No.

In the Supreme Court of the United States

DUANE JOSEPH JOHNSON, PETITIONER

v.

ERIC D. WILSON, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a habeas petitioner asserting ineffective assistance of appellate counsel establish by a preponderance that counsel's omitted argument was meritorious?
2. Did the D.C. Circuit misapply *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Strickland* v. *Washington*, 466 U.S. 668 (1984) when it rejected Petitioner's ineffective-assistance-of-appellate-counsel claims?

RELATED CASES

Johnson v. *Wilson*, No. 18-5350, U.S. Court of Appeals for the D.C. Circuit. Order entered May 29, 2020.

Johnson v. *Wilson*, No. 10-cv-00178, U.S. District Court for the District of Columbia. Order entered Oct. 25, 2018.

Johnson v. *United States*, No. 11-CO-000722, District of Columbia Court of Appeals. Order entered June 18, 2012.

Johnson v. *Stansberry*, No 10-5346, U.S. Court of Appeals for the D.C. Circuit. Order entered May 11, 2011.

Johnson v. *United States*, No. 10-CO-000357, District of Columbia Court of Appeals. Order entered Nov. 15, 2010.

Johnson v. *United States*, No. 09-CO-001124, District of Columbia Court of Appeals. Order entered Nov. 18, 2009.

Johnson v. *United States*, No. 09-OA-0026, District of Columbia Court of Appeals. Order entered July 27, 2009.

Johnson v. *United States*, No. 08-CO-001180, District of Columbia Court of Appeals. Orders entered Mar. 31, 2009 and June 12, 2009.

Johnson v. *United States*, No. 1:06-cv-00453-UNA, U.S. District Court for the District of Columbia. Orders entered Mar. 10, 2006 and May 15, 2006.

Johnson v. *United States*, No. 99-CO-000978, District of Columbia Court of Appeals. Judgment entered Aug. 17, 2001.

Johnson v. *United States*, No. 95-CF-000364, District of Columbia Court of Appeals. Judgment entered June 25, 1996. Orders entered Oct. 30, 1996; Apr. 8, 1997; June 6, 2007; Aug. 30, 2007, Nov. 5, 2008.

United States v. *Johnson*, No. 1994-FEL-004696, Superior Court of the District of Columbia. Judgments entered Mar. 15, 1995. Judgment amended Aug. 8, 1996. Orders entered

Oct. 2, 1996; June 29, 1999; Aug. 20, 2002; May 8, 2007; Aug. 19, 2008; Aug. 25, 2009; Feb. 14, 2010; May 27, 2011; and Feb. 7, 2020.

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PETITION FOR WRIT OF CERTIORARI

Duane Joseph Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 960 F.3d 648. The order of the district court dismissing Petitioner's case (App. B) is unreported. The report and recommendation prepared by the magistrate judge (App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2020. This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996, as codified in Section 2254 of Title 28 of the United States Code, provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT

This petition presents a question regarding the standard for ineffective assistance of appellate counsel claims, a question on which there is widespread confusion in the lower courts. In this case, Petitioner was convicted in 1995 of first-degree felony murder, second-degree murder while armed, and other related offenses following an alleged holdup attempt in a car in Washington, D.C. The incident resulted in a shooting, leaving one person dead

and another person injured. It was undisputed that Petitioner was in the car with five other people at the time. The only question at trial was whether Petitioner intended to hold up the other passengers and intentionally shot the victims, or whether the shooting was accidental after someone else in the car—Victor Williams—attempted to hold up Petitioner. The limited physical evidence presented by the government at trial was equivocal. Aside from that evidence, the government's case depended entirely on the testimony of Williams and the other occupants of the car.

Petitioner was represented at trial and on direct appeal by the same court-appointed counsel. Counsel testified in post-conviction proceedings below that while he knew the case would come down to a credibility contest prior to trial, he did not investigate whether the eyewitnesses had criminal histories, relying instead on the government to provide defense-favorable information prior to trial. Had counsel conducted even a minimal investigation, he would have discovered that he himself had represented Williams—the key government witness against Petitioner at trial—in an unrelated armed robbery charge, which could have been used to support the defense theory that Williams was the aggressor. Because of counsel's failure to investigate Williams's background, however, that information never came to light during Petitioner's trial or appeal.

During and after Petitioner's trial, it became clear that the government had failed to disclose key facts that bore on each and every eyewitnesses' credibility. Taken together, these facts revealed the interlinking motives of the eyewitnesses to testify in favor of the government. Many of these facts could have been discovered by defense counsel upon reasonable pretrial investigation; but because defense counsel did not take even the most basic investigative steps, he was in no position to recognize—much less challenge—the government's numerous discovery failures. As a result, the eyewitnesses' testimony was left to stand essentially unquestioned, and the jury was never presented with all of the evidence that would have challenged their credibility and demonstrated their motives to lie. The defense introduced no evidence and called no witnesses other than Petitioner.

In short, the government's case at Petitioner's trial was not subjected to meaningful adversarial testing. Objectively reasonable defense counsel accordingly would have asserted ineffective assistance of trial counsel claims on direct appeal, as well as *Brady* claims based on the government's failure to timely disclose exculpatory and impeachment information. *See Brady* v. *Maryland*, 373 U.S. 83, 87–88 (1963); *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (clarifying that *Brady* applies to both exculpatory and impeachment evidence). Petitioner's counsel instead opted for a sufficiency-of-the-evidence challenge and a jury-instruction argument that was unsupported by law and contrary to the facts the parties

presented at trial. Counsel's failure to identify, develop, and raise the much stronger *Brady* and ineffective assistance of trial counsel arguments was objectively unreasonable, and cost Petitioner the reasonable probability of success that he would have had on appeal had the arguments been properly raised.

In denying relief on Petitioner's ineffective assistance of appellate counsel claim, the D.C. Circuit did not analyze whether defense counsel's foregone arguments would have stood a reasonable chance of success on appeal. The court below instead looked directly to the question of *Brady* materiality, which it considered dispositive. The panel concluded that Petitioner had not established that his rights were violated under *Brady*, and that he therefore could not show that counsel was ineffective for failing to raise *Brady* arguments on appeal. The panel's analysis proceeded along similar lines as to Petitioner's ineffective assistance of trial counsel arguments. Because the decision deepens widespread confusion among the courts of appeals regarding the standard for ineffective assistance of appellate counsel claims and is incorrect, the petition for certiorari should be granted.

1. At approximately 4:00 am on April 26, 1994, Petitioner accepted a ride from a group of individuals: Keith Nash, Sharon Nash (Keith's sister), Victor Williams, and La-Tina Gary (Williams's girlfriend). App. A, at 2. Petitioner knew only Williams prior to that night. He brought with him an acquaintance named Damitra Rowel. The parties disagree

about the events of the night, but the following facts are not in dispute: Keith Nash, the driver, navigated to the end of an alley and turned off the car. Moments later, there was a confrontation inside the car, and shots were fired. Keith Nash was struck twice by the gunfire and died. Sharon Nash was shot in the side and lost consciousness, but ultimately survived. Petitioner exited the car and fled. Williams ran after Petitioner with a pistol, firing at him repeatedly. The gun that killed Keith Nash was never found.

2. At trial, the government presented the following account: Williams, Gary, and Keith and Sharon Nash were in the car, which was parked on the street. Petitioner approached the group to ask for a ride, and brought Rowel with him. Petitioner then directed Keith Nash to drive to an alley and turn the car off. Petitioner began to exit the car through the rear driver side door, then pulled out a pistol and held it to Keith Nash's head while demanding money. When Keith Nash said that he had spent the money, Petitioner shot him twice in the head and then fired at least one additional shot that hit Sharon Nash, who sat in the front seat on the passenger's side. At that point, Williams—who sat in the backseat on the passenger's side—reached across the others in the backseat to try to seize the gun from Petitioner, who was then standing outside the car. C.A. App. 731–732. The gun jammed. C.A. App. 734. Petitioner beat Williams's hand against the side of the car and then escaped down the alley. Williams exited the car, retrieved a gun that Keith Nash had

on his person when he died, and ran down the alley after Petitioner, firing at him. C.A. App. 683–684.

Petitioner has maintained, at trial and to this day, that in fact *he* was the victim of an attempted robbery. Petitioner testified at trial as follows: The group offered him a ride to see someone who might want to purchase drugs from him. Petitioner had taken Rowel—who happened to be with him—because he did not know any of the other people in the car. Keith Nash drove to the alley and cut off the engine, and Williams then brandished a gun at Petitioner (who was unarmed) while demanding that Petitioner turn over his drugs and money. Petitioner panicked and instinctively tried to snatch the gun from Williams. *See* C.A. App. 870. In the struggle that ensued in the middle of the backseat, the others in the car panicked also, and ultimately Keith and Sharon Nash were shot. *Ibid.* Petitioner then scrambled out of the car, and fled down the alley with Williams in pursuit with a gun, firing at Petitioner as he ran.

Neither the government nor the defense called any fact witnesses to testify other than the passengers. There was no murder weapon, no confession, no fingerprint evidence, no video surveillance, no DNA, and no blood spatter or forensic analysis of the crime scene. Aside from the eyewitnesses' testimony, there was no evidence linking any firearms to Petitioner. Aside from financial motives—which applied with equal force to Williams—the

government could point to no reason why Petitioner, a 17-year-old with no prior record of violence, would have attempted to perpetrate an armed robbery in that setting on a group of four full-grown adults, most of whom he did not know and who were on average a full decade his senior.[1]

The only forensic evidence at trial concerned the gunshot wounds, which struck the back left side of Keith Nash's head and the left side of Sharon Nash's abdomen. The government called an expert pathologist to opine that Keith Nash's wounds were inflicted at close range—hardly groundbreaking testimony, given that the shooting necessarily occurred at close range under both the government and the defense theories of the case—and argued that the shots must have been fired by Petitioner because Petitioner had been seated on the driver's side. The pathologist conceded, however, that he could not determine the proximity between the gun and Keith Nash's wounds with precision, especially without having been able to test the missing gun, and that it was not possible to know where in the car the shots were fired from without knowing how the victims' bodies were positioned at the time. C.A. App. 628–630. Moreover, the pathologist testified that the bullets that struck Keith Nash had upward trajectories, limiting the likelihood that Petitioner fired the shots from a standing position as the eyewitnesses testified. C.A. App. 611. In short, because the

[1] Neither party contended that Rowel was complicit in the shooting.

physical evidence was equivocal, the government's case rose and fell on the credibility of its eyewitnesses.

a. Petitioner was represented at trial and on direct appeal by Frederick Sullivan, his court-appointed counsel.[2] Mr. Sullivan did not present any physical evidence or expert testimony. Petitioner was the sole witness for the defense. Mr. Sullivan understood that Petitioner's case would come down to a credibility contest between Petitioner and the government's witnesses, whose names he knew from the outset. *See* C.A. App. 223, 266–267. However, Mr. Sullivan undertook virtually no investigation of the witnesses' backgrounds. He instead assumed that he would receive all potentially exculpatory and impeaching information from the government. *See* C.A. App. 201–202.

b. During and after Petitioner's trial, however, it became clear that the government had failed to timely disclose critical information about each of the four eyewitnesses. In particular, the following exculpatory or impeachment information was either withheld entirely or disclosed too late for defense to use effectively at trial:

- Williams was arrested in July 1994—months after Nash's death and Petitioner's arrest, but before Petitioner was indicted—on felony robbery charges, which the

[2] Because Petitioner's counsel later became a magistrate judge on the D.C. Superior Court, certain filings in the record refer to him as "Judge Sullivan." To avoid confusion as to counsel's role in Petitioner's case, and because he has since retired, Petitioner refers to him as Mr. Sullivan herein.

government no-papered. C.A. App. 387–388. Less than three weeks later, Williams and Gary testified before the grand jury implicating Petitioner. These facts were never disclosed to the defense and never presented to the jury.

- Both Williams and Keith Nash had several prior convictions, including for violent crimes, which were disclosed to the defense just before trial. Two of William's prior convictions were for theft and unlawful entry, and were pled down from armed robbery charges in a case that bore similarities to Petitioner's case. C.A. App. 389–403. The jury knew about the theft and unlawful entry convictions because the government elicited those facts from Williams on direct examination. The initial charges and the facts of the underlying crime were never disclosed to the defense, and the jury never knew them.

- Williams had been carrying a gun the night of the crime, which was not in evidence and was not mentioned in the police reports. *See* C.A. App. 494–495. The defense was unaware of this fact until trial.

- Williams removed a gun from the scene of the crime and hid it in his home before the police arrived.[3] Williams later gave a statement to the police, but did not mention the gun. C.A. App. 685–686, 738–740. The defense was unaware of this fact until trial.

- Sharon Nash had been carrying a gun on the night of the crime, and had been attempting to hand the gun to Keith when he was shot. C.A. App. 481–482. The defense was unaware of this fact until trial.

- Gary had also been carrying a gun the night of the shooting, and purportedly disposed of it prior to calling the police. C.A. App. 755–756. The police never retrieved that gun and therefore did not inspect it to determine whether it was the murder weapon. The defense was unaware of this fact until trial.

- Gary was a paid police informant, and had received more than $2,000 from law enforcement over several years. The detective who was her point of contact (and who had responded to the crime scene) had once intervened to have a case against Gary dismissed. C.A. App. 810–814. Only Gary's status as an informant and the

[3] The gun was eventually turned over to the police by Gary.

approximate amount of payment were disclosed to the defense on the first day of trial.

- Rowel agreed to speak to the police and provide adverse evidence against Petitioner only after Williams and Gary found and assaulted her. The defense was unaware of this fact until trial.

Certain of the above facts could have been discovered by defense counsel upon basic investigation. Williams's July 1994 arrest, for example, would have been available via publicly available and readily accessible sources. *See* C.A. App. 309–320. Counsel's failure to conduct any research into the witnesses therefore compounded the failure of the government to disclose required exculpatory or impeachment materials and gave the jury an essentially unchallenged version of facts from governments' witnesses at trial.[4]

c. The parties' opening statements illustrate the problems that the above failures presented for the defense case. Mr. Sullivan's statement contained no facts beyond those that Petitioner had told him. It also previewed evidence that neither side ever presented, made no mention of the physical evidence, and misstated key facts, including which person in the car was the murder victim. C.A. App. 948–956.

The government's opening statement included several facts that had not yet been disclosed to the defense. The government stated, for example, that there were other guns

[4] This failure to investigate caused Mr. Sullivan to miss critical other facts, as well—including, most notably, the fact that he had represented Williams on the armed robbery charges underlying his prior convictions.

in the car when the shooting occurred. The government explained that Williams had chased after Petitioner, firing a pistol as he ran, and then removed the gun from the crime scene and hidden it before the police arrived. The government also previewed Sharon Nash's testimony about the gun she had allegedly been handing to her brother when he died. Moreover, unlike the defense, the government purported to explain the physical evidence. C.A. App. 937–945.

d. Information about the government's witnesses continued to come out in dribs and drabs throughout trial. If Mr. Sullivan noticed the new facts, he made little use of them. His attempts to impeach each of the government's eyewitnesses centered primarily on their drug use. In addition:

- Mr. Sullivan made semantic quibbles about Sharon Nash's testimony and suggested, illogically, that she was testifying because she felt guilty about brother's death. *See* C.A. App. 493–494; 997–998. Perhaps surprised by or unprepared to address the government's late disclosure, Mr. Sullivan simply ignored the implications of the fact that she had carried a gun and attempted to hand that gun to her brother, which indicated that her role was not that of a bystander but instead that of a coconspirator under the defense theory of the case.

- Mr. Sullivan attempted to undermine Rowel's credibility by shaming her for her prior drug dependency and by suggesting that she was easily led because of drugs, notwithstanding that Rowel was sober and in recovery when she testified at trial. When he cross-examined her about her altercation with Gary, Rowel stated that in fact, Gary had beaten her up to get her to tell the police the truth. Rowel also stated, without corroboration, that she had not come forward previously because Petitioner had threatened her prior to his arrest. C.A. App. 586–

588. Again, because this was the first that Mr. Sullivan had heard of either incident, he was not in a position to avoid eliciting this damaging testimony or to push back on Rowel's account.

- Mr. Sullivan weakly attempted to impeach Williams by noting that he had not mentioned Nash's gun to the police, suggesting that Williams would have disclosed it previously had he actually been acting in self-defense. C.A. App. 715–718, 735–736. The government rehabilitated Williams easily on redirect using his grand jury testimony, which did mention the gun. C.A. App. 737–741. Mr. Sullivan did not take the opportunity he was given to re-cross or make any other attempt to undermine Williams's credibility. Moreover, although the government disclosed Williams's prior convictions the day before trial, Mr. Sullivan did not investigate, and the government did not disclose, any information on Williams's criminal history outside of those convictions, including Williams's prior armed robbery charges. Mr. Sullivan accordingly was not prepared to use that history to support the defense theory that Williams was the first aggressor.

- Mr. Sullivan suggested that Gary was untrustworthy because she was a police informant, which he had learned from the government the first day of trial. He asked questions about the gun that she had thrown away, but was not in a position to dispute the answers because the government did not disclose prior to trial that Gary had been carrying a gun at the time of the shooting. Attempting to incorporate this information into the defense case on the fly, he overlooked the fact that Gary's testimony strongly hinted that the police's investigation could have been tainted by bias.

In short, Mr. Sullivan left the witnesses' testimony to stand virtually unchallenged and did not object to any late disclosures on timeliness or any other grounds, despite multiple red flags that should have prompted him to do so.

e. At the close of the evidence, Mr. Sullivan proposed a jury instruction that would have allowed the jurors to convict Petitioner for the shooting, even if they found that

Williams was the first aggressor, because the incident was a foreseeable consequence of drug-dealing. The trial judge rejected this instruction on the ground that the theory would not be consistent with either side's account of the facts, and because there was no legal basis for it.

After a few days of deliberations, the jury convicted Petitioner of first-degree felony murder, second-degree murder while armed, and other related offenses. Petitioner was sentenced to 51 years to life in prison.

3. The appellate brief that Mr. Sullivan filed almost a year later included two arguments. First, he advanced a generic sufficiency challenge, in which he argued that the case should never have gone to the jury because "a conviction cannot be based on evidence that is consistent with both innocence and guilt." C.A. App. 432. Citing the witnesses' drug use, Mr. Sullivan asserted that the convictions should be vacated because the evidence "fail[ed] to eliminate [Petitioner's] innocence as being as compellingly possible as his guilt." *Ibid.* Mr. Sullivan also argued, without legal support, that the trial court had erred by declining to give his proposed jury instruction.

The government filed its response in March 1996. The government argued that ample evidence supported the verdict and briefly dispensed with the manslaughter instruction issue, which it deemed "frivolous." C.A. App. 1118. The government noted, as had the trial

court, that such an instruction would have been factually and legally inconsistent with Petitioner's theory of the defense.

Mr. Sullivan never filed a reply brief, nor did he seek oral argument. On June 25, 1996, the D.C. Court of Appeals denied the appeal.

4. In February 2007, Petitioner obtained key details of Williams's criminal history, including the fact that Mr. Sullivan had previously represented Williams. Proceeding *pro se*, Petitioner immediately presented appellate IAC and other claims to the D.C. courts, which denied his requests for post-conviction relief.[5]

5. On January 29, 2010, Petitioner, still proceeding *pro se*, filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Columbia, which was the subject of various decisions, appeals, and remands that are not directly relevant to the issues presented here. Petitioner filed a Third Verified Amended Petition for Writ of Habeas Corpus, which is the operative version, on February 14, 2013, asserting appellate IAC arguments under *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980) and *Strickland* v. *Washington*, 466 U.S. 668 (1984). The government moved to dismiss the petition as time-barred. The district court, Judge Amy Berman Jackson, denied the motion. The Hon. G.

[5] The procedural history shows, and the Magistrate Judge below concluded, that the D.C. courts overlooked the appellate IAC claim rather than adjudicating it on the merits.

Michael Harvey, M.J., to whom the district court referred the matter, subsequently concluded that Petitioner was entitled to *de novo* consideration of his appellate IAC claim, and ordered an evidentiary hearing to develop the factual record.

a. On July 20, 2017, Petitioner called Mr. Sullivan to testify at the evidentiary hearing. Mr. Sullivan's testimony demonstrated that he did not undertake the steps required to render even minimally competent representation of Petitioner at trial or on appeal. Mr. Sullivan testified that although he knew the names of the likely witnesses long before trial, he had not researched basic facts such as whether any of them had criminal backgrounds. C.A. App. 201–202. In fact, other than speaking to Petitioner, visiting the crime scene, and requesting discovery from the government, Mr. Sullivan could not identify any steps of any kind that he took to investigate Petitioner's case or prepare for trial. He explained that he did not investigate the convictions that the government belatedly disclosed as to Williams and Keith Nash because he could not see how the information could have helped Petitioner.

As for the appeal, Mr. Sullivan testified that he did not conduct any investigation of any kind other than reviewing trial transcripts and did not conduct any legal or factual research on any issue. He chose not to file a reply brief because he thought it would be pointless to do so.

b. Following the hearing, Magistrate Judge Harvey issued a report recommending that the habeas petition be denied.[6] The report concluded, in relevant part, that the late-disclosed evidence was not material because it came out at trial, and that none of the withheld facts would have affected the verdict. It also concluded that Mr. Sullivan rendered effective assistance at trial. The report therefore concluded that Mr. Sullivan had not rendered ineffective assistance in failing to raise *Brady* or trial IAC claims on appeal. Petitioner timely objected. The district court overruled Petitioner's objections, adopted the report, and dismissed the petition. App. B, at 1–17.

6. On appeal, Petitioner asserted that Mr. Sullivan rendered ineffective assistance under *Strickland* by failing to raise *Brady* and trial IAC claims.[7] The D.C. Circuit affirmed. The panel's decision hinged on the conclusion that Petitioner had not established his entitlement to relief on the claims of trial-level error underlying his appellate IAC claim. As to the *Brady* arguments, the panel analyzed the late-disclosed and withheld evidence

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[6] In reaching and deciding the merits of all of Petitioner's arguments, Magistrate Judge Harvey rejected the government's contentions that the arguments were procedurally barred and/or unexhausted.

[7] While the appeal was pending, Petitioner was re-sentenced and released from custody under D.C. Code § 24-403.03. The federal courts retain jurisdiction over his habeas petition—and this case is not moot—because Petitioner remains subject to probation, and is also bound by certain registration requirements applicable to firearms offenders in the District of Columbia. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998).

and concluded that it was not material, and reasoned that there accordingly was no reasonable probability that the arguments would have succeeded on appeal. The panel reasoned that the trial IAC argument would merely have "repackage[d]" the *Brady* issues, and so Mr. Sullivan did not render ineffective assistance in failing to advance that argument on appeal, either.

REASONS FOR GRANTING THE PETITION

In requiring Petitioner to establish a *Brady* violation and trial-level ineffectiveness as elements of his appellate IAC claim, the D.C. Circuit's decision deepened the confusion that has developed among the courts of appeals as to how to analyze appellate IAC claims. Further, the decision is legally erroneous because the panel required Petitioner to carry a significantly heavier burden than this Court's precedents require. The decision is also incorrect because the panel's *Brady* analysis—which served as the linchpin for its determination that Petitioner is not entitled to relief under *Strickland*—squarely contradicts three central tenets of this Court's well-settled *Brady* doctrine, and because the panel entirely overlooked (or misapprehended) Petitioner's trial IAC arguments. This Court's review is badly needed to ensure that the erroneous decision below is not allowed to stand, and to provide guidance to the lower courts on how to analyze appellate IAC claims under *Strickland.*

A. The Decision Below Deepens Confusion Among the Lower Courts Regarding the Showing Necessary for an Ineffective Assistance of Appellate Counsel Claim

The court below resolved Petitioner's *Strickland* arguments by analyzing whether he had proven the merits of the issues that Mr. Sullivan failed to raise on direct appeal. App. A, at 13. The panel's decision reflects confusion that has persisted for years among the lower courts regarding the showing that a habeas petitioner must make to prevail on an appellate IAC claim.

1. This Court has held that to prevail on an ineffective assistance claim based on counsel's failure to raise a particular argument, a petitioner must demonstrate that counsel's selection of issues was objectively unreasonable and that there is a reasonable probability that, but for his counsel's errors, he could have obtained a different result. *Smith* v. *Robbins*, 528 U.S. 259, 285–86 (2000); *Strickland*, 466 U.S. at 694. The Court has indicated that where an ineffectiveness claim is based on *appellate* counsel's omission of a particular argument, the petitioner generally must show that the omitted argument was "clearly stronger than those presented" in order to prevail. *Smith*, 528 U.S. at 288 (quoting *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). These precedents instruct that the prejudice question focuses on the outcome on appeal, indicating that a petitioner need not definitively establish that he also was prejudiced at trial. *Id.* at 285; *see also Strickland*, 466 U.S. at 693–94. However, the Court has never elaborated further on the showing required for a

petitioner to prevail on an appellate IAC claim, nor has it specified what sort of merits inquiry courts are to undertake as to trial-level issues in assessing appellate-level ineffectiveness. In the absence of this Court's guidance, multiple inter-circuit splits have developed as to how to analyze appellate-level *Strickland* claims based on counsel's omission of arguments.

a. The lower courts have adopted conflicting standards as to how meritorious an omitted argument must be to warrant appellate IAC relief. The cases that most closely align with this Court's precedents do not require affirmative proof of an omitted claim's merits. For example, in *Neill* v. *Gibson*, the Tenth Circuit emphasized that an omitted argument need not be "a 'dead-bang winner,'" as such a requirement would be inconsistent with *Strickland*. 278 F.3d 1044, 1057 n.5 (10th Cir. 2001) (en banc). The Fourth, Seventh, and Ninth Circuits have also adopted approaches that do not necessarily require a petitioner to definitively establish his right to relief on the omitted trial-level claim in order to show appellate-level deficiency and prejudice. *See Tamplin* v. *Muniz*, 894 F.3d 1076, 1090 (9th Cir. 2018) (concluding that counsel had performed deficiently by failing to raise "a compelling claim to relief"); *Ramirez* v. *Tegels*, 963 F.3d 604, 617 (7th Cir. 2020) (emphasizing that the operative question is whether the argument "had a better than fighting chance at the time"); *United States* v. *Allmendinger*, 894 F.3d 121, 128 (4th Cir. 2018) (holding that

counsel was deficient for failing to raise an argument that "had a strong chance of success"). The Sixth Circuit and D.C. Circuit, in contrast, have effectively required petitioners to definitively establish that they would be entitled to relief on the arguments that appellate counsel omitted, in clear conflict with their sister circuits. *See Coley* v. *Bagley,* 706 F.3d 741, 752 (6th Cir. 2013) (reasoning that omitted argument cannot be "meritless"); *United States* v. *Watson*, 717 F.3d 196, 198 (D.C. Cir. 2013) (holding that petitioner is not entitled to appellate IAC relief if the omitted issue would have been "a losing argument," and accordingly disposing of an appellate IAC claim based on the panel's assessment of whether the omitted argument would have lost or won).

b. The lower courts have fractured along different lines as to the degree of scrutiny that courts are to apply to omitted arguments asserting trial-level error. This Court has emphasized that federal habeas courts should avoid weighing issues better left on first consideration to state courts. *See Baldwin* v. *Reese*, 541 U.S. 27, 29 (2004); *Jimenez* v. *Quarterman*, 555 U.S. 113, 121 (2009). The Sixth Circuit accordingly has refused to definitively decide trial-level issues in adjudicating appellate IAC claims. *See Mapes* v. *Tate*, 388 F.3d 187, 194 (6th Cir. 2004). In contrast, D.C. Circuit precedents, and certain Ninth Circuit precedents, have closely scrutinized omitted arguments and proceeded to the question of appellate IAC only *after* deciding the merits of those arguments. *See, e.g.*, *Moormann* v.

Ryan, 628 F.3d 1102, 1109–14 (9th Cir. 2010); App. A, at 13. These divergent approaches have created confusion as to what sort of evidentiary burden a petitioner must carry in order to prevail on an appellate IAC claim.

c. Finally, the lower courts have split as to what prejudice inquiry should govern appellate-level IAC claims. The Third Circuit has held that the prejudice inquiry focuses on the integrity of the direct appeal. *See United States* v. *Mannino*, 212 F.3d 835, 844 (3d Cir. 2000). The D.C. Circuit, in contrast, has looked to whether the appellate-level issues would ultimately have changed the outcome at trial. *See United States* v. *McLendon*, 944 F.3d 255, 262 (D.C. Cir. 2019); App. A, at 12–13 (determining whether there was trial-level prejudice in order to determine whether there was appellate-level prejudice). The Fifth Circuit has taken yet another approach, by which a petitioner must show that but for his counsel's error, "he *would have prevailed* on his appeal." *Busby* v. *Davis*, 925 F.3d 699, 722 (5th Cir. 2019).

3. Several dissenting opinions from the lower courts have emphasized that requiring a petitioner to establish the merits of his trial-level argument in order to demonstrate appellate IAC is irreconcilable with *Strickland*. For example, Judge Williams of the D.C. Circuit reasoned, in context of an appellate IAC claim based on an omitted claim of harmless error, that "[w]hen you multiply a fraction of a burden (reasonable probability) by a fraction

of a burden (rebutting government's contention that the jury instruction made no difference beyond a reasonable doubt), you get a *smaller* fractional burden," such that the petitioner should have been required to show "only a reasonable probability that the government might not have established harmless error." *Blount* v. *United States*, 860 F.3d 732, 747 (D.C. Cir. 2017) (Williams, J., dissenting); *see also, e.g.*, *Miller* v. *Zatecky*, 820 F.3d 275, 283 (7th Cir. 2016) (Adelman, J., dissenting); *Maupin* v. *Smith*, 785 F.2d 135, 146 (6th Cir. 1986) (Holschuh, J., dissenting).

4. These cases demonstrate that the confusion among the circuits is widespread and deeply developed. These analytical issues are squarely raised by Petitioner's case, and were resolved by the court below in a way that is irreconcilable with *Strickland*'s "reasonable probability" standard. *See* 466 U.S. at 694–95; *see also, e.g.*, *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014); *Tate*, 388 F.3d at 194. This Court's review is needed in order to resolve the confusion and provide guidance to those lower courts, like the D.C. Circuit, that have departed from *Strickland* and its progeny.

B. The Court Below Misapplied *Strickland* to Petitioner's Ineffective Assistance of Appellate Counsel Claims

The standard that the court below applied—which effectively required that Petitioner prove the elements of the claims Mr. Sullivan omitted, including trial-level prejudice,

in order to prevail on his ineffective assistance of appellate counsel claim—is squarely contrary to this Court's precedent. *Strickland* and its progeny provide that appellate counsel performs deficiently if he unreasonably omits arguments that are "clearly stronger" than those actually raised, and that a petitioner is prejudiced if the omitted arguments stood "a reasonable probability" of success on appeal. *Smith*, 528 U.S. at 285-86, 288. These precedents do not require that a petitioner also definitively establish the merits of the omitted claims themselves; indeed, such a requirement would be inconsistent with the "reasonable probability" standard, which does *not* demand any showing by a preponderance that the appeal would have succeeded but for counsel's errors. *See Strickland*, 466 U.S. at 693–94. The standard applied below would also render the right to effective assistance of appellate counsel meaningless in this context: If a petitioner must establish the merits of a claim of trial-level error in order to prove that his appellate counsel rendered ineffective assistance in failing to advance that claim, then his appellate IAC claim would be entirely derivative of the underlying claim; he could never obtain relief on appellate IAC grounds alone. *Strickland* does not permit this result. The central question that courts are to apply is not a but-for test but rather whether, taken together, counsel's errors are sufficiently serious to cast doubt on the integrity of the proceeding. *See id.* These precedents entitle Petitioner to relief in this case.

1. Mr. Sullivan confirmed at the evidentiary hearing that his choices were not strategic. According to his own testimony, he simply did not investigate, identify, or consider any other theories of appellate relief, notwithstanding the numerous red flags that should have prompted him to do so. The *Brady* and trial IAC arguments, both of which would have been obvious to objectively reasonable counsel in Mr. Sullivan's position, were clearly stronger than the sufficiency and jury instruction arguments that he chose to raise to the exclusion of all others. Even a cursory reading of the appellate brief that Mr. Sullivan filed makes clear that the two arguments he actually raised—at least one of which was facially contrary to his client's interests—were doomed to fail. *See* C.A. App. 432.

2. The *Brady* and trial IAC issues, in contrast, find significant support both in the record and in the D.C. Court of Appeals' well-settled case law, and stood at least a reasonable probability of success on appeal. *E.g.*, *Miller* v. *United States*, 14 A.3d 1094, 1116 (D.C. 2011) (finding *Brady* violation where government belatedly disclosed information about an eyewitness, even though defense counsel used the information effectively on cross-examination and for substantive purposes); *Johnson* v. *United States*, 413 A.2d 499, 503 (D.C. 1980) ("[T]he failure to investigate is [an] objective violation of an attorney's duty to his client. Proper investigation is particularly crucial where the central issue is a question of credibility between the key government witness and the defendant." (internal citations

omitted)); *see also Vaughn* v. *United States*, 93 A.3d 1237, 1257 (D.C. 2014); *Kigozi* v. *United States*, 55 A.3d 643, 652–54 (D.C. 2012). At a minimum, counsel's failure to raise these arguments undermines confidence in the fairness of the appeal, given their comparative strength and the force with which they could have been timely presented on a complete record. That entitles Petitioner to relief under this Court's precedents. *Strickland*, 466 U.S. at 693–95.

C. The Court Below Misapplied *Brady* and *Strickland* When It Analyzed Petitioner's Underlying Claims

Notwithstanding the D.C. Circuit's erroneous analysis of Petitioner's appellate IAC claim under *Strickland*, the decision below warrants this Court's review for two further reasons: it directly contradicts *Brady*, and it misapplies *Strickland* to Petitioner's IATC claims. Had *Brady* and *Strickland* been properly applied—as the D.C. Court of Appeals presumably would have applied them—the arguments would have been clearly stronger than those Mr. Sullivan presented and would have stood a reasonable probability of success on appeal. Accordingly, Petitioner is entitled to relief on his claim of ineffective assistance of appellate counsel.

1. *Brady* and its progeny prohibit the prosecution from suppressing evidence that is favorable to the defense and material to the defendant's guilt or punishment. *See Smith* v. *Cain*, 565 U.S. 73, 75 (2012) (citing *Brady*, 373 U.S. at 87). The burden to establish

materiality is low—the petitioner need only show any reasonable likelihood that the suppressed evidence could have changed the result at trial. *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016); *see also Vaughn*, 93 A.3d at 1262. Because both *Strickland* and *Brady* operate under a reasonable probability standard, Petitioner therefore need only show a reasonable probability that the D.C. Court of Appeals would have found a reasonable probability that the result at trial would have been different. *See Blount*, 860 F.3d at 747 (Williams, J., dissenting).

This Court has repeatedly admonished lower courts for applying unduly demanding standards of materiality and discounting the implications of suppressed evidence. *See Wearry*, 136 S. Ct. at 1006–07; *Smith*, 565 U.S. at 75–76; *Kyles*, 514 U.S. at 434–38. Given these pervasive problems, the Court has recently emphasized three key principles that courts must follow when analyzing materiality under *Brady*. The decision below runs directly contrary to all three.

First, the touchstone of *Brady* materiality is "any reasonable likelihood" that timely disclosure of the suppressed evidence[8] *could* have affected the judgment of the jury.

[8] Evidence disclosed before or at trial is considered "suppressed" for purposes of *Brady* if it is disclosed so late that a defendant cannot make effective use of it at trial. *See United States* v. *Pasha*, 797 F.3d 1122, 1133 (D.C. Cir. 2015) (finding evidence suppressed when "[t]he prosecutor waited over eight months until the eve of trial to reveal" the evidence).

Wearry, 136 S. Ct. at 1006 (quoting *Giglio* v. *United States*, 405 U.S. 150, 154 (1972)). A petitioner need not prove by a preponderance of the evidence that proper disclosure *would* have changed the outcome. *Wearry*, 136 S. Ct. at 1006 n.6; *Kyles*, 514 U.S. at 434. Instead, a petitioner need only "undermine confidence in the verdict."[9] *Kyles*, 514 U.S. at 435. To that end, this Court has instructed lower courts to determine whether there is a reasonable probability that withheld evidence would have stirred reasonable doubt in the mind of a single juror. *Buck* v. *Davis*, 137 S. Ct. 759, 776 (2017); *Cone* v. *Bell*, 556 U.S. 449, 452 (2009).

Second, the materiality inquiry "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434. The key question is whether the court can be confident that the jury certainly would have voted to convict had all relevant information been timely disclosed to competent counsel. *Wearry*, 136 S. Ct. at 1007; *Smith*, 565 U.S. at 76. If the court cannot be confident, suppressed evidence is material even if the evidence in total would more likely than not still have been sufficient to support conviction. *See Wearry*, 136 S. Ct. at 1006.

Third, the court must assess suppressed evidence collectively. *Kyles*, 514 U.S. at 437. The reviewing court must consider how various pieces of evidence may have worked together to undermine the government's case. *Id.*; *see also Dennis* v. *Sec'y Pa. Dep't of*

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[9] The reasonable probability inquiry looks to what could have happened had the evidence been properly disclosed "to competent counsel." *Kyles*, 514 U.S. at 441. A court must therefore consider how the information could have been used by an effective attorney, not the attorney that appeared in the particular case at bar.

Corr., 834 F.3d 263, 312 (3d Cir. 2016) (en banc). Accordingly, this Court has instructed lower courts not to emphasize reasons a juror might disregard suppressed evidence while neglecting reasons she might not. *Wearry*, 136 S. Ct. at 1007; *see Smith*, 565 U.S. at 76.

If the D.C. Court of Appeals had faithfully applied this Court's precedent, it likely would have concluded that disclosure of the suppressed evidence had a reasonable probability of raising doubt in at least one juror's mind. In contrast, the court below ignored each of the above three rules, making clear that there is a continued need for this Court's guidance on materiality analysis under *Brady*.

a. The suppressed evidence was material because, under this Court's precedent, it cumulatively challenged the credibility of all four of the government's witnesses and substantiated Petitioner's account of the shooting.

The prosecution's case against Petitioner relied chiefly on the testimony of the others in the car at the time of the shooting. Neither the prosecution nor the defense could make dispositive use of the physical evidence. *See* C.A. App. 628–29. If the government had obtained any affirmative physical evidence implicating Petitioner above the others in the car, the government "would have been shouting it from the rooftops at trial." *Long* v. *Hooks*, 972 F.3d 442, 463 (4th Cir. 2020) (en banc). Instead, because the physical evidence was inconclusive, the case came down to witness credibility. C.A. App. 223, 266–267.

The *Brady* material at issue here challenges the government's theory that Petitioner initiated the robbery and supports Petitioner's account that three of the government's witnesses—Victor Williams, Sharon Nash, and LaTina Gary—had actually set out with Keith Nash to rob Petitioner. Cumulatively assessed, the suppressed materials erode the foundation of the government's case and undermine confidence in the jury's verdict.

i. The suppressed material regarding Williams—a key government witness—would have cast serious doubt on the government's theory of the case had it been timely disclosed. *Wearry* requires courts to consider how evidence that impeaches a particular witness might impact the credibility of other witnesses. 136 S. Ct. at 1006–07. Thus, Williams's prior arrests and convictions would have impugned not only Williams's credibility but also Nash's and Gary's credibility as potential coconspirators. Because the government only disclosed an incomplete criminal history the day before trial, C.A. App. 386, defense counsel did not have time to digest this evidence, use it to impeach each witness, and undercut the government's case.[10] *See Wearry*, 136 S. Ct. at 1006–07.

Moreover, courts must consider that witnesses like Williams, who was arrested just weeks before he gave grand jury testimony against Petitioner, are motivated to lie and

[10] The same is true of evidence that Keith Nash had a string of prior convictions, disclosed two days before trial.

curry favor with the government to avoid future prosecution. *See Wearry*, 136 S. Ct. at 1007 (citing *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959)).

ii. Evidence that Williams, Gary, and the Nashes had all carried guns the night of the shooting would have sown further doubt in the minds of the jurors. Investigators never recovered all of the firearms present at the scene. Gary disposed of her gun before calling police to the scene, C.A. App. 755–756, and Williams tainted the chain of custody of the only gun in evidence at trial by taking it from the scene before it was turned in, C.A. App. 688, 738–739. This Court has emphasized the importance of evidence that raises suspicion of witness tampering with a murder weapon. *See Kyles*, at 514 U.S. at 453. The court below gave this evidence little if any thought.

iii. Jurors likely would have doubted the veracity of Gary's testimony if they had learned everything about her relationship with one of the officers who had responded to the crime scene. The day before trial, the government disclosed that Gary had been a paid police informant who received more than $2,000 from law enforcement, but failed to disclose that Gary's police contact had become a "good friend" and had once intervened to have a case against her dismissed. C.A. App. 756–758, 812–814. The court below improperly ignored Gary's motive to testify for financial gain and protection from prosecution. *See Wearry*, 136 S. Ct. at 1007. Moreover, the court discounted Petitioner's lost opportunity to

use these facts "to challenge the adequacy of the police investigation." *Dennis*, 834 F.3d at 302.

iv. Had it been timely disclosed, evidence that Damitra Rowel only came forward after Gary assaulted her may have been the final nail in the coffin for the prosecution's case. This Court has long emphasized that exposing witness motivation is "a proper and important function" of cross-examination. *See Delaware* v. *Van Arsdall*, 475 U.S. 673, 678–79 (1986). Because the government only revealed Rowel's assault at trial, defense counsel had no opportunity to develop facts and uncover whether Gary's intimidation motivated Rowel to give false testimony implicating Petitioner.

v. In all, the withheld and late-disclosed evidence would have provided vital support for Petitioner's theory of the case. Each piece of evidence would have added further weight to Petitioner's account of the facts, uncovered the motive of each witness to lie on the stand, or both. Equipped with all of the evidence, the D.C. Court of Appeals likely would have found a reasonable probability that at least one juror would have doubted the prosecution enough to vote against conviction.

b. In the face of this mounting doubt, the D.C. Circuit's conclusion that Petitioner's *Brady* arguments stood no reasonable probability of success on appeal is unavailing. The court below so concluded because, in the court's view, (a) none of the evidence

would have cast doubt on Sharon Nash's credibility, *see* App. A, at 12; and (b) the physical evidence, on balance, still supported the government's case, *ibid.* at 12–13. These conclusions misapply the *Brady* materiality standard.

i. With no substantive explanation, the court concluded that the suppressed evidence could not have been used to undermine Sharon Nash's credibility. *See* App. A, at 12. According to the court, Ms. Nash was an especially credible witness because she would have had no reason to perjure herself to protect Williams if he had actually killed her brother. *Ibid.*

But Sharon Nash had strong incentives to lie: had she corroborated Petitioner's account of the facts, Ms. Nash could have been criminally liable for her role in the conspiracy. And after suppressing the evidence described above, the government further exacerbated the harm when it noted the self-created "absence of evidence" supporting Ms. Nash's motive to lie at trial. *See Bellamy* v. *City of New York*, 914 F.3d 727, 762 (2d Cir. 2019). Even so, the D.C. Circuit ignored this Court's instructions to consider whether evidence impeaching Williams or Gary rebutted Ms. Nash's credibility. *Wearry*, 136 S. Ct. at 1006–07; *Kyles*, 514 U.S. at 436–437. And, by concluding that all jurors would still have trusted Ms. Nash's lack of motive, the court below improperly emphasized a reason jurors might disregard suppressed evidence while neglecting the reasons jurors might weigh it more

favorably. *See Wearry*, 136 S. Ct. at 1007; *Long*, 972 F.3d at 463.

ii. Subsequently, the court below concluded that, because "undisputed forensic evidence" implicated Petitioner, there was "almost no chance" the suppressed evidence would have swayed the jury. App. A, at 12. As noted above on page 8, the "forensic evidence" consists only of (a) the positioning of Mr. and Ms. Nash's bullet wounds and (b) testimony of the State's expert pathologist regarding the possible proximity of the murder weapon to Mr. Nash's wounds when inflicted. *See ibid.* at 12–13. Nonetheless, the panel resolved that a jury would still have convicted Petitioner because the bullets struck both Mr. and Ms. Nash on the left side and because Petitioner was the only passenger sitting to their left. *Ibid.*

But the physical evidence was far from dispositive. The State's own pathologist testified that he could not place the shooter with certainty because there was no physical evidence indicating how Mr. Nash was positioned at the time of the shooting—no blood spatter, no collateral damage to the vehicle, nor anything else. *See* C.A. App. 629–630. Rather than heeding the ambiguities highlighted by the State's own expert, the court below took it upon itself to assess whether the government's physical evidence still supported Petitioner's convictions. App. A, at 12–13. In doing so, the court did precisely what this Court has cautioned lower courts not to do: it subtracted the testimony called into question by

the suppressed evidence and assessed whether the remaining evidence, standing alone, was enough to convict. *See Kyles*, 514 U.S. at 435–437.

The D.C. Circuit failed to appreciate the ways that the physical evidence could have been developed (by locating the other firearms present at the scene) or subjected to meaningful adversarial testing had Petitioner received timely and complete discovery. A proper application of *Brady* compels the conclusion that the untested physical evidence provides no confidence in the integrity of the verdict in Petitioner's case.

2. Turning to Petitioner's trial IAC claims, the court below reasoned that Mr. Sullivan had not rendered ineffective assistance at trial because the Petitioner could not establish materiality under *Brady*. App. A, at 13–14. But the problems with Mr. Sullivan's trial-level performance are not coextensive with issues under *Brady*. The panel ignored Mr. Sullivan's abundant other failures as trial counsel, all of which would have been sufficient to undermine the confidence of the D.C. Court of Appeals in the fairness of Petitioner's trial.

a. Even if deficiencies in the prosecution's pretrial disclosures do not amount to *Brady* violations, a criminal defendant may still be prejudiced at trial if defense counsel is unable to "present[] and explain[] the significance of all the available evidence." *Williams* v. *Taylor*, 529 U.S. 362, 399 (2000). The issue of materiality under *Brady* therefore does

not dictate a finding of no prejudice under *Strickland*. In holding otherwise, the panel committed legal error. *See Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (finding error when the lower court collapsed issues and failed to perform any independent *Strickland* analysis).

Moreover, as the record makes clear, Mr. Sullivan's failures are by no means limited to failures to present and explain evidence. The D.C. Circuit failed to address the much broader array of Mr. Sullivan's failures, including his failures to screen cases for conflicts of interest, investigate key government witnesses, develop the defense theory of the case prior to trial, and appropriately prepare his client to testify. These issues are completely unrelated to *Brady*, and ought to have entitled Petitioner to relief under *Strickland* on direct appeal.

3. Even if the D.C. Circuit was right to conclude that neither Petitioner's *Brady* claims nor his trial IAC claims would have won out in isolation, the errors at trial "cumulatively necessitate[d] reversal of the convictions." *United States* v. *Parker*, 997 F.2d 219, 221 (6th Cir. 1993). The adversarial process broke down on both sides in Petitioner's case. Petitioner's *Brady* claims would have emphasized the failures of the prosecution to comport with constitutional standards, and his trial IAC claims would have highlighted the failures of defense counsel to do the same. Thus, "[w]ithout considering their simultaneous impact on jurors," the aggregate harm wrought by deficiencies on both sides "cannot fairly be

measured." John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1154 (2005). The D.C. Circuit's failure to cumulatively examine how the *Brady* and trial-level *Strickland* violations combined to corrode confidence in the trial verdict was therefore in error. *See Taylor* v. *Kentucky*, 436 U.S. 478, 487 n.15 (1978); *Butler* v. *United States*, 414 A.2d 844, 851–52 (D.C. 1980). If the decision below is allowed to stand, it will undermine decades of this Court's jurisprudence under *Strickland* and *Brady*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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