**NO:**

# In the Supreme Court of the United States

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**JOHN CREECH,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED FOR REVIEW

Is evidence material for purposes of *Brady v. Maryland*, 373 U.S. 83 (1963), if its disclosure would affect defense litigation strategy?

## PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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John Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unpublished but reported at 852 F. App'x 172. It also is reprinted in the appendix at A-1.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming Creech's conviction and sentence was entered on March 25, 2021. The time to file this petition was extended to August 22, 2021, by this Court's Order of March 19, 2020, extending deadlines in relation to the COVID-19 pandemic. This petition is timely filed pursuant to Supreme Court Rule 13.1.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment states, in relevant part, that "[n]o person shall be held . . . deprived of life, liberty, or property, without due process of law."

## INTRODUCTION

This case presents a vehicle for addressing lingering uncertainty about the materiality standard under *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecutor did not disclose—until its final witness at trial—forensic phone evidence that undermined the testimony of a key witness. This nondisclosure critically harmed John Creech's ability to chart his strongest trial strategy from the outset. He had no ability to craft an opening statement around this evidence or cross-examine the government's lead witness about it during the government's case-in-chief. This Court should clarify that this type of nondisclosure undermines confidence in a jury's verdict when the defense's ability to craft a strategy is harmed, not solely when a court believes the outcome of a trial would change. This question is important to the

proper functioning of our criminal justice system and deserves this Court's attention through a grant of a writ of certiorari.

## STATEMENT OF THE CASE

1. This case centers on an alleged drug conspiracy occurring in 2012 and 2013. The prosecution was delayed for several years while Creech faced state charges in California. The federal government did not indict him until August 2017.

2. The delayed timing of the indictment became a critical issue at trial. The key witness against Creech, drug dealer Craig Todd, became a government cooperator in mid-2012, outside the five-year statute of limitations for the charged drug conspiracy. Thus, the government sought to prove that other people were involved, including Creech's wife at the time, Chandrika Cade.

3. As evidence of Cade's involvement, the government relied on testimony from Todd that Creech sent Todd a text message telling him to give money for drugs to Cade because of Creech's state arrest. This evidence, the prosecution argued, showed that Creech intended Cade to assist in collecting a drug debt.

4. Todd testified about this text exchange during his direct testimony at trial. But during the testimony of the final witness of the government's case-in-chief, case agent Brian Satori, the agent revealed that he had downloaded and analyzed the contents of Todd's phone using a forensic tool. This analysis revealed no evidence of the text message Todd claimed to have received from Creech. Defense counsel

notified the court that this forensic report had not been turned over to the defense, despite requests for it.

5. The jury convicted Creech, and the district court imposed a sentence of 130 months' imprisonment.

6. On direct appeal, the Sixth Circuit agreed that the government failed to disclose this report before trial and that the report contained potential impeachment evidence. App. A-1, at 8. But the court decided that Creech had not proven the "materiality" of the evidence because he did not show a reasonably probability that the outcome would be different with the report. *Id.* "The jury already knew they could only take Todd's word for the existence of the text message." *Id.* at 8–9. Thus, the Sixth Circuit concluded that any harm Creech suffered did not undermine confidence in the verdict. *Id.* at 9.

## REASONS FOR GRANTING THE WRIT

### I. This case presents a good vehicle to correct misapplication of the materiality standard.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150, 154 (1972), the prosecution must disclose impeachment evidence, even if only known to police investigators and not prosecutors. *See Youngblood v. W. Virginia*, 547 U.S. 867, 869 (2006). The prosecution's obligation to disclose material evidence favorable to the defense "is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). *Brady* demands a prosecutor depart from the normal adversary model of

criminal litigation, and "assist the defense in making its case." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). In this circumstance, "the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (alterations omitted)).

The Sixth Circuit should not have focused on whether the outcome of trial would have differed. Sufficiency of the evidence is not the standard for materiality in the context of a *Brady* claim:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

*Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

In case like this one, where witness credibility is a close question, "nothing was more important to the case than the indicia that one story was more believable than the other." *Washington v. Hofbauer*, 228 F.3d 689, 707 (6th Cir. 2000). The credibility of the prosecution's lead witness here was tenuous, and physical evidence showing the jury that his phone did not back up his testimony could have made the difference in the jury believing him.

Here, the contents of the late-disclosed forensic report revealed that one of the critical pieces of physical evidence that could have corroborated the dubious testimony of the prosecution's lead witness did not back up his testimony. The fact that government agents downloaded the contents of this phone and then failed to turn them over to the defense—and only revealed their existence during re-direct of the government's final witness—undermines confidence in the jury's verdict.

## II. Clarity is needed on the materiality standard.

The need for prosecutors to disclose potential impeachment evidence before trial is of critical importance. Yet the materiality standard—which relies on whether there is "a reasonable probability" that the evidence affected the outcome—has drifted over time to under-account for what may be "material" to defendants' ability to explain their view of what happened. *See* Riley E. Clafton, *A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307, 311 (2020). "Commentators and members of the judiciary have criticized *Brady*'s materiality filter because it has been used to justify withholding favorable evidence." Jason Kreag, *The Jury's Brady Right,* 98 B.U. L. REV. 345, 393 (2018). Further, "courts have observed that the impact-based analysis used to determine materiality is unworkable as a pretrial standard for prosecutors attempting in good faith to comply with *Brady*." Cynthia E. Jones, A *Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 432 (2010).

Unfortunately, "the lenient standard of materiality encourages prosecutorial gamesmanship by allowing prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court." Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 549 (2007). In particular, over time, the reliance on probabilism has created a "disjunction between what is deemed material by law and what is material to a defense in reality," and this distinction "undermines a defendant's right to a fair trial—a right that Americans have jealously guarded since 1791." Clafton, *supra*, at 312. At it stands, "*Brady* doctrine is diminished in efficacy where it is undermined by probabilistic language and theory." *Id.* at 313.

This Court should clarify that "[t]he materiality of evidence is not a question of whether the outcome of the trial would have changed, but instead whether the evidence could be used to influence the factfinder in reaching a verdict." *Id.* at 348. The difference would add needed clarity, as "predicting how a jury would have evaluated the undisclosed evidence requires guesswork and often leaves even those conducting a careful and reasoned review in disagreement." Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. REV. 345, 367 (2018)

This case is a good vehicle to address this problem. The late-disclosed forensic report could at first blush seem minor: The jury eventually heard that the report revealed no text messages on the phone. But on closer examination, the Sixth Circuit's analysis overlooks how much this late disclosure affected Creech's trial

strategy. Creech's opening statement would have differed if this evidence was properly disclosed, to focus on the fact that agents tried *and failed* to corroborate Todd's account of events. His cross-examination of Todd would have been built around showing that Todd's story lacked even basic, easily recoverable corroboration. Because the prosecution did not meet its burden to turn over this critical impeachment evidence before trial, it is nothing but guesswork to say the outcome would not have changed. This Court should grant certiorari to confirm that the materiality standard covers this type of impeachment evidence that affects defense strategy.

## CONCLUSION

For the foregoing reasons, Petitioner John Creech prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER

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August 19, 2021