NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JASON KEITH WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Whether the petitioner, Jason Keith Walker, is entitled to a certificate of appealability on his claim that his trial counsel provided ineffective assistance of counsel in derogation of Walker's Sixth Amendment rights in three respects: (1) during plea negotiations when trial counsel advised Walker that he faced a maximum penalty of 20 years instead of life; (2) providing erroneous advise that co-defendants' plea agreements could not be used against Walker at trial or sentencing; and, (3) trial counsel's assessment that the government would not be able to prove its case because it was based on unreliable witnesses, known perjurers, and lack of evidence that Pitch Dark Family (PDF) was a criminal enterprise.

2. Whether the petitioner, Jason Keith Walker, is entitled to a certificate of appealability on his claim that his appellate counsel provided ineffective assistance in derogation of Walker's due process rights under the Fifth Amendment in two respects: (1) failing to assert the trial evidence was insufficient to establish that PDF was an ongoing organization composed of associates functioning as a continuing unit; and, (2) failing to challenge prosecutorial misconduct or evidence based on perjured and unreliable testimony.

3. Whether the petitioner, Jason Keith Walker, is entitled to a certificate of appealability on his claim that the Government violated his due process rights under the Fourteenth Amendment by: (1) failing to disclose the

fact that a Government witness was a paid informant then failing to correct the informant's false trial testimony that he had received no money from the Government; and, (2) knowingly allowing five Government witnesses to provide perjured trial testimony.

4. Whether the denial of petitioner's request for a certificate of appealability improperly condoned the prosecutor's profligate misconduct in not only failing to disclose to the defense before trial that a Government witness had been paid as an informant in violation of *Brady v. United States*, 397 U.S. 742 (1970), but also by not correcting the informant's false trial testimony that he received no money from the Government, in violation of *Napue v. Illinois*, 537 U.S. 322 (2003), and *Giglio v. United States*, 405 U.S. 150 (1972)?

PARTIES TO THE PROCEEDING

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

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Jason Keith Walker respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit denied Walker's request for a certificate of appealability February 27, 2019. Walker's motion for reconsideration was denied on April 2, 2019. This petition is timely filed within 90 days after the entry of the judgment. Sup.Ct.Rule 13(3).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

OPINIONS BELOW

The April 2, 2019 order of the Ninth Circuit denying Walker's motion for reconsideration is unpublished and is reproduced in the appendix at A1. The February 27, 2019 order of the Ninth Circuit denying Walker's request for a certificate of appealability of the District Court's denial of his 28 U.S.C. section 2255 motion is unpublished and is reproduced in the appendix to this petition at B1. The order of the District Court denying Walker's request for a certificate of appealability is unpublished and is reproduced in the appendix at C1-C2.

The order of the District Court denying Walker's 28 U.S.C. section 2255 motion is unpublished and is reproduced in the appendix at D1-D2. The United States District Court for the Eastern District of California magistrate's August 17, 2017, Findings and Recommendation denying Petitioner's Section 2255 Motion is unpublished and available at *United States v. Walker*, No. 2:03-cr-0042, 2017 WL 3438763, and is reproduced in the appendix at E1-E81. The United States Supreme Court denial of Walker's petition for writ of certiorari, S10-8425, dated February 22, 2011 is published at *Walker and Greer v. United States*, 562 U.S. 1245 and is reproduced in the appendix at F1. The opinion of the Ninth Circuit affirming Walker's conviction and sentence is unpublished and available at *United States v. Walker and Greer*, 391 Fed.Appx. 638 (2010), and is reproduced in the appendix at G1-G5. The judgment and sentence in United States District

Court, *United States v. Walker*, Case No. 2:03-cr-0042-MCE, filed October 23, 2006 is reproduced in the appendix at H1-H6.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

The pertinent section of the Anti-Terrorism and Effective Death Penalty Act provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under Paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

INTRODUCTION

This case presents important questions relating to the standard for a court to apply when weighing whether a certificate of appealability should issue in cases involving constitutional violations of a criminal defendants' rights. The governing statute states that when there is a "substantial showing of the denial of a constitutional right" a certificate of appealability may issue. 28 U.S.C. §2253(c)(2). The Ninth Circuit has held that "[t]he standard for a certificate of appealability is lenient," and a certificate should issue when it is established "that reasonable jurists could debate the district court's resolution or that the issues are adequate to deserve encouragement to proceed further." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir.2010) (en banc), overruled on other grounds by *Swarthout v. Cooke*, 562 U.S. 216 (2011), (citation and internal quotation marks omitted). The standard "requires something more than the absence of frivolity but something less than a merits determination." *Id*. (internal quotation marks omitted.) However, the appellant "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983).

Petitioner Walker established that his trial counsel provided constitutionally inadequate representation during plea negotiations by failing to provide correct advice that Walker faced a potential life sentence not a maximum sentence of twenty years. Walker also established that his trial counsel misled him by underestimating the evidence against Walker and

providing erroneous advice that co-defendants' plea agreements could not be used against Walker at trial or sentencing. Based on these erroneous advisements, Walker rejected a twelve-year plea offer and chose to go to trial, something he would not have done if he had been provided accurate information and advice. Walker's appellate counsel provided ineffective assistance when she failed to challenge on direct appeal prosecutorial misconduct or the sufficiency of the evidence which consisted of known perjured and unreliable testimony thus precluding de novo review and a reasonable probability of success. Walker's allegations regarding the ineffective assistance provided by his attorneys presented questions of "some substance" and set forth a "substantial showing of the denial of a constitutional right." These issues warranted the issuance of a certificate of appealability.

A certificate of appealability should also have issued regarding the government's violation of its *Brady* obligations and its violations of the Fourteenth Amendment by allowing witnesses to knowingly provide perjured testimony during Grand Jury and trial testimony.

As this Court has clarified:

> At the COA stage . . ., a court need not make a definitive inquiry into [the merits of the habeas petition]. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Miller-El v. Cockrell, 537 U.S. 322, 342 (2003) (citations omitted).

Petitioner Walker met this "modest standard."

STATEMENT OF THE CASE

A. Walker's Prosecution, Verdict and Sentencing

Petitioner Jason Keith Walker was charged and convicted of one count of a four-count indictment, conspiring to conduct the affairs of an enterprise, the Pitch Dark Family or PDF, through a pattern of racketeering activity, 18 U.S.C. section 1962(d). Seven of his eight co-defendants were indicted on several other charges which carried the possibility of the death penalty pursuant to 18 U.S.C. sections 1959(a)(1) and 2.

On December 17, 2004, the Government filed a notice of its intent not to seek the death penalty against any of the defendants. ECF 248. Until this decision there had been no plea offers in the case. With the Government's decision that it would not seek the death penalty, the Government began to make offers for the defendants to plead guilty to the conspiracy charge, the only count alleged against Walker. Five of Walker's codefendants accepted plea offers to the conspiracy count and received sentences between twenty-seven and sixty months. During this period of time Walker's trial counsel advised him that the government had made an offer of twelve years for the Section 1962(d) conspiracy charge and advised Walker he faced a maximum sentence of twenty years. Based on counsel's advice, Walker rejected the

offer. Walker and co-defendant Shango JaJa Greer were tried together before a jury.

On April 7, 2006, the jury returned a verdict finding Walker guilty of the sole conspiracy count. With respect to this count the jury found that Walker had agreed to a pattern of racketeering activity which involved attempted murder, possession of a controlled substance with the intent to distribute and conspiring to distribute illegal narcotics. The jury also concluded that Walker committed or aided and abetted in the attempted murder of Hickerson, committed or aided and abetted in the murders of Roberts and Garrett and committed the crime of conspiracy to distribute illegal narcotics.

The district court sentenced Walker to life in prison. App. H1-H2.

B. Trial Evidence

The government alleged "Pitch Dark Family" was a criminal enterprise that operated in Vallejo, California, from 1994 through 2000, selling drugs, protecting drug turf, and committing a number of unconnected murders the state never prosecuted. No evidence established the nature of PDF, it's alleged structure, or whether it had any rules, bylaws, agendas, chain of command, or leadership.

Several witnesses testified regarding their version of how Pitch Dark Family began on the west side of Vallejo. Witnesses, some of them paid informants and others with a history of perjury, testified regarding the sale of

controlled substances, persons killed, and other activities in and around west Vallejo where Pitch Dark Family lived and hung out. The government relied principally on the testimony of Detective Steven Fowler of the Vallejo Police Department (VPD) to establish that PDF was a RICO "enterprise." Over repeated defense objections, Fowler was permitted to tell the jury that he relied on two main sources for his opinion: the word on the street from persons involved in criminal activity, which he called "street intelligence," and admissions made by codefendants as part of their plea agreements. Although both of those sources were inadmissible hearsay, the jury was never told that they could use that information *only* to evaluate the expert's opinion, not to establish guilt.[1]

The trial evidence showed a hodgepodge of unrelated crimes that were never proven to have been committed by PDF, acting as a "continuing unit" with a "common purpose, as part of a "pattern of racketeering activity." Amazingly, appellate counsel on direct appeal never challenged the sufficiency of the evidence. No evidence was presented establishing that PDF, as an organization, purchased cocaine, distributed it to members to sell, collected the profits and used the proceeds for any other illegal activity.

Likewise, no evidence established beyond a reasonable doubt that any particular murder was committed by or on behalf of PDF. At best, the

[1] This issue was raised unsuccessfully on direct appeal by Walker's former appointed appellate counsel.

unrelated predicate-act murders alleged in the indictment were for separate, independent drug debts to individual street dealers.

C. Post-Trial Proceedings

A direct appeal was filed June 30, 2008 with the Ninth Circuit Court of Appeals, 06-10643. In an unpublished Memorandum Disposition, August 5, 2010, the Ninth Circuit affirmed Walker's sentence and conviction. App. G1-G5. A petition for panel rehearing and for rehearing *en banc* was filed September 17, 2010 and denied October 31, 2010. A petition for writ of certiorari was filed with the Supreme Court, 10-8425, and denied. *Walker v. United States*, 562 U.S. 1245 (2/22/2011). App. F1.

On February 14, 2012, petitioner Walker filed a motion to vacate, set aside or correct sentence under 28 U.S.C. §2255. The motion included claims under the Sixth and Fifth Amendments for ineffective assistance of both trial and appellate counsel, *Brady* violations, violation of due process under the Fifth Amendment based on the government's knowledge that the indictment was based partially but materially on perjured Grand Jury testimony, and violations of the Fourteenth Amendment based on Walker's conviction as obtained through known false evidence.

On August 10, 2017, the magistrate filed its Findings and Recommendations, recommending the denial of appellant's §2255 motion. App. E1-E81. The district court adopted the findings and recommendations to deny the §2255 motion and on July 3, 2018 declined to issue a certificate

of appealability. App. C, D.

Petitioner Walker timely filed a Notice of Appeal July 11, 2018 and filed a request for the Ninth Circuit Court of Appeals to issue a certificate of appealability. The Ninth Circuit Court of Appeals denied petitioner's request for a certificate of appealability because "appellant has not made a 'substantial showing of the denial of a constitutional right,'" citing 28 U.S.C. § 2253(c)(2), and *Miller-El v. Cockrell*, *supra*, 537 U.S.322 at p. 327. App. B. On April 2, 2019, the Ninth Circuit issued its order granting petitioner Walker's request to file an addendum to the motion for reconsideration but denying the motion for reconsideration. App. A1.

REASONS FOR GRANTING THE PETITION

A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the effective assistance of trial counsel. Under the Due Process Clause of the Fifth Amendment, an appellant has the right to representation by effective counsel in his direct appeal. *United States v. Skurdal*, 341 F.3d 921, 926 (9th Cir.2003). The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

The benchmark for assessing claims of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir.2003) (quoting

Strickland, 466 U.S. at 686). A criminal defendant must first show both that his counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, at 687-688. It is well settled that the right to the effective assistance of counsel applies at critical stages of the criminal proceedings including trial preparation, trial, plea negotiations, and appeal. *Montejo v Louisiana*, 556 U.S. 778, 786 (2013) (*quoting United States v. Wade*, 388 U.S. 218, 227-228 (1967); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *Missouri v. Frye,* 566 U.S. 134, 145 (2012); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

A petitioner shows prejudice due to ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," but a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington, supra*, 466 U.S. at p. 693 (1984).

B. Ineffective Assistance of Trial Counsel During Plea Negotiations

Petitioner Walker raised ineffective assistance of trial counsel in his motion to amend his section 2255 motion and in his affidavit. App. I1-I6. In the affidavit Walker declared under penalty of perjury that his trial counsel

did not explain the sentencing guidelines. The attorney had advised him that he faced a maximum penalty of twenty years for a violation of 18 USC section 1962(d), not a life sentence. App. I4-I5. Walker declared that had he known he faced a maximum sentence of life imprisonment he would have accepted the government's twelve-year offer. *Id*., at 5, ¶22. There was no admission or denial of this error and omission from counsel. Petitioner Walker was entitled to an evidentiary hearing because he has set forth a colorable claim for relief; the allegations if true, would entitle him to relief. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007), but the district court ordered no hearing.

During pretrial the lead counsel in Walker's defense advised Walker that the Government had offered twelve years if he pled guilty to Count Two, the conspiracy charge. It was Walker's understanding from reading section 1963(a), that he faced a maximum penalty of twenty years for a violation of section 1962(d). Trial counsel did not disabuse Walker of this understanding and did not inform Walker that he faced a maximum sentence of life imprisonment. Walker knew his co-defendants had received much lower offers despite being charged with multiple counts which included the death penalty: Defendant Villafan had faced the death penalty for Count Three, Violent Crime in Aid of Racketeering Activity, and Aiding and Abetting, Defendant Villafan accepted a plea to Count Two, and was sentenced to Fifty-Two months; Defendant Elliot Cole who had been charged with Counts One,

Two and Three, and had faced the death penalty, pled guilty to Count Two and was sentenced to Forty-Three months; Defendant Eric Jones who had been charged with Counts One, Two and Three and had faced the death penalty, pled guilty to Count Two and was sentenced to Sixty months; Defendant Oscar Gonzales who had been charged with Counts One, Two and Three and had faced the death penalty, pled guilty to Count Two and was sentenced to Fifty-Seven months; Defendant Louis Walker who had been charged with Counts One, and Two and had faced the death penalty, pled guilty to Count Two and was sentenced to Thirty –Three months; and, Defendant Marc Tarver who, like Walker, had only been charged with Count Two, entered a plea and was sentenced to Twenty-Seven months. Within this context a twelve-year offer seemed unreasonable, and his counsel did not advise him otherwise.

Further, Walker's counsel advised him that the Government would not be able to use the factual basis for the co-defendant's plea agreements against Walker at trial or sentencing, and that the Government would not be able to prove its case which was based on unreliable witnesses, known perjurers, and lack of evidence that PDF was an enterprise. Walker understood that witness Uvonda Parks' grand jury testimony was the basis for the death penalty charges. Knowing that Parks had repeatedly perjured herself before the grand jury, Walker believed his attorneys' assessment of the weakness of the Government's case. Given the sentences of his co-defendants of five years

or less, and his maximum exposure of twenty years of imprisonment, Walker did not agree to a plea. Had Walker known he risked a life sentence he would have accepted the twelve-year offer and avoided the risk of a lifetime in prison.

It was during trial after the plea offer had been withdrawn, when Walker learned that he faced a maximum sentence of life, and that he could be held accountable as a co-conspirator, or aider and abettor for the alleged predicate acts committed by others.

Trial counsel's failure to properly advise Walker of the risks of trial during plea negotiations was constitutionally deficient representation. To prevail on a claim of ineffective assistance of counsel, petitioner must show that: (1) his trial counsel's performance "fell below an objective standard of reasonableness"; and, (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland v. Washington, supra*, 466 U.S at 688.

Where a plea offer is rejected based on erroneous advice, Walker must show prejudice in the following way: (1) a "reasonable probability" that he would have accepted the plea offer; (2) that the plea would have been entered without the prosecutor canceling it or the trial court refusing to accept it; and (3) that the offer was more favorable than the sentence actually imposed. See *Missouri v. Frye*, *supra*, 566 U.S. at p. 147; *Lafler v. Cooper*, supra, 566 U.S. at pp. 164-166 (2012). Petitioner Walker satisfied the *Strickland* prejudice

prong as evidenced by his sworn statement that had he received the proper advice, he would have accepted the plea and not exercised his right to trial. App. I5, ¶¶22-23. In addition, as a result of not accepting the plea and being convicted at trial, Walker received a life sentence, far lengthier than the twelve-years he would have received under the plea offer. Trial counsel's failure to advise Walker he faced a maximum sentence of twenty years was constitutionally deficient legal representation, resulting in prejudice to Walker.

The record does not reflect that Walker had been advised as to the maximum penalty at any time prior to trial or during plea negotiations. The Government cited the Reporter's Trial Transcript from February 6, 2006, when Greer's counsel referenced the life sentences faced by co-defendants who accepted plea offers. However, these statements were made on Day 34 of the jury trial. Whether Walker had previously been advised of this maximum sentence is not reflected in this transcript or in any earlier transcript, and the Government did not present any evidence of such an advisement. A transcript of a statement made long after an offer has been rejected is not relevant as to whether Walker had been properly advised as to the maximum penalty when he was considering the Government's 12-year offer. Further, whether or not Walker's attorneys were aware of the maximum penalty does not establish that this information was provided by counsel to Walker during plea negotiations.

C. Ineffective Assistance of Appellate Counsel

1. Failure To Challenge The Sufficiency of the Evidence

Appellate counsel in the opening brief on direct appeal described the trial evidence that "PDF was an ongoing organization composed of various associates function[ing] as a continuing unit" as "slim", yet despite this assessment appellate counsel failed to raise this argument for review precluding de novo consideration of an issue which had a reasonable probability of success. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The court records revealed the vague, inconclusive, contradictory, and faulty evidence used by the government during trial was insufficient to support a RICO conviction beyond a reasonable doubt. The evidence was insufficient and could not satisfy the elements necessary to establish PDF was an "enterprise", "engaged in a pattern of conduct, including murder, attempted murder, and sales of controlled substances" as required by statute. The facts presented to the jury was that PDF was a group of young men trying to become rap stars. No evidence was presented which established any form of coherent leadership, structure, chain of command, operation, or organization. There was no money trail, no infrastructure, no headquarters, no records, no membership lists and no profit sharing, and the Findings do not identify such evidence. Vague testimony about PDF being a "gang", did not satisfy the required evidence of an "enterprise" that functioned with a "common purpose" as a "continuing unit".

The evidence at trial fell far short of establishing proof beyond a reasonable doubt that PDF was (1) an "enterprise," having (2) a "common purpose," (3) that PDF functioned as a "continuing unit" and (4) that Walker conspired to participate in a "pattern of racketeering activities" conducted by PDF. Appellate counsel aware of these fatal evidentiary shortcomings, was ineffective by not challenging the sufficiency of the evidence in favor of presenting objections to the Government's expert testimony. If the evidence was insufficient, the testimony of the Government's expert was irrelevant. However, if the challenges of the Government's expert had been successful, the RICO convictions could still be upheld in the absence of a challenge to the sufficiency of the evidence. Therefore, it was objectively unreasonable for appellate counsel to concede the sufficiency of the evidence supporting the RICO charges.

2. Failure To Challenge Prosecutorial Misconduct and The Insufficiency of The Evidence Based On Perjured and Unreliable Testimony

Appellate counsel failed to raise any challenge to the Government's highly improper conduct during grand jury proceedings which resulted in the issuance of the indictment, or to the use of known perjured testimony and failure to disclose remuneration for testimony, *i.e.*, Derrick Washington, Derrick Shields, Dante Webster, Uvonda Parks, Jason Hickerson, and Charles McClough, at trial.

The outrageous conduct of AUSA Jodi B. Rafkin during the grand jury

proceedings vouching for the veracity of Derrick Washington, testifying to "falsehoods" and "untruths" "flagrantly" and "deliberately deceiving" the grand jury, undermined the independent grand jury process and tainted the prosecution from beginning to end. For example, Rafkin told the grand jury that Washington had "severe learning disabilities", was not an intelligent person and then used the Larry Rude shooting as an example, stating that "it's the only thing like this he's (Washington) has ever been involved in." This was a deliberate falsehood used by the Government to mislead the grand jury, because Rafkin knew Washington had participated in a prior murder in 1991 before becoming a witness for the State in that case.

Washington was a key witness for the Government in establishing two predicate acts, the murders of Keith Roberts and Richard Garret. However, Washington was a known suspect not only in the Keith Roberts murder, but the Richard Garret murder as well. Witnesses Cherise Johnson, Brian Anderson and Terry Chargualuf (unbiased witnesses) testified they saw a six-foot-one dark-skinned man exit the right front passenger seat of Teresa Williams' car with a gun in his hand, walk up to Richard Garrett and shoot him. Washington admitted he was the person in that right front passenger seat. Further, the description of Garret's assailant matched Washington not Walker. Nevertheless, Washington was offered help from the Government to avoid prosecution for these murders and for perjury if he helped the FBI.

The willingness of the prosecution to procure and present such tainted testimony should have given appellate counsel pause in choosing which issues to raise on appeal. This glaring misconduct exemplified the worst of prosecutorial misconduct and overreaching by the Government. Appellate counsel was responsible for challenging the sufficiency of the evidence derived from grand jury abuses. Rafkin's deliberate introduction of perjured testimony exemplifies "perhaps the most flagrant example of misconduct" which can cause "improper influence and usurpation of the grand jury's role," resulting in a violation of due process. *United States v. Samango*, 607 F.2d 877, 881-882 (9th Cir.1979).

The Government admitted AUSA Rafkin's conduct was not behavior they would endorse. However, this diminishment of the pervasiveness of Rafkin's misconduct is not supported by the record. Rafkin intentionally interfered with and undermined the grand jury's role to independently and objectively evaluate the evidence when she included the grand jury in brainstorming ways in which to bolster Washington's tainted testimony and obtain an indictment. Rafkin's vouching was especially problematic because the credibility of the witnesses was crucial for persuading the grand jury to indict. *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir.1993).

This misconduct placed in jeopardy the integrity of the criminal trial and resulting convictions, however, appellate counsel failed to challenge these issues on appeal, precluding petitioner Walker from obtaining de novo

review. There was a reasonable probability that the Ninth Circuit Court of Appeals would have determined that the Government's conduct by engaging the grand jury in strategy to convict Petitioner before the grand jury had made a determination that there was sufficient evidence for indictment, caused the failure of the grand jury to remain neutral and objective, and resulted in an abuse of the broad prosecutorial discretion in grand jury proceedings. *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), *cert. denied*, 461 U.S. 932 (1983). And further would have found this prosecutorial overreaching impinged the grand jury's autonomy and unbiased judgment resulting in the denial of a fair and just process. The failure of appellate counsel to raise this issue violated Petitioner's right to effective assistance of counsel on direct appeal.

This same constitutionally deficient performance of appellate counsel is apparent in the failure to raise the insufficiency of the evidence reliant on the perjured and unreliable testimony of Derrick Washington, Derrick Shields, Jason Hickerson, Uvonda Parks, Charles McClough, and Dante Webster.

It was objectively unreasonable for appellate counsel to concede the sufficiency of the evidence supporting the charges against Petitioner Walker. The words of Judge J. Ely's concurring opinion in *United States v. Butler*, 567 F.2d 885, 893 (9th Cir.1978), could have been written about the manner in which the Government prosecuted its case against Walker and Greer.

> The Government, and particularly the United States Attorney's office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds*, 345 U.S. 1, 12 (1953); *Berger v. United States*, 295 U.S. 78, 88 (1934). (T)he interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done. . . . Surely, conduct such as that indulged in here by the Government cannot in any imaginable way promote the just administration of the laws in the United States, and, in fact, affirmatively obstructs the pursuit of justice, the very lofty mission with which the government is charged. The appellant has been forced to pursue two new trial motions and a 28 U.S.C. §2255 petition, as well as separate appeals from the denials thereof. The heart of these motions and appeals is that Butler's convictions were obtained, in part, through Durden's perjury and the Government's failure to disclose leniency agreements with Durden. Because of the Government's conduct, the administration of justice has been delayed seven years. Even to this point, the Government adamantly refuses to admit culpability. Consequently, I am driven to the conclusion that the prosecution's intolerable misconduct has so permeated these proceedings that the indictment ought to be dismissed as a prophylactic measure to deter such conduct in the future. All federal courts are endowed with certain inherent supervisory powers over the administration of justice in the courts of the United States and must utilize that power, which comprehends the power to dismiss an indictment, whenever the pursuit of truth and justice becomes tainted.

The Government's misconduct in Walker's prosecution has resulted in a conviction based on deceit and half-truths, known to the Government and left unchecked when the evidence was presented to the jury.

If appellate counsel had challenged the sufficiency of the evidence and had documented the numerous inconsistencies and unreliability of grand jury and trial testimony of Washington, Hickerson, Shields, Parks, McClough, and

Webster, it is reasonably probable that the court would have agreed and would have reversed Walker's convictions for insufficiency of the evidence.

D. EXTREME PROSECUTORIAL MISCONDUCT UNDER *BRADY*, *GIGLIO* AND *NAPUE*

This Court has repeatedly explained the Government's obligation to disclose material evidence to the defense, whether bearing on guilt, impeachment of a witness, or punishment:

> Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

United States v. Bagley, 473 U.S. 667, 676 (1985).

This Court condemned the Government's failure to correct false testimony sixty years ago:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend….

> It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue v. Illinois, 360 U.S. 264, 269-270.

1. Derrick Shields

Prosecution witness Derrick Shields testified petitioner Walker was a member of PDF and sold drugs. He also testified that Shango Greer had confessed to the murder of Larry Cayton, but the material fact that Shields *was paid by the FBI* for information and testimony *was not disclosed to defense counsel before trial*. This crucial impeachment information was not revealed until 2013, after Walker filed his 2255 motion in the District Court. In response to the 2255 motion, the Government provided a copy of a June 1, 2001 letter documenting Shields' cooperation with the FBI. The letter proves Shields (1) received thousands of dollars from the FBI, (2) a reduction in prison time and (3) assistance relocating to a different prison. The letter further explained funds were provided for "operating expenses, "motel accommodations," "food," and "entertainment in furtherance of the investigation…" as well as funds for "clothing and incidental expenses."

The Government's failure to disclose the letter to Walker before trial was a beach of *Brady* and *Giglio*. Shields was permitted to lie to the jury, and Walker was unable to impeach him without the June 1, 2001 letter. Even worse, perhaps, the Government failed to correct Shields' lies:

> Q. All right. Now, let me ask you this: You told us that the ***FBI didn't do anything for you to get your testimony***; is that right?
> A. Yes. [False.]
> Q. You're sure about that, right?
> A. Yes. [False.]
> Q. All right. Now, let me ask you this: You told us that the FBI didn't do anything for you to get your testimony; is that right?
> A. Yes. [False.]
> Q. You're sure about that, right?
> A. ***Yes***. [False.]

App. K 2; RT Feb. 9, 2006, 7337:1-6.

The undisclosed June 1, 2001 letter proves Shields was lying. Both the magistrate judge and the Government noted Shield's cooperation with the FBI and the benefits he received.

The combination of Shields' lies and the Government's failure to correct them severely erodes confidence in the jury's verdicts. "Because each additional *Napue* and *Brady* violation further undermines our confidence in the decision-making process, we analyze the claims "collectively," *Kyles v. Whitley,* 514 U.S. 419, 436, (1995), and proceed to consider the other asserted prosecutorial violations." *Jackson v. Brown*, 513 F.3d 1057 1072 (9th Cir. 2008).

Shields' testimony was unquestionably "material," as he, like the witness in *Napue*, connected Walker to PDF as a member and drug dealer. Shields' testimony was false in material respects, including his denial that the government had paid him any money.

The Government admitted the crucial letter was *not* provided to the defense before trial. The magistrate judge also noted Shields' undisputed cooperation with the government.

> Shields cooperated with the government's investigation of this case. He was in custody on May 9, 2000, on unrelated charges when the FBI interviewed him about the murder of Larry Cayton. Ex. A, (FBI-302). He told the FBI agents what he knew at that time, which was consistent with his testimony at trial. Id. The FBI arranged for Shields to be released from custody for two weeks, for the purpose of wearing a wire on Greer, Walker, White, and others, after which Shields returned to custody and completed his sentence.

App. E22. Footnote omitted.

The Government in its opposition to Walker's §2255 motion, more accurately documented Shields' extensive cooperation and agreement, which was not disclosed before trial:

> In a prior case against Petitioner Jason Walker, 2:00-CR-386, a felon in possession charge in which Shields was a witness and, in fact, based on the same time period in which he was working on the Government's investigation of PDF, the government provided to Walker a June 1, 2001, letter from the FBI outlining ***almost $3,500 in operational expenses paid to Shields for motel accommodations, food, transportation, clothing, and incidental expenses necessary to the work he was performing***. Ex. G, hereto. It ***appears*** that Walker ***shared this letter, produced on June 4, 2001***, with his

> colleagues on the street, resulting in Greer approaching Shields sometime in December 2001 to confront him about getting paid and in Greer's attorney using information from the letter to impeach Shields in 2006.

Contrary to the Government's speculation, Greer's trial counsel did *not* rely on the June 2001 letter when cross-examining Shields. The cross-examination makes no refence to the content of the letter. Rather, trial counsel expressly referenced the FBI-302 reports and agents French and Butler.

Instead of correcting Shields' false denials per the requirement of *Napue*, the Government allowed the lies to go unchallenged. The Government's failure to correct Shields' lies violated *Napue* and *Giglio*.

In *Giglio*, the witness testified for the government at trial, stating that he had *not* received any promise that he would not be indicted. *Id.* at 151-152. Writing for the Court, Chief Justice Berger found reversible error under *Napue* and *Brady*: "[w]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman and for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154. (Cites omitted.) *Giglio's* focus on the responsibility of the prosecutor to investigate all promises made on behalf of the Government extends to promises made by the police, who also make any such promises as spokespersons for the Government, and for whom the prosecutor bears responsibility. *United States v. Butler*, *supra*, 567 F.2d at p. 891.

The Court should grant review to remedy these disturbing abuses.

The magistrate found erroneously:

> The government's position that defendants' trial counsel had seen the June 1, 2001 letter, with its mention of a $3,1500 payment to Shields, finds support in the record. As set forth above, Greer's trial counsel specifically asked Shields whether Greer told him "word's out on the street that you got $3500 from the FBI." 19 RT Feb. 9, 2006 at 7337. ***Thus, it is apparent that defense counsel was aware of the pertinent information and able to use it on cross-examination.***

App. E80. Emphasis added.

Contrary to the magistrate's speculation, trial counsel's questions to Derrick Shields were *not* and could *not* have been based on the June 1, 2001 letter, as it had *not* been disclosed to Walker or Greer before trial, and the transcript of the cross-examination makes no reference to the benefits in the undisclosed letter.

Moreover, the Government's disclosure of the letter to Walker defense counsel in a separate prior case did not satisfy the Government's *Brady* obligations. As the Ninth Circuit explained in 1986, "However, because the trial strategies of co-defendants often conflict (i.e., each may seek to place liability solely on the other), we do not think it prudent to allow the government to satisfy its due process requirements to each of several defendants by merely giving exculpatory evidence to one defendant." *United States v. Shaffer* 789 F. 2d 682, 690 (9th Cir. 1986).

The letter was *not* disclosed to Walker until May 31, 2013, ***seven years*** after Walker was convicted. Additionally, contrary to the magistrate judge's finding, this claim was *not* waived, as Walker did not know about the undisclosed evidence until May 31, 2013 and, therefore, could not have waived a claim of which he was unaware.

The Government knew that Shields lied. In exchange for his cooperation, he received money, was given a reduction on his parole violation term, and was relocated to a prison closer to his family. This information was never disclosed to Walker during discovery, and the Government has been unable to document that the information was "formally produced." The Government's failure to correct Shields' lies was highly prejudicial.

Moreover, the information suppressed by the Government would have provided co-defendants Walker and Greer with an effective means of impeachment. "Payments to a government witness are no small thing." *United States v. Sedaghaty*, 728 F.3d 885, 901 (9th Cir.2013); *United States v. Price*, 566 F.3d 900, 911-12 (9th Cir. 2009) (stating, "to be 'material' under *Brady*/*Giglio*, 'undisclosed information or evidence acquired through that information must be admissible,' *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989), or capable of being used "to impeach a government witness.")

Here, although Shields had been cross-examined by the defense and denied receiving payments, the jury did not know about his *agreement* with

the Government to cooperate in exchange for money, relocation, and reduced prison time. The Government's failure to disclose its arrangement with Shields violated *Brady, Napue* and *Giglio*, among other cases. These were material facts relevant to Shields' credibility. Both Greer's and Walker's counsel should have been provided with this information before trial.

The Government's knowledge about Shields' payment and cooperation was particularly within the Government's information, unlike the cases cited in the Findings and Recommendations, which involved defense counsel's failure to obtain records from a *third party*. Clearly, the Government violated its obligation under *Brady*.

The Government allowed Shields to commit perjury during his Grand Jury and trial testimony when he testified that he had "never" received any money or anything of benefit for his cooperation. This was a momentous lie that Walker should have been able to prove to the jury and violated Walker's Due Process rights.

The Findings and Recommendations acknowledge, "Government counsel concedes, in the absence of evidence to the contrary, that the June 1, 2001 letter (indicating Shields had been paid and received a sentence reduction in exchange for his cooperation) was not 'formally produced' to either Greer or Walker in the instant case." App. E 79. The Magistrate Judge, however, excused the Government's *Brady* violation, stating: "But even if the claim had not been waived, it lacks merit. '[W]here the defendant

is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense.' *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (quoting *United States v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978)). At the very least, Walker's [Greer's] trial counsel had enough information to alert him to the fact that Shields had been compensated for his cooperation and to seek these documents through discovery. (App. E 80.)

The district court's voluminous docket clearly establishes that Walker *did* seek all such information in discovery. Despite seeking all relevant discovery, the Government breached its duty to disclose its confidential agreement with Shields.

The Magistrate Judge's reliance on *Cunningham v. Wong*, 704 F.3d 1143, 1154 (9th Cir. 2013), is misplaced as Cunningham involved disclosure of *third party* records, not records in the Government's possession. Accordingly, *Cunningham* is irrelevant to the facts in this case, in which the Government suppressed information within its exclusive possession. For the same reasons, *Raley v. Ylst*, *supra*, 470 F.3d at p. 804. (App. E 80) is inapplicable to Walker's *Brady* claim.

The result of the Government's failure to disclose the June 1, 2001 letter was Shields' false grand jury and trial testimony, which the prosecution never corrected. "To prevail on a claim based on *Mooney*-

Napue, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) ... the false testimony was material." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) quoting *United States v. Zuno-Arce,* 339 F.3d 886, 889 (9th Cir. 2003).

The Government's misconduct in not correcting Shields' false testimony violated the precedents cited above. This Court should grant review to remedy this abuse and reaffirm prosecutorial duties to provide discovery to the defense under *Brady*. Moreover, the Court should grant review to reinforce and reaffirm the prosecution's obligation to disclose agreements with cooperating witnesses and its duty to prevent and correct false testimony under *Giglio* and *Napue*.

2. Charles McClough

Prosecution witness McClough testified regarding PDF, its structure and membership, and that he had seen PDF members selling guns and drugs. McClough also implicated appellant Walker in the murder of Keith Roberts. A month after McClough provided this testimony the defense called him to the witness stand. McClough recanted his trial testimony, admitting he had lied on the stand and had been coerced to testify by FBI through threats and official misconduct. McClough testified that FBI Agent Peter French had told him what to say during trial regarding the Robert's murder:

> Q: Well, let me ask you this: Did anybody in the FBI, Agent French, anybody, other agents try to get you to change any parts of your

statements?
A: Yes. Exactly.
Q: All right. Now, who did that?
A: That was Pete French.
Q: What did he try to get you to change?
A: The statement about they already know that it was a lie because when Charles White made—I told them, you know, he was lying. So they told me the scenario about the incident in the alley with Roberts. They told me that - don't say certain things.
Q: Like what?
A: Like where the incident took place.
Q: You mean, an alley?
A: Yeah. They told me, Don't say that it took place in the alley, because it didn't.
Q: Who's they?
A: Pete French.
Q: Do you remember if anybody asked you about how many times Roberts was shot?
A: I got a good indication that - you know, I remember that Pete French told me he was shot a lot of times. And he said, Man, you should see the pictures. It's horrible. And I don't even know nothing about this.
Q: You mentioned the word scenarios.
A: Uh-huh.
Q: The FBI would give you scenarios. What do you mean by that?
A: Like, you know - they say like, you know, well, you know, he was shot here, you remember that, or - or, you know, it was multiple times and, you know, stuff like that to lead me on to thinking like I knew -1 don't know nothing about nothing.
Q: Did the FBI - anybody in the FBI ever tell you anything about somebody getting shot with a gage?
A: Exactly.
Q: And an unfired shell popping out?
A: Exactly.
Q: Who told you that?
A: Pete French.
Q: What was said about that?
A: He said to make sure that I said that Charles White popped a live round out because they needed to put that in the - in the umm - part of my statement because, I guess, it must have been part of what happened or whatever. He said - said make sure I put that in the statement.
Q: Is this what you referred to like as a scenario?
A: Exactly.

Q: Well, did anybody - did you have any knowledge about this live round?
A: No. I didn't have no knowledge about no live rounds.

App. J1-J7; RT 8556-8558, March 1, 2006 a.m.

Government witnesses McClough, Uvonda Parks, Jason Hickerson and Derrick Washington each committed perjury which the government knew was false and yet the government failed to correct any of the false testimony, including the false testimony that these witnesses had not received promises in exchange for their cooperation in the case against appellant Walker. These nondisclosures violated *Brady* and *Napue*, knowing use of false evidence, or failure to correct false evidence. *Napue*, 360 U.S. at 269.

The district court concluded in its findings that there was insufficient evidence of the actual falsity of the testimony and no "reasonable likelihood that the false testimony could have affected the judgment of the jury." ECF 1213 75, citing *United States v. Bagley, supra*, 473 U.S. at 670, n.9. Certainly, this conclusion is debatable among jurists of reason and a court could resolve in a different manner, making this issue appropriate for certification on appeal.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 33.2

I, Carolyn D. Phillips, counsel for petitioner, certify that this document is prepared in accordance with the requirements of Supreme Court Rule 33.2, and contains 8,190 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance, as counted by the word count program of Microsoft Word, version 16.26.

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Dated: June 26, 2019

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