IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. _____

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MARQUES SMITH,

PETITIONER,

-v.-

UNITED STATES OF AMERICA,

RESPONDENT.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

(1) Does the District of South Dakota's Standing Order 16-04, which prohibits a defendant from independent review their discovery, deny defendants of their Sixth Amendment right to adequately prepare for effective cross examination?; and (2) Did the federal district court deny Smith a fair trial by allowing the government to conduct a "discovery dump" at the "11th Hour" just prior to trial without allowing him to review such discovery independently the night before trial?

## LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Marques Smith respectfully petitions the United States Supreme Court for a writ of certiorari for it to review the Judgment entered by the Eighth Circuit Court of Appeals.

## OPINION BELOW

On March 12, 2019, an Indictment was filed in the Central Division of the United States District Court for South Dakota, charging Smith with Conspiracy to Distribute a Controlled Substance. On October 24, 2019, a jury trial concluded before the Honorable Roberto A. Lange, United States District Court Judge, wherein Smith was found guilty of the sole conspiracy charge. On February 4, 2020, Smith timely filed his Notice of Appeal with the Eighth Circuit Court of Appeals challenging his conviction and sentence on four separate basis, one being his denial of access to independent review of a large amount of discovery which was provided to him the night before the start of trial. The Eighth Circuit's denied Smith's appeal on July 20, 2021. A copy of the Opinion and Judgment is supplied within Appendix A.

## JURISDICTION

The decision of the Eighth Circuit Court of Appeals is dated July 20, 2021. This Writ of Certiorari is submitted in timely fashion. No Petition for Rehearing was filed. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment's right to confrontation, as well as the Fifth Amendment's right to due process of law, require that an accused be permitted to introduce all relevant and admissible evidence. See *United States v. Kasto*, 584 F.2d 268, 272 (8th Cir. 1978). This Court has long recognized that the primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of cross-examination. *Hannah v. Larche*, 363 U.S. 420 (1960); *Davis v. Alaska*, 415 U.S. 308 (1974); *Delaware v. Fensterer*; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). This Court has also held that the Confrontation Clause provides a defendant with the right to "the opportunity for effective cross-examination." *Delaware v. Fensterer*, 474 U.S. 15 (1985) (emphasis added). Smith argues the only way to guarantee effective cross-examination is through full disclosure of discovery in criminal cases at a meaningful time which simply doesn't exist under present law.

Smith argues that every person charged with a crime has an absolute and fundamental right to a fair and impartial trial under *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340 (1986). He further argues that the present discovery rules resulted in a denial of his right to a fair trial which constituted a denial of due process of law under the Sixth Amendment. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967).

This petition follows.

## STATEMENT OF THE CASE

On March 12, 2019, Marques Smith (hereinafter "Smith") was indicted by a federal grand jury for Conspiracy to Distribute a Controlled Substance (Methamphetamine) involving more than 500 grams in the Central Division of the South Dakota District Court . (Appendix C). On October 16, 2019, a Superseding Indictment was filed alleging that an enhancement was appropriate because Smith had a previous conviction for a serious drug felony. (Appendix C).

Trial was set in Smith's matter for October 21, 2019. In the weeks prior to trial, the government provided Smith with 1,838 pages of discovery, 212 pages of transcripts, 8 hours 17 minutes of recordings and various motions and responses, none of which could be left with Smith in his jail cell for him to review due to a standing order entered in all federal criminal cases in South Dakota which prohibits defendants from having access to their discovery without counsel present. (Appendix D).

On October 21, 2019, at the final pretrial conference held the day before trial, Smith received hundreds of pages of unredacted discovery from the government. (Appendix A). Smith's counsel made a motion to remove the protective order to allow him to review his discovery in his jail cell which was denied. The trial court did however allow Smith to review his discovery at the jail if provisions could be made to have jail staff could monitor the discovery review which the jail was unable to accommodate. (Appendix C).

On October 24, 2019, Smith was convicted of his conspiracy charges at a jury trial held before the Honorable Roberto A. Lange. (Appendix C). On January 7, 2020, Smith was sentenced to 235 months in federal prison, followed by 10 years of supervised release. (Appendix C).

On February 4, 2020, Smith timely filed a Notice of Appeal with the Eighth Circuit Court Appeals challenging his conviction and sentence, in part, arguing that he was denied his Sixth Amendment right of effective confrontation through cross examination due to his inability to review his discovery prior to trial. (Appendix A). The Eighth Circuit affirmed the district court's Judgment in its entirety. (Appendix A).

## REASONS FOR GRANTING THE PETITION

This Court has consistent held that other than the limited discovery set forth in *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972) and Jencks Act - 18 U.S.C. § 3500, a criminal defendant has no right to discovery in his case, nor has the Court established rules for the time at which such discovery needs to be provided. The Confrontation Clause of the Sixth Amendment to the United States Constitution and this Court's interpretation of it, seems at odds with the current discovery rules which simply don't afford a defendant "the opportunity for effective cross-examination." *Delaware v. Fensterer*, 474 U.S. 15 (1985). Further complicating the right to adequately prepare for effective cross examination is the common practice of entering blanket protective

orders, such as the one ordered in all South Dakota federal criminal cases, which prohibit a defendant from independently reviewing the discovery without counsel present. *See* United States District Court, District of South Dakota, Amended Standing Order 16-04. With the advent of electronic discovery, the amount of discovery being provided in preparation for trial exceeds the time counsel has available to review such discovery personally with their clients and severely disadvantages defense counsel by expending critical time needed for trial preparation to essentially babysit defendants so that they may review their discovery. Simply put, defense counsel is left in an impossible position of being unable to review all of the incoming discovery with their clients and prepare for trial at the same time which denies them the right to a fair trial.

## I. The Constitution requires that a defendant be given access to discovery so he or she can participate in the defense of the case, which necessarily requires him or her to have a meaningful review of the discovery in preparation for trial.

The Sixth Amendment's right to confrontation, and the Fifth Amendment's right to due process of law, require that an accused be permitted to introduce all relevant and admissible evidence. See *United States v. Kasto*, 584 F.2d 268, 272 (8th Cir. 1978). The government's disclosure of exculpatory material and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such

evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they involve Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor these cases, however, creates a general discovery right for trial preparation or plea negotiations. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

A federal criminal defendant is entitled to limited discovery with no general right to obtain the statements of the government's witnesses before they testify. This greatly hampers a defendant's ability to obtain evidence to use at trial and be adequately prepared for effective cross examination. Fed. R. Crim. P. 16(a)(2); 26(2). The extremely limited discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, as well as 18 U.S.C. § 3500 (the *Jencks* Act); *Brady*, 373 U.S. 83 and *Giglio*, 405 U.S. 150 (1972). These cases and rules precede the digital revolution and provide an outdated framework for federal discovery that has become unworkable as the amount of discovery continues to exponentially increase. See *Federal Criminal Discovery Reform: A Legislative Approach*, Mercer Law Review, Vol. 64, p. 639, 2013, and Fordham Law Legal Studies Research Paper No. 2258633.

Due process requires that disclosure of exculpatory and impeachment evidence that is material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. See, e.g. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). "[A]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

As is well-stated by Nina Marino and Reed Grantham in *Piling On: Unresolved Issues Regarding Voluminous Discovery in Complex Criminal Cases in Federal Court,* p. 2, a significant problem has developed related to the amount of discovery that is being produced electronically. With the advent of body cameras, social media, jail phone call recordings, jail emails, electronic pole cameras and vehicle tracking devices, the discovery produced in criminal cases is often beyond the amount that could be reviewed with a defendant in the presence of counsel. It is not uncommon in criminal cases that discovery is provided on 1 terabyte hard drives as there is simply that much discovery in many criminal cases.

To put this in context for the Court, according to Seagate, one of the largest manufactures of hard drives, a terabyte of discovery would contain

roughly: 250,000 photos taken with a 12 mega pixel camera or 250 movies or 500 hours of HD video or approximately or 6.5 million document pages, commonly stored as Office files, PDFs, and presentations. It is simply a fallacy to presume that counsel would be able to access enough time in any jail to review these extremely large amounts of discovery with their client and still be able to prepare for trial. Even if this were to be accomplished, the attorney would not likely be compensated for the amount of time such review would require as it would exceed the monetary limits set for court appointed counsel.

Criminal representation has always involved a partnership between defense counsel and the defendant. In the past, client meetings with defendants were held to discuss with the client the discovery they had been given to review and then discuss legal strategy and missing discovery that was believed to be outstanding. With the inclusion of the Standing Order preventing such independent review, defense counsel has undertaken a babysitter role in criminal defense wherein they are expected to sit and watch a defendant review their discovery which greatly slows the process and strategically disadvantages defense counsel from doing the legal work necessary to successfully defend a criminal case. It also creates a disconnect in representation and many criminal defendants become upset that their attorney is not affording them all of the time they need to review all of their discovery.

## II. Smith received the typical 11th hour discovery dump and had no opportunity to review the discovery prior to trial and could not ask for a continuance without suffering lengthy additional pretrial incarceration.

On appeal Smith argued that he was denied his right to personally review the discovery in his case due to the protective order South Dakota district courts impose in all criminal cases which prohibits defendants from reviewing their discovery without counsel being present.

United States District Court, District of South Dakota, Amended Standing Order 16-04 provides:

> "6. Federal court officers or employees (including probation officers and federal public defender staff), retained counsel, appointed CJA panel attorneys), and any other person in an attorney-client relationship with a detained or incarcerated person may, consistent with this order, review any sealed or restricted portions of the file with their client, but may not provide copies to the defendant."

Smith argues that contrary to the clear wording in Federal Rule of Criminal Procedure 16(d)(1), South Dakota district courts impose blanket protective orders in all criminal cases without the required showing of good cause needed for the imposition of a protection order as required by the rule..

Federal Rule 16(d)(1) provides:

> (1) *Protective and Modifying Orders.* **At any time the court may, for good cause**, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Federal Rule 16(d)(1) requires a case-by-case determination prior to application of a protective order, which was neither done in Smith's case, nor in any case in the federal district courts of South Dakota. *Id.* As a result of this protection order, Smith was limited to reviews of documents at the Hughes County Jail which could be schedule in up to three hour block. The discovery in Smith's case included over 1838 pages of discovery, 212 pages of transcripts, 8 hours 17 minutes of recordings and various motions and jail phone calls. A conservative estimate of time required to review all of this discovery would be at least 60 hours. Requiring counsel to be present for that period of time simply isn't realist.

The Eighth Circuit's Opinion described this issue this way:

> The day before trial, the Government gave Smith a 'document dump' that included hundreds of pages of witness statements. Smith says that many of the documents had information he had not seen before. The Government says it followed the district court's discovery order and timely released previously redacted discovery, but the only difference between what he received earlier and what he received the day before trial were personal identifiers (*e.g.*, social security numbers) and information about unrelated investigations. . . . Smith argues he was unable to fully review the document dump before trial because of a district court Standing Order. The Standing Order bars counsel from leaving copies of sealed or restricted documents with a criminal defendant in custody[.] . . . At the pretrial conference, Smith's lawyer . . . asked if the documents could be left in a visitation room for Smith to review. The district judge said this would be okay if the jail allowed it.

> The jail refused, and counsel did not review the unredacted discovery with Smith before trial.

*Eighth Circuit Opinion,* pp. 2, 3 (Appendix A).

On this issue, the Eighth Circuit held that because Smith had not requested a continuance of the trial when further discovery was presented at the "11th Hour," the review would be on the basis of plain error. (Appendix A). The Eighth Circuit found no basis upon which to grant Mr. Smith's request for a new trial regarding this issue. (Appendix A).

The Eighth Circuit decision essentially requires that Smith bear all of the burdens associated with the last minute discover dump done by the government which simply is unfair. In Smith's case, sentenced cooperating witnesses were brought and housed from six different federal correctional facilities. Officers were subpoenaed from four different law enforcement agencies and the trial court had set aside a week for trial that simply would not have been available for rescheduling for months due to the completely packed court schedule. For Smith, his decision to ask for a continuance would have meant months of additional incarceration and an uncertain future as to his ability to produce witnesses for trial. Lastly, because much of Smith trial strategy had been discussed at the final pretrial, asking for a continuance would have resulted in additional time for the government to prepare to meet this defense which would have put him at a strategic disadvantage. If a continuance was granted, the government would be able to file additional motions and to request reconsideration of motions they had

lost at the final pretrial because they did not have the evidence to support their position at the time of the hearing. In short, asking for a continuance when last minute discovery is presented works to an incredible disadvantage that few defendants are willing to agree to. Rather than focusing on the actions of the government in providing last minute discovery or the trial court in precluding independent review, the decision focuses on Smith decision not to request a continuance which is patently unfair.

Smith concedes that there times when restricting discovery makes sense and there are legitimate concerns for the protection of cooperating witnesses. Those cases are the exception, not the rule, and the South Dakota blanket protection order simply dispenses with the consideration of the rights of each of the parties as is required by Federal Rule 16(d)(1). In practice, any request for exception from the blanket protection order is usually denied. The Standing Order has resulted in a simple unspoken rule that defendants are never entitled to have independent review of their discovery for any reason under the premise of protecting confidential informants and cooperating witnesses. What this Court must consider is whether it is constitutional permissible to shift the burden under Rule 16(d)(1) to require a defendant to prove that discovery can be released to him or her without danger. Because this is an abstract danger, not related to any specific threat in any given case, the protection of confidential

informants always wins even if there are no such witnesses in the specific criminal case.

If the Court is to consider this issue on this Writ, the question is more closely a determination of whether we have determined that the risks of providing defendant's independent access to their discovery outweighs the defendant's right to adequately prepare for trial. The federal district courts in South Dakota appear to have concluded that preservation of the safety of cooperating witnesses is always paramount to the rights of a defendant to adequately prepare for trial. It's a strange legal determination and one that Smith feels should be addressed by this Court as there appears no likely change to the position that has been taken in South Dakota.

## III. Due to the lack of specific discovery rules and deadlines, the criminal justice system has developed in a way discouraging complete discovery until a trial has been set, and then only at the last minute.

Federal Rule of Criminal Procedure 16 does not codify the government's obligation to disclose exculpatory and impeachment material as established by the Supreme Court in *Brady, Giglio* and their progeny. Rule 16 only requires the government to disclose, upon defendant's request, documents and tangible objects "material to the preparation of his defense." The largest weakness to Rule 16 is the fact that it does not establish a time frame for disclosing this material and it allows for the government to determine what items are exculpatory.

A review of the ninety-four federal districts' local rules, standing orders, and websites, reveals that of the ninety-four federal districts, only thirty-eight districts have local rules and/or standing orders that impose requirements beyond those of Rule 16 for disclosure of exculpatory and impeachment material. See *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases*, Federal Judicial Center. (2011). This creates a situation in which defendants in cities located near two districts, have vastly different discovery rights which results in a situation simply incomprehensible to defendants and the general public. In short, it creates distrust of the courts in the general public as they simply can't understand why their rights should be different in two different federal district courts.

Smith is cognizant that changing and establishing open discovery rules and disclosure deadlines will result in additional workload which is not popular in the present system which lacks enough resources. The argument against full disclosure and deadlines is that with a 96% settlement rate, disclosing every piece of discovery becomes somewhat of a waste of resources until absolutely required by defendants who are going to trial. The problem with that approach is that in most cases, the determination of whether a trial is in fact going to go to trial doesn't occur until after the final pretrial which is usually set the day proceeding trial or within a few days of trial. By waiting until trial is guaranteed, there is a sudden last minute onslaught of

discovery that is produced which simply cannot be reviewed in person with defendants due to the limited visitation times most jails have with inmates.

The documents that are produced last minute can be some of the most lengthy to review such as jail phone calls, audio interviews which were previously provided only as law enforcement summaries, video surveillance footage, audio interviews of witnesses conducted in preparation for trial and discovery that is learned of from meeting with law enforcement just before trial or while subpoenaed at trial.

In the last critical hours before trial, defense counsel is left trying to review newly created discovery from interviews being prepared by law enforcement, respond to pretrial motions, reviewing jail phone calls provided to defense and attempting to prepare their own case for trial as well as review prospective jury pools. The government has law enforcement officers, jail administrators and correctional officers, case agents, a secretarial staff and computer multimedia production specialist, all working to produce this discovery and the defendant is left with one counsel in most cases to try to deal with this onslaught. Additional difficulties arise as defense counsel is required to redact this provided discovery if it is to be used at trial, which requires that the last minute discovery be reviewed and then edited prior to being offered at trial.

Lastly, there are no requirements that any explanation of discovery be provided or clues to be given as to its relevance. When pole camera evidence

is provided to defense counsel, this video can cover several weeks or months in length. Without explanation of what portions are relevant, a defense attorney is left to review essentially weeks of camera footage in attempting to decipher the few minutes of video that may be used by the government. Social media discovery such as Facebook extractions often include thousands of pages of discovery, indexes and photos, yet provides no meaningful explanation of what portions are relevant. Defense counsel is left in a precarious situation where a needle of important evidence is likely contained in the haystack of evidence but simply doesn't have the manpower or time to review all of this evidence, especially where other relevant discovery explaining the importance of the social media is not provided.

Times have changed and discovery has become sufficiently complex to require that Federal Rule of Criminal Procedure 16 be codified and that specific disclosure deadlines be provided within Rule 16.

## IV. The only true way to solve these issues is for this Court to adopt "open file" discovery in federal criminal cases.

This Court has long recognized that the primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of cross-examination. *Hannah v. Larche*, 363 U.S. 420 (1960); *Davis v. Alaska*, 415 U.S. 308 (1974); *Delaware v. Fensterer*, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). This Court has also held that the Confrontation Clause provides "*the opportunity for effective cross-examination.*" *Delaware v. Fensterer*, 474 U.S. 15 (1985). The only way to achieve effective cross-examination however is

through full disclosure in criminal cases which has not been ordered by this Court. In his case, Smith did not have the *opportunity for effective cross-examination* because he was not given the tools to prepare for cross-examination, that being true open-file discovery and access to such discovery at a meaningful time. If the Court were to adopt an "open file" discovery process for federal district Courts, the idea that discovery could be withheld until just before trial would be removed and there wouldn't be the "hide the ball until you can't" approach to the distribution of discovery. As noted above, the most critical component of preparation for cross-examination is complete information about the case. The ability to study, dissect, analyze and reanalyze the statements of witnesses — to learn about the witnesses' character, their potential for bias, their ability to observe, and their credibility — is the very essence of effective cross-examination.

This Court should therefore recognize that the ability to prepare for cross-examination is a primary essential component of the Confrontation Clause. The Court should also find that preparation for cross-examination cannot be effective unless that discovery is provided with a meaningful time period within which defense counsel may have access to it. Without effective cross-examination, the rights to a fair trial and due process become a sham. *Douglas v. Alabama*, 380 U.S. 415 (1965) (citing *Mattox v. United States*, 156 U.S. 237 (1895)). Inherent in the Confrontation Clause is the principle that testing the accuracy of testimony is so important that the absence of

proper confrontation calls into question the ultimate integrity of the trial itself. *Ohio v. Roberts*, 448 U.S. 56 (1980).

As of 2016, 17 states have adopted open file discovery processes. Grunwald, Ben, *The Fragile Promise of Open-File Discovery*, 49 Connecticut Law Review 771-836 (2017). Most other state courts have discovery rules that exceed what is available in federal district courts. This lack of discovery leads to a generalized perception that federal district courts aren't as "fair" as state courts and the general public simply can't understand why all courts wouldn't have the same discovery rights as those rights are set forth under the same United States Constitution. The lack of discernable discovery standards and disclosure deadlines will continue to result in the denial of defendant's rights under the Confrontation Clause until such time as some bright line rules are set out. **As this Court previously noted, "comprehensive discovery affords counsel a full opportunity to prepare the case, rather than be hijacked by surprise evidence." *Wardius v. Oregon*, 412 U.S. 470, 473-74 (1973) ("[t]he end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.").**

## CONCLUSION

Defendant Marques Smith submits this Petition for a Writ of Certiorari on the date shown below.

Dated this 18 day of October, 2021.

Respectfully submitted,
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