NO. _____

In The Supreme Court of the United States

STEVEN MASON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to determine whether the lower courts erred in finding that the Government's very late disclosure of extensive exculpatory and impeaching information – including its knowledge about a letter that its key witness had reportedly written, outlining his plans to lie against the co-defendants at trial – did not prejudice these Defendants under *Brady* and its progeny?

II. Whether this Court should grant certiorari to determine whether the lower courts erred in refusing to sever Mr. Mason's trial from that of co-defendant Andrea Miller, where these defendants' alleged criminal activities did not involve common acts or transactions, and even after a juror's written note demonstrated clear spillover prejudice, with that juror (later the foreperson) plainly confused and attributing criminal conduct presented only against Ms. Miller to Mr. Mason?

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner is Steven Mason, who was the Appellant below. Respondent is the United States of America, which was the Appellee below.

STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTE

RULES

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

Steven Mason respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, issued on March 6, 2020, is reproduced in the Appendix to this Petition ("Pet. App.") at 1a. The District Court's Judgment, imposing a five-year prison sentence on Mr. Mason following a jury's guilty verdict at trial, is included therein at Pet. App. at 17a.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2020. Pet. App. 1a. This Court has jurisdiction over this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY OR OTHER PROVISIONS

Fed. R. Crim. P. 8 provides as follows:

> (a) JOINDER OF OFFENSES. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
>
> (b) JOINDER OF DEFENDANTS. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 14(a) provides as follows:

> RELIEF. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

STATEMENT OF THE CASE

A. Procedural Background

On May 16, 2016, Appellant Steven Mason was charged in United States v. Ukuazaoku *et al.*, Case No. 1:16-CR-90 (D.D.C.) as the 12th of 13 defendants named in a four-count Indictment alleging various drug crimes. Mr. Mason was not named in Count One (alleging conspiracy to import), or in Counts Three or Four (alleging substantive offenses), but was named in Count Two as one of 13 people involved in a conspiracy to distribute and possess with intent to distribute certain listed controlled substances. This Indictment did not charge Mr. Mason with any mandatory minimum quantities, but merely described him as involved in an unspecified amount of a mixture or substance containing heroin and other substances.

After Case No. 1:16-CR-90 advanced through pretrial proceedings, and after the Government reached dispositions with all but two of the defendants, a trial date was set to begin January 9, 2018, for Mr. Mason and one other co-defendant, Andrea Miller. The Government then decided to separately indict these two remaining Defendants still seeking a trial. This was not done via a superseding indictment; instead, the Government filed an entirely separate action, in United States v. Miller, *et al.*, Case No. 1:17-CR-195, which alleged only two counts. JA:23.[1] As in the

[1] References to "JA" reflect pinpoint cites to the Joint Appendix filed in the court of appeals.

previous case, Mr. Mason was not charged in Count One (conspiracy to import, now alleged only against Ms. Miller). JA:23. Count Two charged that Ms. Miller and Mr. Mason conspired "together, and with other persons both known and unknown to the Grand Jury," to distribute and possess with intent to distribute three specified drugs: "heroin," "fentanyl," and "alprazolam, also known as xanax," JA:24. The new Indictment also now alleged Mr. Mason was responsible for "100 grams or more" of a mixture or substance containing a detectable amount heroin, JA:24, subjecting him to a 5-year mandatory minimum term of imprisonment.

Case No. 1:17-CR-195 proceeded to arraignment on October 20, 2017. Both defendants pled not guilty, and the Court granted the Government's motion to dismiss all counts filed against these Defendants in the old case and adopting that case's schedule. Defendants were directed to re-file their pleadings in the new case, with the trial still tracked to begin on January 9, 2018. JA:27-46.

B. Pretrial Matters – Motion for Severance and *Brady* Problems

Mr. Mason then re-filed all pleadings as directed, including a Motion for Severance Pursuant to Rules 8(b) and 14. JA:68. This motion specifically asked for Mr. Mason to receive a separate trial from Ms. Miller, and reminded the Court that "Mr. Mason is solely charged in Count two of the indictment with a separate conspiracy." JA:70. This filing directly warned that having other conspiracies in his trial would be "prejudicial and will be confusing to the jury despite any jury instructions devised by the government." JA:70. Mason also explained more specifically that the discovery in this case had included seized "mailings [that] are

unrelated to defendant Mason." JA:70. He acknowledged that "[a]n individual named Steve is discussed in a handful of telephone calls, but these conversations do not have Mr. Mason undertaking any drug transactions with … Miller." JA:70. He then further noted, "Most importantly, the government has not provided any seized evidence involving transactions with Mr. Mason and defendant[] Miller…." JA:70. Mr. Mason's severance motion also noted that he had specifically asked for any overt acts among Mr. Mason and his co-defendants in a Motion for a Bill of Particulars. JA:70-71. As that separate Motion, JA:61, confirmed, it was filed because "Mr. Mason's exact role and indication of the coconspirators he is claimed to have participated with has not been made apparent." JA:62. *See also* JA:66 ("the thousands of pages of discovery, electronic recordings and other material does not provide clarification as to the role of Mr. Mason."). The Government never provided any of the requested particulars, and the District Court never ordered it to do so.

Mr. Mason also refiled his Motion for Release of Brady Materials and Giglio Materials, JA:52, along with a Motion for Disclosure of Impeachment Evidence and Jencks, JA:47, and joined in various co-defendants' motions. The Government later opposed almost all the defense motions, and continued to advise both defense counsel and the District Court, as it had throughout, that the Government was well-aware of its obligations under *Brady*, and would comply.

Just a month before the scheduled trial date, however, at a point when its case against these defendants had been active for over 18 months, the Government sent the defendants a *Brady* letter on December 8, 2017. In a December 12, 2017 Minute

Order, and after discussions in Court at a hearing held that day, the Court agreed that "[i]n light of new findings pertaining to Brady material filed by the government, defense counsel [i]s instructed (by order of the Court) to file a response no later than 12/20/17." A Joint Motion to Dismiss was then filed under seal on December 20, 2017, JA:1554, as publicly revealed at a Pretrial Conference on December 22, 2017. JA:194. At that Pretrial Conference, the Court set a new motions hearing on January 29, 2018, and reset the trial date so that it would now begin with jury selection on February 26, 2018. JA:207 & 209.

The sealed, December 20, 2018 Joint Motion to Dismiss attached the Government's December 8, 2017 letter, which disclosed extensive new evidence about its cooperating witnesses, including the person who would later become the Government's main witness against both Defendants at their trial – Nicholas Jones.[2] The scope of the new disclosures was breathtaking – 10 single-spaced pages of new evidence. JA:1573. Buried well into the midst of that new letter, on page 4, was also a bombshell: a description of a handwritten letter another inmate at the jail, Robert Bethea (nicknamed "Jazz") said he had received from Jones, stating that Jones planned to commit perjury at trial by lying about the role of the other defendants:

> On June 1, 2017, Walker said that on February 8, 2017, he had an encounter with another inmate known to Walker as "Jazz," someone who also knows Jones. This subject, who has been identified by Walker to be Robert Bethea, had a piece of paper, which he claimed was from Jones and said across the top, "Rip after finished reading." The letter

[2] The Government's December 8, 2017 *Brady* letter also revealed significant new information about Frank Walker, another co-defendant who had agreed to cooperate, but the Government later decided not to call Walker as a witness at trial. Miller and Mason subpoenaed Walker to appear as a defense witness, but he asserted his Fifth Amendment rights and was not allowed to appear before the jury.

> included a reference to Jones "snitching" and said something about Jones going to "go down there and lie on everybody." According to Walker, the next day "Jazz" gave Walker this letter and Walker turned the letter over to his attorney. Walker also said that "Jazz" called his uncle, someone named "Beanie," and learned that Jones had called "Beanie," and learned that Jones had called "Beanie" to complaint that "Jazz" was telling everyone that he was snitching. Walker said that "Jazz" later asked him for the letter back so that he could use it to defend himself to show that Jones was the one telling everyone that he was snitching. A copy of the letter accompanies this notice.

JA:1576. Although this part of the Government's *Brady* letter referenced June 1, 2017, a separate excerpt revealed between the lines that the Government had actually known about this letter since March 2017, JA:1581 – over nine months before defense counsel were told about it on December 8, 2017. The Government had also been in physical possession of this letter since June 2, 2017, when it had retrieved the letter from Walker's lawyer – over six months before its disclosure.

After receiving this December 8, 2017 *Brady* letter, defense counsel sought clarifications from the Government about when they had first learned of this letter and from whom. JA:1559. Prosecutors then admitted they had learned of this letter from another (unnamed) cooperator sometime before March 10, 2017 (the exact date was not provided), and that the information had come from Walker to this cooperator. The Government also learned that "Jazz" had said that he did not still have a copy of the letter, but that Frank Walker did. Clearly recognizing this letter's significance and impact for its *own* purposes, the Government also revealed that it had promptly gone to Jones to ask him about this letter on March 10, 2017, at which time it said Jones denied ever writing such a letter. In response to defense counsels' inquiries, the Government also revealed that Bethea ("Jazz") had been released from the D.C.

Jail sometime in April, after his own D.C. Superior Court criminal case had been dismissed. JA:1559-60. The Government also said it had waited until June 2017 to talk to Walker about this letter. During those discussions, Walker confirmed that, on February 8, 2017, he had indeed been in contact with Jazz, with Walker confirming that he had been given possession of a letter Jazz had said came from Jones, and which stated that Jones was going to "go down there and lie on everybody." JA:1558-59. The day after this talk with Walker, the Government received the letter itself from Walker's lawyer, but then withheld that letter from Ms. Miller and Mr. Mason's counsel for more than six additional months. JA:1559.

As the Defendants' Joint Motion noted, after receiving the Government's December 8, 2017 *Brady* letter, defense counsel expended extensive, immediate resources in an all-hands-on-deck effort to try to locate "Jazz" and/or his uncle, interrupting all other case preparations to focus on this overriding priority. JA:1560-62. *See also* JA:1568 ("The practical effect of the belated *Brady* disclosure was to bring trial preparation to a complete halt."). By the time the Defendants filed their Joint Motion to Dismiss on December 20, 2017, however, defense counsel had "learned that 'Jazz' is deceased and will therefore be unavailable to testify about the letter and its contents, that is, Jones' intention to lie on the stand." JA: 1561.[3] Defendants noted that, "[w]ith 'Jazz' deceased, there is little likelihood the defense could be able to track the chain of custody of the letter to 'Jazz' [and r]elatives have

[3] *See* JA:1569 ("Investigative resources have been burned on a wild goose chase while the golden egg sat, undisclosed, in not one, but two prosecutors' offices").

not been located to determine who is the uncle referred to in the letter who allegedly talked to Jones." JA:1561-62.

The Joint Motion then sought a dismissal based on this violation of *Brady*:

> As soon as the government found out about the letter, at least by March of 2017, they should have conducted an investigation to corroborate or dissuade "Jazz's" account, ***at the same time they [should have] disclosed its existence to the defense to permit it to take its own necessary steps.***

JA:1568 (emphasis added). *See also id.* ("the government effectively destroyed exculpatory witness testimony [by] failing both to investigate and disclose it"):

> The delay in not making the information known to defense counsel in March 2017, so the defense could independently corroborate and preserve what was in the letter and find additional witnesses and evidence as to information captured in the letter, has led to the witness most knowledgeable about the letter "Jazz," not being available to the defense for further investigation.

p.1570. Moreover, as the Joint Motion noted, "[t]his is not the run of the mill [*Brady*] case where the prosecutor was unaware of exculpatory evidence in the custody of the police without his knowledge." JA:1571. The prosecution had been advised of the letter, and even specifically asked Jones about it in a March 10 debriefing. *See also* JA:1571 ("The government's conduct cannot be ameliorated by the grant of additional time to the defense; 'Jazz' will still be dead.").

In a written Opposition, the Government conceded many of these key facts:

> Defendant Walker claimed that Mr. Bethea gave him the letter while they were incarcerated together at the D.C. jail and told him that the letter was written by Defendant Jones, who was also in custody at the jail at that time. Walker initially provided the letter to his counsel, and

> the government was unable[4] to get a copy of the letter until Walker agreed to provide it during a debrief on June 1, 2017. At that time, Walker also provided the name of the person who gave him the letter as Robert Bethea.

JA:1585. As the Government also conceded, the prosecutor himself was aware of the letter's existence and its contents months before its retrieval in June of 2017:

> Government counsel became aware of the letter in early March 2017, through a cooperator in an unrelated case. The cooperator did not know who wrote the letter but said that Defendant Walker showed him a copy of it, and stated that his co-defendant planned to "lie" to the government about him. Although government counsel had not seen the letter or verified its existence, government counsel confronted Defendant Jones about the letter on March 10, 2017.

JA:1585 n.2. Although the Government claimed that Jones had denied writing the letter or having any knowledge about it, the Government later sent a supplemental *Brady* letter to defense counsel on December 21, 2017, revealing that Jones had been polygraphed by the Government about the Jazz letter, and that the Government's polygraph examiner had declared Jones' denials to be "deceptive."[5]

The Government's response to the Joint Motion to Dismiss boiled down to a claimed lack of prejudice: "if permitted by the Court, the defense will still be able to make use of the jailhouse letter at trial, and, as a result, there is not prejudice to the defense." JA:1588. It claimed the Defendants could still try to ask Jones or Walker about the letter, and that "[t]he only potential witness who is not available is Robert Bethea." JA:1588. Ignoring both the March informant's information and Walker's

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[4] Mr. Mason disputes this claim, since nothing at all prevented the Government from contacting Walker or his counsel before June 1, 2017. The letter was also immediately provided by Walker's counsel the day after this debriefing session.

[5] The Government separately moved *in limine* to bar any and all references to any polygraph of Jones, and its motion was granted by the trial court.

own confirmation of what Jazz would say about this letter, the Government asserted "there is no way to know what, if anything, Mr. Bethea would have said about the letter had he not died." JA:1588. The Government further claimed that since Jazz had died before the government learned his true identity, it could not be said that the government caused or contributed to his non-availability. JA:1588 n.6.[6]

In Reply, the Defendants reminded the Court that the newly-disclosed *Brady* materials included not only the letter sent to Jazz, but also a whole host of other exculpatory and impeachment material that had been produced many months late, despite repeated defense requests. With respect to the handwritten "Jazz" letter, it also called the Government's claims of no prejudice "simply untrue":

> The defense CAN'T use the information because the information the defense needs can't be obtained. The information the defense needs died with Jazz. The defense needs to know who wrote the letter,[7] how Jazz acquired it, whether Jazz spoke to Jones about the letter and how Frank Walker came to be in possession of it, at a minimum. The government knew this information for … months and had they shared this information with the defense, [the defense] would have sought out Mr. Bethea immediately as the most critical witness.

JA:1595. The Defendants also squarely took issue with the notion the Government could not at least have revealed all exculpatory information it knew in March 2017:

> The government claims they didn't know Mr. Bethea's name on March [10], 2017, when they interviewed Jones. However, even without knowing the name, they still had a duty to tell the defense about the exculpatory/impeaching letter ***so we could investigate it.***

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[6] The Government cited no authority for the notion that *Brady's* standards require the defense to prove that the Government caused or contributed to the non-availability of a witness.

[7] Defense counsel noted the possibility, for example, that another individual may have written this letter on Jones' behalf. JA:1561.

JA:1595 n.2 (emphasis added). The suggested remedy offered by the Government was also inadequate:

> With regard to the "Jazz" letter, although the government magnanimously offers "to withhold any hearsay objections about the content of the letter," this offer falls far short of remedying the due process violation here. They will just turn around and say Jones didn't write the letter and provide their [handwriting] expert to testify to same.[8] This smacks of certain unfairness when the polygraph results which Jones failed cannot be used for cross examination by the defense.

JA:1596-97.

At a January 29, 2018 Pretrial Hearing, the Court addressed Mr. Mason's severance and *Brady* motions. It first denied Mr. Mason's severance motion, after noting the general preference for joint trials and "in the absence of a showing that the evidence against him is dramatically different as between Ms. Miller." JA:232-33. The Court then turned to the Joint Motion to Dismiss for *Brady* violations, and denied that motion as well. While the Court reiterated its earlier-expressed concerns about the Government's severe delays in disclosing this information, the Court said there was insufficient prejudice to warrant a dismissal:

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[8] After the "Jazz" letter was disclosed in December, defense trial counsel apparently discussed *ex parte* with the District Court a handwriting expert, JA:1614-15, since the District Court publicly revealed that such an expert request was likely forthcoming. JA:103. The Government had offered to have its own expert evaluate the letter for both sides, but the Court said, "I don't think the defense wants you to know what their handwriting analysis reveals." JA:105. But the Government's handwriting expert later proceeded and opined that Jones had not written this letter. No defense handwriting expert was retained before the February trial; defense counsel apparently felt so rushed that they agreed to use the Government's expert, never following up with a counter-expert. The day before trial, the Court told defense counsel "you were allowed to get a handwriting expert," but had not, so "I'm not sure how you can be standing here when we're about to open complaining that they're attempting to use the[ir expert's] results." JA:284-85. Faced at trial with a scenario in which Jones would likely deny writing the letter and a Government expert's analysis would be unrebutted, the defense ultimately never cross-examined Jones on the letter at trial at all. With more lead time, competent defense counsel surely would have retained their own expert and these trial results never would have transpired.

> A couple things: One is that … they didn't have an opportunity to review the letter until June 2017, at which point Jazz had already died. So the defense would not have had an ability to interview Jazz had the government disclosed this information in June when they should have.
>
> With regard to the other inconsistency or potentially exculpatory statements, … it's certainly understandable that exculpatory statements made by one defendant in one debriefing may slip notice by another. So I don't think there's been any malfeasance here or any deliberate attempt to not provide [the] defense with impeachment evidence which they're entitled to have under *Brady*.
>
> Moreover, I do agree that, given the time that has now passed since the disclosures were made and the trial date, the defense has had sufficient amount of time to investigate these statements…. [B]oth defense counsel have been zealous in running down all the leads provided by the disclosure.
>
> The government has also engaged a handwriting expert, and they have indicated that they're not going to object on hearsay grounds if the defense wasn't to cross examine with respect to the letter….
>
> So given all those things, I don't find that the prejudice that has resulted to the defense as a result of the [late] disclosure is sufficient to warrant a dismissal….

JA:248-50. In its ruling, the District Court did not address the Defendants' separate contention that a *Brady* disclosure properly should have been made in March (not June) 2017 – ***before*** Robert Bethea ("Jazz") died. No evaluation was performed by the District Court on how a Government disclosure made on or before March 10, 2017 would have affected Defendants' ability to find Jazz and obtain pivotal evidence.

Ultimately, Jones testified at this trial, where he served as the single most important witness against Mr. Mason. JA:887-906. Among other things, Jones identified Mr. Mason in Court, authenticated Mr. Mason's voice on the wiretapped calls, described their drug transactions together (despite no related drug seizures),

and explained various "code" words to provide *the only evidence* at this trial that Mr. Mason had been engaged in quantities involving more than 100 grams of heroin.

C. Trial: Joinder of these Defendants Creates Juror Confusion

On February 26, 2018, the trial began. Although the revised Indictment had specifically alleged that Ms. Miller and Mr. Mason conspired "together" – perhaps giving the District Judge Chutkan reason to believe their cases were properly joined – the actual evidence never established this at all. There was no such evidence – at trial or ever. Instead, these were two separate cases thrown together, with few (if any) overlapping facts. Ms. Miller's case related exclusively to two separate imported packages (one involving heroin and the other involving heroin and Xanax) mailed internationally to arrive at her residence on September 1 and 10, 2015. Her alleged criminal activity, involving receipt of these packages containing heroin and Xanax, and her alleged involvement in a conspiracy to possess with intent to distribute those drugs, all ended in September 2015. The facts against Mr. Mason, by contrast, arose from his alleged "redistributing" of heroin (not Xanax) for Jones several months later. His case was not tied to the importation, since he was not even charged in Count One's conspiracy to import. The facts against Mr. Mason, presented at trial, began with wiretapped calls that had not occurred until November/December 2015 – months after Ms. Miller's challenged activities had already ended. Nor was there any evidence to suggest that Ms. Miller and Mr. Mason knew, or even knew of, each other, before their cases had been initially charged and eventually tried together.

The Defendants' cases were so disparate that the Government, by its own admission, claimed to be trying to separate out its presentations of evidence against each Defendant, since in truth there was no real factual overlap. But those efforts were not consistent, and did not succeed. Mr. Mason was prejudiced by spillover prejudice from being tried together with Ms. Miller, since at least one sitting juror was even ***verifiably*** confused by this evidence that was supposed to be presented only against Ms. Miller – improperly attributing it to Mr. Mason.

Following opening statements at trial, the Government began its case by calling its Case Agent, Thomas Fowler of Homeland Security, who described his duties. Fowler began with a description of organized crime and international drug trafficking – topics that would have been of questionable relevancy in a separate trial of Mr. Mason, who was not charged in any conspiracy to import. A separate jury likely would not have heard the details, for example, of Francis Akuazaoku, the Nigerian source for Ms. Miller's packages, whom Fowler ominously described as having been previously deported from the U.S. following multiple convictions for drug trafficking, fraudulent U.S. passports, and prison escape.

Agent Fowler ultimately testified several times during this trial, as he was recalled on multiple occasions as the Government sought to interweave his testimony with that of other agents who had dealt with Ms. Miller and then, later, Mr. Mason during the course of their investigation. At the end of the first full day of testimony – focused on the Government's case against Ms. Miller alone – Mr. Mason's counsel renewed his motion for severance, expressing fear that the jury may be confused

about his client's role. The District Court agreed that no evidence had yet been presented against Mr. Mason, but again denied the motion. JA:514-15.

Another full day of testimony then ensued on February 28, 2018, with Fowler providing additional testimony and other agents also testifying. A pen register was introduced as Government Exhibit 41, and Mr. Mason's attorney objected that its introduction was misleading, by suggesting that it may contain evidence against Mr. Mason, but this objection was overruled. JA:668-70. Physical evidence of the heroin seized from two packages mailed to Ms. Miller's address – which DEA lab results confirmed had over 400 grams of heroin – was then admitted into evidence in this joint trial, although no physical evidence at all existed of any heroin that Mr. Mason was later said to have redistributed.

In the midst of Agent Fowler's direct testimony at this time – ostensibly focused on Ms. Miller's case alone – Agent Fowler was then oddly asked questions by the prosecutor about ***Mr. Mason***, thereby improperly conflating their cases:

> Q: Do you know what date the defendant Andrea Miller was arrested?
>
> A: Andrea Miller was also arrested on June 6th of 2016.
>
> Q: As a part of your investigation, did you do an investigation also of an individual by the name of Steve Mason?
>
> A: Yes.
>
> Q: Can you tell the members of the jury what date Mr. Mason was arrested?
>
> A: To my recollection, Steve Mason was also arrested on June 6th of 2016.
>
> ….

Q: How old is Ms. Miller?

A: Ms. Miller was born on June 15th of 1969, she's 48 years old.

Q: Based on your investigation and your arrest of Mr. Mason, do you know how old he is?

A: Yes. Mr. Mason was born on September 15th of 1969, he's also 48 years old.

JA:692-93. Into the middle of the Government's direct case against Ms. Miller, then, Mr. Mason was suddenly affirmatively interjected, based on questioning by the prosecutor – with the Government going out of its way to elicit testimony from Agent Fowler that Mr. Mason had been arrested the same day as Ms. Miller, that Mr. Mason was the same age as Ms. Miller, and that Mr. Mason had been investigated as "a part of" the same investigation involving Ms. Miller.

Agent Fowler's testimony continued the next day, on March 1, 2018, with Mr. Mason's counsel seeking to protect his client by getting clarification from Agent Fowler on cross-examination that there was no evidence of any communications between Ms. Miller and Mr. Mason, and that the Government exhibits introduced into evidence over the past two days had not implicated Mr. Mason. JA:748-71.

The Government then called to the stand its key witness, Nicholas Jones, an admitted heroin dealer with three prior felony convictions who had agreed to a cooperation plea deal in order to avoid a mandatory life sentence.[9] Jones proceeded to testify about how he and a partner, Frank Walker, had arranged for heroin

[9] Jones turned state's evidence *downstream*, against Ms. Miller (one of his girlfriends), whom he said had agreed to accept the September 10, 2015 heroin package, and also later against Mr. Mason, whom he named as one of his "redistributors" in 2016. Jones was facing a mandatory life sentence prior to his cooperation.

packages to be sent to various addresses they had provided to their Nigerian source.[10] Jones then began authenticating and discussing certain wiretapped calls – all of which post-dated by months Ms. Miller's involvement in this case. After reviewing several wiretapped calls – ranging in date between November 2015 and March 2016, all long after Ms. Miller's alleged role in criminality had ended – the Government's direct examination then turned the clock back to ask Jones about the nature of his relationship with Ms. Miller, how they had first met in a club, and how they had been romantically involved for 8-9 months prior to the time she received the September 2015 packages at her 2639 Bowen Road address. The details of those packages and Jones' conversations with Ms. Miller were then reviewed in detail. JA:776-854.

When the parties reconvened the next morning, on March 2, 2018, for Day 5 of the trial, the Court revealed that it had received two notes from the jury, with the Deputy Clerk advising that both had come from "juror No. 1." JA:871. The first note advised that "many of the jurors would now like from you a new estimate time when the trial will end." JA:871. The second note, as the Court acknowledged, was "much more … concerning." JA:873:

> Your Honor, would it be possible for the government to ask Mr. Jones, one, why did he or Mr. Walker choose Mr. Mason's house for drug delivery? And two, did he or Mr. Walker have a personal relationship with Mr. Mason or was this address picked at random? Thank you. Juror No. 1.

JA:874. The note was troubling because no evidence at all had been presented (nor would any be) that any drugs had ever been delivered to Mr. Mason's house. His

[10] Jones said that the heroin supply sources of he and Walker included not only Francis in Nigeria, but also "Ale," located in Washington, DC. JA:797.

alleged role in this case was exclusively limited to that of a "redistributor" of drugs for Jones and Walker. And even that evidence had still not been presented yet.

As the District Court acknowledged, this note meant "at least one juror is confused, and thinks that Mason lives at the 2639 Bowen Road address." JA:874.[11] The Government conceded, "I don't think we've connected anything to him [Mr. Mason] yet," and acknowledged this note was "unusual" since, now almost 800 pages of the transcripts into this case, "I don't think we've even connected anything to him yet." JA:875. The Court concurred, *id.* and further stated that the note revealed "evident confusion," and also a problem since the prosecutor was insisting, in resisting proposed Court clarifications, that "it's the jury's recollection of the evidence that controls," and "that rule still has to stand." JA:876. The prosecutor also *incorrectly* advised the District Court that "I haven't talked about Mason yet," JA:875, and falsely claimed that "[t]he only time Mr. Mason has come up is when Mr. John Carney got up and asked Agent Fowler," JA:876, in an attempt to suggest that this problem may have somehow been created by Mr. Mason's attorney's cross-examination of Agent Fowler. The District Court was having none of it, and replied: "You're laying this at Mr. Carney's feet?" JA:876.[12] In response, the prosecutor replied he couldn't be certain, but then again *falsely* summarized the record: "I haven't talked about Mr. Mason yet, just so the record is clear." JA:876.

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[11] As the first note revealed, Juror No. 1 had also been talking to other jurors.

[12] Indeed, as this prosecutor had just acknowledged, Mr. Carney had *already* tried to clarify this point during his cross-examination of Agent Fowler: Whitted: "I thought Mr. Carney was fairly clear when he indicated that – I thought he asked him, did you use my client's address?" JA:874.

Mr. Mason's counsel asked that this issue be cleared up "immediately," either by note or via Government questioning. JA:877. But the Court made clear it saw a problem in instructing the jury as defense counsel was requesting, and refused: "I'm not instructing the jury on what the evidence is, because I'm not the finder of fact, and their recollection controls." JA:878.

Instead, the Court responded to this note by ultimately telling the jury that "[t]here was a second question from a juror relating to questions regarding the evidence," and that "I believe your question ***may*** be resolved through the remainder of the evidence." JA:881 (emphasis added). Jones' testimony then resumed, with no immediate clarification on this point, either from the District Court or from the prosecutor, as Mr. Carney had requested. Instead, some five pages into the ensuing transcript, mixed into the middle of Jones' direct testimony, Jones finally acknowledged that he had never used Mason's address to have Francis send packages into the United States. JA:886. Jones' testimony then quickly pivoted to various wiretap activations – i.e., what was obviously the Government's strongest evidence against Mr. Mason. Jones' direct testimony against Mr. Mason then concluded with highly inflammatory testimony describing fentanyl samples Jones said he had unwittingly provided to Mr. Mason, with Jones asserting that Mr. Mason's redistributions caused two users to overdose and put at risk of death. JA:898-902.[13]

[13] No substances were ever obtained or tested from Mr. Mason's alleged redistributions for Jones, and Jones acknowledged that he did not know that these samples were fentanyl. The Court later granted a Rule 29 motion on the portion of Count Two's conspiracy involving fentanyl, but the jury still heard all of this incredibly prejudicial evidence, which was never stricken.

Later, Mr. Mason's counsel renewed his motion for severance, noting the spillover effect of the parties being tried together, and referencing Juror #1's note in particular as verifying that prejudice. JA:1129-31 ("probably the first time I've ever seen it happen."). He described this as an example of how, when multiple conspiracies exist and the evidence is not separate, it can cause misunderstandings, and that despite various efforts at clarification, "we contend spillover is there and is still there." JA:1131. But the Court again denied severance, acknowledging that Juror #1 was "confused" between Ms. Miller and Mr. Mason, but then oddly stating that "I don't think there's been any spillover, really." JA:1133. In her separate motion for a judgment of acquittal, Ms. Miller's counsel also (while not herself requesting severance) conveyed her own view that the jury here had improperly transferred evidence from one alleged co-conspirator to another. JA:1143.[14]

After the jury retired to deliberate, an additional significant fact was later revealed: Juror #1 was not only a member of the jury that decided this case, but eventually ***served as this jury's foreperson***. JA:1438 (Court reveals that foreperson is the same Juror #1 "who sent us a lot of notes"). On March 8, 2018, after spending over a full day out in deliberations, the jury found both defendants guilty of all charges filed against them, and also declared that they were each responsible for 100 grams of a mixture or substance containing heroin. JA:1451.

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[14] During closing arguments, the Government at times also conflated the conspiracy charges. It began its closing arguments, for example, by saying the case was about "a" drug trafficking conspiracy from 2014-2016, and stating that the Government's burden was to prove the two defendants committed "this crime." JA:1288. While its closing argument later did reference the separate charges, and stated that the first applied only against Ms. Miller, it said the second, involving heroin and xanax, JA:1290-91, was against both Defendants – although Mr. Mason was never charged with xanax. *See also* JA:1384 (rebuttal closing references "the conspiracy").

D. District Court Proceedings Conclude with a Mandatory Minimum Sentence

In light of the jury's verdict, the District Court issued a mandatory minimum sentence of 60 months of imprisonment, along with supervised release, a $100 special assessment, and 100 hours of community service, plus an $8000 forfeiture judgment. JA:1537-38 & 1547-53. Mr. Mason then filed a timely Notice of Appeal. JA:1546.

E. Proceedings in the Court of Appeals

The District Court record was later unsealed, and briefs were filed in the court of appeals. The court of appeals did grant oral argument, but affirmed. *United States v. Mason*, 2020 U.S. App. LEXIS 7043 (D.C. Cir. No. 18-3056, Mar. 6, 2020).

1. The *Brady* Issue

Under *Brady*, the court of appeals said this issue has three parts: (1) the evidence "must be favorable to the accused," (2) it "must have been suppressed by the State," and (3) "prejudice must have ensued. " *Id.* at *7. On the first two points, the court of appeals found for Mr. Mason. *See id.* at *7 ("Information about the letter was favorable to Mason because it tended to impeach Jones"); *id.* at *7-8 ("The government suppressed its knowledge of the letter by postponing disclosure for months, until trial was imminent.... At oral argument, the government declined to 'defend the timeliness' of its disclosure and conceded that it had 'made a misjudgment.'"). The court of appeals "agree[d]" and even called the prosecutors' actions "inexcusable."

But the court of appeals affirmed after concluding that insufficient "prejudice" had been established. It acknowledged that Mr. Mason had asserted "three forms of prejudice," but ultimately rejected all three: First, it acknowledged Mr. Mason's

claim of being "hamstrung" at trial, but said the short trial continuance had negated all such prejudice. Second, it discussed Mr. Mason's several descriptions of how earlier disclosure would have allowed him to develop exculpatory evidence from a variety of sources. The court of appeals did not disagree with this, *see id.* at *9 ("maybe so") – but it found them insufficient to support a *Brady* violation, calling Mr. Mason's arguments "too speculative." *Id.* Finally, it noted Mr. Mason's claim that if the Government had disclosed this information in March 2017, as *Brady* required, the defense could have found and interviewed Jazz himself, and obtained his statements or others that could be admissible even after Jazz died. On this point, the court of appeals declared that any such evidence would be barred by the rule against hearsay – rejecting all three of the hearsay exceptions Mr. Mason proffered.

2. The Misjoinder and Severance Issues

On the misjoinder and severance issues, the court of appeals also affirmed. On the misjoinder issue, the court of appeals found no reversible error in the fact that Ms. Miller and Mr. Mason's trials had been joined based on an indictment claiming they conspired "together," even though they had not, since the evidence at trial plainly revealed their acts and transactions had never overlapping at all: the court of appeals said the allegations contained in the indictment ended the inquiry, even if the evidence at trial revealed those allegations to be incorrect. *Id.* at *15-16.

With respect to severance, the court of appeals noted that Mr. Mason had alleged not only "general" prejudice from being tried together with Ms. Mason, but also "'specific prejudice' that arose from the 'confusion' demonstrated by the note from

Juror #1." *Id.* at *16. Never once mentioning that Juror #1 turned out to be this jury's foreperson, the court of appeals' opinion issued generalized, euphemistic phrases to describe the prejudicial effect, claiming that the District Court and Government took "appropriate steps" to address this juror's confusion, and incorrectly claiming that "[t]he government presented its cases against Miller and Mason separately," *id.* at *18, wholly ignoring all the cited deviations noted above. The court of appeals also described the District Court's incredibly muted response to Juror #1's note, JA:881 ("I believe your question *may* be resolved through the remainder of the evidence") (emphasis added), as "an appropriate instruction." *Id.* at *18. And ignoring the Government's delay in clearing up this issue with the jurors, so that the impact could be minimized, the court of appeals claimed that "the government *promptly* elicited testimony to dispel the juror's confusion," *id.* at *18. Nor did the court of appeals explain how these measures, or the District Court's closing instruction, could suffice when those same or similar measures *preceding* Juror #1's note so clearly ***had not.***

Most importantly, the court of appeals ***did not dispute at all*** Mr. Mason's argument that "there can be no assurance that the spillover prejudice that we clearly *know* Juror #1 harbored … was in fact later purged," and that "[n]othing whatsoever reveals that Juror #1 did not vote to convict based at least in part on this mistaken understanding of the evidence." *Id.* (quoting from Mr. Mason's appeal brief). ***The court of appeals even conceded: "<u>That may be true</u>."*** *Id.* But it claimed that "the scope of our review" did not permit reversal, even if it was "true" a juror (indeed,

the foreperson) had voted to convict based on ***a tangibly-revealed mistaken impression of the evidence*** that the court of appeals ***could not say with confidence had been purged.*** The court of appeals claimed its only role was to determine if this District Judge had abused her discretion; it simply said she had not.

REASONS FOR GRANTING THE PETITION

I. Certiorari is Warranted to Clarify that A Prosecutor Cannot Violate *Brady* and then Use that Same *Brady* Violation to Argue Prejudice is Speculative

It is well-settled that "suppression by the prosecution of evidence favorable to an accused" – known as a *Brady* violation[15] – "violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler v. Greene*, 527 U.S. 263, 280 (1999). This fundamental principle of due process "illustrates the special role played by the American prosecutor in the search for truth in criminal trials." *Id.* at 281. The prosecutor's interest "is not that [he or she] shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Because of this, the Government must disclose evidence in its possession that is favorable to a defendant and material to guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). A prosecutor's affirmative duty extends to all information in files that are within the Government's possession, custody and control, and encompasses impeachment evidence as well as exculpatory evidence. *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

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[15] *Brady v. Maryland*, 373 U.S. 83 (1963).

A due process violation exists under *Brady* and its progeny if three elements are met: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently, and prejudice must have ensued. *Strickler*, 527 U.S. at 281-82.

Here, the court of appeals conceded the first two prongs, with respect to key information that the Government learned in March 2017: the prosecution team itself (not merely Government agents or the police) specifically learned from an informant that Jazz said he had received a handwritten letter from Jones, and that this letter stated that Jones planned to lie about his co-defendants at their trials. The Government also knew additional key facts, including that this letter had been given to Frank Walker. Yet in March of 2017, all this information was withheld from the defense. That suppression was in no way due to any belief by the Government that this information was immaterial. The Government itself promptly confronted Jones with this information on March 10, 2017 asking him if he had written this letter they had recently learned about, *because they knew this information if true would make him a far less convincing cooperating witness*. But the other side – the defense – was kept entirely in the dark about this new exculpatory and impeaching information.

Unlike the defense, which surely would have hopped on this information right away and followed up – as their all-hands-on-deck effort in December 2017 tangibly demonstrated – the Government initially sat on this information, literally for months, until June 1, 2017, before it finally got around to speaking to Walker. At that time,

Walker confirmed that his lawyer in fact still possessed this letter Jazz said he had gotten from Jazz. The very next day, the Government was able to obtain the physical letter from Walker's lawyer. And it is ***literally impossible*** to read that letter – with its notation to "(Rip up After Reading)," and its contents confessing plans to lie – and not realize that this letter needed to be disclosed immediately under *Brady*. Yet the Government somehow still kept this letter, as well as a long list of additional exculpatory and impeaching information, suppressed from the defense for more than six additional months – until the trial was just a month away. To be clear: this is not a typical *Brady* situation in which the prosecutor simply failed to round up exculpatory and impeaching information buried in some agent's files until the trial neared. ***This was a bombshell the lead prosecutor withheld from the defense for more than half a year even though he personally knew about it himself.***[16]

Here, the Government attempted to claim that no *Brady* prejudice existed because if they had disclosed the "Jazz" letter to the defense in June of 2017, when they obtained a copy of it, that disclosure would have made no difference, since "Jazz" had died in April. The District Court adopted this reasoning, which formed the heart of her ruling that there had been no *Brady* prejudice. But wholly omitted from the District Court's analysis was any discussion of whether the Government had a duty to disclose this exculpatory information that it knew about in March 2017. That argument had squarely been made in the Joint Motion to Dismiss and related Reply,

[16] The prosecutors never offered any valid explanation why they failed to turn over to the defense this letter, which came into their possession in June, for another six months, but their disclosure came shortly after they likely learned the defense had spoken to Frank Walker. While the court of appeals described their actions as "inexcusable," *id.* at *8, it simultaneously *did* excuse them.

but the District Court never addressed it below. The Government could not fairly claim it did not understand the importance of this information in March 2017, since the prosecutor had personally confronted Jones with it directly. It was improper under *Brady* for the Government to take care of its own needs at that point (checking in with Jones to see if he was still a satisfactory cooperator), while simultaneously withholding this same information from the defense, thus preventing the defense counsel from pursuing its own needs:

> It should by now be clear that in making judgments about whether to disclose potentially exculpatory information, the guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for *defense counsel*, who has a different perspective and interest than the police or prosecutor. It is not for the prosecutor to decide not to disclose information that on its face might be explained away or discredited at trial, or ultimately rejected by the fact finder.

Zanders v. United States, 999 A.3d 149, 163-64 (D.C. 2010).

If defense counsel had been told what the Government knew in March 2017 – that "Jazz" had said Jones gave him a letter verifying Jones' plans to lie against his co-defendants, and that this letter had also been given to Walker – the results in this case likely would have been different. Defense counsel's all-hands-on-deck approach upon learning of this letter in December verifies that they likely would have pursued this lead with similar zeal, if they had learned of this information earlier. With Jazz at that time conveniently detained in the D.C. Jail on a pending D.C. Superior Court case – during March and even into April – he likely would have been found and interviewed by the defense. It is inconceivable defense counsel would have waited *months* – as the Government did – to talk to Walker and his counsel about this letter.

While Walker did eventually assert his Fifth Amendment rights at trial, his lawyer had allowed Walker to be interviewed by defense counsel pre-trial, so defense counsel would have been able to secure this letter, either from Walker or his lawyer informally, or even via subpoena, or from the Government by demanding it as evidence within the custody and control of one of their cooperators – at a time before Jazz died.[17] At the very least, earlier production of the letter would have kept defense counsel from being hamstrung by the time constraints that later arose in the waning weeks before trial, including failure to obtain a separate handwriting analysis on this letter.[18] This failure left defense counsel unable to effectively cross-examine Jones about the Jazz letter, and unable to rebut the Government's own handwriting expert. This series of events led to a situation in which the blockbuster "Jazz" letter was never even placed before Mr. Mason's jury. As a result, Jones – the single most important witness against Mr. Mason – could not be effectively impeached. But for the late disclosure of the Jazz letter, which left the defense scrambling to react, those results likely would have been different.

More importantly, a timely disclosure would have allowed the defense to interview Jazz at the D.C. Jail before he died. The court of appeals did not deny this,

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[17] The fact that prosecutors were able to obtain the letter from Walker's counsel on June 2 – the very next day after meeting with Walker on June 1 – demonstrates how easily and quickly it could have been obtained by the Government.

[18] In an attempt to ameliorate the fallout of its late disclosures on December 8, the Government offered to waive hearsay objections to the Jazz letter, and offered to have its handwriting expert examine the Jazz letter for both sides, to see if it was Jones' handwriting. With less than a month before trial, defense counsel agreed to this arrangement. When the Government handwriting expert later opined that the handwriting did not belong to Jones, defense counsel objected, but with the trial now close at hand, the Court declared that their objection was untimely, since they could have (but had not) timely obtained their own handwriting expert.

but it held that any statement from Jazz would have been inadmissible hearsay, for two reasons. First, the court of appeals claimed that any statement from Jazz that Jones had stated his clear intention to lie under oath could not be a statement against interest under Fed. R. Evid. 804(b)(3)(A). But that is wrong. If Jazz was aware of Jones' plainly-stated intention to obstruct justice, and even possessed physical evidence from Jones which confirming that plan, and failed to report that to authorities, Jazz was subject to possible prosecution as an accessory-after-the-fact.

Second, the court of appeals found that Jazz's statements would be inadmissible hearsay despite Fed. R. Evid. 807(a)(1)'s residual exception. The court of appeals said "we doubt that more hearsay from Jazz would provide the 'sufficient guarantees of trustworthiness' the residual exception requires." But this finding ignores confirmations available from at least two sources: Walker had separately *confirmed* to the Government that Jazz had told him Jones wrote the letter, and Jones himself had failed a Government polygraph. Earlier disclosure also would have allowed the defense to confirm that Jazz had told others. The Government, after all, had first heard (before March 2017) about the fact that Jones had written a letter to Jazz, and that Jazz had given that letter to Walker, from one of its informants, whose identity ***has still not been revealed to the defense, <u>even to this day</u>***. That witness, if disclosed, could have been called as a ***live*** witness at trial, with ***no hearsay even at issue***. Moreover, Jazz had an uncle who could have confirmed Jazz's statements, but due to the prosecutors' late disclosure, could never be located, because Jazz was no longer available to be interviewed. There were thus ample

indicia of trustworthiness for the residual exception to be invoked. Yet the court of appeals declared ***on its own*** that this discretionary exception could not be applied, without ever remanding this issue for the District Court to evaluate that issue in the first instance.

The violations of *Brady* and its progeny that occurred in this case were serious and disturbing. The Government had an obligation to disclose what it knew in March 2017 – when Jazz was very much alive. And this evidence was plainly important enough to change the outcome. As even the court of appeals acknowledged: "We can grant that a statement by Jazz impeaching Jones might have been 'very important' to Mason's defense." *Id.* at *12. The only question is whether it was "inadmissible hearsay." The Government cannot benefit from its own misconduct. Prosecutors who are in ***actual*** (not merely constructive) possession of ***information they know is exculpatory***, cannot ***intentionally*** withhold it, and then, when confronted with their blatant efforts to undermine justice, fairly argue that a Defendant's claims of prejudice are only "speculative" – when the non-disclosure has itself undermined an Defendant's ability to prove such prejudice. Stated simply, under *Brady* and its progeny, federal prosecutors cannot be allowed to eliminate the dots and then demand that they must all be connected. A writ of certiorari should be granted.

This was not some *Brady* broadside lobbed by overzealous defense lawyers; it was raised by seasoned appointed counsel who even expressed regret about having to make their accusations, which they even filed under seal in an apparent effort to minimize the reputational harm to the Government. But they could not deny their

shock at such blatant *Brady* violations, which prevented them from doing their jobs. Will this Court abide yet another mere warning to the Government to essentially "go and sin no more," even when important exculpatory information still remains undisclosed, even today?[19] Or will it grant a writ of certiorari and issue a decision clarifying that *Brady* disclosures are not mere discovery issues to be finessed, but constitutional obligations that prosecutors ignore or delay at their peril?

II. Certiorari is Warranted Because this Case Involves Manifested, Spilled-Over Prejudice, and is an Ideal Case for this Court to Accept to Illustrate Why the Federal Joinder and Severance Rules Matter

Federal Rule of Criminal Procedure 8(b) governs joinder of multiple defendants in the same Indictment. This rule provides for the joinder of defendants whenever the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Notably, the standards under Rule 8 for the joinder of defendants are not the same as the standards governing the joinder of counts. *Unlike* Rule 8(a), which governs the joinder of counts, Rule 8(b) does *not* contemplate or permit joinder of defendants simply because the charged offenses are of the same or similar character. Rather, under Rule 8(b), the defendants must be "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." *See* *United States v. Sarkisian*, 197 F.3d 966, 976 (9th Cir. 1999)

[19] The court of appeals wholly ignored, and never addressed at all, Mr. Mason's argument that the Government has, *to this day*, still failed to disclose the name of the informant who provided this information that Jones had written this letter to Jazz, who had given it to Walker.

(joinder improper because there was "not a sufficient logical relationship" between the counts and there was no substantial overlap in evidence").

In this case, as noted, the Government began this case with an Indictment filed against 13 different defendants, including Ms. Miller and Mr. Mason, in Case No. 1:16-cr-90. The Government then dismissed that Indictment against Ms. Miller and Mr. Mason after it separately charged them in a separate two-count Indictment in Case No. 1:17-cr-195 – the case on which they were tried. Mr. Mason was only charged in Count Two. This Count Two, charging both Ms. Miller and Mr. Mason, alleged that they had conspired "together," as well as with other individuals known and unknown to the Grand Jury. But as the facts – and even Government admissions – at trial would later reveal, however, this allegation was false: there was no evidence that these two defendants ever conspired "together." They did not know, or even know of, each other. Their alleged drugs were different. Their locations were different. And the times of their alleged involvement were different (months apart).

Stated differently, while their charged offenses may have been of the same or similar character, Ms. Miller and Mr. Mason clearly never participated in the same act or transaction, nor did they ever participate in the same series of acts or transactions constituting an offense or offenses. While the standards of Rule 8(a) may have existed, those of Rule 8(b) did not. And any suggestion that the requirements for proper joinder of these Defendants were met *disappeared* once they were segregated from the other alleged co-conspirators and their various overlapping acts and transactions. As the prosecution's own statements made at trial also

revealed, Ms. Miller's and Mr. Mason's "acts and transactions" did not overlap at all, and it was therefore inappropriate for their cases to be tried together under Rule 8(b).

The Government's refusal to respond to Mr. Mason's requests for a Bill of Particulars prevented the defense from being able to present this position pre-trial. It therefore cannot be held against the Defendant that it only later became apparent (and was even admitted) at trial that these two defendants had not, in fact, conspired "together," as alleged in the Indictment. At that point, the District Court was obliged to grant a severance to Mr. Mason, pursuant to Rule 8(b). *See* United States v. Jackson, 562 F.2d 789, 795 (D.C. Cir. 1977) (citing a pragmatic approach: "Where … there are no presumptive benefits from joint proof of facts relevant to all the acts or transactions, there is no 'series,' Rule 8(b) comes to an end, and joinder is impermissible."). *See also* United States v. Garner, 837 F.2d 1404, 1411-12 (7th Cir. 1987) (Rule 8 challenge may be proper if indictment's predicate language authorizing the joinder was made in bad faith).

Moreover, even if severance under Fed. R. Crim. P. 8(b) was not required by the *false* allegation made in this Indictment that they had conspired "together,"[20] a severance was separately warranted under Rule 14(a), which calls for a severance "if

[20] Now-Justice Kavanaugh declared in United States v. Bostick, 791 F.3d 127, 145 (D.C. Cir. 2015) that Rule 8(b) joinder analysis "does not take into account the evidence presented at trial," but "focuses solely on the indictment and pretrial submissions." But the Government cannot be allowed to secure joinder via an indictment with false information (i.e., that Ms. Miller and Mr. Mason conspired "together"). In a case like this, where Mason's counsel specifically asked for the particulars of who his client supposedly acted in concert with, and where he was *rebuffed* from obtaining this information needed to make the "pretrial submissions" that would have alleged the truth of their separateness, as emerged at trial, this general rule cannot be applied.

the joinder of offenses or defendants in an indictment … appears to prejudice a defendant." Fed. R. Crim. P. 14(a).

Here, the prejudice to Mr. Mason from joinder was far more than the necessary "appear[ance]" of prejudice. There was, of course, the generalized prejudice of having his jury exposed, for example, to wide-ranging testimony about international drug trafficking and physical evidence of large heroin seizures that were placed before his jury because he was in a trial with Ms. Miller, who (unlike Mr. Mason) was charged with a conspiracy to import drugs. And there was, in addition, the fact that these two defendants never should have been joined in the first place, under Rule 8(b).

But even more important was the *specific* prejudice Mr. Mason separately faced at trial: *documented* juror confusion. After days of testimony that were supposed to be focused only on Ms. Miller's "acts and transactions" – but with the prosecution affirmatively slipping in occasional prejudicial snippets about Mr. Mason, as noted above – it is undeniable that at least one of the jurors believed she had heard incriminating evidence against Mr. Mason that did not exist. Juror #1, in a second note produced at or around the same time as another note which revealed that she had also been talking with other jurors, stated that she believed (wrongly) that a drug package had been delivered to Mr. Mason's house. Despite requests from Mr. Mason's counsel, the District Court was unwilling to instruct the jury that this assumption was wrong. Nor was this misunderstanding immediately cleaned up via Government questioning, as the defense requested. Instead, the only clean-up

questions were asked later, immediately before the Government then quickly pivoted to its most dramatic wiretap evidence against Mr. Mason himself.

Although the court of appeals tried to suggest that such clarifying efforts were sufficient to clear up any juror misunderstanding, the record belies this. As the prosecutor himself acknowledged, an almost identical clarification had already been tried once before, and it obviously had not worked. JA:876 ("I thought Mr. Carney was fairly clear when he indicated that – I thought he asked him, did you use my client's address?"). Despite that clarification, Juror #1 somehow had still seen incriminating evidence against Mr. Mason. The subsequent clarifying questions essentially ***did nothing more than elicit the very same types of answers that had already failed once before***. There can be no assurance that the spillover prejudice we ***know*** Juror #1 harbored, as revealed in her own handwriting, was in fact later purged. And her role as the jury's foreperson only magnifies those concerns.

The defense is well-aware of case law suggesting liberality of joinder, particularly in conspiracy cases. Perhaps severance of alleged co-conspirators is and should be rare. But Rule 14 still means something, and it must be applied in a case where after days of testimony at a joint trial are focused on one co-conspirator only, a juror openly expresses a demonstrably incorrect assessment of the evidence, revealing evident confusion about facts concerning the guilt of a co-defendant. At a minimum, at that point, the District Court was required to do what the defense requested, and advise this jury about what both sides' counsel affirmatively agreed was the truth – that there had not yet been any incriminating evidence produced

against Mr. Mason, rather than issuing an instruction so bland ("I believe" Juror #1's question "may" get answered by later testimony) that there is insufficient confidence that it sufficed. Nor did urging the prosecutor to initiate a clarification that had already failed once before suffice – especially when that was delayed, and did not cover the problem anyway, since the prosecutor merely ***asked Jones*** if any deliveries had been sent to Mr. Mason's house, never eliminating the possibility that Juror #1 may have believed such evidence came from another source, such as Agent Fowler.

This is not a case where "spillover" prejudice was a mere possibility. Not one of the cases cited by the court of appeals – or by the Government in its almost 30 pages of briefing devoted to this issue below – involved a sitting juror ***confirming*** that she was misconstruing the evidence. This is not, in other words, a case where lower courts were making predictions about spillover prejudice risks. This is a case where prejudice ***actually manifested*** – a case involving ***"spilled over"*** prejudice.

A sitting juror here (who later also became the foreperson) plainly construed key evidence in this case incorrectly, wrongly attributing inculpatory evidence presented only against Ms. Miller to Mr. Mason. The only relevant issue, then, is whether the court of appeals had adequate assurance this juror surely *changed her mind*.[21] Insufficient confidence exists in this record. Indeed, even the court of appeals' own opinion openly admitted it "may be true" that Juror #1 voted to convict based on a continued confusion of the evidence. If affirmed anyway. Its decision does not satisfy this Court's mandate in *Zafiro v. United States*, 113 S. Ct. 933 (1993)

[21] In this regard, this Court need not ignore the social science revealing how it is often far more difficult for a person to change their mind once a conclusion has been reached.

("severance required under Rule 14 if there is a risk that a proposed joint trial would "prevent the jury from making a reliable judgment about guilt or innocence.") – a case which Mr. Mason cited below, but which the court of appeals never addressed. The federal joinder and severance rules exist for a reason. This is an ideal example of a case where reversal based on Fed. R. Crim. P. 8 and/or 14 had to be ordered.[22]

This case provides an ideal opportunity for this Court to remind lower courts, at a time when severance motions are almost invariably denied, that Rule 14 exists for a reason, and that these risks cannot be minimized when prejudice becomes evident. As this Court noted in *Schaffer v. United States*, 362 U.S. 511 (1960):

> We do emphasize … that in such a situation, the trial court [still] has a continuing duty at all stages of the trial to grant a severance [under Rule 14] if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial court should be particularly sensitive to the possibility of such evidence.

Id. at 516. This is an ideal case in which to reinforce what *Schaffer* expects. It is case where prejudice ***did*** appear. It is a case where the "charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." And yet in this situation where the District Court was supposed to be "particularly sensitive," it failed in that continuing duty, and the court of appeals later affirmed. Particularly

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[22] This prejudice here also affected more than just the jury's overall guilt-innocence decision. The spillover prejudice surely impacted Juror #1's separate evaluation of whether Mr. Mason was responsible for 100 grams or more of heroin. On that point, the jury had before them *physical* evidence of packages containing hundreds of grams of heroin that had been delivered to Ms. Miller's Bowen Road address. But on the actual evidence against Mr. Mason himself, involving Jones describing his "redistributions," there was *no physical evidence at all*. The only actual evidence against Mr. Mason about *his* quantities came from Jones' uncorroborated testimony, and his interpretations of "code" language on the wiretaps. Juror #1's mistaken belief that heroin was delivered to Mr. Mason's house thus likely affected her decision on whether Mr. Mason was guilty of the higher "100 gram" charge.

given the court of appeals' rather dismissive assertion that "Mason misunderstands the scope of our review," granting certiorari in this case is particularly appropriate.

First, contrary to the court of appeals' claim that the Government took "appropriate steps," these prosecutors in fact took advantage of the situation, and used continued joinder to their advantage. Following Juror #1's note, Mr. Mason's demand for an immediate curative instruction from either the Court or the Government was refused. *Nothing* prevented the District Court from telling the jury, in plain language, *the truth that the parties were stipulating among themselves at the bench* – namely, that no evidence at all existed that a package had ever been delivered to Mr. Mason's house. But the prosecutor opposed any direct curative instruction of this sort, claiming the jury's recollection (*even if recognized by all parties as wrong and based on sheer confusion*) must be honored. In truth, a direct refutation could have been provided via a stipulation of the parties, since the prosecutor was at that point was even claiming, "I haven't talked about Mr. Mason yet."[23]

Second, the court of appeals' claim that the District Court gave an "appropriate instruction" utterly fails to address how it was as muted as it gets: "I ***believe*** your question ***may*** be resolved through the remainder of the evidence." While the Government argued below that Juror #1 never sent back another note complaining her question remained unanswered, that is no response: A trial judge cannot delegate

[23] This claim was actually false. The prosecutor told the District Court, when confronted with a renewed severance motion following Juror #1's note, that "I haven't talked about Mr. Mason yet, just so the record is clear." But in fact, he had: During Ms. Miller's case, he improperly went out of his way to suggest a connection between the co-defendants that in reality did not exist, by pointing out to jurors their similar age, and the fact that they had been arrested on the same day.

its obligation to ensure a fair trial onto a jury, declaring that it will basically "assume this trial is fair unless you the jury tell me otherwise." And that notion is *particularly* illogical if this burden is being shifted into the hands of *the one juror whom all parties agreed* was obviously "confused" by the evidence already presented.

Finally, after this instruction was given, the prosecutors stalled. Anyone truly interested in fixing this admitted "problem" would have done exactly what Mr. Mason's lawyer requested, by addressing the misunderstanding "immediately" after the Court's instruction. But the prosecutor here did not. There was no "immediate" response; the record reveals the prosecution waited to present any curative evidence until several transcript pages later, even wedging it in just before its most dramatic wiretap evidence began – in a manner not dissimilar to how these same prosecutors had earlier buried the bombshell "Jazz" disclosure four pages into the middle of their *Brady* letter. Nor did the Government's belated presentation cure the problem anyway. There is no reason to believe it succeeded when an earlier, similar clarification by Mr. Mason's defense lawyer had failed. And more importantly, this "curative" questioning consisted only of asking *Jones* if any deliveries were sent to Mr. Mason's house – *never eliminating the possibility that Juror #1 may have believed such evidence came from another witness, such as Case Agent Fowler.*

This is an ideal case for this Court to lay down what is expected of prosecutors and trial judges in the joinder and severance context when faced with prejudicial spillover, and of the various courts of appeals when reviewing such situations. This Court recently noted, in *Zafiro*, common areas in which Rule 14 prejudice risks often

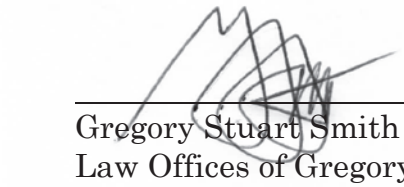
exist, and further noted how, "[f]or example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a jury was guilty." 506 U.S. at 539. *See also Kotteakos v. United States*, 328 U.S. 750, 774 (1946) (The "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant."). While wide leeway might be afforded to lower courts when spillover prejudice is merely a possibility, this Court should grant certiorari to clarify that stricter scrutiny is required when prejudice manifests.

This is an ideal case to illustrate this point. Mr. Mason ultimately received a mandatory minimum sentence. Yet, given that the bulk of the evidence in this joint trial was presented against Ms. Miller alone, a new trial against Mr. Mason alone would be very short indeed. A new trial is required, and the court of appeals' overly deferential approach when reviewing this issue should be reviewed and reversed.[24]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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[24] A new trial would also eliminate the incredibly prejudicial "fentanyl" evidence (testimony that Mr. Mason had sold drugs "that would kill people") which he faced in his original trial (another example of the prosecutors pushing the envelope). That claim (but *not this evidence*) had been dismissed at the end of the previous trial.