisonment. The Government expressly acknowledged a potential disposition of the case, as guided by *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), "would have resulted in far less time than the defendant would receive if he were convicted after trial."

Superseding Indictment S3 14 Cr. 296 (KBF), filed on March 3, 2015, charged Matthew Davis in six counts with narcotics conspiracy, murder-for-hire, firearms charges and drug crime murder. Count One charged Davis with conspiracy to distribute 5 kilograms or more of cocaine and 280 grams or more of crack in or about 2010 through 2013. Count Two charged Davis with conspiracy to murder-for-hire Terry Harrison, and Count Three charged him with the substantive murder-for-hire of Mr. Harrison, both in violation of 18 U.S.C. § 1958. Count Four charged Davis with use of a firearm in the murder-for-hire of Harrison in violation of 18 U.S.C. § 924 (j)(1). Count Five charged the use and possession of a firearm relating to the murder-for-hire

counts, Two and Three, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Count Six, again on or about September 10, 2010, alleged Davis participated in killing Mr. Harrison as part of the narcotics conspiracy of Count One, this in violation of 21 U.S.C. § 848 (e)(1)(A). Counts Three through Six also charged aiding and abetting liability under 18 U.S.C. § 2, and the Indictment contained Forfeiture Allegations under 18 U.S.C. § 981, 28 U.S.C. § 2461 and 21 U.S.C. § 853(p).

Production of 3500 Materials

On March 16, 2016, 18 days before trial, the Government produced voluminous 3500 materials that included a section regarding cooperating witness Karriem Thomas. Contained within the Thomas 3500 materials was a subsection that contained 52 pages of mostly redacted pages referring to another witness, Parris. Included within those materials was a handwritten chart by an unnamed person that identified members of the conspiracy, but which did not mention the Petitioner.

Trial

Trial commenced before Judge Forrest and a jury from March 30 to April 15, 2015. From the Government's opening, the primary theory of the Petitioner's guilt was that he was an enforcer of a large drug trafficking organization; a man of violence, a role that made him a member of the narcotics conspiracy charged, and only secondarily that he was even in the presence of drugs, much less specific quantities of same.

The defense made a motion pursuant to Fed.R.Crim.Proc. 29, on April 8, 2015, which was in large part granted by the Court on April 15, 2015, determining that no rational juror could find the "pecuniary value" element of the charged murder-for-hire crimes and acquitting

Petitioner Davis of Counts Two, Three, Four and Five. The jury found the Petitioner guilty of Count One, the narcotics conspiracy, but was unable to reach a verdict on the remaining Count Six on April 20, 2015, and the Count was dismissed at sentencing by the Government.

Sentencing

On October 28, 2015 Judge Forrest sentenced Petitioner Davis principally to 240 months of imprisonment and ten years of supervised release.

Matthew Davis is presently incarcerated and serving his sentence.

Rule 33 Motion

Eight months after petitioner's trial and two weeks after his sentencing, cooperator Robert Parris, who had been withdrawn as a witness by the Government because it deemed his testimony cumulative, testified in a trial involving the same criminal conspiracy before a different District Court Judge in *United States v. Jamal Smalls*, No. 14-cr-167. In that trial, Parris testified, contrary to the Government's theory in the case below, that Petitioner was actually a family friend – not a member of the narcotics conspiracy, that a crucial meeting at which the Government had argued was proof that Petitioner was acting as a drug conspiracy enforcer relying upon the Government's primary witness, was in truth and in fact a condolence meeting attended by friends of the deceased murder victim.

Petitioner moved for a new trial based on this newly discovered evidence and the District Court denied the motion.

REASONS FOR GRANTING THE PETITION

POINT I

THE EXCULPATORY CHART BURIED WITHIN THE 3500 MATERIALS WAS *BRADY* MATERIAL NOT PROPERLY IDENTIFIED AS SUCH BY THE GOVERNMENT, WHICH REQUIRES THAT THE SENTENCE BE VACATED AND A NEW TRIAL GRANTED

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the Government violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016); *Smith v. Cain*, 565 U.S. 73, 75 (2012). The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or punishment irrespective of the good faith or bad faith of the prosecution. *Wearry*, 136 U.S. at 1006. And evidence is material when there is any likelihood it could have affected the judgment of the jury *Id. See also Giglio v. United States*, 405 U.S. 150 (1972) (*Brady* applies to evidence undermining witness credibility).

The Second Circuit denied Petitioner's appeal among other reasons because "at best Parris's testimony at Davis's trial would provide material for impeachment." *United States v. Davis,* 715 Fed. Appx.107, 108 (2d Cir. 2018). Respectfully, the Government not only failed to produce material that could impeach a material witness in the case (inconsistent with *Giglio*), it suppressed exculpatory evidence.

First, the manner in which the material was turned over violated Petitioner's Due Process rights. As in *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002), the Government denominated all

the material it produced immediately prior to trial as *Jencks/Giglio Material, see Gil*, supra, 297 F.3d at 106. No items, including the exculpatory chart were identified as *Brady* material.

The Parris 3500 material was commingled with Thomas 3500 material. The undated and anonymously authored chart was thus buried in the document production for another witness with no indication of its relevance or importance. Therefore, in this case as was true in *Gil, supra,* and *Leka v. Portunondo*, 257 F.3d 89, 102 (2d Cir. 2001), there was no reason for the defense to assume the folders so labeled contained exculpatory information, no reason for defense to turn their attention to this chart immediately. *See, e.g. Gil, supra*, 297 F.3d at 106 (labeling *Brady* evidence as *3500 material* and producing it as part of a large 3500 production on the eve of trial constitutes suppression); *United States v. Breit*, 767 F.2d 1084 (4th Cir. 1985) (Government may not discharge its *Brady* obligation merely by tendering a witness without providing any indication that the witness' testimony may be helpful to defense). At worst, the Government's conduct suggests a deliberate effort at deception.

Federal prosecutors have an affirmative obligation not to mislabel the material they disclose. The Government as is its custom, organized all the 3500 material in folders, one for each witness, with an index of material contained in each folder, and provided it in an orderly manner. *See, St. Germain v. United States*, 2004 WL 1171403, *14 (S.D.N.Y. 2004) (mislabeling *Brady* material as *Jencks/Giglio* material constitutes a Due Process violation); *also see, United States v. Flynn*, 2018 US Dist. Lexis 27198 at *2-3 (D.D.C. Feb. 16, 2018) ("The Government is further directed to produce documents as they are kept in usual course of business or must organize and label them clearly.")

By definition, *Jencks Act*, 18 U.S.C. §3500, material must consist of the statements of persons the Government intends to call as witness. The Government, however, never intended to call Parris as a witness for the reasons already discussed. Indeed, in its responsive brief below, the Government chided Petitioner for suggesting that he might have called Parris as a witness if he had received correct labeled materials concerning Parris in time to speak with him and investigate his story, on the ground that Parris was expected to exercise his Fifth Amendment rights and refuse to testify. If Petitioner Davis should have known Parris would be unavailable to testify at trial, as the Government now asserts, than as a matter of simple logic the Government should have known it too – yet it identified the Parris *Brady* material as *Jencks/Giglio* material.

Where doubt exists as to the usefulness of the evidence to defendant, the Government must resolve all such doubts in favor of full disclosure. *See United States v. Paxson*, 861 F.2d 730, 737, 274 U.S.App.DC 71 (D.C. Cir. 1988). The Government's actions with regards to burying the exculpatory chart within the 3500 materials of another witness in the hope that it would not be discovered in the mixed of confused labeling constitutes suppression. The Government manner of producing the Parris chart was either deliberate, tactical concealment or the product of mismanagement of information or sloppy thinking about the evidentiary significance of the materials. *Leka*, 257 F.3d at 103. *Brady* compels clearly communicated disclosure. The Government never provided a summary that included sufficient detail and specificity to enable the defense to assess the relevance and potential usefulness of the exculpatory "chart" (A-473), which the defendant now knows belong to Parris, was undated, anonymously authored and produced with no indication of what it meant, or who it belonged to. Simply put, the Government cannot hide *Brady* material as an exculpatory needle in a haystack

of discovery materials. *See United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010) (suggesting *Brady* violations related to voluminous open file"); *see also United States v. Hsia*, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998) (The government cannot meets its *Brady* obligations by providing 600,000 documents and then claiming that "the defendant should have been able to find the exculpatory information[.]").[1]

POINT II

THE EXCULPATORY TESTIMONY BY PARRIS IN THE SUBSEQUENT CRIMINAL TRIAL IS QUINTESSENTIAL "NEWLY DISCOVERED EVIDENCE" WARRANTING VACATION OF THE SENTENCE AND A NEW TRIAL

Mr. Parris's testimony in the subsequent trial identified the Petitioner as merely a family friend and did not associate him with the criminal conspiracy. This exculpatory evidence meets the standards for granting a new trial. See *Mitchell v. U.S.*, 368 U.S. 439 (1962); *United States v. Mallay*, 712 F.3d 79 (2d Cir. 2013).

1. The Evidence is Newly Discovered: Robert Parris's testimony in a subsequent trial that Matthew Davis was merely a friend of the family – and not part of the charged drug trafficking organization – is the very definition of newly discovered evidence. This exonerative testimony did not exist at the time of Petitioner's trial.[2] The heavily redacted 3500 materials

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[1]Making matters worse, a protective order in place with respect to the 3500 materials impeded Petitioner's own ability to adequately analyze the documents on the eve of trial. *See Leka*, 257 F.3d at 101 ("When such a disclosure is first made on the eve of trial, or when trial is underway, the opportunity to use it may be impaired. The defendant may be unable to direct resources from other initiatives and obligations that are or may seem more pressing, and the defense may be unable to assimilate the information into its case").

[2]Parris had been listed as a likely Government witness and then withdrawn as cumulative. No experienced defense lawyer would have called Parris to testify as a defense witness under

produced by the Government reflected no clear exculpatory content. How the Government could have interviewed the witness and not asked him about the most crucial gathering to the prosecution's case is inconceivable and yet the heavily redacted 3500 material contains no reference to it. There is no basis in the District Court's dismissive opinion that the Judge even viewed the unredacted 3500 materials to assess this defense contention.

2. Defense Counsel Exercised Due Diligence: The 3500 materials provided no reasonable basis to expect exculpatory testimony from Parris. No defense lawyer would put a witness on the stand without any real confidence in knowing what he would say. Given Parris's cooperation with the government and the paucity of the disclosures in the 3500 materials, neither Parris's lawyer nor the government was going to permit the defense to interview Parris beforehand. And the District Court was unlikely to permit the witness to be questioned outside the presence of the jury. Under the circumstances, counsel exercised due diligence in its review of the evidence and in its defense of Mr. Davis.[3]

3. The Evidence is Material: "A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . [The] touchstone of materiality is a reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419 (1995) (internal citations and quotes omitted).

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these circumstances.

[3]Furthermore, Petitioner exercised reasonable diligence during the appeal, filing a Rule 38 stay on appeal, which gave him the time needed without pressure of trial to painstakingly review the voluminous production and uncover the exculpatory chart and the fact that Parris had been removed as a witness. His reasonable diligence did not stop there; Petitioner discovered upon further investigation that Parris testified at the *Jamal Smalls* trial and had accurately described Petitioner Davis as a friend of the family – the very same position Petitioner Davis asserted at his own trial and told the District Court at his sentencing.

Here, Parris's testimony in the *Jamal Smalls* trial before a different district court judge concerned the *same* drug trafficking organization, the *same* time period, and indeed the *very same* meeting the Government argued in the Petitioner's trial proved the Petitioner was acting as a member of the drug-trafficking organization. Yet in the *Smalls* trial, eight months later, Parris testified that Petitioner Davis was, in fact, present at the meeting in question as a friend of the Smalls family. Moreover, Parrris did not identify Petitioner as a member of the drug conspiracy let alone as an "enforcer," as the Government alleged. These disparities comprise a material contradiction in the government's theories of prosecution.

4. Parris's Testimony Went Beyond Mere Impeachment – It Directly Refuted the Testimony of the Key Witness Against Petitioner: Parris's testimony in the subsequent *Smalls* trial directly and almost completely contradicted the testimony of the key cooperating witness in the trial below concerning the meeting at issue. To characterize the testimony as simply impeachment material is to argue that a jury would simply conclude that evidence that demonstrated that a murder weapon was a knife simply impeached prior evidence that it was a handgun. The Parris testimony and recorded conversations proffered to the district court in the subsequent *Smalls* trial describe Petitioner Davis as a friend of the family, a statesman who calmed the turbulent waters and who acted reasonably and fairly – and not as a member of a narcotics conspiracy. This testimony is not simply impeachment evidence – it is proof that Thomas, the key cooperating witness, was an outsider, inaccurately testifying to gain his get-out-of-jail-free card and to obtain a 5K1.1 letter for himself. The evidence would have resulted in an acquittal of Petitioner Davis – instead of the unjust, mandatory 20-year sentence he is presently serving.

6. Parris's Testimony Would Have Exonerated Petitioner Davis: Had the defense simply been aware of Parris's likely testimony, Petitioner would in all reasonable probability be continuing his education and fulfilling his life ambitions today free from incarceration. Also, if the highly redacted 3500 materials had fully disclosed what Parris likely said in his pre-trial interviews with the Government, the Petitioner would not have been convicted. Even if the materials contained no reference to the crucial meeting evidence, no professional prosecutor or investigator could have interviewed this witness and not asked about the meeting so important to the Government's case. Whether the 3500 materials contained reference to the meeting or not, the Government had a duty to record its notes on the subject before it was discovered at a subsequent trial.

CONCLUSION

In light of the foregoing, Petitioner requests that this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed his conviction and sentence.

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