NO:

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL PYE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal agent's assurance that U.S. Immigration and Customs Enforcement, Homeland Security Investigations would "look into what we can do" for the government's Haitian-citizen witnesses after the trial, made for the express purpose of securing their testimony, was a "promise or offer" within the purview of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959).

2. Whether, as the First, Second, Third, Fifth, and D.C. Circuits hold, the Constitutional prohibition against the prosecutorial use of false testimony encompasses testimony that is technically true but substantially misleading; or whether, as Eleventh and Sixth Circuits have held, Due Process is not violated unless the testimony is "literally" and "indisputably" false.

INTERESTED PARTIES AND RELATED PROECEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

The following proceedings directly relate to the case before the Court:

United States v. Pye, 4:17-mj-04002-BAB-1 (W.D. Ark. Feb. 28, 2017).

United States v. Pye, 1:17-cr-20205-UU-1 (S.D. FL. Jan 15, 2018).

United States v. Pye, No. 18-10277, 781 F. App'x 808 (11th Cir., June 21, 2019), *reh'g denied* (11th Cir. Aug. 6, 2019).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

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Daniel Pye respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10277 in that court on June 21, 2009, *United States v. Pye,* 781 F. App'x 808 (11th Cir., June 21, 2019)*, reh'g denied* (11th Cir. Aug. 28, 2019), which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Pye,* 781 F. App'x 808 (11th Cir., June 21, 2019)*, reh'g denied* (11th Cir. Aug. 28, 2019), is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 21, 2009. The Court of Appeals extended the time for filing petition for rehearing; a timely petition was filed and denied by the panel on August 28, 2019. Mr. Pye was subsequently granted a 60-day extension of time in which to file the instant petition. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3.

The district court had jurisdiction under 18 U.S.C. § 3231 because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law...

U.S. Const. amend. VI:

> 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 defence

STATEMENT OF THE CASE

Statement of Facts and

Course of Proceedings in the District Court

1. Petitioner Daniel Pye was indicted in the Southern District of Florida with four counts of traveling in foreign commerce for the purpose of engaging in illicit sexual conduct with minors, in violation of 18 U.S.C. § 2423(b). Mr. Pye had been a Christian missionary, and was accused of molesting young girls at an orphanage that he previously managed in Haiti. The agent in charge of the investigation was Emily A. Shoupe, a "Special Agent with U.S. Immigration and Customs Enforcement, Homeland Security Investigations (HSI)." (DE 96-1) (Declaration of Agent Shoupe) (hereafter "Shoupe Decl.").

The government filed a written response to the district court's Standing Discovery Order, indicating that it would "disclose any information or material which may be favorable on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976)" and "disclose any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), or *Napue v. Illinois*, 360 U.S. 264 (1959)." (DE 27:2).[1]

[1] With the exception of the Shoupe Decl., all citations to the record are identified herein by reference to the Docket Entry number in the district court ("DE"), followed by the page number.

During a pre-trial hearing, defense counsel asked Agent Shoupe whether the government had "made any indications to any of these alleged minor victims that they could receive some sort of benefit, meaning immigration benefit, as battered women or as abused women, in other words, receive residency in the United States due to what has occurred to them?" (DE 143:28). Shoupe answered: "No. No one has talked to them whatsoever about any kind of visa they could get. The only thing that has been discussed with them is their ability to come to the U.S. prior to trial in order for witness preparation and possibly for their safety." (DE 143:28).

The government's case rested on the testimony of nine of the Haitian witnesses, including five young girls who testified to various acts of abuse by Mr. Pye. During opening statements, the government told the jury that the witnesses' testimony was "the heart of this case," and "what it all boil[ed] down to," was "the words of the children that the defendant abused." (DE 129:130).

To rebut Mr. Pye's defense that the witnesses were lying, and that their testimony was motivated by a desire to stay in the United States, the prosecutor elicited statements from each witness that they had not been promised anything from the United States and that they would each be returning to Haiti after the trial.[2] Two

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[2] *See* DE 129:165 (victim E.T: "Q. Have you been promised anything in exchange for your testifying? A. No. ... Q. And after this trial, are you going back to Haiti? A. Yes."); DE 130:67-68 (eyewitness Edwidge Belizaire: "Q. Have you been promised anything in exchange for your testimony here? A. No. ... Q. After the trial is over, are you going back to Haiti? A. Yes."); DE 130:134-135 (eyewitness Woodley C: "Q. Have you been promised anything in exchange for your testimony? A. No. ... Q. And after this trial are you going back to Haiti?" A. Yes, of course."); (DE 131:54) (eyewitness

of the victims additionally testified that they were testifying to get justice.[3] And, one of the eyewitness testified that she had come to protect other children in Haiti from future abuse.[4]

The only witness who was even remotely equivocal about his intent to return to Haiti was Edwidge Belizaire, who initially denied during cross-examination that he had been "looking to leave Haiti for some time" (DE 130:72). Upon further questioning, Mr. Belizaire admitted that he'd had the idea to ask someone to sponsor him to attend a university outside of Haiti, but he had not started the process. (DE 130:72). He stated that the orphanage would not take him back "***if***" went back to Haiti. (DE 130:73) (emphasis added). Defense counsel asked, "But you said if you go back to Haiti, right?" and Mr. Belizaire answered: "I'm going back to Haiti." (DE 130:73). Defense counsel asked whether Mr. Beliziare would swear that he was not

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Omega S: "Q. Have you been promised anything in exchange for your testimony here? A. No. Q. After the trial is over, are you going back to Haiti? A. Yes."); DE 131:87 (victim S.R: "Q. [H]ave you been promised anything in exchange for your coming here today? A. No. ... Q. And after this trial, are you going back to Haiti? A. Yes.").

[3] *See* DE 130:239 (victim L.S: "Q. Have you been promised anything in exchange for your testimony? A. No. ... Q. After the trial is over, are you going back to Haiti? A. Yes. Q. Why did you come to Miami to testify? A. So I can get justice.); DE 130:329-330 (victim E.J.J: "Q. "[H]ave you been promised anything in exchange for your testimony? A. No. ... Q. After the trial is over, are you going back to Haiti? A. Yes. Q. Why did you come to Miami to testify? A. I came for justice, because this is the only way.").

[4]DE 129:197-98 (eyewitness Berline D: "Q. [H] have you been promised anything in exchange for your testimony here today? A. No. ... Q. And after this trial, are you going back to Haiti? A. Yes. Q. Why did you come to Miami to testify? A. I came to give my testimony in a way to protect other children, because there are many missionaries who claim they want to create orphanages and they do the same thing. So I came to protect the others.").

going to try to stay in the United States, and Mr. Beliziare testified: "Let me tell you, the only thing I know, after the trial I'm going back to Haiti" (DE 130:73). Defense counsel attempted to ask whether Mr. Belizaire would swear under oath that he was "not applying to stay in the United States, but the district court sustained the government's objection, ruled that the question was argumentative, and instructed counsel to "move on." (DE 130:74).

During her testimony, Agent Shoupe told the jury that she had made no "promises or offers to [the witnesses] whatsoever." (DE 131:107). To her knowledge, no one had made any such promises or offers. (DE 131:108).

The witnesses' testimony was riddled with inconsistencies, about major events as well as minor ones. The prosecutor was forced to acknowledged this, prompting the argument that if the witnesses were lying, they would have "gotten their stories straight." (DE 133:56-57). Perhaps most significantly, several of the witnesses' stories evolved over time. Four of the witnesses, including two of the victims, only accused Mr. Pye of misconduct ***after*** Agent Shoupe raised the issue of travel to the Miami. (*See* DE 130:19-20, 69-70, 136; DE 131:17-18, 107).

Nonetheless, in closing argument, the prosecution expressly pitted the witnesses' credibility against Petitioner's. The prosecutor argued that the witnesses had no motive to lie, and emphasized that "[t]hey all said they're going back to Haiti after the trial." (DE 133:23-24). By contrast, Mr. Pye had a motive to lie because he had "the most at risk." (DE 133:31). "If anyone has a motive to lie, he does." (DE 133:31).

In rebuttal closing, the government argued:

> This is not a he said/she said case. This is a he said versus she said versus she said versus she said versus he said versus he said versus he said versus she said versus she said versus she said. It's Danny Pye and his wife versus Berline, S------, Omega, Edwidge, Woodley, E------, E------, L----- and D---- . . .

(DE 133:78). The government asserted that it had proven its case "through the statements of the children", and asked the jurors to go back to the jury room and "[t]alk about their words." (DE 33:60).

The jury deliberated for the better part of two days, prior to returning a split verdict. (DE 133:72-75; DE 134:2-3). Mr. Pye was found guilty on three of the counts with which he was charged, and acquitted of one count. (DE 134:3).

2. Shortly after the trial, the government disclosed that Agent Shoupe had an undisclosed conversation with the witnesses regarding their fears for their safety "if they testified at trial." (*See* DE 96; Shoupe Decl. ¶ 5). Approximately one week after the trial, the witnesses had been granted Deferred Action status for six months. (*See* DE 96). In light of the revelations, Mr. Pye moved for a new trial based on newly discovered evidence and the Due Process Clause of the United States Constitution (DE 95).

The government filed a written response, attaching the Declaration of Agent Shoupe,[5] and the district court held an evidentiary hearing. (DE 139). The following facts are undisputed:

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[5] A copy of Agent Shoupe's declaration is included in the Appendix.

i. The conversation occurred in a hotel in Port-au-Prince, Haiti, while Shoupe was discussing the logistics of bringing the witnesses to Miami for trial preparation, the following day. (Shoupe Decl. ¶5). During that meeting, "several individuals began speaking in Creole, and one witness who speaks some English, stated that the victims and witnesses were concerned about their safety if they testified at trial." (Shoupe Decl. ¶5).[6] Shoupe "informed them that, after trial, they would all be returning to Haiti, but that their safety is important and HSI would look into different ways to keep them safe, but that this was not a topic that could be discussed during trial preparation or during trial." (Shoupe Decl. ¶6).

ii. Shoupe testified that she was "thinking of possible ways to keep them in the U.S. But that was never communicated to them." (DE 139:9). Shoupe had learned from another case that it was "not appropriate for the Government ... to be discussing immigration topics with the victims and witnesses." (DE 139:14).

> Like I said, the only thing I said was that this was a topic we – basically I said you're going back to Haiti; that we understand, you know, we know that you guys are scared. We understand your concerns. ***We're going to look into what we can do. But it's not a topic that could be discussed during trial prep or during trial.***
>
> ...

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[6] Shoupe's Declaration and testimony refer to the victims and witnesses as separate groups. They are referred to herein collectively as "the witnesses."

> It was more just saying that, you know, we knew they were scared and we knew that they wanted to know how we were going to keep them safe. But ***we just couldn't talk about those options while*** -- [7]

(DE 139:15) (emphasis added).

iii. Shoupe also explained that, "if there was nothing we could do, I didn't want them to stop participating right before trial." (DE 139:14). *See also* Shoupe Decl. ¶ 6 ("Based on my prior experience in other trials of this nature, I believed that I should not discuss anything about immigration. Additionally, in the event that HSI would not be able to ensure their safety, I did not want them to stop cooperating.").

iv. The day after she returned from Port-au-Prince, approximately two weeks before the trial, Shoupe spoke to the "person who does the immigration and benefits" in her office. (DE 139:23, 25). That person explained that Deferred Action "might be an appropriate action" if the witnesses had a fear of participating. (DE 139:23).

On November 3, 2017, after the close of evidence but before closing arguments, Shoupe began preparing Deferred Action applications for the witnesses. (Shoupe Decl. ¶8; DE 139:23). Shoupe "did this because she believed that Deferred Action might be an appropriate measure to protect the victims and witnesses if they renewed their fears about returning to Haiti, and [she] was aware that the Deferred Action process can be a lengthy administrative procedure." (Shoupe Decl. ¶8).

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[7] At this point in Shoupe's testimony, she was interrupted by a question from the district court, who was trying to discern whether Shoupe had instructed the witnesses to "keep their mouths shut." (DE 139:15).

v. The day after the verdict, the spokesperson for the group asked Shoupe "what would happen to them and said they were scared." (Shoupe Decl. ¶9). Shoupe "thanked them for waiting until after trial to raise these concerns." (Shoupe Decl. ¶9). That same day, the witnesses were interviewed by HSI personnel and, a few days later, "senior management of HSI determined that the victims and witnesses were eligible for Deferred Action for six months." (*See* Shoupe Decl. ¶12).

3. The district court denied Mr. Pye's motion for a new trial, finding that there was newly discovered evidence, but that it was not material and probably would not produce a new result in a subsequent trial. (DE 104; DE 193:35). The court reasoned that, "if the witnesses didn't know about [the Deferred Action paperwork] what difference does it make?" (DE 193:32).

4. The district court sentenced Mr. Pye to 480 months' imprisonment, which represented a significant downward variance from the "shockingly" high advisory guidelines range of 1,080 months. (*See* DE 128:2). During the hearing, the court expressed reservations about the strength of the evidence, stating, "This is not your usual case where . . . the situation is relatively obvious. It's far more subtle than that. It's far more complex. But I have to respect the jury's verdict." (DE 128:3). The court also stated: "And I hate to say this in front of Mr. Pye's family – I think it is certainly is more likely than not that Mr. Pye is a pedophile." (DE 128:20).

The Opinion Below

Mr. Pye appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit, arguing *inter* alia, that Agent Shoupe's pre-trial

conversation with the witnesses, in which she promised to "look into different ways to keep them safe," and to see what she could do for them after the trial, was material exculpatory information that should have been disclosed. Mr. Pye also argued that the government unconstitutionally presented false or highly misleading testimony when the witnesses testified that they had been promised nothing in exchange for their testimony and would be returning to Haiti after the trial, and when Agent Shoupe testified that she made no "promises or offers to them, whatsoever."

On June 21, 2019, without the benefit of oral argument, the Eleventh Circuit issued an unpublished, *per curiam*, opinion affirming the judgment of the district court. *United States v. Pye*, 781 F. App'x 808 (11th Cir. June 21, 2019). After setting forth the applicable standards (as well as the standards related to a non-constitutional claim which Mr. Pye did not pursue on appeal), the court disposed of Mr. Pye's *Brady* and *Giglio* claims in a single paragraph:

> The district court did not abuse its discretion when it denied Pye's motion for a new trial based on newly discovered evidence because the government's post-trial disclosures, indicating that the government's Haitian witnesses were granted Deferred Action status to remain in the United States for an additional six months, was not evidence that would have affected the jury's verdict. Specifically, the trial record and the testimony from the hearing on the motion for new trial demonstrated that none of the witnesses believed they were promised immigration benefits in exchange for their testimony and the post-trial disclosures indicated that the witnesses did not know about the Deferred Action steps taken on their behalf until after the trial. Pye has not established that there is new material evidence that would probably lead to a different result at trial or help establish his innocence.

Pye, 781 F. App'x at 810 (citations omitted).

REASONS FOR GRANTING THE WRIT

This case presents an important question of constitutional law that has not been, but should be, settled by the Court: At what point does a communication between the government and a prosecution witness become an inducement which must be disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972)? The Court has yet to provide "definitive guidance" on the issue, and there is wide divergence among the lower courts regarding where to draw the line.

In this case, the Eleventh Circuit found that there was no *Brady* or *Giglio* violation, because the witnesses did not believe that they had been "promised immigration benefits" by Agent Shoupe. *Pye*, 781 F. App'x at 810. But other courts, including this Court, have recognized that firm promises are not required. Moreover, Agent Shoupe did promise that HSI – an arm of U.S. Immigration and Customs Enforcement – would "look into" different ways to help the witnesses. Was this not a promise or offer of any kind, as Shoupe testified? Or, as an Alabama court opined on comparable facts, was Shoupe's insistence that she had made no "promises or offers," where she had instead told the witnesses they could talk about it later, simply a "word game[]?"

The misleading nature of the evidence in this case also invokes a clear a long-standing circuit split warranting resolution by the Court. Can a statement that is technically or literally true, but nonetheless substantially and materially misleading, can give rise to a *Giglio* violation? The First, Second, Third, Fifth, and D.C. Circuits

all hold that it can. The Sixth Circuit, however, has imposed a rigid 'indisputable falsity' requirement, and the Eleventh Circuit has repeatedly held that testimony that is literally or technically accurate cannot support a *Giglio* claim.

There is no doubt that the jury in Mr. Pye's case was left with a false impression regarding the witnesses' impending return to Haiti. In reality, their return to Haiti was never certain; nor had the possibility of immigration benefits been foreclosed. Shoupe had simply told them that the matter could not be discussed until after the trial.

There can similarly be no doubt that the misleading testimony was material. The prosecution's case rested entirely on the credibility of the Haitian witnesses. That is why the prosecution crafted a mantra out of their imminent return to Haiti, the absence of any promises from the United States, and their purported lack of any motive to lie. Had the true facts been disclosed, there is a reasonable possibility that the verdict would be different.

The misleading nature of the testimony would have supported a *Giglio* claim – and almost certainly would have required a new trial – in the First, Second, Third, Fourth, Fifth, and D.C. Circuits. Because no conviction, let alone one carrying a 40-year sentence, should depend on geography, the Court should grant review.

I.

The Court's review is needed to clarify what inducements are subject to the government's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), and *Napue v. Illinois*, 360 U.S. 264, 270 (1959).

A. General Principles

1. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court set forth the now-familiar rule that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." The Court explained that the principle underlying this rule "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id*.

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the position candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' ... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guilt.' ...

Id. (internal footnote and citation omitted).

Because *Brady* applies regardless of the good or bad faith of the prosecutors, "*Brady* suppression occurs when the government fails to turn over evidence that is known only to police investigators and not to the prosecutor." *Wearry v. Cain*, 136 S.

Ct. 1002, 1007 n.8 (2016) (quotation omitted). *See also Kyles v. Whitley*, 514 U.S. 419 (1995).

2. The government's *Brady* obligation applies to evidence that is impeaching, as well as directly exculpatory. *Giglio v. United States,* 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 254, 269 (1959)). In *Napue*, the State's principle witness testified that he had received "no promise of consideration in return for his testimony." 360 U.S. at 265. It was later revealed that the prosecutor had represented that, in exchange for the witness' cooperation, "a recommendation for a reduction of his sentence would be made and, if possible, effectuated." *Napue*, 360 U.S. at 267. The witness was later assured that "every possible effort would be made to conform to the promise." *Id*. at 267 n.1.

On these facts, the Court unanimously held that the Due Process Clause of the Fourteenth Amendment required a new trial. "First," the Court wrote, "it is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourth Amendment." *Id*. at 269 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. (citations omitted). The Court explained that "[t]he 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." *Id*. Indeed, "[t]he jury's estimate of the truthfulness and reliability of a given witness

may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Id*. at 279.

3. In *Giglio v. United States*, 405 U.S. 150, 153-154 (1972), the Court expressly extended *Brady*'s disclosure requirement to impeachment evidence:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, ... (1935), the Court made clear that deliberate deception of a court and jurors by the presentation of false evidence is incompatible with the 'rudimentary demands of justice.' ... In *Napue* ... we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears' ... Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' ... ***When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.*** *Napue*, *supra*, at 269, 79 S.Ct., at 1177.

Giglio, 405 U.S. 150 at 153-154 (internal citations omitted).

4. Where evidence favorable to the defense is suppressed, a new trial is required if there "any reasonable likelihood" the suppressed evidence or false testimony could have "affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quotation omitted). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quotation omitted).

B. Clarity is needed on the scope of the government's *Brady* obligations.

While the above principles are clear and well-established, the "more fundamental, yet far more complex question of what type of statement to a cooperating witness will be considered a 'promise, reward, or inducement,' in the first instance," is an area of law in which "state and federal courts have diverged widely" *See* R. Michael Cassidy, "*Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1151 (Spring 2004) (footnote omitted). The Eleventh Circuit noted 35 years ago that "[t]he Court has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness' credibility that they must be disclosed at trial." *McClesky v. Kemp*, 753 F.2d 877 (11th Cir. 1985). And, "[a]t least in part because this underlying conceptual problem has not been resolved, claims of *Giglio* error arise with disturbing frequency in state and federal courts." Cassidy*, Soft Words of Hope*, *supra*, at 1152 (footnote omitted).

The question in this case is whether Agent Shoupe's pretrial conversation with the witnesses, in which she promised to "look into" different ways to keep them safe, and to "look into what" HSI could do for them, was material impeachment evidence which should have been disclosed. The Eleventh Circuit held that the "government 's post trial disclosures ... was [sic] not evidence that would have affected the jury's verdict," because "the trial record and the testimony from the hearing on the motion for new trial demonstrated that none of the witnesses believed they were promised

immigration benefits in exchange for their testimony and the post-trial disclosures indicated that the witnesses did not know about the Deferred Action steps taken on their behalf until after the trial." *Pye*, 781 F. App'x at 810. However, the fact that the witnesses did not believe they had been promised actual immigration benefits is not determinative.

In *Wearry v. Cain*, the Court found a *Brady* violation where the State failed to disclose that its witness "had twice sought a deal to reduce his existing sentence" in exchange for testimony, and the police stated they would "talk to the D.A. if he told the truth." 136 S. Ct. at 1004. Hence, "this Court has said that 'a witness' attempt to obtain a deal before testifying' can be material 'even though the State had made no binding promises.'" *McGee v. McFadden*, 139 S. Ct. 2608, 2610 (2019) (Sotomayor, J., dissenting from the denial of *certiorari*) (citing *Wearry*, 136 S. Ct. at 1007 (further citation omitted)).

In *Tassin v. Cain*, 517 F.3d 770, 778 & n.27 (5th Cir. 2008), the Fifth Circuit affirmed a grant of habeas relief where "the state [courts] had erroneously concluded that there was no duty of disclosure absent a firm promise of leniency from the judge or prosecutor." Discussing *Napue*, the Fifth Circuit wrote: "[a]lthough the Court referred to the covered-up deal as a 'promise,' the Court focused on the extent to which the testimony misled the jury, not whether the promise was indeed a promise, and emphasized that the witness 'believed' that he 'might' receive a promise prior to trial." *Tassin,* 518 F.3d at 778. "*Giglio* and *Napue* set a clear precedent, establishing that

where a key witness has received consideration or ***potential*** favors in exchange for testimony and lies about those favors, the trial is not fair." *Id.* (emphasis added).

In Massachusetts, "any communication that suggests favorable treatment" to a witness must be disclosed:

> We take this occasion to emphasize that any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth. ... The fact that the terms of the agreement are not clearly delineated does not insulate the arrangement from disclosure. Indeed, the very nature of the situation may require that its terms be vague as the consideration given may be dependent on the degree of cooperation. But even without precise terms, the government easily can induce a witness to believe that his treatment is dependent on his testimony. Thus, if any communication is reasonably susceptible of such an interpretation, it must be disclosed to the defense.

Massachusetts v. Hill, 739 N.E. 670, 675 (Mass. 2000).

The question should not be whether there was an agreement between the parties in a contractual sense, but whether a government agent knowingly instilled in the witness a motive to "slant" their testimony against the accused. *See United States v. Abel*, 469 U.S. 45 (1984) ("Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party."). As an Alabama court put it, to deny the existence of a "promise," after a law enforcement officer has promised to "see what [they] can do," in exchange for the witness' cooperation, is "merely playing with words." *See Hamilton v. Alabama*, 677 So.2d 1254 (Ala. Crim. App. 1995) ("Such word games are intolerable [at any] time, much less when a man's, even a murderer's, life is being decided. Owens may not

have been promised anything specific in terms of results, but he was promised their efforts.") (quoting the post-conviction judge), *certiorari denied* (Ala. 1996).

C. Shoupe's promise that HSI would "look into" what it could do for the witness was material impeachment evidence within the purview of *Brady*, *Giglio*, and *Napue*.

In response to being confronted with the witnesses' fears of returning to Haiti after testifying on behalf of the United States, Agent Shoupe promised the witnesses that Homeland Security Investigations – an arm of U.S. Immigration and Customs Enforcement – would "look into different ways to keep them safe," (Shoupe Dec. ¶6), and would "look into what we can do." (DE 139:16). Shoupe understood that the witnesses were, at least potentially, seeking immigration benefits: That was the reason she told them "that this was not a topic that could be discussed during trial preparation or during trial." (Shuope Decl. ¶6). And, Shoupe also knew that her response was material to the witness' decision to testify. "Based on my prior experience in other trials of this nature, I believed that I should not discuss anything about immigration. Additionally, in the event that HSI would not be able to ensure their safety, ***I did not want them to stop cooperating***.") (Shoupe Decl. ¶6) (emphasis added).

Agent Shoupe may not have used the word "immigration," or expressly told the witness that they may be able to stay in the United States. But she was a representative of the United States ***Immigration Customs Enforcement*** agency. She did not need to use the word "immigration," for the witnesses to understand what

"options" were on the table. Thus, while Shoupe declared that she "did not inform them that they might be able to remain in the United States," (DE 96-1 ¶6), it is equally true that she did not tell them otherwise. She did not "want them to stop participating right before trial." (DE 139:14). *Cf. United States v. Morris*, 498 F.3d 634, 639 (7th Cir. 2007) ("It was therefore improper both to give the jury the impression that Peterson's sentence could not go below 10 years during his examination of Peterson, and then later to argue the same thing to the jury at least when it is obvious that the United States had not firmly rejected the possibility of the § 5K1.1 motion").

Every one of the government's critical fact witnesses had a powerful motive to curry favor with the United States, which was suppressed from the defense and aggressively denied throughout the trial. Try as he might, "counsel got nowhere in his effort to uncover the prosecutorial bargain." *Boone v. Paderick,* 541 F.2d 447, 448 (4th Cir. 1976) (granting habeas relief based on undisclosed promise that a detective would "use his influence" to see that the witness was not prosecuted). "No matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon a conjecture a conjecture which the prosecutor disputed." *Id.* at 451. Had the jury known that each one of the witnesses had requested assistance from Agent Shoupe, and that HSI was "looking into" ways to help them, there is a reasonable likelihood that the result would have been different. In light of the importance of this issue, and the clear need for direction from this Court, Mr. Pye asks the Court to grant review.

II.

The Court should resolve the split of authority regarding whether the Due Process Clause of the United States Constitution is violated where a conviction is obtained based on materially misleading testimony, or whether the Constitution is not is not offended unless the testimony is "literally" and "indisputably" false.

A. There is a clear and long-established circuit split regarding the question presented.

The First, Second, Third, Fifth, and D.C. Circuits all hold that Due Process is violated where a conviction is obtained based on testimony that is "misleading," even if not technically false. *See Blankeship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977) ("This court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with a material witness.") (citation omitted); *United States v. Bynum*, 567 F.2d 1167 (1st Cir. 1978) (applying *Giglio* where the witness' testimony did not reveal "outright deception," but was nonetheless "misleading"); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (affirming grant of habeas relief where the prosecutor elicited "technically correct answers," which left the jury with a "mistaken impression" about the existence of the witness' plea agreement; "testimony was probably true but surely misleading"); *United States v. Harris*, 498

F.2d 1164, 1169 (3d Cir. 1974) ("[T]he prosecution's duty to disclose false testimony by one of its witnesses is not to be narrowly and technically limited to those situations where the prosecutor knows the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading."); *United States v. Iverson*, 637 F.2d 799, 805 n.19 (D. C. Cir. 1989) ("The dissent suggests that absent perjury there is no affirmative duty on the prosecutor to correct false testimony .... But it makes no difference whether testimony is technically perjurious or merely misleading.").

These cases are in direct conflict with the law of the Sixth Circuit and Eleventh Circuits, which hold testimony which is literally accurate cannot give rise to a *Giglio* claim. In *Hammond v. Hall*, 586 F.3d 1289, 1306, 1307 (2009), the Eleventh Circuit rejected an argument that "the prosecution violated [*Giglio*] by eliciting misleading testimony" about a witness' criminal background. The court held that, to establish a *Giglio* claim, "[t]he testimony or statement elicited or made must have been a false one." *Id*. at 1307. The petitioner in *Hammond* conceded that the testimony given was "literally accurate," and, "[b]ecause there was no lie, there was no *Giglio* violation." *Id*. *See also Smith v. Secretary, Department of Corrections,* 572 F.3d 1327 (11th Cir. 2009) ("Accurate statements do not violate the *Giglio* rule"). The Sixth Circuit has similarly held that "[t]o establish a claim of prosecutorial misconduct or denial of due process, ... the defendant must show that the statement in question was 'indisputably false,' rather than merely misleading." *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000)

(citation omitted). There is thus a clear and longstanding circuit split regarding the question presented, warranting this Court's review.

B. The testimony was substantially and materially misleading.

In this case, it may have been technically true that none of "the witnesses believed they were promised immigration benefits in exchange for their testimony." *Pye,* 781 F. App'x at 810. But that is only because they were told that the topic could not be discussed until after the trial. They got the message – and brought up the issue the day after the verdict was returned. (Shoupe Decl. ¶9). Removing any doubt that there was a meeting of the minds, Shoupe "thanked them for waiting until after trial to raise these concerns." (Shoupe Decl. ¶9).

Nonetheless, all but one of the Haitian witnesses testified without hesitation that they would be returning to Haiti after the trial. It was only Edwidge Belizare, who inadvertently testified about what would happen "if" he returned to Haiti. (DE 130:73). When defense counsel picked up on his language and questioned him, Mr. Belizaire insisted that he was "going back to Haiti." (DE 130:73). After twice being asked whether he would "try to stay" in the United States, Mr. Belizaire testified: "Let me tell you, ***the only thing I know***, after the trial I'm going back to Haiti." (DE130:292) (emphasis added).

Mr. Belizare's testimony illuminates the understanding that existed between SA Shoupe and the witnesses. The witness were all expressly told that they were returning to Haiti, but the "topic" of their return could be discussed again, after the trial. This is confirmed by Shoupe's written and oral testimony:

> I informed them that, after trial, they would all be returning to Haiti, ***but*** that their safety is important ***and*** HSI would look into different ways to keep them safe, ***but*** that this was not a topic that could be discussed during trial preparation or during trial.

DE 96-1 ¶ 6 (emphasis added).

> Like I said, the only thing I said was that this was a topic we -- basically I said ***you're going back to Haiti***; that we understand, you know, we know that you guys are scared. ***We understand your concerns. We're going to look into what we can do***. But it's not a topic that could be discussed during trial prep or during trial.

(DE139:15) (emphasis added).

In light of these undisputed facts, the witnesses' unqualified and unequivocal testimony that they were "going back to Haiti" was, at the least, highly misleading. *See United States v. Bagley*, 473 U.S. 667, 684 (1985) (finding significant likelihood that statement that no "promise of reward" had been made to witnesses, though "technically correct," was misleading, where it "induced defense counsel to believe that [the witnesses] could not be impeached on the basis of bias or interest arising from inducements offered by the Government.").

Similarly, even if Agent Shoupe believed she was testifying truthfully when she told the jury that she had not made any "promises or offers to them, whatsoever," she knew that she had dangled the ***possibility*** of assistance in order to secure the witnesses' testimony. By the time of her testimony, she had already spoken to HSI's immigration coordinator about the witnesses. And, by the time the prosecutor insisted in closing arguments that the witnesses "all said they're going back to Haiti after the trial" (DE 133:24), Shoupe had already began filling out the Deferred Action

applications. (Shoupe Decl. ¶ 8). Under these circumstances, both the testimony and argument that the witnesses were all going back to Haiti right after the trial, had been offered nothing of value from the United States, and had no motive to lie, was substantially misleading. It should have required a new trial.

The Eleventh Circuit, however, simply observed that "none of the witnesses believed they were promised immigration benefits in exchange for their testimony and the post-trial disclosures indicated that the witnesses did not know about the Deferred Action steps taken on their behalf until after the trial." *Pye*, 781 F. App'x at 810. The court made no inquiry into the misleading nature of the testimony or the prosecutor's arguments to the jury. Presumably, the Court concluded that: "[b]ecause there was no lie, there was no *Giglio* violation." *Hammond v. Hall*, 586 F.3d 1289, 1307 (11th Cir. 2009). Because the First, Second Third, Fifth, and D.C. Circuits would have recognized a valid *Giglio* claim on these facts, Mr. Pye asks the Court to grant review.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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