No. 20-

IN THE

Supreme Court of the United States

ALVIN HENRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, it is undisputed that the Government failed to timely disclose impeachment-related evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The evidence only came to light during trial, when the government's star witness blurted it out on cross-examination. Both the District Court of the Virgin Islands and the United States Court of Appeals for the Third Circuit found untimely disclosure. However, both Courts upheld the conviction on the ground that Mr. Henry failed to demonstrate prejudice, as his trial counsel provided effective representation once the impeachment-related evidence was disclosed during the witness's cross-examination. The question presented is:

> Whether the Third Circuit's focus on trial counsel's effective use of *Brady/Giglio* material at trial is consistent with this Court's uniform precedent inquiring into whether there is a reasonable probability of a different result had the *Brady/Giglio* material been timely disclosed, such that the withheld evidence undermines confidence in the outcome of the trial.

PARTIES TO THE PROCEEDING

Alvin Henry, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decision below in the U.S. Court of Appeals for the Third Circuit:

United States v. *Henry*, No. 20-1531 (3rd Cir.) (January 19, 2021) (unpublished)(panel decision holding that prejudice is not demonstrated for *Brady*/*Giglio* purposes where late-disclosed impeachment-related evidence was put to effective use at trial by defense counsel)(Pet.App. 1a-12a).

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Alvin Henry respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

INTRODUCTION

The untimely disclosure of *Brady/Giglio* evidence should result in the reversal of Mr. Henry's conviction. Here, Mr. Henry's co-defendant Lamech Matthew decided to cooperate with the government and testify against Mr. Henry. The government failed to disclose a written cooperation agree-

ment between the government and Mr. Matthew—which only came to light when Mr. Matthew mentioned the agreement during his testimony. Had Mr. Matthew not testified about the agreement, it might still remain hidden. But that wasn't all—after further probing, Mr. Matthew—and ultimately the government—conceded that there was also a previously undisclosed oral agreement between Mr. Matthew and the government that specified that Matthew need not testify or answer any questions regarding anyone else who was involved in the drug trafficking operation for which Mr. Henry stood trial. All of this information was disclosed in the midst of trial, when it was too late for Mr. Henry's attorney to investigate this critical evidence.

Ultimately, both the District Court and the Third Circuit found no *Brady/Giglio* error based on a lack of prejudice. Those courts determined that Mr. Henry's trial counsel made effective use of the impeachment evidence at trial. Neither court addressed, however, Mr. Henry's argument that had the impeachment evidence been timely closed pre-trial, Mr. Matthew would not have been allowed to testify and the government would have been deprived of its star witness. Instead, those courts evaluated whether trial counsel did the best job possible under the circumstances, while ignoring what would have happened at trial had the error not occurred at all.

This case thus presents the issue of whether *Brady/Giglio* prejudice should be determined by examining the effectiveness of counsel once the *Brady/Giglio* comes to light, or whether prejudice

should be determined by comparing the error-infected trial to the trial which would have resulted had the *Brady/Giglio* error not occurred at all.

OPINIONS BELOW

The Third Circuit's opinion is unpublished. Pet. App. 1a-12a.

JURISDICTION

The Third Circuit judgment became final upon the entry of judgment by the Court of Appeals on January 19, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

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

STATEMENT

Procedural Background

The grand jury returned an indictment charging Mr. Henry with one count of conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii)(II), and 846, and one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii)(II). The charges stem from a Customs and Border Patrol inspection of Defendant's carryon luggage on November 2, 2016, as he waited at the Henry E. Rohlsen Airport on St. Croix, Virgin Islands. This search resulted in the discovery of five or more kilograms of cocaine.

Mr. Henry was initially charged along with co-defendant Lamech Matthew. Mr. Matthew ultimately pled guilty and cooperated with the government by testifying against Mr. Henry at trial.

On the second day of trial, the government called Lamech Matthew as its star cooperating witness. Matthew had entered a plea agreement with the government shortly before trial. During direct examination, Matthew testified to his role in the conspiracy to traffic cocaine through the Henry E. Rohlsen Airport. He described his employment at the airport and how it led to his initial involvement in the conspiracy at the behest of a family friend. He detailed the method by which he would transport the cocaine to and through the airport. Matthew specifically recounted the pertinent events of this case, including meeting Mr. Henry on November 1, 2016 and delivering cocaine to him on November

2, 2016. Matthew also described the events subsequent to his arrest. He stated that he was interviewed multiple times and admitted lying during his first interview. He described his plea agreement and his agreement to testify against Mr. Henry. He stated that under the terms of his agreement, he did not "have to call any names." He identified no co-conspirators by name except Mr. Henry.

It became apparent that Matthew had entered into two agreements with the Government in addition to his plea agreement. The first—the Supplemental Agreement—was a written cooperation agreement which set forth the terms of Matthew's cooperation that would lead the Government to advocate for a four-point reduction at his sentencing hearing. The Supplemental Agreement stated that "if the government determines that [Matthew] has not provided full and truthful cooperation … or has otherwise violated any other provision of this supplemental agreement and the Plea Agreement, the agreements may be voided." The second agreement—the Oral Agreement—allowed Matthew to refrain from identifying his co-conspirators—with the exception of Mr. Henry—and any "locations [that] would give away the identity of those individuals." Accordingly, Matthew refused to answer defense counsel's questions regarding the identity of other co-conspirators except Mr. Henry.

Once these previously undisclosed agreements came to light during trial, the District Court instructed the parties: "And so what I suggest is that counsel get together and figure out how they suggest the Court proceed[,] without in any regard [Defense Counsel] waiving your right to file a motion to dismiss the indictment as you suggested on the basis of prosecutorial misconduct, but for

purposes of proceeding with this matter[.] [I]f you all agree how this is to be resolved, the Court will consider that." After hearing from the parties on possible courses of action to address Matthew's refusal to testify fully, the District Court "order[ed] the parties to sit down and figure out whether they . . . can come to an agreement."

In compliance with these Court orders, the parties reached an agreement regarding how the matter would be handled. Specifically, (1) Matthew's second recorded interview—in which he identified certain alleged co-conspirators—would be submitted to the jury "for the truth of the matter;" (2) the Government would "be precluded from arguing against them, or rebutting" Matthew's statements in the interview; and (3) the jury would be instructed regarding "the extreme measures the government went through in this case in working out a deal." In the latter regard, the Government and defense counsel agreed to the following stipulation that the Court read to the jury:

> Lamech Matthew entered into a plea agreement with the government. The plea agreement is contained in Defense Exhibit 24. That agreement was properly filed on the public court docket. The plea agreement between the government and Lamech Matthew included a supplement contained in Defense Exhibit 27. That was not filed on the public court docket, but was properly filed under seal. The government had an obligation to disclose the supplement to the plea agreement to the defense. The government did not inform the defense of the supplement prior to the start of trial. And because the supplement was under seal, the defense did not have access to it. The defense did not learn of the supplement to the plea agreement until after Mr. Matthew testified on direct examination. The government did not notify the defense of this supplement until defense counsel initiated a discussion with the Court and the government about the scope of the cross-examination.
>
> In addition to the supplement to the plea agreement, the government also entered into an improper oral agreement with Lamech Matthew that is addressed in the Court's jury instruction regarding Defense Exhibit 12. Through their oral agreement, the government and

> Mr. Matthew agreed that Mr. Matthew was never required to provide any information that would reveal the identity of anyone other than Mr. Henry in connection with his cooperation with the government.
>
> The Court and the defense first learned of this oral agreement during the cross-examination of Mr. Matthew. The individuals covered by the oral agreement between the government and Lamech Matthew are individuals that have larger roles in the conspiracy that Mr. Matthew pled guilty to than the role the government alleges of Mr. Henry. The reason Mr. Matthew gave for not agreeing to testify regarding those individuals was that he was concerned about his family's personal safety.
>
> By reaching the oral agreement with Mr. Matthew, the government agreed that Mr. Matthew did not have to comply with the terms of the supplement to the plea agreement contained in Defense Exhibit 27. The government's tunnel vision in prosecuting Mr. Henry led it to agree that Mr. Matthew did not have to comply with all the terms of the supplement to the plea agreement in order for the government to recommend to the Court at his sentencing that Mr. Matthew receive a four level downward departure from the sentencing guidelines. The agreement to allow Mr. Matthew to receive the benefit of full compliance with the supplement to the plea agreement without having to comply with all its terms is unusual.
>
> The entire ma[nn]er in which the government has handled the testimony of Mr. Matthew is inconsistent with the regular course of business.

The jury was also instructed that Matthew's second recorded statement to police could be used for its truth, rather than simply as impeaching prior inconsistent testimony. As to these statements, the jury was instructed:

> As you were instructed during trial, you may treat Mr. Matthew's statements in Defense Exhibit 12 in the same manner as you will treat the other evidence in this case. In other words, you may use Mr. Matthew's statements in Defense Exhibit 12 as proof of the truth of what Mr. Matthew said in those statements.

During closing arguments, defense counsel argued that Matthew's testimony was unreliable as evidenced by his cross-examination, his admission that he lied during his first recorded interview, and his agreements with the Government. Defense counsel argued to the jury that Matthew was "not to be trusted when he says how these packages [of cocaine] were placed into Mr. Henry's luggage." The reason Matthew was allegedly not telling the truth, according to defense counsel, was because "he knows that in order to get as little time as possible, he has to testify with what the government believes to be true." Defense counsel set forth the parameters of the plea agreement, Supplemental Agreement, and Oral Agreement. Defense counsel further argued that these agreements were evidence that the Government's "tunnel vision" in pursuing Henry led it to "ignore[] all of the evidence suggesting they're wrong" in concluding that Henry committed this crime.

The jury returned a verdict of guilty on both the conspiracy and the possession of cocaine with intent to distribute counts. Mr. Henry filed a motion to dismiss the indictment, arguing that the indictment should be dismissed because the Government failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) by suppressing the Supplemental Agreement and Oral Agreement, which were favorable to Mr. Henry and bore on Matthew's credibility. Mr. Henry argued that he was prejudiced by the Government's suppression because if "the Court were aware of Matthew's [O]ral [A]greement, the government likely would not have been permitted to call Mr. Matthew as a witness because there was no legitimate reason for Matthew to be

excused from answering questions about co-conspirators." Without Matthew's testimony "there would be no witness to impeach [Defendant's] final statement that he neither knew the night before, nor while in the bathroom the day of, that cocaine was going to be placed in his luggage." Mr. Henry contended that his case relied on impeaching Matthew's credibility; that the suppression of the Supplemental and Oral Agreements was material to the outcome of the trial; and that prejudice resulted from the suppression. He further maintained that the stipulation could not cure the prejudice against him created by the *Brady* violation and thus the Indictment should be dismissed.

Mr. Henry argued that the violation was intentional and "amounted to the commission of a fraud upon the Court." Thus, dismissal of the Indictment rather than some other remedy was appropriate in order to deter future prosecutorial misconduct. He argued that the government misrepresented that it had followed the Court's Order to turn over all correspondence regarding Matthew's plea agreement when the prosecutor turned over only that individual's email correspondence, and not correspondence from another prior prosecutor. Mr. Henry also alleged multiple knowing misrepresentations about the Oral Agreement and Matthew's knowledge of alleged co-conspirators. Mr. Henry argued that these actions constituted prosecutorial misconduct and a departure from the ethical prosecutorial responsibility to such a degree that the District Court should exercise its supervisory powers to dismiss the Indictment.

The Government asserted that there was no *Brady* violation or prosecutorial misconduct because Mr. Henry was not prejudiced and therefore dismissal was not an appropriate remedy. The Government acknowledged that the Supplemental and Oral Agreements constituted *Brady* material, and that defense counsel did not understand the full scope of the Supplemental and Oral Agreements until Matthew's testimony. However, the Government contended that it fulfilled its obligations under *Brady* in an email to defense counsel,[1] and when it elicited the exculpatory evidence about the Supplemental and Oral Agreements during its direct examination of Matthew.

The District Court accepted the government's acknowledgment that the several undisclosed agreements between Matthew—which were first disclosed during Matthew's testimony—constituted *Giglio* material. The District Court found, however, that Mr. Henry was not prejudiced by the "delayed disclosure" of the evidence because he was able to effectively use it at trial. The District Court concluded that "the Court does not find the evidence regarding Matthew's Supplemental and Oral Agreements to be material such that prejudice to Defendant resulted," despite "the Court's expectation that the Government would timely disclose *Brady* information—which was not done here." The District

[1] The email stated, in pertinent part: "Matthew entered a plea late this afternoon with a supp[lemental] agreement to cooperate and testify against your client. If he has to testify, the [government] will recommend a 4 level reduction, and a 2 level reduction if he is not required to testify."

Court denied the motion to dismiss based on the Court's supervisory authority based on the same finding that prejudice was lacking.

In conclusion, the Court denied the motion to dismiss in its entirety, but while observing:

> While the Court will deny Defendant's Motion to Dismiss the Indictment, that should in no way suggest that the Court condones the actions of the Government. It does not. The requisite preparation, attention to detail, and oversight of the case on the part of the prosecution were clearly lacking. This was evident from counsel's: (1) untimely disclosure of *Brady* material; (2) unusual and untimely disclosed side agreement limiting the testimony of a witness, see Trial Tr. vol. 3, 119–28, 132–38, 173; (3) failure to affix the date of an amendment—rather than the original date— to an agreement, thus causing incorrect representations to the Court as to the timing of the agreement and its relationship to another agreement, see Trial Tr. vol. 3, 10–19; (4) lack of familiarity with the terms of the agreements, thus causing incorrect representations and omissions to the Court, see Trial Tr. vol. 3, 97–100, 119–28, 132–38; (5) failure to initially produce "all" materials in response to a clear directive from the Court, see Trial Tr. vol. 3, 18–19, 33–35; and (6) omission of pertinent information in response to inquiries from the Court, see Trial Tr. vol. 3, 110–14. These failures by the Government were unacceptable; fell far below the performance standards that the Court expects of counsel; and caused delay and frustration that were decidedly avoidable.

The Third Circuit affirmed the District Court's ruling, despite noting that "[t]he Government's work appears to have been slipshod." (App. 2a). That Court relied upon trial counsel's impeachment and securing of a favorable jury instruction to find lack of prejudice. (App. 2a, 8a-9a). Nowhere in its unpublished opinion did the Third Circuit address Mr. Henry's argument that had the *Brady/Giglio* evidence been disclosed pre-trial, Matthew would have been precluded from testifying, and thus the government would have been deprived of its star witness.

REASONS FOR GRANTING THE PETITION

I. THE PROPER DEFINITION OF *BRADY/GIGLIO* PREJUDICE REQUIRES CLARIFICATION FROM THIS COURT.

A. The late disclosure of *Brady/Giglio* material was error

The Due Process Clause of the Fifth Amendment guarantees a defendant the right to a trial free from prosecutorial misconduct. *See United States v. Welshans*, 892 F.3d. 566, 574 (3d Cir. 2018). A prosecutor's obligation is not to secure a conviction, but to do justice. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In fact, a prosecutor "has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the United States and he must exercise that responsibility with the circumspection and dignity the occasion calls for." *United States v. Bates*, 46 Fed.Appx. 104, 113 (3d Cir. 2002) (*quoting United States v. Somers*, 496 F.2d 723, 736 (3d Cir. 1974)).

Here it is indisputable that the prosecutor failed to uphold his duties. It is well established by *Brady v. United States*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny that the government is obligated to turn over all information related to any and all deals or agreements made between the government and its witnesses, as well as all benefits a witness has received or expects to receive from the government. 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). A violation of this requirement under *Brady* rises to the level of prosecutorial misconduct when 1) evidence that was favorable to the defendant, either because it was exculpatory or impeaching; 2) was suppressed by the government, and 3) was material to the defense. *See Strickler*, 527 U.S. at 280-82. "A new trial is required if the *Brady* violation could in any reasonable likelihood have affected the judgment of the jury." *Gov't of Virgin Islands v. Fahie,* 419 F.3d 249, 253 (3d Cir. 2004).

The prosecutor did not disclose the written cooperation agreement—the supplemental agreement—between Lamech Matthew and the government before calling Mr. Matthew as a witness. The supplemental agreement laid out the terms of Mr. Matthew's cooperation and included a provision that, if the government did not deem his testimony truthful, the plea agreement could be voided by the government, and Mr. Matthew would be forced to stand trial on all of his charges and could be prosecuted for additional offenses. The government also did not disclose an oral agreement it had with Mr. Matthew before calling him as witness at trial. The oral agreement allowed Mr. Matthew to withhold the identity of his co-conspirators, other than Mr. Henry, in direct violation of the terms of the supplemental agreement. Both agreements contained information favorable to Mr. Henry and were suppressed by the government.

B. **Confusion exists as to how prejudice should be analyzed when *Brady/Giglio* evidence is suppressed and only uncovered at the last minute**

The government's failure to timely disclose the supplemental and oral agreement deprived the defense of sufficient time to effectively incorporate those agreements into cross-examination of Mr. Matthew.[2] Further, the oral agreement limited Mr. Henry's ability to test the truthfulness of Mr. Matthew's testimony on direct examination. Mr. Matthews was the only government witness who could testify as to how the plan to put the cocaine in Mr. Henry's luggage evolved as well as to how the cocaine was put into Mr. Henry's carry-on luggage the day of his arrest. Impeaching Matthew's credibility was critical to the defense. A court must take into consideration how prosecutorial misconduct may have affected the jury's credibility determination. *See Gov't of Virgin Islands v. Mills*, 821 F.3d 448, 463 (3d Cir. 2016). The Third Circuit did not do so here.

Instead, the Third Circuit focused solely on the actions taken by Mr. Henry's trial counsel, and ignored how those actions would have been different had the evidence been timely disclosed. There was other evidence that others were involved in the offense. For example, a drug-sniffing canine

[2] For example, defense counsel failed to cross-examine Mr. Matthew on the fact that 1) if the government did not consider his testimony at trial to be truthful, and thus 2) the plea agreement was voided, then 3) there would be no agreement by the government to argue to the Court that Mr. Matthew qualified for safety valve, and 4) Mr. Matthew would have no mechanism to avoid the ten-year mandatory sentence, even if he pled to the indictment.

alerted another individual seated in the departure area. Absent an agreement to the contrary, Mr. Matthew would have been compelled to testify about this person's role in the offense. Had counsel had sufficient time to prepare pretrial, counsel could have ensured that Mr. Matthew either testified fully, or not at all. The District Court and the Third Circuit only examined whether trial counsel did the best she could at trial, and did not analyze prejudice by examining how things would have been different if the evidence was timely disclosed.

Circuit Court's routinely opine that that prosecutors must disclose *Brady* material with sufficient time for the defense to make effective use of the information. *See United States v. Rivera Calderon,* 578 F.3d 78, 93 (1st Cir. 2009). "[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made," the less opportunity the defense has to make use of *Brady* information. *Leka v. Portuondo,* 257 F.3d 89, 100 (2d Cir. 2001). Timely disclosure is imperative to protect defendants' fair trial guarantees because "new witnesses or developments tend to throw existing strategies and preparation into disarray." *Id.* at 101. Thus, these circuits recognize, *Brady* clarifies that "[t]he opportunity for use" means an "opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Id.* at 103.

Based on this timeliness requirement, courts hold that where the government is aware of evidence that is potentially useful to impeach a witness, it must provide that evidence to the defense in a timely fashion. *United States v. Van Anh*, 523 F.3d 43, 51 n. 5 (1st Cir. 2008) (citing *Giglio v. United*

States, 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)). If disclosure of such evidence is delayed, these courts reason, the delay leads to reversal if "there is a reasonable probability that, had the evidence been disclosed to the defense in a timeous manner or had the trial court given the defense more time to digest it," the outcome of the trial would have been different. *United States v. Pérez–Ruiz,* 353 F.3d 1, 8–9 (1st Cir. 2003) (citing *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

The touchstone of *Brady* materiality is "any reasonable likelihood" that timely disclosure of the suppressed evidence *could* have affected the judgment of the jury. *Wearry v. Cain,* 136 S. Ct. 1002, 1006 (2016) (quoting *Giglio v. United States,* 405 U.S. 150, 154 (1972)). A defendant 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 v. Whitley,* 514 U.S. 419, 434 (1995). Instead, a petitioner need only "undermine confidence in the verdict." *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).

Rather than focus on whether the result of trial might have been different absent the *Brady* violation, the Third Circuit instead focused on whether Mr. Henry's trial counsel "used the *Brady* material extensively at trial." (App. 8a). The Third Circuit finds no prejudice, and hence no violation,

since trial counsel "effectively used [the *Brady* material] for all its impeachment value" at trial. (App. 9a). This analysis inquires not into whether there was "any reasonable likelihood" of a different result, but whether the trial attorney "did the best she could" under the circumstances.

This faulty mode of analysis is based on published Third Circuit precedent. Here, the panel cited to its published precedent *United States v. Johnson*, 816 F.2d 918, 924 (3d Cir. 1987), in support of its holding that no *Brady/Giglio* violation occurred. (App. 8a). The cited portion of *Johnson* demonstrates the same infirmity—there, the Third Circuit focused on whether counsel used the late-disclosed fingerprint report effectively under the circumstances. The phrase "reasonable likelihood" appears nowhere in the *Johnson* decision. The Third Circuit did not examine what would have happened but-for the error, but instead appears to have graded the performance of trial counsel under difficult circumstances, and because the Court gave trial counsel a "passing grade," the Court found no *Brady/Giglio* error. The Third Circuit also cited to *United States v. Higgs*, 713 F.3d 39, 44 (3d Cir. 1983). (App. 9a). In *Higgs*, the Third Circuit once again focused solely on whether disclosure a trial "will fully allow appellees to effectively use that information to challenge the veracity of the government's witnesses." *Higgs, supra*, at 44. Once again, that inquiry only seeks to grade the performance of the trial attorney and does not inquire into whether there was a reasonable likelihood of a different result but-for the *Brady-Giglio* error.

C. **The Third Circuit's approach contradicts this Court's 'reasonable probability inquiry'**

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. 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 v. Cain,* 565 U.S. 73, 76 (2012). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks omitted).

A defendant accordingly "can prevail" on a *Brady* claim "even if … the undisclosed information may not have affected the jury's verdict." *Wearry,* 136 S. Ct. at 1006 n.6. All that is necessary is a "reasonable likelihood" that it would have. It is well established that suppressed evidence impeaching a key prosecution witness may be material even where it would leave substantial portions of the prosecution's case - including testimony from other purported eyewitnesses - unaffected. *Kyles,* 514 U.S. at 445 ("[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." (citing *Agurs,* 427 U.S. at 112-13 & n.21); *see*

also id. at 435 n.8 (suppressed evidence "would have left two [of four] prosecution witnesses totally untouched" (quotation omitted)); *id.* at 451 (defendant need not show that "every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed"). In crafting the materiality standard, the Court has been cautious "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. For a court to conclude that withheld evidence is not material, the question is not whether a jury "*could* have disbelieved" the withheld evidence; a court must instead have "confidence that it *would* have done so." *Smith*, 132 S. Ct. at 630.

Based on the instant decision, as well as the *Johnson* and *Higgs* decision cited therein, it appears that the Third Circuit has strayed from the proper *Brady/Giglio* inquiry. Instead, the Third Circuit has grafted a *Strickland*-type of inquiry into whether counsel effectively used the *Brady/Giglio* materials at trial. This inquiry has the effect of raising the bar for establishing *Brady/Giglio* error, since *Strickland* inquiries involve a presumption of adequacy of counsel. Moreover, it may be difficult to determine what counsel could have done with adequate time for investigation and preparation, and thus counsel may appear effective despite the opportunity for counsel to make far *more* effective use of the evidence had it been timely disclosed.

Central to the reasoning of *Brady* is the notion that an overly high bar for materiality undermines the "truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 104 (1976).

Indeed, in developing the *Brady* materiality rule, this Court has been careful "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles,* 514 U.S. at 440. To that end, the Court has routinely rejected a demanding definition of materiality. *See, e.g., Smith,* 565 U.S. at 75-76 ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.' ") (citation omitted); *Kyles,* 514 U.S. at 434-35 (materiality "is not a sufficiency of evidence test"); *Agurs,* 427 U.S. at 111 ("[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.").

The Third Circuit's approach may unwittingly provide incentive to prosecutors to wait until the last moment to disclose *Brady/Giglio* evidence. So long as a reviewing Court finds that defense counsel was effective, no error will be found in such late disclosures. As *Strickland* largely presumes effectiveness, it is entirely likely that the Third Circuit will find counsel to have been effective. This approach also punishes defendants with competent counsel, while perhaps providing a windfall to those defendant without skilled counsel. If *Brady/Giglio* evidence is disclosed late and competent counsel does the best she can, then the Third Circuit will find no error. But if that same evidence is disclosed late and unskilled counsel falls apart, then the Third Circuit would presumably find error. Such a resilt rewards inadequacy. Moreover, it places skilled counsel in a quandry should *Brady/Giglio* evidence be

late-disclosed—is it better to do the best job possible and hope to win the trial, or sandbag the trial in order to secure an appellate reversal on *Brady/Giglio* grounds?

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE.

The question presented is in dire need of this Court's review. *Brady* seeks to ensure that criminal trials are just and the resulting verdicts worthy of confidence. *United States v. Bagley,* 473 U.S. 667, 675, 682 (1985); *United States v. Agurs,* 427 U.S. 97, 112 (1976). The overarching purpose of *Brady* is "to ensure that a miscarriage of justice does not occur." *Bagley,* 473 U.S. at 675. Accordingly, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs,* 427 U.S. at 112. Although "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," the Court has underscored that "[a] 'reasonable probability' is a probability sufficient to *undermine confidence in the outcome.*" *Bagley,* 473 U.S. at 682 (emphasis added). That is, faith in the integrity of the verdict - which depends on the completeness of the evidentiary record available for presentation to the jury - is the touchstone for the *Brady* rule.

The truth-and-justice-seeking function that animates *Brady* would be severely jeopardized if the Court were to narrow *Brady* as the Third Circuit below did by focusing on whether trial counsel

appeared effective at trial. Trial counsel may appear effective from the transcript, but that inquiry fails to examine how the trial would have differed but-for the suppression of the evidence.

Based on the decision below, which cites to long-standing Third Circuit precedent, it appears that this flawed *Brady* analysis by the Third Circuit has been ongoing for years, and remains binding precedent in that circuit. Thus, it appears that intervention by this Court is necessary in order to bring Third Circuit precedent in line with the proper *Brady*/*Giglio* analysis set forth in this Court's decisions.

CONCLUSION

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

Respectfully submitted,

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