NO. _____

IN THE UNITED STATES SUPREME COURT

REBECCA STAMPE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

When the government refuses to disclose material to a defendant after that defendant makes a specific request for its production, *in camera* review by the district court is appropriate if the defendant can make a plausible showing that the withheld evidence is material to his defense or punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58-59 n.15 (1987). This requirement of *in camera* review to resolve legitimate doubt about the existence of undisclosed *Brady* material exists to "balance[] the defendant's important need for access to potentially relevant material with the government's valid interest in protecting confidential files and the integrity of pending investigations." *United States v. Jumah*, 599 F.3d 799, 810 (7th Cir. 2010); *Ritchie*, 480 U.S. at 60.

Here, in conflict with its sister circuits the United States Court of Appeal for the Sixth Circuit held that even if a defendant makes a "plausible showing" as required under *Pennsylvania v. Ritchie*, the government can nonetheless avoid *in camera* review by asserting its belief that the requested evidence is immaterial, and thus not subject to disclosure.

The question presented here is:

Can the district court, consistent with *Brady* and its progeny, refuse *in camera* review of evidence that is plausibly subject to disclosure under *Brady* based only on the government's assertion that it believes the evidence is immaterial?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

All relevant opinions below are included in the Appendix filed herewith.

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JURISDICTIONAL STATEMENT

Rebecca Stampe pled guilty to conspiracy to distribute 500 grams or more of a methamphetamine mixture under 21 U.S.C. § 846, 841(a)(1) and 841(b)(1)(A). She was sentenced by the District Court for the Eastern District of Tennessee on November 5, 2019. She appealed her sentence to the United States Court of Appeals for the Sixth Circuit, which affirmed the sentence on April 20, 2021. Stampe filed a timely petition seeking en banc rehearing, which was denied on June 22, 2021.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13 of the Supreme Court and this Court's March 19, 2020 COVID-19 Order, and the Court's July 19, 2021 COVID-19 Order, the time for filing a petition for certiorari review is 150 days from the order denying the petition for rehearing. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Jay Woods, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

PRAYER FOR RELIEF

Petitioner, Ms. Rebecca Stampe, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment due process clause of the United States Constitution provides, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE AND FACTS

Rebecca Stampe was changed along with her codefendant Michael Loden with conspiracy to distribute at least 500 grams of methamphetamine. Pet. App. at 2. The indictment alleged a conspiracy running from January 1, 2017 through on or about January 20, 2018. (Superseding Indictment, R. 14, PageID #44.) Stampe was arrested on November 15, 2017, eight months into the conspiracy, after law enforcement executed a search warrant at her home based on information from both a "reliable source" and a "confidential informant." (Revised Presentence Investigation Report ("PSR"), R. 60, Page ID# 237-39.)

After her arrest Stampe provided law enforcement information about Loden, which, along with Stampe's name was used in a search warrant leading to Loden's arrest. Pet. App. at 3. That search warrant also stated that Loden had pending felony methamphetamine charges from an arrest that occurred around March 13, 2017. (Loden Search Warrant, R. 100 (sealed), Page ID# 378.) It also explained that that a confidential informant had made three audio recorded controlled buys from Loden between December and January 16, 2018. (*Id.*) It is unknown whether the confidential informant that gave information in support of the warrant for Stampe's home is the same confidential informant noted in Loden's warrant.

While Loden proceeded to trial, Stampe signed a cooperation plea agreement whereby she agreed to testify against him. Pet. App. at 2-3. On the eve of trial, however, the government dismissed all the charges against Loden—including the identical conspiracy charge pending against Stampe—after "discover[ing] circumstances apart from evidence of

. . . guilt which prevent[ed] . . . moving forward." *Id.* at 3 (alterations in original) (citation omitted). The government declined to share these circumstances with Stampe, stating that the evidence at issue related to inappropriate conduct by a confidential informant that the government did not view as affecting the case against her, even though her charges also stemmed from information from a confidential informant, and even though both her and Loden were charged with a conspiracy that stretched back to January of 2017. *Id.* Ms. Stampe then sought direct production or *in camera* review of the tainted evidence that caused the government to dismiss the entire conspiracy against Loden. *Id.* at 3.

The government responded, claiming that the requested evidence was not relevant to Stampe because "the issues in Loden's case occurred while Stampe was in custody." Pet. App. at 4. But, the government never explained why issues occurring after November 15, 2017 (when Stampe was arrested) required dismissal of a conspiracy count stretching back to January of 2017 against Loden, but not Stampe, particularly where Stampe was prepared to testify as to Loden's drug activity prior to her arrest and where Loden had been arrested for felony methamphetamine charges in March of 2017. Pet. App., *generally*; (*see also* Gov't Resp. to Compel Mot., R. 86, Page ID# 318-19.)

The district court denied her motion. Pet. App. at 4-6. In denying the motion for *in camera* review it characterized Stampe's argument that the tainted evidence might be material to her as "pure speculation," because the government had asserted that it fully complied with its obligations under *Brady*, *Giglio*, Federal Rule of Criminal Procedure 16 and the Jenks Act. *Id.* at 4-5. It reached this conclusion despite stating that "it did not 'fully understand what the government[]' was saying 'when it sa[id], well, [the tainted

evidence] couldn't affect Ms. Stampe because she was in custody.'" *Id.* at 4 (first two alterations in original).)

On appeal Stampe reasserted her argument that the district court abused its discretion by accepting the government's un-checked materiality assertion as the sole basis for denying *in camera* review. *Id.* at 5-8. The Sixth Circuit denied her appeal. *Id.* at 7. With respect to whether Stampe made a plausible showing that the tainted evidence could require disclosure under *Brady* or Rule 16, it explained that "it is not immediately clear that the district court's characterization [that Stampe presented only "pure speculation"] was accurate." *Id.* It explained that "[t]his is not a case in which the defendant fired blindly into the prosecutions papers alleging materiality. Her speculation was at least to a certain degree informed." *Id.*

But, it determined that the resolution of this question was unnecessary, because even if she had made a plausible showing of materiality, the government could nonetheless avoid *in camera* review by asserting that the tainted evidence was immaterial. Pet. App. at 7-8. It explained that "[i]n *Hernandez*, this court gave the government a powerful tool to avoid criminal discovery requests." *Id.* at 7 (citing *United States v. Hernandez*, 31 F.3d 354, 361 (6th Cir. 1944)). Thus, "because a 'prosecuting attorney is an officer of the court,' a district 'court is entitled to accept his representations' about whether a specifically requested item is material 'absent some indication of misconduct.'" *Id.* at 7-8 (quoting *Hernandez*, 31 F.3d at 361). Thus, even assuming that Stampe had made the requisite showing under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to trigger *in camera* review, the government

could avoid that review by merely asserting its belief that the requested evidence was immaterial. *Id.* at 7-8.

REASONS FOR GRANTING OF THE WRIT

A circuit split has developed regarding the district court's duty to review potential *Brady* material *in camera* when a defendant has made a plausible showing that the requested evidence is material to either guilt or punishment.

In *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. 83, 87 (1963). And in *Pennsylvania v. Ritchie* the Court explained that "[a] defendant's right to discover exculpatory evidence [under *Brady*] does not include the unsupervised authority to search through the [state's] files," nor can a defendant "require the trial court to search through the [requested evidence] without first establishing a basis for his claim that it contains material evidence." 480 U.S. at 59 (citing *United States v. Bagley*, 473 U.S. 667, 675 (1985)); *id*. at 58 n.15 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). But, when a defendant establishes a basis for his claim by making "some plausible showing" that the requested evidence is disclosable under *Brady, in camera* review is required. *Ritchie*, 480 U.S. at 58 n.15 (quoting *Valenzuela-Bernal*, 458 U.S. at 867).

The Second, Fifth, Eight and Eleventh Circuits have held that when a defendant makes a plausible showing that specifically requested evidence could require disclosure under *Brady*, the district court must review that evidence *in camera*. *United States v. Kiszewski*, 877 F.2d 210, 215-16 (2nd Cir. 1989) (under *Brady* and its progeny, "it was error for the district court to refuse to compel production of [a law enforcement witness's]

personnel file for *in camera* inspection based solely on the representations of the government"); *United States v. Brown*, 574 F.2d 1274, 1278 (5th Cir. 1978) (remand required for *in camera* review of specifically requested evidence that may have been material because absent *in camera* review "there was no way that [the trial judge] could determine whether [the requested evidence] contained exculpatory evidence that was material to guilt or to punishment in a way that might have affected the outcome"); *Anderson v. United States*, 788 F.2d 517, 518-19 (8th Cir. 1986) (pursuant to *Brady* and *Jencks*, district court was required to review *in camera* government recordings of a witness's statements despite the government's assertion that the tapes were voluminous and unrelated to Anderson); *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983) (remand required for *in camera* review of evidence that may have been material under *Brady*).

The Second and Eight Circuits have specifically held that when the defendant makes a sufficient showing that evidence could be *Brady* material, the district court cannot refuse *in camera* review based on the government's representations that the material is non-disclosable. *Kiszewski*, 877 F.2d at 215-16; *Anderson*, 788 F.2d at 518-19 (requiring *in camera* review of material that could be disclosable under *Brady* or Jencks). And, the Seventh Circuit's precedent appears to be aligned with these Circuits. *Compare United States v. Navarro*, 773 F.2d 625, 631 (7th Cir. 1984) (*in camera* review not required where defendant requested a government file but gave "no indication of the existence of [*Brady*] material" and the government asserted it had turned over all the required material), *with United States v. Allen*, 798 F.2d 985, 995 (7th Cir. 1986) (addressing a request for Jencks material, which it explained was distinguishable from the *Navarro* case's assessment of

Brady material because "[w]hile the district court may be able, as in *Navarro,* to rely on a government assertion that a requested document does not exist, the court cannot rely on a government assertion that a document does not 'relate to' the subject matter of the witness's testimony and should not rely on an assertion that the document does not fit the statutory definition of 'statement.'") This suggests that in the Seventh Circuit, where a defendant makes a plausible showing that specific material could require disclosure under *Brady*, that the district court cannot deny *in camera* review based on the government's assertion that the material need not be disclosed.

By contrast, the Sixth Circuit holds that even assuming a defendant makes a plausible showing that specifically requested material requires disclosure under *Brady*; the government can avoid *in camera* review by asserting that the evidence is immaterial. Pet. App. at 7 ("[e]ven assuming Stampe said enough to trigger Rule 16 or *Brady* disclosure [by making a plausible showing that the specifically requested evidence contained Rule 16 or *Brady* material]" "her arguments here ultimately fail because of the [district] court's second move—relying on the government's representations"). In reaching this conclusion, the Sixth Circuit relied upon *United States v. Hernandez*, which it describes as a case that "gave the government a powerful tool to avoid criminal discovery requests." Pet. App. at 7 (citing 31 F.3d 354 (6th Cir. 1994)). In *Hernandez* the Sixth Circuit held that "because a 'prosecuting attorney is an officer of the court,' a district 'court is entitled to accept his representations' about whether a specifically requested item is material 'absent some indication of misconduct.'" Pet. App. at 7-8 (quoting *Hernandez*, 31 F.3d at 361).

Even judges within the Sixth Circuit differ in their views as to the legitimacy of *Hernandez*. In *United States v. Carmichael*, the court found itself bound by *Hernandez* to find that the district court did not abuse its discretion when it refused *in camera* review of specifically requested wiretapped conversations which the defendant argued could contain *Brady* material, because the government "represented unambiguously that all material that was then in its possession that might have been used to impeach Adams was disclosed." 232 F.3d 510, 510 (6th Cir. 2000). But in doing so the panel explained that it "ha[s] serious misgivings about the breadth of the rule announced in *Hernandez*." *Id.* "After all, it is difficult to conscientiously conclude that the government has met its obligations under *Brady* without seeing the materials that the government concededly did not disclose." *Id.*

The instant case deepens this circuit conflict by expanding the reach of *Hernandez* to expressly apply even assuming a defendant has made a plausible showing that the specifically requested material should be disclosed under *Brady*. That holding conflicts with the Second, Fifth, Eight and Eleventh Circuits, and undermines the reasoning of the Court in *Pennsylvania v. Ritchie*. 480 U.S. at 60 ("We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the [requested] files be submitted only to the trial court for *in camera* review."

In camera review of disputed material is the recognized way "of balancing the due process rights of the defendant and the privacy interests of the government and its witnesses." *United States v. Phillips*, 854 F.2d 273, 278 (7th Cir. 1988). It also preserves the role of the court as the final arbiter over the parties' disputes. When

addressing requests for material under the Jencks Act, the Seventh Circuit explained that "[o]nce the question has [adequately] been raised by defense counsel, the court should dispose of it on its own responsibility based upon what it ascertains in [an *in camera*] hearing." *Allen*, 798 F.2d at 995 (quoting *United States v. Keig*, 320 F.2d 634, 637 (7th Cir. 1963)). "The court should not make a final disposition upon the representation of government counsel. It cannot escape its duty to learn the truth firsthand." *Allen*, 798 F.2d at 995 (quoting *Keig*, 320 F.2d at 637). Indeed, "*[i]n camera* inspection of disputed materials likewise allows the court to engage in a more delicate balancing of the competing interests than does a decision to decide a discovery issue based on the representations of the parties alone." *Phillips*, 854 F.2d at 278 (citing *Navarrro*, 737 F.2d at 631). And, "*in camera* inspection provides the additional advantage of including the disputed materials (sealed, of course) in the record, facilitating our review on appeal." *Phillips*, 854 F.2d at 278 (citing *Navarro*, 737 F.2d at 631).

This circuit split reaches fundamental aspects of a criminal defendant's due process right to a fair trial as well as the proper role of the district court in protecting those rights while balancing them against the government's interests. The Sixth Circuit's approach not only results in inconsistent enforcement of *Brady* based purely on the location in which one is charged with a federal crime, but it also narrows the reach of the Court's *Pennsylvanian v. Ritchie* case, thereby unfairly narrowing a defendant's ability to enforce his due process rights. This is an issue that warrants the attention of the Court.

This case presents a good vehicle to address this split, as the instant case rests on a legal conclusion whereby the Sixth Circuit expressly held that *even if* a defendant makes a

plausible showing that specifically requested material could be subject to disclosure under *Brady*, the government can still avoid *in camera* review (and thereby disclosure to the defendant) by merely asserting that the evidence is immaterial. This case presents the Court with the ability to settle the divergent conclusions of the United States Courts of Appeals and address the Sixth Circuit's overstep.

ARGUMENT

When a defendant has made a plausible showing that specifically requested evidence should be disclosed under *Brady* a district court violates due process when it nonetheless refuses *in camera* review based only on the government's asserted belief that the evidence is immaterial.

Due process requires the government to disclose favorable evidence to an accused upon request when the evidence is material to either guilt or punishment. *Brady*, 373 U.S. at 87. This duty extends beyond a finding of guilt by trial or plea and applies "irrespective of the good faith or bad faith of the prosecution." *Id.*; *see Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [whether it be part of the guilt phase or punishment phase] would have been different." *United States v. Bagley*, 473 U.S. 667 (1985). And, when a defendant "establishes a basis for his claim that [requested evidence] contains material evidence" the district court should review that requested evidence *in camera*. *Ritchie*, 480 U.S. at 58-59 n.15. All that is required is "some plausible showing" that the requested material is subject to disclosure under *Brady*. *Id*.

The Sixth Circuit erred by limiting a defendant's access to potential *Brady* material by allowing district court to blindly rely upon the government's assertion that it believes the requested evidence is not material—even where a defendant has made "some plausible showing" as required by *Pennsylvania v. Ritchie*. This undermines *Ritchie* and conflicts with the Second, Fifth, Eight, Eleventh and Seventh circuits. *Kiszewski*, 877 F.2d at 215-16 (2nd Cir.) (under *Brady* and its progeny, "it was error for the district court to refuse to compel production of [a law enforcement witness's] personnel file for *in camera* inspection

based solely on the representations of the government"); *see also Brown*, 574 F.2d at 1278 (5th Cir.); *Anderson*, 788 F.2d at 518-19 (8th Cir.); *Griggs*, 713 F.2d at 674 (11th Cir.); *and compare Navarro*, 773 F.2d at 631 (7th Cir.) *with Allen*, 798 F.2d at 995 (7th Cir.). The Sixth Circuit's conclusion also fails to account for the fact that prosecuting attorneys are people too, who sometimes make mistakes, misinterpret the law, or simply overlook things. *Brady* applies "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *accord Walker v. Lockhart*, 763 F.2d 942, 958 (8th Cir. 1985) ("[i]t is irrelevant whether the State acted in good faith or bad faith in failing to disclose the evidence").

Indeed, the need for judicial review when a defendant has made a plausible showing that requested evidence contains *Brady* material is particularly poignant here. First, even the district court had misgivings about the government's statement that the tainted evidence required the dismissal—but only as to Loden—of a conspiracy that ran from January of 2017 through January of 2018 because the problematic evidence occurred while Stampe was in custody. If problematic evidence occurring after November 15, 2017 required dismissal of charges based on conducted that predated November 15th, how can that taint not apply equally to both defendants? Particularly where the charge is a *conspiracy* to distribute drugs, which requires no overt act by any member, requiring only *an agreement* to illegally distribute drugs. *United States v. Shabani*, 513 U.S. 10, 17 (1994) ("[p]roof of an overt act is not required to establish a violation of 21 U.S.C § 846"). As a conspiracy change, it is not as if one bad controlled buy could undermine the entire conspiracy charge (but only for one codefendant), especially given that other independent evidence indicates both Stampe and Loden were working in concert prior to November 15, 2017. It is hard to imagine how

Loden be differently situated from Stampe where there is independent evidence that both participated in the conspiracy prior to November of 2017.

Stampe could plausibly have relied upon the same tainted evidence to move to withdraw her guilty plea or move to dismiss the indictment. Moreover, even if the evidence related only to the scope of the conspiracy after Stampe was in custody, it could still provide reason to reduce or mitigate her punishment. The district court violated due process by refusing *in camera* review, despite its misgivings, based only on the government's assertion that it believed the evidence was immaterial. And, that violation was repeated by the Sixth Circuit's affirmance here—where it expressly assumed that Stampe had made the requisite plausible showing of materiality, yet held that *in camera* review was not required.

Second, there is reason to believe that in this very case the government's belief that the evidence was immaterial was mistaken. At oral argument before the Sixth Circuit it first misstated the scope of *Brady's* materiality requirement. (TR. Oral Argument, App. R. 62 at 44.) The government specifically stated that "the materiality analysis has to be more than" something helpful to the defense, but "has to be something that *would change* the outcome," specifically evidence "inconsistent with any *element of the offense*." (*Id.*) The threshold is neither that high nor that narrow, however, as all that is required to trigger disclosure is that the evidence "would have made a different result *reasonably probable*," which requires a showing of less than a preponderance. *Kyles v. Whitley*, 514 U.S. 419, 434, 441 (1995). And at the same time the evidence need not undermine an element of the offense, but can go to guilt *or punishment*. *Brady*, 373 U.S. at 87.

The government's response spurred further questioning by the panel: "Doesn't *Brady* though also talk about relevant to guilt or punishment? Which is a little different than

defense, isn't it?" (*Id.*) In response, the government responded that the evidence it refused to disclose to Stampe, or to the district court *in camera*, could have at least impacted the extent of punishment, noting "especially in this case, that could—It could have been material to punishment." *Id.* Here, when to date, no court nor Stampe, nor her counsel have been able to independently review this known problematic evidence—so problematic that it required dismissal of identical charges against her codefendant—the risk that her due process rights were note adequately protected is too high.

Finally, refusal to review *in camera* evidence know to be so tainted that it required dismissal of one codefendant's charges runs head-long into the Court's holding in *Alderman v. United States*, 394 U.S. 165, 183 (1969). In *Alderman* the Court addressed facts similar to those presented here and the Court was clear: A district court cannot rely only on the government's assertion that tainted evidence which directly undermines the charges against one co-conspirator is irrelevant to other defendants in the conspiracy. 394 U.S. at 167-68; 180-81. When it becomes apparent that some evidence was collected illegally, and the only question is whether that illegality infected the case against a coconspirator, reliance on "the government's *ex parte* determination of relevance" is inappropriate. *Alderman*, 394 U.S. at 168, 181-83 (refusing to accept the government's pronouncement that the tainted evidence did not impact its case against the co-conspirators and requiring direct production).

Here, the government conceded that certain evidence was so tainted that it required dismissal of the charges against Loden, Stampe's co-conspirator and codefendant. But, the government's *only* asserted basis for refusing to disclose the tainted material is that it is unrelated to the case against Ms. Stampe. *See cf Alderman*, 394 U.S. at 167-68; 180-81; *see also Ritchie*, 480 U.S. at 58-60. But despite acknowledging the questionable

explanation from the government, the district court below refused to review this evidence *in camera* in order to determine if the taint should be disclosed to other co-conspirators. *Alderman*, 394 U.S. at 167-68; 180-81.

At bottom, Rebecca Stampe made a specific request for *in camera* review of evidence that was so damning to the government's case it required dismissal of the identical conspiracy charge against her codefendant Loden. The Sixth Circuit assumed this was sufficient to make out "some plausible showing" of how such evidence could be material to her defense or punishment. It acknowledged that Stampe's situation was unique, "dismissals like Loden's 'rarely happen[],' and the district court said it didn't 'fully understand' the government's contention that materials related to Stampe's co-conspirator's identical charge 'couldn't affect' her 'because she was in custody.'" Pet. App. at 8 n.1. Thus, granting an *in camera* hearing under these circumstances would likely not "force[] district courts 'into the government's files in any case where . . . a defendant wants' review." *Id.* But it then, inexplicably, held that the government's asserted belief of immateriality was sufficient to preclude *in camera* review.

That holding sets the Sixth Circuit apart from the other circuits, and unreasonably narrows the requirements of due process set out by the Court in *Pennsylvania v. Richie*. It also fails to account for the government's disclosure duties under *Alderman*. If *in camera* review was not required under these circumstances, it will rarely, if ever be required. And that fundamentally changes the role of the district court in ensuring that a defendant's due process right to disclosure of requested evidence material to either guilt or punishment is adequately preserved.

CONCLUSION

In consideration of the foregoing, Ms. Rebecca Stampe submits that the petition for certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and the case remanded for *in camera* review of the requested material.

Respectfully submitted,

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