No. 21-5256

In The

SUPREME COURT OF THE UNITED STATES

In Re ISAIAH S. HARRIS SR., Petitioner

PETITION FOR REHEARING

WRIT OF HABEAS CORPUS

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GROUNDS FOR INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT

Mr. Harris' habeas petition for rehearing presents exceptional circumstances that have sharply divided the courts below. **Eight out of twelve or 66.6%** of the United States of Appeal Circuits have controlling case law that "violates clearly established" United States Supreme Court case precedent with an "affirmative due diligence" 4th prong to the Brady analysis. Also, Harris highlights a **6-6 or 50%** United States of Appeal Circuit **split** about whether the **"new"** evidence required under **Schlup** includes only **"newly discovered"** evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder, i.e., **"newly presented"** evidence.

(1) Whether or not, the prosecutor's obligation under Brady to turn over evidence **in the first instance stands independent** of the defendant's knowledge in this case, or does the fact that defense counsel **knew or should have known** irrelevant to whether the prosecution had an obligation to disclose the information?

(2) Whether or not, if it is proper for the **trial court to admit** to a Brady violation on the record, **then deny the defendant** the right to present a defense and to fully cross-examine the accuser with the impeachment and exculpatory evidence?

(3) Whether or not, if due process violations still matter in this case or, can those due process violations remain intact and hinge on a fact of law, of whether there is a **meaningful difference** between **newly discovered** evidence or **newly presented** evidence, while the **classification** of the evidence **is predicated** on the **State's suppression** of the Brady-Chamber evidence **at trial.**

(4) Whether or not, if impeachment evidence, **by itself**, can demonstrate actual innocence where it gives rise to sufficient doubt about the validity of the conviction, under the Schlup actual innocence "gateway standard"?

(5) Whether or not, it is true that **today in America**, any court or agency can hide evidence, while knowing that fact, and the outcome of a case will be predicated on which circuit you were charged with a crime in?

LIST OF PARTIES

[X] All parties appear in the caption of the cover page.

Just to be clear, The Warden of Richland Correctional Institution is Mr. Kenneth Black and Ohio's Attorney General is Mr. Dave Yost and Petitioner Prison inmate is Isaiah S. Harris Sr.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

OTHER PAGE#

PETITION FOR REHEARING OF WRIT OF HABEAS CORPUS

Petitioner Isaiah S. Harris Sr., invokes this Court's broad and discretionary power pursuant to 28 U.S.C.S. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution, to remand this case to the Sixth Circuit with instructions to grant an unconditional writ of Habeas Corpus relief.

OPINION BELOW

The opinion of the United States Supreme Court is Published at In re Isaiah S. Harris Sr., 2021 U.S. LEXIS 4768 on October 4, 2021 and attached at appendix A.

STATEMENT OF JURISDICTION

The order of the Supreme Court of the United States denying Habeas relief without a merit determination was entered on October 4, 2021. This Court's jurisdiction is invoked pursuant to 28 U.S.C.S. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution.

RELEVANT CONSTITUTIONAL AND STATUORY PROVISIONS

THE FIFTH AMENDMENT OF THE UNITED STATES CONST. STATES IN RELEVANT PART: 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;

THE SIXTH AMENDMENT OF THE UNITED STATES CONST. STATES IN RELEVANT PART: shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONST. STATES IN RELEVANT PART: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Abdirahman v. United States, 2018 U.S. LEXIS 4114, (U.S. 2018)

Bell v. Arn, 536 F. 2d 123, (6th Cir. 1976)

Benge v. Johnson, 474 F.3d 236, (6th Cir. 2007)

Brady v. Maryland, 373 U.S. 83, (U.S. 1963)

Buck v. Davis, 137 S. Ct. 759, (U.S. 2017)

Carter v. Bell, 218 F.3d 581, (6th Cir. 2000)

Carvajal v. Dominguez, 542 F.3d 561, (7th Cir. 2008)

Criston v. United States, 125 S. Ct. 1112, (U.S. 2005)

Cleveland v. Bradshaw, 693 F. 3d 626, (6th Cir. 2012)

Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, (3rd Cir. 2016)

Ellesworth v. Warden, N.H. State Prison, 33 F.3d 1, (1st Cir. 2003)

Foster v. Texas, 179 L. Ed.2d 797, (U.S. 2011)

Gamble v. United States, 139 S. Ct. 1960, (U.S. 2019)

Gonzalez-Longoria v. United States, 2018 U.S. LEXIS 3693, (2018)

Giglio v. United States, 405 U.S. 150, (U.S. 1972)

House v. Bell, 547 U.S. 518, (U.S. 2006)

In re Sealed Case No. 99-3096, 185 F.3d 887, (D.C. Cir. 1999)

Mc Quiggin v. Perkins, 569 U.S. 383, (U.S. 2013)

Nat'l Review, Inc. v. Mann, 140 S. Ct. 344, (U.S. 2019)

Ramos v. Louisiana, 140 S. Ct. 1390, (U.S. 2020)

Smith v. Cain, 565 U.S. 73, (U.S. 2012)

Strickler v. Greene, 527 U.S. 263, (U.S. 1999)

United States v. Brown, 650 F. 3d 581, (5th Cir. 2011)

United States v. Davis, 139 S. Ct. 2319, (U.S. 2019)

United States v. Holloway, 939 F.3d 1088, (10th Cir. 2019)

United States v. Howell, 231 F.3d 615, (9th Cir. 2000)

United States v. Le Roy, 687 F.2d 610, (2nd Cir. 1982)

United States v. Mullins, 22 F.3d 1365, (6th Cir. 1994)

United States v. Ohio Power Co., 353 U.S. 98, (U.S. 1955)

United States v. Parker, 790 F.3d 550, (4th Cir. 2015)

United States v. Rigal, 740 Fed. Appx. 171, (11th Cir. 2018)

United States v. Roy, 781 F.3d 416, (8th Cir. 2015)

United States v. Tavera, 719 F.3d 705, (6th Cir. 2013)

Wearry v. Cain, 136 S. Ct. 1002, (U.S. 2016)

A. INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT.

On September 28, 2017. Clerk Deborah S. Hunt did an **illegal, unpublished** merits review and denied (COA). **See appendix B at 3rd page 1st paragraph.** Also **contrary to** the traditional ministerial role of clerks **and to Buck v. Davis, 137 S. Ct. 759, at HN4,5. See appendix C.**

The Sixth Circuit used case law that is in direct opposition to United States Supreme Court precedents used in **Brady v. Maryland, 373 U.S. 83, (1963); Giglio v. United States, 405 U.S. 150, (1972); Chambers v. Miss., 410 U.S. 284, (1973); Smith v. Cain, 565 U.S. 73, (2012); Wearry v. Cain, 136 S. Ct. 1002, (2016); and Strickler v. Greene, 527 U.S. at 281-82. (1999).**

The Sixth Circuit United States Court of Appeals stated: "Although **the trial record shows** that the prosecution **did not disclose** to Harris that K.T. had previously made domestic violence allegations against him, that the **police determined were unfounded,** the record also shows that Harris' attorney acquired the information independently before trial. **Consequently,** the prosecution's failure to disclose the impeachment evidence was harmless". **See Carter v. Bell, 218 F.3d 581,601, (6th Cir. 2000)** (Stating that there is **no Brady violation** if the information was available to defendant from another source.) **See appendix B at 3rd page 1st paragraph.**

The crux of what the "affirmative due diligence" 4th prong requirement to the Brady analysis used in some form or fashion by 66.6% or 8 out of 12 United States Appeals Circuits, is defendant's actions in taking advantage of the knowledge of the Brady evidence at trial. See **Benge, 474 F.3d at 234-44; Mullins, 22 F.3d at 1371-72.** What is **apparently distinguishable** in Harris' case is the fact **Harris did attempt** to use Brady evidence in open court and the court suppress it in defiance of the U.S. Constitution and fundamental fairness **on the record**. The suppression of the Brady evidence is attributed to the State.

The Eight Different United States of Appeal Circuits with Controlling Circuit law that **contravenes** "clearly established" United States Supreme Court case precedent with an "affirmative due diligence" 4th prong requirement to the Brady analysis are the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and the 11th, Appeal Circuit Courts.[1]

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[1] **United States v. Mullins, 22 F.3d 1365, at HN5 (6th Cir)** The government's failure to disclose potentially exculpatory information does not violate Brady "where a defendant **'knew or should have known** the essential facts permitting him to take advantage of any exculpatory information,' or where the evidence is available to defendant from another source." See also **United States v. Parker, 790 F.3d 550, at HN6 (4th Cir.) United States v. Brown, 650 F.3d 581, at HN1 (5th Cir.) Ellsworth v. Warden, N.H. State Prison, 333 F.3d 1, at HN7 (1st Cir.) United States v. Le Rory, 687 F.2d 610, at HN8 (2nd Cir.)**

United States v. Roy, 781 F.3d 416, at **10 (8th Cir.) There was no Brady [**10] violation here. **"The government does not suppress evidence in violation of Brady by failing to disclose evidence to which the defendant had access through other channels."** United States v. Santisteban, 501 F.3d 873, 877 (8th Cir. 2007) (alteration omitted), quoting United States v. Zuazo, 243 F.3d 428, 431 (8th Cir. 2001) (internal quotation marks omitted). See United States v. Ladoucer, 573 F.3d 628, 636 (8th Cir. 2009)

Carvajal v. Dominguez, 542 F.3d 561, at HN5 (7th Cir.) While most commonly viewed as prosecutor's duty to disclose to the defense, the duty imposed pursuant to Brady extends to the police and requires that they similarly turn over exculpatory/ impeaching evidence to the prosecutor, thereby triggering the prosecutor's disclosure obligation. A Brady suppression occurs when the government fails to turn over evidence that is known only to police investigators and not to the prosecutor. A Brady violation can be broken down into three basic elements: **(1)** the evidence at issue is favorable to the accused, either being exculpatory or impeaching; **(2)** the evidence must have been suppressed by the government, either willfully or inadvertently; and **(3)** there is a reasonable probability that probability that prejudice ensued- in other words, materiality. Evidence is suppressed when **(1) the prosecutor fails to disclose the evidence in time for the defendant to make use of it, and (2) the evidence is not otherwise available to the defendant through the exercise of reasonable diligence.** Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

United States v. Rigal, 740 Fed. Appx 171 at HN3 (11th Cir.) To establish a Brady violation, a defendant must show that **(1)** the government possessed evidence favorable to her; **(2) she did not possess the evidence and could not obtain it with reasonable diligence; (3)** the government suppressed the favorable evidence; and **(4)** the evidence was material. For Brady purposes, evidence is material if a reasonable probability exists that, had the evidence been disclosed, the outcome of the proceeding would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome.

The Four Different United States of Appeal Circuits along with the United States Supreme Court that never required or recognized a 4th or 5th prong to the Brady analysis with and "affirmative due diligence" requirement, are the 3rd, 9th ,10th and D.C. Circuits. "The prosecutor's obligation to turn over evidence **in the first instance stands independent of the defendant's knowledge in this case,** the fact that **defense counsel knew of should have known is irrelevant** to whether the prosecution had an obligation to disclose the information." **See United States v. Howell, 231 F. 3d 615, 625 at HN7, 8, and 9. (9th Cir. 2000)**

See also, Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, at HN8,10,11,12,13, and 14. (added emphasis) HN11 The concept of **"due diligence"** plays **no role** in Brady analysis. To the contrary, the focus of the U.S. Supreme Court has been, **and it must always be,** on whether the government has unfairly "suppressed" the evidence in question in derogation of its duty of disclosure.[2]

Harris asked this Court, **which** United States Appeals Circuit is **right** on this fundamental question of constitutional and criminal procedural Law? It is true that **today in America**, any court or agency **can hide evidence**, while knowing that fact, and the outcome of a case will be **predicated on which circuit** you were charged with a crime in?

Today, what does **"intervening circumstances of a substantial or controlling effect"** mean? "The interest in finality of litigation **must yield** where the interest of Justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have **exercised our power over our own judgments**, both in civil and Criminal Cases". **See United States v. Ohio Power Co., 353 U.S. 98,99 or HN1. (1955)**

Harris implores this Court**, this term, to unify the 8 to 4** United States Appeal Circuit Court's **split** as to whether an "affirmative due diligence" 4th prong requirement to the Brady analysis **is applicable** in America today.

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[2] **HN13**All favorable material ought to be disclosed by the **prosecution to hold otherwise** would, in essence, **add a fourth prong to the Brady inquiry,** contrary to U.S. Supreme Court directive that courts are not to do so. **HN14** Impeachment evidence unquestionably falls under Brady's purview and cannot be suppressed by the prosecution.

The Eight Different Appeal Circuit Courts including the 6th Circuit, (Harris Court) are contravening Stare Decisis. **See Ramos v. Louisiana, 140 S. Ct. 1390, at*1411, *1403.** "Stare Decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true." R. Cross & J. Harris, Precedent in English Law 1 (4th ed. 1991) (attributing this aphorism to Jeremy Bentham).

The Truth that the 6th Circuit **methodically ignored** was the trial Court Prosecutor's **obligation under Brady** and that the suppression of all that evidence is attributed to the State.

"Stare Decisis promotes the evenhanded, predictable, and consistent development of legal principle, fosters reliance on judicial decisions, and contributes to the **actual and perceived integrity** of the judicial process..." **See Gamble v. United States, 139 S. Ct. 1960, at HN4.**

This situation is made clear in **United States v. Tavera, 719 F.3d 705.** As dissenting Sixth Circuit Judge Eric L. Clay clearly pointed out. **See dissent, (3rd paragraph). (added emphasis)**[3]

Petitioner Harris Implores this Court in this case to justify the exercise of its discretionary powers also because, "there is a **6-6 Circuit Court split** about whether the **"new"** evidence required under **Schlup** includes only **"newly discovered"** evidence that was not available at the time of trial, or broadly encompasses **all** evidence that was not presented to the fact-finder, i.e., **"newly presented"** evidence. **See Cleveland v. Bradshaw, 693 F.3d 626, at **20.**[4]

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[3] However, **Brady is not the only star** in the constellation of cases that we are obliged to consider and faithfully apply. Even in many of **the controlling cases are unwise or ill-conceived** in light of the fairness concerns that underpin Brady, **we are no less bound to adhere to them.**

[4] **See Connolly v. Howes, 304 F. App'x 412, 419 (6th Cir. 2008) (Sutton, J., concurring).** Our opinion is Souter suggests that this Circuit considers **"newly presented"** evidence sufficient. See 395 F.3d at 596 n.9. However, just as Judge Sutton stated in his concurrence in Connolly, "we need not address... **whether there is a meaningful difference between 'newly discovered' and 'newly presented' evidence,"** 304 F. App'x at 419, because the evidence Cleveland Submits to demonstrate his innocence is **analogous** to the evidence considered **"new"** by the **Schlup Court.**

"Issues concerning the admissibility of evidence are state law question and not open to challenge on collateral review **unless the fundamental fairness** of the trial has been so impugned as to amount to **denial of due process"** See **Bell v. Arn, 536 F.2d 123, (6th Cir. 1976). See Brofford v. Marshall, 751 F.2d 845, at HN11, (6th Cir. 1985).**

"To prevail on his Brady Claim, Wearry need **not show** that he 'more likely than not' would have been acquitted had the new evidence been admitted" **Smith v. Cain, 565 U.S. 73, 75, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571, 574, (2012) (internal quotation marks and brackets omitted).** "He must **only show** that the new evidence is sufficient to **'undermine confidence'** in the verdict. Ibid. [6] Given this legal standard, Wearry can prevail even if, as the dissent suggest, the undisclosed information **may not** have affected the jury's verdict." **Wearry v. Cain, 136 S. Ct. 1002, at *1006, (2016).**

Harris would like to affirm this is **analogous** with the actual innocence **Schlup** requirements for first time habeas petitioners like Harris to overcome **28 U.S.C.S. §2244(d)(1)(D). See appendix E.**

See House v. Bell, 547 U.S. 518, at HN2,3,6,and 7.(2006)[5] **HN3** "Yet a petition supported by a convincing gateway showing raises sufficient doubt about the petitioner's guilt **to undermine confidence** in the result of the trial without the assurance that the trial was untainted by constitutional error; hence, **a review** of the **merits** of the constitutional claims is **justified.**" **(added emphasis)**

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[5] **HN7** The gateway **actual-innocence standard** for habeas corpus relief **is by no means equivalent to the standard** which govern claims of insufficient evidence. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because an actual-innocence claim involves evidence the trial did not have before it, the inquires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If new evidence so requires, **this may include consideration of the credibility of the witnesses presented at trial.**

See Mc Quiggin v. Perkins, 569 U.S. 383, See HN8- "No showing of innocence required." Also See HN10,15,16,1,7, and 12.[6]

"The interest in finality of litigation **must yield** where the **interest of justice** would make unfair the strict application of our rules. This policy **finds expression** in the manner in which we have **exercised our power over our own judgments**, both in civil and **criminal** cases." **See United States v. Ohio Power Co., 353 U.S. 98,99 or HN1. (1955)**

Harris has an unexhausted list where this court has exercised its power over its own judgments in the interest of justice, or intervening circumstances of a substantial or controlling effect:

- Abdirahman v. United States, 2018 U.S. LEXIS 4114 (2018) rehearing granted.
- Gonzalez-Longoria v. United States, 2018 U.S. LEXIS 3693 (2018) rehearing granted.
- Foster v. Texas, 179 L. Ed. 2d. 797, (2011) rehearing granted.
- Criston v. United States, 125 S. Ct. 1112, (2005) rehearing granted.

Harris points out two recent examples of where this court has or should have exercised its reviewing power. In **Nat'l Review, Inc. v. Mann, 140 S. Ct. 344, (2019).** Where Justice Alito dissented the denial of certiorari and he emphasized:

"We therefore have before us a decision on an **indisputably important question of constitutional law** on which there is an **acknowledged split** in the decisions of the lower courts. A question of this nature **deserves** a place on our docket... For these reasons, the first question presented in the petition **call out for review**."

See United States v. Davis, 139 S. Ct. 2319, at 2325, (2019). Because the Fifth Circuit's ruling **deepened a dispute**

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[6] **HN10** "i.e. a **first petition** for federal habeas relief, the miscarriage of justice exception **survived** the AEDPA's passage **intact and unrestricted.**

among the lower courts about the constitutionality of §924(c) residual clause, we **granted** certiorari **to resolve** the question.

Harris affirms that Rule 20.4(b), **see appendix F** of this court states in relevant part: "nether the denial of the petition, without more..., is an adjudication on the merits, and therefore **does not preclude** further application to another court for the relief sought." Harris has no other court to turn to for any relief.

Also Harris declares that Rule 44.2, **see appendix G** of this court states in relevant part: "but its grounds shall be limited to intervening circumstances of a **substantial** or **controlling effect**..."

Harris is **hard-pressed** to have some type of understanding of this very important phrase, because his life and dreams are tied to this very important phrase. The **gravity** of the reality has set in on Mr. Harris.

The interpretation, application of that phrase today means whether or not, Harris can begin a new life at 37 or 50 years old after this **unjust** incarceration. Whether or not, if anyone takes his **innocence** claim seriously, when his case **rest** with the credibility of a **proven liar**. **See appendix I.** Whether or not, he will be afforded **due process** rights that every American citizen was **promised to have** as a birth right. Whether or not, this court will allow **clerks** across the country to issue, **render and decide cases, in lieu of any judge,** in all and any court throughout America.

Whether or not, this court will allow this case to become the **Undisputed Civil Rights Champion of Due Process**, in respects to the Brady & Actual Innocence **analogous** effect on Supreme Court Case Precedent, in doing so **unifying all** the Appeal Circuit Court under a modest and simple rationale that **harmonizes** with the **fabric** of this justice system, and constitutional **hallmarks** that makes America, America, "that when the government's case **depends almost entirely** on a witness testimony, without which there could be **no indictment** and **no evidence** to carry the case to a jury." **See Giglio, 405 U.S., at 154-55. (added emphasis).**

Harris flat out **begs** this court, because finality **must yield** to correct a fundamental **unjust** incarceration, and in doing so it will have a **substantial** or **controlling effect** over the United States Appeal Circuits, **8 to 4 & 6 to 6 Splits** highlighted in Harris' case.

B. CONCLUSION

Harris prays that this court will grant this Petition for Rehearing.

Respectfully Submitted,

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