No. _____

In The
Supreme Court of the United States

KENDALL STREB,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER, L.L.P.

ALFREDO PARRISH
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

When the government intentionally conceals *Brady* evidence (payments and benefits to witnesses) on the eve of trial – in violation of DOJ policy, ABA Standards for the Prosecutorial Function, and Federal Rules of Criminal Procedure – is an evidentiary hearing required?

PARTIES TO THE PROCEEDINGS

1. Kendall Streb, Petitioner
2. United States of America, Respondent
3. Human Trafficking Institute, Amicus Curiae below.

RELATED PROCEEDINGS

I. *United States v. Kendall Streb*, Southern District of Iowa No. 4:19-CR-00076-SMR-CFB, Order on Motion for New Trial, 477 F. Supp. 3d 835 (S.D. Iowa 2020).

II. *United States v. Kendall Streb*, Southern District of Iowa No. 4:19-CR-00076-SMR-CFB; Judgment entered September 24, 2020.

III. *United States v. Kendall Streb*, Eighth Circuit Court of Appeals No. 20-8007; Judgment entered July 31, 2020.

IV. *United States v. Kendall Streb*, Eighth Circuit Court of Appeals No. 20-3028; 36 F.4th 782 (8th Cir. 2022); Judgment entered June 7, 2022; Corrected Opinion filed July 1, 2022.

V. *United States v. Kendall Streb*, Eighth Circuit Court of Appeals No. 20-3028; 2022 WL 2378976 (8th Cir. Jul. 1, 2022); Petition for Rehearing Denied June 30, 2022.

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On June 7, 2022, the Eighth Circuit affirmed the district court for the Southern District of Iowa's rulings regarding the late and inadequate disclosure of benefits paid to the victims, and regarding cross examination. *United States v. Streb*, No. 20-3028; 36 F.4th 782 (8th Cir. June 7, 2022; revised July 1, 2022). (App. 1). The petition for further review was denied. *United States v. Streb*, 8th Cir. No. 20-3028 (July 1, 2022). (App. 52).

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §3231. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

FEDERAL RULE OF CRIMINAL PROCEDURE 16(d)(2)

Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

STATEMENT OF THE CASE

Kendall Andrew Streb was charged by superseding indictment on August 13, 2019, with the following offenses:

> Count 12: Sex Trafficking of Children in violation of 18 U.S.C. §§ 15941(a)(1) and 1591(b)(2), regarding Minor Victim A [hereinafter "MVA"].
>
> Count 13: Distribution of a Controlled Substance to a Person Under Age 21 in violation of 21 U.S.C. §§ 841(a)(1) and 859, regarding MVA.
>
> Count 14: Sex Trafficking of Children in violation of 18 U.S.C. §§ 1591(a)(1) and 1591(b)(2), regarding Minor Victim B [hereinafter "MVB"].
>
> Count 15: Coercion and Enticement of a Minor in violation of 18 U.S.C. § 2422(b), regarding MVB.
>
> Count 16: Distribution of a Controlled Substance to a Person Under Age 21 in violation of 21 U.S.C. §§ 841(a)(1) and 859.

> Count 17: Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).
>
> Count 18: Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).
>
> Count 19: Unlawful User in Possession of a Firearm, 18 U.S.C. §§ 922(g)(3) and 924(a)(2).
>
> Count 26: Sex Trafficking of Children in violation of 18 U.S.C. §§ 1591(a)(1) and 1591(b)(2), regarding Minor Victim E [hereinafter "MVE"].
>
> Count 32: Distribution of a Controlled Substance to a Person Under Age 21 in violation of 21 U.S.C. §§ 841(a)(1) and 859, regarding MVE.

He entered a plea of not guilty. Count 15 was dismissed by the government prior to trial, and the remaining counts proceeded through pretrial litigation.

On January 19, 2020, 48 hours before trial, the Government provided a letter to the defense stating:

> Throughout the entirety of this case, meetings and/or prep sessions were individually held with Minor Victims A, B, and E. During these meetings and/or prep sessions, lunch was sometimes provided by staff with the U.S. Attorney's Office, the Iowa City Bureau of Investigation, or other non-profit or law enforcement agencies. Additionally, sometimes Minor Victims A, B, and/or E were provided items to help them care for their basic

> needs, such as shampoo, body wash, soap, and basic items of clothing. Minor Victim A was once given a gift card to assist her with purchasing school supplies. All of these items were provided by either members of the U.S. Attorney's Office, the Iowa City Police Department, the Federal Bureau of Investigation, and/or other non-profit or law enforcement agencies.

(District Court Docket Number [hereinafter "DCD"] 353 at 2). This was the first time that the government had disclosed any witness benefits. (*Id.* at 5).

Trial began on January 21, 2020, without the Government providing any additional detail regarding the witness benefits. Defense counsel raised the issue with the court, which agreed the lack of disclosure was "a serious problem," and commented "this comes close to what I would consider misconduct." (S. App. 3). The court did not give defense counsel the opportunity to question those involved in the benefits. (S. App. 3-13). Instead, the court asked a few follow-up questions to the prosecutor. (S. App. 5-8). The prosecutor was unable to provide necessary detail or documentation, so the court adjourned the hearing and instructed the prosecution to obtain further information about the benefits. (S. App. 5-8, 10).

The prosecution's information regarding witness benefits continued to shift. When the parties reconvened, the prosecution provided a bullet-point list of witness benefits. (DCD 353 at 7-8). Among other things, the list revealed that the prosecutor and victim

specialist had taken Minor Victim A (MVA) shopping at Target and given her $50 in gift cards. (DCD 353 at 7). Defense counsel asked for an evidentiary hearing to question the parties involved in providing the benefits, in order to develop information regarding the benefits and why the information was not disclosed earlier. (S. App. 10-15). The court declined, and again engaged in its own questioning of the prosecution and the case agent, Detective Gonzalez. (S. App. 10-12). The prosecution still could not provide the necessary detail. The court repeated its order to the Government to gather documentation regarding the witness benefits, but decided to move forward with jury selection.

After the jury was selected and excused for the day, the prosecution provided a report authored by Detective Gonzalez with additional detail and different information from its first bullet-point list. (DCD 353 at 12-14). The report confirmed the prosecutors had been aware of the witness benefits – and were personally involved in providing those benefits – for months. (DCD 353 at 12). Inexplicably, there were no receipts for any of these transactions. (DCD 353 at 12-14).

In light of the continuing problems with the prosecutor's incomplete and inadequate disclosures, defense counsel repeated its request for an evidentiary hearing to develop the underlying facts of the benefits and explore why the information was not timely disclosed. (S. App. 15-18). As defense counsel pointed out, "you don't make these kinds of mistakes for nine months, Judge, and claim that it was accidental." (S. App. 17). The court again refused this request and

instead engaged in its own questioning of the prosecutor, the witness coordinator, and Detective Gonzalez – none of whom were placed under oath or subjected to cross-examination. (S. App. 17-23). Notably the prosecutor told the court that she had provided the first, inaccurate letter to the defense upon consultation with the United States Attorney, Marc Krickbaum:

> I described generally the types of things that were given here, and I asked him is that something that we need to disclose and how to disclose it, and he suggested doing a generic letter the way that we did it.

(S. App. 31). The refenced "generic letter" was inconsistent with later disclosures and omitted significant benefits paid to the victims. (DCD 353 at 2). Given the prosecutor's direct participation in the provision of those benefits, the prosecution should have been well aware of the inaccuracies in the disclosure.

Defense counsel moved to dismiss the prosecution or, in the alternative, suppress the testimony of witnesses who received late-disclosed benefits. (DCD 324). The court denied the motion. (S. App. 33-34). Instead, the court indicated it would allow "liberal cross-examination" on the witness benefit issue. The court further ruled that it would overlook what it viewed as deficiencies in Streb's Rule 16 expert disclosures, though the court would still consider relevancy and other objections to the proposed expert testimony. (App. 4). The parties recessed for the day, with the plan to begin with opening statements the next day.

That night, at 9:09 pm, the Government disclosed yet another benefit that it had paid witness MVA. (DCD 353 at 17-19). Again, there was no receipt for the "$40-50 cash" that was paid to MVA after her grand jury testimony in April 2019. (*Id.*). In light of the new disclosure, the parties again made a record on the matter before opening statements on the second day of trial. Streb identified lingering questions regarding the witness benefits and again asked for an evidentiary hearing on the matter. (S. App. 37-42). The defense noted that U.S. Attorney Krickbaum was in the courtroom and requested that he make a professional statement regarding when he became aware of the witness benefits and what he told the prosecutor to do regarding those benefits. (S. App. 39-41). The court sua sponte ruled that the U.S. Attorney was protected by Executive Privilege and would not be asked to reveal his conversation with the prosecutor. (S. App. 41-43). The court then proceeded with trial.

Trial testimony of at least one of the minor victims strongly suggested that the payments from the government changed her testimony. Streb was accused of sex trafficking MVB, who the court later described as "both prey and predator," with "some responsibility to bear, in my view, for what happened to MVA and MVE." (DCD 513, Sentencing Transcript at 64). MVB was the one who introduced MVA and MVE to Streb. On December 29, 2018, MVB set Streb up with MVA. (DCD 405, Trial Transcript Vol. 4 at 909-10). This was the only time that MVA met Streb. (*Id.*). MVA subsequently gave multiple statements regarding the events

of that night in interviews on December 31, 2018; January 22, 2019; April 8, 2019; and April 18, 2019. In none of those interviews did she tell law enforcement that she had sex with Streb on December 29, 2019. (DCD 407, Trial Transcript Vol. 3 at 537-38). Not until January 10, 2020 – after receiving $400 in benefits from the Government – did MVA make allegations against Streb. (*Id.* at 538-39). She conceded on cross-examination that her story had changed dramatically. (*Id.* at 480). MVA also admitted doing "a shit ton of drugs" on December 29, 2018, including Ecstasy, methamphetamine, marijuana, and alcohol. (*Id.* at 489-90). She denied that she did these drugs – other than the methamphetamine – with Streb. (*Id.* at 490). At trial, she testified that she used methamphetamine with Streb, but admitted to stating in prior interviews (before receiving payments from the government) that she was given methamphetamine by "a black guy." (*Id.* at 499-500). Streb is white. (*Id.*).

Streb was found guilty on Counts 12, 14, 16, 17, 18, 19, 26, and 32. (App. 32). The sole acquittal was on Count 13, distribution of a controlled substance to MVA while she was under the age of 21. On appeal, Streb raised the issue of failing to exclude or suppress their testimony, and failing to hold a hearing on the government's disclosure, as a basis for reversal. The Eighth Circuit held that the District Court did not abuse its discretion in refusing to exclude MVA, MVB, and MVE's testimony and refusing to hold a hearing because a lesser sanction was appropriate under Fed. R. Crim. P. 16(d)(2), and because Streb's Sixth

Amendment rights were not violated when the evidence was disclosed in time for him to utilize it at trial. *United States v. Streb*, 36 F.4th at 786-88. (App. 3-6).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A United States Court of Appeals has entered a decision that sanctions a departure from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's supervisory power.

1. The evidence of payments by the prosecutors were exculpatory evidence, required to be disclosed.

Money is "a powerful motivator." Johnson, Vida B., *When the Government Holds the Purse Strings but Not the Purse:* Brady, Giglio, *and Crime Victim Compensation Funds*, 38 N.Y.U. Rev. L & Soc. Change 491, 495 (2014) [hereinafter "Johnson."]. While financial assistance to victims can "provide much-needed relief from daily economic pressures," it can also "provide a powerful incentive for some witnesses to fabricate, add details, shade their testimony at trial, or otherwise, make themselves seem more indispensable in order to get access to additional resources." *Id.* There is no doubt that funds paid to victims are *Brady* material that should be disclosed to the defense. *See, e.g., United States v. Bagley*, 473 U.S. 667, 683 (1985) (noting that the promise of a reward gave witnesses "a direct, personal stake

in respondent's conviction," reflecting bias that must be disclosed under *Brady*). Detailed disclosures of the funds and their source are necessary for a defendant to effectively demonstrate this bias to the jury. Johnson, *supra*, at 498.

At least with regard to MVA, Streb had strong circumstantial evidence that payments to her were a motivating factor in her accusations. MVA testified that she had one encounter with Streb. There were four separate interviews with law enforcement before she ever brought up Streb's name. And her story with regard to Streb changed. At trial, she claimed that Streb gave her methamphetamine – directly supporting one of the charges against Streb. But previously she had stated that she received methamphetamine from "a Black guy."

2. The disclosure was unfairly and prejudicially delayed.

The Court's discovery orders required the government to produce evidence of payments to the witnesses on an ongoing basis. The parties entered into a stipulated discovery agreement on May 28, 2019, which provided the government would produce copies of any *Brady* materials "upon execution and approval of this Agreement, to be supplemented if and when additional materials become available." (DCD 87 at ¶ 3). The government acknowledged that its duty to provide *Brady* materials was a "continuing obligation," both by

stipulation and by the rules of criminal procedure. (*Id.* at ¶ 13).

The government's disclosures on January 19, 2020, on the eve of trial, came too late. The disclosures covered benefits paid to the complaining witnesses as far back as April 2019, *before* the government signed the stipulated discovery agreement. The payments continued throughout the trial preparation phase, and were notably not included in several "supplemental disclosures" made by the government throughout Streb's case, on May 28, 2019, June 4, 2019, June 17, 2019, June 25, 2019, July 1, 2019, July 9, 2019, August 1, 2019, August 29, 2019, October 17, 2019, October 22, 2019, November 6, 2019, November 19, 2019, December 13, 2019, December 16, 2019, January 6, 2020, January 7, 2020, January 11, 2020, January 15, 2020, and January 18, 2020. There was no legitimate reason not to disclose them earlier, and on a continuing basis. The timing of the disclosure also violated DOJ Policy, which requires impeaching evidence to be disclosed "at a reasonable time before trial to allow the trial to proceed efficiently." DOJ, Justice Manual 9-5001(D)(2).

The delayed disclosure was prejudicial to Streb's defense, even though he was able to deploy some of the evidence effectively in cross-examination. In delayed-disclosure cases, "the critical inquiry is . . . whether the tardiness prevented defense counsel from employing the material to good effect." *United States v. Osorio*, 929 F.2d 753, 757 (1st Cir. 1991). "[The] court's principal concern must be whether learning the information altered the subsequent defense strategy, and whether,

given timeous disclosure, a more effective strategy would likely have resulted." *Id.* (citing *United States v. Devin*, 18 F.2d 280, 290 (1st Cir. 1990)). The court must determine whether the late-disclosed evidence was material, and second, whether the defendant was denied the opportunity to use that evidence effectively. *Id.*

Streb's case was complicated. The allegations involved three different victims, who were trafficked by multiple individuals other than Streb. The allegations spanned a lengthy period of time, and they shifted throughout the course of the investigation. The complaining witnesses used controlled substances throughout the time that they were trafficked, which contributed to their memories being unclear. Without documentary evidence of the funds and benefits that were paid out to the complaining witnesses, it was exceptionally difficult to impeach them with that information.

In response, the government and the courts have simply noted that Streb was offered, and declined, a continuance. This ignores the fact that Streb was detained pre-trial, despite having virtually no criminal history, no history of violence, and long-standing ties to the community. He had a right to a speedy trial, and he exercised that right, to avoid the further anguish of waiting in jail pre-trial, by moving forward. The defendant's strategic decision not to seek a continuance must be balanced against the "government's negligence in meeting its disclosure duties." *Osorio*, 929

F.2d at 760. As discussed below, the government's actions here went beyond mere negligence.

3. The prosecutors were *personally* involved in the payments to complaining witnesses, raising ethical concerns.

The facts below demonstrate that the prosecutors were personally involved in making payments or providing benefits to the victims. The prosecuting attorney personally went shopping with a key witness and provided benefits, yet disclosed no reports of these activities until the eve of trial – and only then by way of a "generic" letter at the direction of the United States Attorney. The court recognized that this made the prosecuting attorney a witness on the issue of bias.

> [I]f the AUSA prosecuting the case and the victim/witness coordinator and the key witness or a key witness are alone together on a shopping trip and there's no reports of that, then all of a sudden the AUSA and the victim/witness coordinator become the witnesses to anything that may have happened during that particular trip.

(S. App. 15).

While it is true that the Government can offer witnesses leniency and even compensation for testifying, there have to be limits to protect the integrity of the judicial system and a Defendant's due process rights. *See, e.g.*, *United States v. Ihnatenko*, 482 F.3d 1097, 1100 (9th Cir. 2007); *United States v. Mojica-Baez*, 229 F.3d

292, 301-02 (1st Cir. 2000); *United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000); *United States v. Harris*, 210 F.3d 165, 167 (3d Cir. 2000); *United States v. Anty*, 203 F.3d 305, 311 (4th Cir. 2000); *United States v. Barnett*, 197 F.3d 138, 144-45 (5th Cir. 1999); *United States v. Albanese*, 195 F.3d 389, 394-95 (8th Cir. 1999). Obviously, the benefits need to be disclosed. For that to properly happen, the benefits need to be documented.

Here, the government tried to skirt both requirements. Its initial disclosure – which the U.S. Attorney instructed the prosecutor should be "generic" – did not identify who paid the complaining witnesses, when they were paid, or how they were paid. It did not identify the conditions for payment, or whether the complaining witnesses met those conditions. It did not contain any information that would allow the defense to cross examine the complaining witnesses. (DCD 353 at 3). The Court recognized the deficiency of the disclosure and ordered the Government to supplement. The government struggled to do so – producing three more disclosures after its initial disclosure. *See, e.g.* (DCD 353). There were no receipts to confirm who paid for the witness benefits, or how much was paid. There was never an explanation of why the first disclosure was so bereft of details.

The reason the disclosure was so inadequate was probably the government's failure to document these payments in the first place. The government *should know* that payments to witnesses are exculpatory evidence – whether it is commonplace or not, whether there is a good reason for the payment or not. The

government's practice here of buying meals, handing over personal items, and in some cases, providing the complaining witnesses with cash, would be less concerning if the matter were documented. The behavior in this case was contrary to the prosecutor's duty to do justice, as outlined by the DOJ Guidelines:

> All potential Giglio information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:
>
> * * *
>
> - Benefits provided to witnesses including:
>   - Dropped or reduced charges
>   - Immunity
>   - Expectations of downward departures or motions for reduction of sentence
>   - Assistance in a state or local criminal proceeding
>   - Considerations regarding forfeiture of assets
>   - Stays of deportation or other immigration status considerations
>   - S-Visas
>   - Monetary benefits
>   - Non-prosecution benefits
>   - Letters to other law enforcement officials (e.g., state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf

- o Relocation assistance
- o Consideration or benefits to culpable or at risk third-parties.

DOJ, Justice Manual 9-5002, Step I: Gathering and Reviewing Discoverable Information, (B)(7). The discovery should again be disclosed a "reasonable amount of time before trial." *Id.* Step III: Making the Disclosures, (B). And the "prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant." *Id.* Step III: Making the Disclosures, (C).

The behavior in this case was also contrary to the ABA Standards for prosecutors:

> The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.

ABA Standards for the Prosecutorial Function Standard 3-3.4(e).

Under similar circumstances, the First Circuit Court of Appeals has admonished prosecutors to take their duty to do justice more seriously:

> An Assistant United States Attorney using a witness with an impeachable past has a constitutionally derived duty to search for and produce impeachment information requested regarding the witnesses. *See generally Giglio v. United States*, 405 U.S. 150 (1972). That constitutional imperative, sharpened in this case by specific court order, is not merely good policy. It is good strategy. No properly prepared trial lawyer should permit himself to be surprised by the vulnerability of his witness, particularly when that vulnerability is well known by his colleagues. To do so needlessly hand a strategic advantage to one's adversary. And it is not merely sloppy personal practice; it implicates the procedures of the entire office for responding to discovery ordered by the court.

Osorio, 929 F.2d at 761. Here, the prosecutors went beyond mere negligence. They were personally involved in the payment of witness benefits, and they purposefully provided a less-than complete disclosure on the eve of trial pursuant to the direction of the U.S. Attorney. This was purposeful behavior, calculated to prejudice Streb's right to a fair trial.

4. Even under the abuse of discretion standard governing discovery violations, it was error to deny a hearing into the government's misconduct.

Federal Rule of Criminal Procedure 16(d)(2) provides that the court may sanction failure to comply with the discovery rules in a wide variety of ways:

> [T]he court may:
>
> > (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
> >
> > (B) grant a continuance;
> >
> > (C) prohibit that party from introducing the undisclosed evidence; or
> >
> > (D) enter any other order that is just under the circumstances.

Fed. R. Crim. P. 16(d)(2). Discovery sanctions (or the lack thereof) are reviewed for abuse of discretion. *United States v. Sims*, 776 F.3d 583, 585 (8th Cir. 2015). In deciding what sanction to impose, the court is to consider (1) the reason for the delay in production of the evidence, including whether the government acted in bad faith; (2) whether the defendant was prejudiced; and (3) whether a lesser sanction would secure future compliance by the government. *Id.* at 585-86.

Here, the denial of a hearing prevented the defense from introducing evidence of the government's bad faith. The questioning by defense counsel and the

Court was sufficient to support an inference of bad faith. The necessity for a full, accurate, and timely disclosure was obvious, and was noted by the court, The inadequacies of the government's disclosures was unexplained. Most significantly, the prosecutor stated that she was *instructed to provide a "generic" disclosure* by her boss, the U.S. Attorney. This suggests a pattern or policy of not providing complete disclosures to defense counsel of important *Brady* material. This creates a concern that a lesser sanction – such as the offered continuance or "liberal cross-examination" into the undocumented payments – would not be enough to secure future compliance by the government of its obligations.

The Eighth Circuit has held that "an evidentiary hearing is required" if a motion is "sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact" are in question. *United States v. Losing*, 539 F.2d 1174, 1177 (8th Cir. 1976); *see also Franks v. Delaware*, 438 U.S. 154, 156 (1978). While those cases discussed suppression issues, they stand for the principal that the Court should not be deciding contested evidentiary issues, particularly those bearing on credibility, without looking at the actual evidence. An evidentiary hearing was warranted. Failure to grant an evidentiary hearing gave the government cover to keep important, exculpatory information in the dark.

CONCLUSION

When the government fails to disclose exculpatory evidence, and fails to document its payments to witnesses, more than a continuance is needed. More than cross examination of those witnesses is needed. Justice depends on the court system understanding why payments are given to witnesses, and why they go undocumented. A hearing was warranted in this case. The petition for writ of certiorari should be granted to establish uniform rules and procedures for the management of similar scenarios.

Respectfully submitted,

PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER, L.L.P.

ALFREDO PARRISH
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com