IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

ROBERT MCMILLIAN,

Petitioner

v.

UNITED STATES OF AMERICA

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Appointed pursuant to the
Criminal Justice Act
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Supreme Court of the United States

QUESTION PRESENTED

I. Whether the opinion of the District of Columbia Court of Appeals concerning the withholding of material *Brady* evidence is inconsistent with opinions from other cases from the District of Columbia Court of Appeals, another case from the highest court of California and from cases from this Court

PARTIES TO THE PROCEEDING

1**. Petitioner Robert McMillian**: Robert McMillian is an individual and resident of the District of Columbia. He was convicted before the Superior Court of the District of Columbia and his conviction was affirmed by the District of Columbia Court of Appeals. Petitioner is currently serving a sentence at a United States Penitentiary.

2. **United States of America**: The United States prosecuted Petitioner in the Superior Court of the District of Columbia.

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UNITED STATES CONSTITUTION

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Opinions Below

On February 24, 2021, the District of Columbia Court of Appeals affirmed the denial of post-conviction relief filed on behalf of Petitioner. (D.C. Court of Appeals Case No.: 2018-CO-000107 (A copy of the Opinion is included in the attached Appendix Exhibit #1.).

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to Supreme Court Rule 10 (b). This petition seeks review of an opinion from the District of Columbia Court of Appeals which is the jurisdiction's court of last resort. The opinion of the District of Columbia Court of Appeals is in conflict with other opinions of the District of Columbia Court of Appeals, another opinion of the highest court of California and with decisions of this Court. The affirmance of the denial of post-conviction relief was issued on February 24, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies upon the Due Process Clause of the Fifth Amendment to the United States Constitution in arguing that the District of Columbia Court of Appeals erred in its ruling. Petitioner further asserts that the opinion of the District of Columbia Court of Appeals is in contradiction with other opinions of the District of Columbia Court of Appeals, this Court and the California Court of Appeals.

STATEMENT OF THE CASE

On October 18, 2007 defendant was convicted of second degree murder while armed and weapons offenses following a trial by jury in the Superior Court of the District of Columbia. He was sentenced to a period of incarceration of 420 months (35 years). Defendant noted an appeal to the District of Columbia Court of Appeals which affirmed the convictions in an unpublished opinion. See *McMillian v. United States*, No. 08-CF-282 (July 6, 2012).

Petitioner moved for a New Trial pursuant to 23 D.C. Code Section 110 in the Superior Court of the District of Columbia. The Motion for New Trial was denied by the trial court. The District of Columbia Court of Appeals affirmed the denial of the Motion for New Trial on February 24, 2021. (Appendix Exhibit #1).

SUMMARY OF THE PROCEEDINGS

Petitioner's direct appeal

On initial direct appeal the following issues were raised: (1) the government improperly elicited fear testimony from four witnesses; (2) the

trial court abused its discretion by precluding admission of a police report containing statements of a non-testifying witness; and (3) there was insufficient evidence to sustain defendant's conviction.

Proceedings during the direct appeal, **the second appeal and remand instructions to the trial court**

While the initial direct appeal was pending, defendant raised concerns about his trial counsel's performance. The Court of Appeals permitted his counsel who had been his trial counsel to withdraw from further representation. On June 9, 2010 defendant filed a Motion for New Trial pursuant to 23 D.C. Code § 110. The trial court denied defendant's Motion for New Trial after the Court of Appeals affirmed the convictions on direct appeal. The grounds argued in the Motion for New Trial before the trial court were as follows: (1) trial counsel failed to provide effective assistance of counsel, (2) the government's failure to disclose impeachment evidence regarding a key witness prior to trial, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963).

The trial court denied defendant's motion without a hearing. Defendant filed a renewed appeal. The Court of Appeals affirmed the trial court's denial of defendant's motion related to the claim of ineffective assistance of counsel but remanded the portion of the Order relating to the

Brady claim for a § 23-110 hearing. The Court of Appeals noted "At such a hearing, the trial court can assess the record and transcripts of Ms. Harris' testimony from that separate trial and hear testimony, as needed, from Ms. Harris, as well as witnesses who can shed additional light on the information regarding her multiple personalities." *McMillian v. United States*, No.: 12-CO-1343, 13 (2014).

Evidence withheld during the trial proceedings

On March 24, 2010 the United States disclosed to defendant the following information related to material witness Cynthia Harris:

> In the United States v. Johnel McQueen case, Cynthia Harris was arrested on a material witness warrant prior to trial and was incarcerated pending her testimony at the D.C. Jail. During Ms. Harris's incarceration, she made a statement to medical personnel that she had multiple personalities and identified one personality as a personality that gets her into trouble. Ms. Harris subsequently received a full medical evaluation while at the D.C. Jail and was diagnosed with depression and Post Traumatic Stress Disorder. Subsequently, Ms. Harris gave a statement to defense counsel in the case of United States v. Johnel McQueen in which Ms. Harris stated that she had four personalities and that one of the personalities was a liar and it was that personality that observed the murder at issue in the case of United States v. Johnel McQueen.

The letter concluded, "Please note that, while the government as an entity was aware of this additional material at the time of the *United States*

v. McMillian trial, undersigned counsel was not. Regardless, we believe this information should have been disclosed and its potential use for cross-examination litigated before the trial court.

Initial ruling from the District of Columbia Court of Appeals

The Court of Appeals concluded that "trial counsel was unable to attack Ms. Harris' credibility on the basis that she had multiple personalities, one of whom was a liar, because counsel did not learn of the information until after trial." Id, page 11. This determination must be read within the context that Ms. Harris, during the course of a full medical evaluation, was diagnosed with depression and post-traumatic stress disorder." Id.

The significance of Ms. Harris's testimony was addressed by the Court of Appeals. "Moreover, given that two of three government witnesses in this case testified pursuant to plea agreements, we cannot say conclusively that appellant failed to show prejudice on his Brady claim…." Id. 12.

The remand evidentiary hearing

The United States framed the issue as follows: "The case was remanded to the Court from the Court of Appeals for a determination about whether or not there was a reasonable probability of a different result had the Government witness Cynthia Harris been impeached with statements she made about her mental health in connection with a prosecution of an unrelated case." The government argued that "had Cynthia Harris been impeached with the testimony from the John McQueen case, it would not have made a difference in the outcome of the case." Id. 6.

Defendant argued that Ms. Harris was a critical witness because "she was the only one who claimed to identify Mr. McMillian by name, recognizing his voice…her testimony was critical to the robbery charge and they hung on that because she was the one who said she recognized his voice…."

The trial remand court conducted a hearing and denied the Motion for New Trial ruling,

> Defendant has the burden of establishing that there is a reasonable probability that the undisclosed evidence would have altered the outcome at trial. Based upon the record herein, Defense counsel had not met the burden of establishing that there is a reasonable probability that the use of the word "liar" would have altered the outcome

at trial. Thus, Defendant's convictions should be affirmed.

An appeal was noted and the District of Columbia Court of Appeals again affirmed the conviction. It is worth noting that the District of Columbia Court of Appeals concluded that "trial counsel was unable to attack Ms. Harris' credibility on the basis that she had multiple personalities, one of whom was a liar, because counsel did not learn of the information until after trial." This determination must be read within the context that Ms. Harris, during the course of a full medical evaluation, was diagnosed with depression and post-traumatic stress disorder.

The significance of Ms. Harris's testimony was addressed by the Court of Appeals. "Moreover, given that two of three government witnesses in this case testified pursuant to plea agreements, we cannot say conclusively that appellant failed to show prejudice on his Brady claim…."

REASONS FOR GRANTING THE PETITION

The Due Process Clause of the Constitution requires the United States disclose to the defendant any evidence that "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland* 373 U.S. 83, 87 (1963). This requirement includes the prosecution's duty to disclose to the defense evidence that is useful to the defense in impeaching government witnesses, even if it is not inherently exculpatory. *Giglio v. United States* 405 U.S. 150, 153 (1972).

It is well settled that the defendant is not under an obligation to request specific exculpatory evidence. "Regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), quoting *United States v. Bagley,* 473 U.S. 667, 682. This constitutional requirement mandates the United States to "volunteer exculpatory evidence never requested, or requested in a general way." *Kyles,* 514 U.S. at 433 (Internal quotation marks omitted). The good faith or bad faith of the government is irrelevant. "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of

evidence.*" Kyles*, 514 U.S. at 439.

Vaughn v. United States, 93 A.3d 1237 (D.C. 2014) from the District of Columbia Court of Appeals is instructive. Appellant was charged with assaulting a guard at the D.C. Department of Corrections. The incident was captured on videotape and although the quality of the tapes was not high end, two correctional officers identified defendant as one of the assailants resulting in a conviction.

Following the verdict, it was revealed that six months earlier one of the identifying witnesses had filed a report against a different inmate accusing him of an assault. An internal investigation of the event was initiated and it was concluded that video footage of the incident did not show the alleged inmate assault.

The *Vaughn* Court noted, "When the government possesses favorable information subject to disclosure under *Brady*, it has an obligation to disclose this information to the defense in a timely and complete manner." Id. 1256. In examining whether the suppressed material was material, the Court concluded, "we consider whether there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different., (quoting Bagley, 473 U.S. at 434) Id. 1262.

Ultimately the conviction in *Vaughan* was reversed. The evidence was "powerfully impeaching…At the very least, defense counsel would have had a firm foundation to press for much more leeway in cross-examining Officer Childs on the subject of his prior false reporting…instead of hitting in the dark." Id. 1263-264. The Court added, "As a general rule a defendant is entitled to wide latitude in presenting evidence tending to impeach the credibility of a witness, especially where [as here], that evidence relates to key government witness." Id. 1265. Internal quotations and citations omitted.

The People v. the Superior Court of Tulare County, 162 Cal. App. 4th 28 (2008) involved a defendant who sought to discover a police officer's interview related to a witness' statement concerning a shooting. The police officer's report could not be located and the officer who conducted the interview had passed away. The prosecutor repeatedly represented that no reports concerning the statement existed. However, during jury selection the prosecutor learned that filed interviews were actually in possession of

the police department.

The California Court concluded, “it appropriate to impose a sanction to ensure such untimely disclosure by law enforcement will not happen again.” Id. 33. The Court explained the material nature of the suppressed evidence. “In assessing materiality, we must keep in mind that an incomplete response to a specific Brady request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance…the defense might abandon lines of investigation….” Id. 371-72.

United States Circuit Judge Kozinski said it best. “Betray Brady, give short shrift…and you will lose your ill-gotten conviction.” *United States v*. *Olsen*, 737 F.3d 625, 633 (9th Cir. 2013). (dissenting from denial of petition for rehearing en banc).

CONCLUSION

Petitioner was denied his constitutional right to a fair trial. His right to due process of law was denied by the withholding of material and exculpatory evidence in violation of the Fifth Amendment to the United States Constitution and *Brady v. Maryland.* The material and withheld information related to a key and essential witness for the prosecution. She had a medical history that clearly would have been cross-examined by defense counsel had counsel been made aware of her psychiatric problems. The medical history was suppressed resulting in a deprivation of due process.

Respectfully submitted

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, postage prepaid, on this the 21st day of July, 2021 to the Office of the Solicitor General, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

_____/s/_____
Steven R. Kiersh