

IN THE SUPREME COURT OF THE UNITED STATES

RYAN McGUIRE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

1. Does a trial court's ruling excluding evidence at trial violate a criminal defendant's right to due process, including the rights to confront and examine law enforcement witnesses, when the ruling precludes cross-examination designed to impeach the thoroughness and good faith of a law enforcement investigation on information obtained by law enforcement that some person other than the defendant committed the crime?

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1. Resolution of the question of whether a trial court's ruling excluding evidence at trial violates a criminal defendant's right to due process, including the rights to confront and examine law enforcement witnesses, when the ruling precludes cross-examination designed to impeach the thoroughness and good faith of a law enforcement investigation on information obtained by law enforcement that some person other than the defendant committed the crime is important to maintaining consistent application of constitutional principles handed down by the Court in previous decisions, and is necessary to protect the accused's due process right to a fair trial and the rights to confront and examine witnesses called by the prosecution against the defendant. The Ninth Circuit decided this case in a manner that conflicts with relevant decisions of the Court, particularly, the Court's decisions in *Davis v. Alaska*, 514 U.S. 308 (1974), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and *Kyles*.

a. This case provides the Court with an ideal vehicle to apply of same due process principles from *Brady*, as recognized in *Kyles*, that prevented an accused

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No. _____

IN THE UNITED STATES SUPREME COURT

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

Petitioner, RYAN McGUIRE (hereinafter McGuire) respectfully prays that a writ of certiorari issue to review the unpublished memorandum from the United States Court of Appeals for the Ninth Circuit entered on June 17, 2022.

OPINION BELOW

On June 17, 2022, the Ninth Circuit entered an unpublished memorandum affirming Petitioner's convictions and sentences for conspiracy to distribute methamphetamine and distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The memorandum is attached in the Appendix (App.) at pages 1-4. The Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc* on August 23, 2022. App. 5.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law...."

U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...."

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

A jury sitting in the District of Montana convicted McGuire for conspiracy to distribute five or more grams of methamphetamine and with distribution of five or more grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 846. The charges resulted from an investigation by the Drug Enforcement Agency (DEA) in Billings, Montana in September of 2016. The indictment was not returned until December 21, 2018.

The investigation centered on the drug trafficking activities of Angela Killen who was illegally selling pain pills from her residence in Billings. During undercover buy operations, agents from the DEA successfully purchased illegal pain pills from Killen at her residence. DEA learned the Killen had a methamphetamine supplier. The agents set up an undercover operation in an attempt to identify her methamphetamine supplier.

On September 20, 2016, agents conducted undercover surveillance of Killen's residence. Agent Cavanaugh stationed himself near Killen's residence and saw a gray Toyota Camry, occupied by a male and a female, arrive at the residence. Cavanaugh saw the female enter Killen's residence and watched as male drove away from the residence. Undercover agents Grayson and Brittan then arrived and entered Killen's residence.

The two undercover agents left the residence, and left the area in their vehicle. Over the radio, Grayson and Brittan said they were going to return to the residence. After that, Cavanaugh saw the same male driver of the gray Toyota Camry return and enter the residence.

Brittan and Grayson returned to Killen's residence to buy more pills and with the goal of buying methamphetamine from Killen. The agents quizzed Killen about purchasing methamphetamine. Killen explained that her supplier was not available. The agents chose to stop the operation for the day and return some other day.

Cavanaugh identified the male driving the Camry as having "numerous tattoos, on his arms, hands, [and] neck." At trial, Cavanaugh identified McGuire as the male driver of the Camry he saw on September 20, 2016.

On September 21, 2016, Brittan and Grayson returned to Killen's residence to buy the methamphetamine and to identify her supplier. Once inside the residence, Brittan saw four other females and a white male. One of the females was Killen.

Brittan testified that the "white male, who was sitting on the couch, reached into his jacket and came out with a package of white powder and handed it to [Killen]." Brittan testified that the white male had on "a jacket and a baseball cap," and said his arms were covered. Brittan did not identify any tattoos on the male. He did, however, identify McGuire at trial as

the white male who handed Killen the methamphetamine. Brittain testified that he obtained the methamphetamine from Killen and Grayson handed Killen \$2,200.00 as payment.

On cross-examination, defense counsel pointed out that Brittain did not identify the white male as having tattoos. Defense counsel also pointed out that no attempts were made to obtain fingerprints on the plastic packaging containing the methamphetamine. In addition, Brittan did not identify the white male as having facial hair in his report, even though video evidence from surveillance the day before showed McGuire had facial hair.

Agent Grayson testified that on September 21, 2016, he and Agent Brittain went into Killen's residence to buy methamphetamine. He testified that when he entered the residence, he saw "several females and a male." Grayson saw Killen hand methamphetamine to Brittain. He testified he was "looking at the other individuals in the room for security reasons," and did not see the male give anything to Killen. Grayson said that he paid Killen for the methamphetamine and the agents left the residence.

Grayson testified that he was able to observe the male in the living room. He testified that the only feature which stood out to him was the male's nose. Grayson later identified McGuire as the white male he saw in Killen's residence from a Facebook photograph.

On cross-examination, Grayson testified that the video recording on September 20, 2021 clearly showed McGuire in the Camry. McGuire's tattoos, face, nose and hair were clearly visible that day. Grayson confirmed that he did not see the Facebook photo of McGuire until December 2018, well after the events in September 2016. He confirmed that the packaging containing the methamphetamine was not processed for latent fingerprints.

Agent Osborne was the case agent and organized the investigation into Killen's drug trafficking activities. He participated in surveillance of Killen's residence on September 20 and 21, 2016.

Osborne testified that on September 21, he saw "the same car from [September 20, 2016] show up with the same two people." Both occupants entered Killen's residence. He testified that he recognized the male on September 21 because he saw that the "male ... had tattoos on his hands, arms and neck, and wearing a baseball cap from the day before, and same build, same hat going in [Killen's residence] the next day." Osborne identified McGuire as the white male he saw on September 20 and 21 at Killen's residence.

The prosecution used telephone toll records in an attempt to corroborate McGuire as the person who gave the methamphetamine to Killen during the undercover buy. Agent Osborne testified that there "was an extremely high-volume of calls" between Killen's phone and a phone number registered to McGuire on September 20. He also testified that "during the time frame that [they] were doing the deal, between 3:30 and 3:41, there was no activity on the phone whatsoever."

On cross-examination, defense counsel pointed out that Killen "was in contact with 15 different phone numbers during the time of the undercover operation on September 21. Those contacts included two phone numbers belonging to a guy identified as "T.C.," registered to an Anthony Costello.

Defense counsel established that one of Anthony Costello's numbers was logged into Killen's phone forty times between 2:00 to 4:00 pm on September 21. The other number for Anthony Costello contacted Killen's phone 36 times during the same period.

Then defense counsel began to ask Osborne about a post-arrest statement he obtained from Killen after her arrest on the December 2018 indictment. In that statement, Killen gave Osborne a physical description of the person who supplied her the methamphetamine on September 21, 2016. Killen's physical description did not match McGuire's physical description. When defense counsel began to cross-examine Osborne about the contents of Killen's description, the prosecutor objected.

At first, the district court overruled the objection, but then switched courses. The district court sustained the objection after the prosecutor argued that the contents of Killen's statement did not fit any exception to the rule excluding hearsay. The prosecutor argued, "Killen has not been called to testify in this trial, so it's hearsay."

Defense counsel responded, "I am not admitting it for the truth of the matter, but I'm admitting it for what [Osborne's] state of mind was and how he conducted the investigation." App. 15. The judge sustained the objection. App. 16.

Without an ability to examine Osborne on Killen's post-arrest statement that described someone other than McGuire as the person who supplied her the methamphetamine on September 21, 2016 at her residence, McGuire was left without a defense. The district court simply allowed defense counsel to confirm through Agent Obsorne that an individual called "T.C." had been identified by the DEA as Anthony Costello.

Defense counsel tried a second time to question Osborne to establish that Anthony Costello more fit the physical description given by Killen in her post-arrest statement. The district court sustained the prosecutor's objection which completely shut down this line of cross-examination.

As previously indicated, during his first day of testimony, Osborne testified that he observed the white male's tattoos on his hands, arms and neck outside Killen's residence on September 21, the same male he saw on September 20. After an overnight break, during his second day of testimony, the prosecutor asked Osborne to identify the "kind of clothing" McGuire was wearing outside Killen's residence on September 21. He responded, "[j]eans and a jacket," a different description from his prior testimony. This change in testimony is significant.

The changed testimony made Osborne's later description more consistent with Brittain's testimony about the male wearing a jacket during the September 21 undercover operation. It also established inconsistent, and perhaps fabricated, testimony by Osborne in his testimony identifying McGuire as Killen's supplier in her residence.

The defense trial strategy rested on attacking the thoroughness and good faith of DEA's investigation by pointing out DEA's failure to investigate Anthony Costello as Killen's supplier at her residence on September 21, 2016. This strategy would also expose a potential bias in DEA's identification of McGuire as the person who supplied the methamphetamine during undercover buy-operation. After the jury found McGuire guilty, defense counsel filed a post-verdict motion for new trial.

Defense counsel alleged that by sustaining the government's objection, the district court precluded cross-examination of Osborne on Killen's post-arrest description and deprived "the jury ... of hearing this key testimony" that Killen had "identified a male, not fitting Mr. McGuire's physical description" as the supplier on September 21. App. 19. In her declaration supporting the motion, defense counsel informed the district court that Killen "described a second male who was present, and this male, who was stocky and Mexican or Native, pulled

something out of his jacket and she recalled giving this male the money.” App. 21-22.

Defense counsel pointed out that during a second post-arrest statement, Killen changed her identification of a Mexican or Native who supplied the methamphetamine, only after the agents “confronted her” about providing false information and then “suggestively” showed her a photograph of McGuire. In response, Killen said, “it must have been McGuire.” App. 22.

Defense counsel wrote: “the defense strategy was to elicit inconsistent identifications that would show the main participant in the drug transaction, Angela Killen, had identified in her first interview, a male whose physical characteristics were dissimilar to those of Mr. McGuire.” App. 23. She further wrote: “defense counsel intended to elicit through cross-examination of the DEA Agent Joe Osborne, the prior statement of Angela Killen in which she identified a short stocky Native or Mexican male was the person who brought the meth.” *Id.*

The defense strategy was to create a reasonable doubt that McGuire was Killen’s supplier on September 21, without having to call McGuire to testify at his trial. App. 25. Killen’s initial description pointed to Anthony Costello as the person who supplied the methamphetamine during the buy operation. Defendant counsel asserted that “[t]he exclusion and suppression of this exculpatory evidence denied [McGuire] his Due Process Right to a fair trial and to present his defense, and to cross examine witnesses.” App. 19.

The district court denied the motion, stating,

McGuire was free to call Killen as a witness and could have cross-examined her about the prior statements. He chose not to do so. Further, Killen’s statement bore none of the assurances of reliability in *Chambers*.¹ Nor do the facts and circumstances of McGuire’s inability to admit Killen’s hearsay statements indicate

¹ *Chambers v. Mississippi*, 410 U.S. 284 (1973).

McGuire was deprived of a fair trial. Instead, Killen's statements were inadmissible hearsay, but McGuire was free to admit them through Killen herself.

App. 10. McGuire appealed the district court's exclusion of defense counsel's cross-examination of Agent Osborne's into Killen's post-arrest description to the Ninth Circuit.

The Ninth Circuit affirmed the district court in an unpublished memorandum, stating,

The district court did not violate McGuire's due process rights by sustaining the government's hearsay objections to McGuire's efforts to elicit Agent Osborne's recollection of Killen's out-of-court statements. Such testimony was not admissible under the state of mind hearsay exception, because Killen's out-of-court statements identifying someone other than McGuire as the methamphetamine supplier were made years after the transaction, and were not spontaneous. *See United States v. Miller*, 874 F.2d 1255, 1264 (9th Cir. 1989). Rather, Killen's out-of-court statements are more "statement[s] of memory or belief to prove the fact remembered or believed," which do not fall within the state of mind hearsay exception. Fed. R. Evid. 803(3). Nor was such testimony admissible under *Kyles v. Whitley*, 514 U.S. 419 (1995), as out-of-court statements shedding light on the quality of a police investigation. *Kyles* establishes no such exception to relevant hearsay rules.

Further, the district court's exclusion of Agent Osborne's testimony as to Killen's out-of-court statements did not violate McGuire's right to present a complete defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Given the district court's determination that Killen was available to testify, and that McGuire could have called her as a witness and elicited her testimony directly, McGuire was not deprived of the ability to present his defense adequately.

App. 3-4. The Ninth Circuit missed the point.

Kyles established that due process is violated if a defendant is prevented in some manner from presenting to a jury facts that call into question the thoroughness or good faith of law enforcement investigation when information known by law enforcement points to another person

who committed the crime. 514 U.S. at 445-54. In *Kyles*, the exclusion of such evidence resulted from a *Brady* violation where the prosecution failed to disclose material exculpatory evidence known by law enforcement to the defendant that could have been used to establish that someone other than the defendant murdered a police officer.² *Id.*

In this case, the same type and quality of evidence was excluded by the district court when it sustained the prosecutor's hearsay objections that prevented defense counsel from cross-examining Agent Osborne into Killen's post-arrest description of her supplier that described someone other than McGuire as the person who supplied the methamphetamine during the September 21, 2016, undercover buy operation. The district court's ruling excluding defense counsel's cross-examination should be determined to be as much a due process violation as was the *Brady* violation in *Kyles*.

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether a trial court's ruling excluding evidence at trial violates a criminal defendant's right to due process, including the rights to confront and examine law enforcement witnesses, when the ruling precludes cross-examination designed to impeach the thoroughness and good faith of a law enforcement investigation on information obtained by law enforcement that some person other than the defendant committed the crime is important to maintaining consistent application of constitutional principles handed down by the Court in previous decisions, and is necessary to protect the accused's due process right to a fair trial and the rights to confront and examine witnesses called by the prosecution against the defendant.

² *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the suppression of evidence favorable to an accused upon request violates due process...").

The Ninth Circuit decided this case in a manner that conflicts with relevant decisions of the Court, particularly, the Court’s decisions in *Davis v. Alaska*, 514 U.S. 308 (1974), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and *Kyles*.

The Court in *Chambers* reiterated that “[t]he right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” 410 U.S. at 294. Therefore, due process includes “the rights to confront and examine witnesses” called by the prosecution against the defendant at trial. *Id.*

Kyles teaches that fundamental to due process and the right to a fair trial is the right of an accused to cross-examine law enforcement witnesses on knowledge of information obtained during an investigation that points to a person other than the defendant who may have committed the crime. *Kyles*, 514 U.S. at 446. Due process should afford a defendant the opportunity to attack the thoroughness and good faith of an investigation through cross-examination of a law enforcement witness where law enforcement failed or refused to investigate the other suspect known to the police. *Id.*

Here, the Ninth Circuit relied on the Federal Rules of Evidence that exclude hearsay to support the conclusion that the district court did not deprive McGuire of due process nor deprive his right to confront witnesses when the district court sustained the prosecutor’s objection to defense counsel’s examination of Agent Osborne about Killen’s description. App. 3-4. Since Killen’s description of a “Mexican or Native” as her supplier was “made years after the transaction, and were not spontaneous,” the Ninth Circuit concluded that hearsay rules precluded McGuire from cross-examining Osborne on Killen’s description. *Id.* (citing Fed. R. Evid. 803(3)).

In *Chambers*, the defendant was convicted of shooting and murdering a police officer. *Id.* at 285. Chambers was one of many patrons of a bar who gathered to outside during the evening hours to prevent police officers from arresting another patron. During the melee, the gun shots that killed the police officer came from the direction of an alley near the bar where Chambers was standing. Before falling to the ground, the police officer was able to shoot back with his shotgun, and it appeared that the fallen officer deliberately shot and wounded Chambers. *Id.* at 85-86.

At trial, the prosecution had just one law enforcement witness who specifically identified Chambers as the killer. Three other officers saw the wounded officer shoot Chambers and they concluded that the officer was shooting at his killer. *Id.* at 286.

There was no evidence that Chambers ever owned a pistol. A witness who was standing near the deceased officer was looking at Chambers when the shots rang out, and this witness testified that “he was sure” that Chambers did not shoot the officer. *Id.* at 289. The defense also relied on evidence that another person, McDonald, confessed to shooting the officer. *Id.* at 287-89.

At trial, the defense called McDonald as a defense witness and admitted a written confession executed by McDonald under oath where he confessed to shooting the officer with his .22 caliber pistol. On cross-examination, McDonald testified that he had previously repudiated his confession and only confessed due to a promise that he would receive a large sum of money from a lawsuit. He testified that he was in another bar and only arrived at the location of the shooting after hearing shots fired. McDonald testified that he found Chambers wounded and lying in the alley. *Id.* at 291.

After the prosecutor elicited McDonald's prior repudiation of his confession on cross-examination, the defense moved the trial court to declare McDonald an adverse witness and permit examination of McDonald on confessions he made to three of his friends that he shot the officer. The trial court denied the motion, precluding Chambers from using the three confessions to impeach McDonald's repudiation of his confession. *Id.* at 292. The trial court concluded that McDonald's testimony was not adverse to Chambers since McDonald's testimony did not directly implicate Chambers in the murder. *Id.* 291-92.

Chamber's then attempted to call the three friends as witnesses to testify that McDonald had individually confessed to them. *Id.* 292-93. The trial court excluded this testimony as hearsay. *Id.*

The Court reversed Chamber's conviction. *Id.* at 303. In doing so, the Court announced that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice." *Id.* at 302. Therefore, "the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

Here too, the trial court's mechanical use of the rule excluding hearsay precluded McGuire from developing his defense that someone else supplied Killen the methamphetamine sold to the undercover agents on September 21, 2016. The trial court precluded him from examining Agent Osborne about Killen's post-arrest statement where she described someone other the McGuire as her supplier. This precluded McGuire from establishing that Anthony Costello more closely matched Killen's physical description of her supplier which was

corroborated by evidence that Costello's phone had been in contact with Killen's phone multiple times on the day of the undercover buy operation. In sustaining the prosecution's hearsay objection, the trial court deprived McGuire of his right to present completely his only defense and denied him the right to a fair trial.

Furthermore, the Ninth Circuit rejected the impact of the Court's decision in *Kyles* on McGuire's due process claim. For sure, *Kyles* does not establish an "exception to relevant hearsay rules." App. 3.

Kyles does, however, establish that the due process right to a fair trial encompasses a defendant's rights to confront and examine law enforcement witnesses to expose "shoddy" investigations. *Kyles*, 514 U.S. at 442-54 n. 13 ("There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy."). This includes examining law enforcement witnesses on their knowledge of information about suspects other than the defendant who may have committed the crime. *Id.* at 446. The ability to examine a law enforcement witness for failing to investigate other known suspects does not turn on whether the person who provided information on the other suspect to law enforcement was called as a witness at trial. *Id.* *Kyles* supports the notion that a defendant's ability to "attack ... the thoroughness and even the good faith of [an] investigation" into other suspects is a critical component of due process when the defense centers on establishing a reasonable doubt that the defendant committed the crime and establishing that the police had information that some other person may have committed the crime and failed to act upon that information. *Id.* at 445-46.

The Court observed:

Even if *Kyles*'s lawyer had followed the more conservative

course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. *See, e.g., Bowen v. Maynard*, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case").

Id. at 446.

The fact that the district court concluded "that Killen was available to testify," and that McGuire could have called Killen as a witness at trial does not override his right to due process. App. 3; *see, Chambers*, 410 U.S. at 302 ("the hearsay rule may not be applied mechanically to defeat the ends of justice."). Just as the Court recognized as a sound strategic choice in *Kyles*, McGuire's defense counsel chose to follow "the more conservative course of leaving [Killen] off the stand" and chose to examine Agent Osborne on of Killen's statement that described a person other than McGuire as the person who supplied the methamphetamine in her home on September 21, 2016. *Kyles*, 514 U.S. at 466.

Both *Chambers* and *Kyles* support the conclusion that due process encompasses the right to develop a defense that some other person committed the crime through cross-examination of law enforcement witnesses about their knowledge of information that points to someone other than the defendant who may have committed the crime. This type of examination was essential to McGuire's right to present a complete defense. *See, Crane v. Kentucky*, 476 U.S. 683, 690

(1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”).

a. This case presents the Court with an ideal vehicle to apply of same due process principles from *Brady*, as recognized in *Kyles*, that prevented an accused from attacking the thoroughness and good faith of law enforcement’s investigation by withholding impeachment evidence from the defendant before trial to situations where a trial court prevents the the accused from using the same type of impeachment evidence through an evidentiary ruling at trial.

Federal court of appeals’ decisions and state appellate court decisions that have addressed *Kyles* in relation to *Brady* are uniform in their conclusions. These cases consistently hold that when the prosecution withholds evidence from a defendant before trial that prevents the defendant an “opportunity to attack ‘the thoroughness and event the good faith of the [law enforcement] investigation,’” the failure to disclose such material exculpatory evidence to the defendant before trial runs afoul of *Brady* and violates due process. *See, Fontenot v. Crow*, 4 F.4th 982, 1081-82 (10th Cir. 2021) (citing *Kyles*, 514 U.S. at 445) (the withheld evidence “would also raise an opportunity to attack ‘the thoroughness and even good faith of the investigation.’”); *United States v. Obagi*, 965 F.3d 993, 998 (9th Cir. 2020) (same); *Floyd v. Vannoy*, 894 F.3d 143, 165 (5th Cir. 2018) (same); *Jupiter v. Zook*, 876 F.3d 551, 570-71 (4th Cir. 2017) (same); *Bies v. Sheldon*, 775 F.3d 386, 401 (6th Cir. 2014) (same); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (same); *In re Sodersten*, 146 Cal.App.4th 1163, 1243, 53 Cal.Rptr.3d 572 (2007) (same); *Workman v. Commonwealth*, 636 S.E.2d 368, 376, 272 Va. 633, 647 (2006) (same); *Johnson v. State*, 38 S.W.3d 52, 57 (2001) (same); *Lay v. State*, 14 P.3d 1256, 1262, 116 Nev. 1185, 1194 (2000) (same); *Mazzan v. Warden, Ely State Prison*, 993 P.2d 25, 37, 116 Nev. 48, 67 (2000) (same).

In *Watson v. Greene*, the defendant was convicted by a jury of first degree murder and sentenced to a minimum of twenty five years in prison. 640 F.3d 501, 507 (2d Cir. 2011). The defendant, Watson, and Rakeem Harvey robbed an individual, and during the course of the robbery the victim was shot and killed. At trial, Watson denied shooting the gun and claimed that Harvey shot the victim. *Id.* 505-07.

Harvey testified at trial that Watson shot the victim. *Id.* at 506. He was the prosecution's key witness. Well before trial, police officer, Sherry Pierce, unrelated to the murder investigation called and reported to an unknown officer that she overheard a conversation amongst her family members that Harvey had admitted to some member of his family that he accidentally shot the victim during the robbery. Some of Officer Pierce's family knew members of Harvey's family. *Id.* at 503.

A note of Pierce's report was made by the unknown officer, called the "Harvey Note." The note was placed in the investigative file under the care of lead detective, Warren Bond. *Id.* at 503-04. The prosecutor did not disclose the Harvey Note to the defense until the second day of jury selection. *Id.* at 504. The defense requested the trial court three time to permit cross-examination of Harvey, Pierce and Bond on the existence of the notation that Harvey had admitted to some family member that he accidentally shot the victim. *Id.* 505-06.

The trial court did not allow the defense to refer to the contents in the Harvey Note in his cross-examinations, holding that the statements in the note were double, if not triple, hearsay. *Id.* at 505. The defense was permitted to ask Harvey if he ever admitted to neighbors or family that the gun accidentally discharged during the robbery. He denied making such statement. The trial court prohibited defense counsel from calling Pierce to testify as to what she overheard about

Harvey, and prohibited the defense from examining Bond about the contents in the Harvey Note.

Id. at 505.

Watson's murder conviction was upheld on direct appeal. *Id.* 507. He then filed a habeas corpus petition in federal court.

Watson claimed that the trial court violated his Sixth Amendment right to confront witnesses by prohibiting cross-examination of Bond on the contents of the Harvey Note to impeach "Bond's reliability, the thoroughness of his investigation." *Id.* at 512. The Second Circuit concluded that Watson's right to confront Bond was not violated because the trial court "allowed defense counsel to inquire into this topic on cross-examination ... [by] eliciting a number of statements going to the thoroughness of the investigation..." *Id.* Thus, the Second Circuit concluded, that the trial "imposed only a limited restriction that prohibited questioning Bond about the Harvey Note." *Id.*

The Second Circuit rejected the assertion in *Watson* that *Kyles* supported his claim, stating, that "the Supreme Court 'stressed the importance of allowing the defense to inquire about information not pursued police investigators.'" *Id.* n. 11 (citing *Kyles*, 514 U.S. 419). The Second Circuit noted,

[*Kyles*] addresses only the prosecutor's obligation to disclose *Brady* material. *Kyles* held that the prosecution improperly withheld evidence that, had it been disclosed, would have "raised opportunities to attack ... the thoroughness and even the good faith of the investigation." *Id.* at 445. *Kyles* provides no guidance about what evidence must be admitted at trial or what lines of questioning must be permitted to ensure a meaningful opportunity to cross-examine adverse witnesses.

Watson, 640 F.3d at 512 n. 11.

Watson is the only other case located where a lower appellate court affirmed a trial court’s exclusion of hearsay evidence and rejected the defendant’s claim that exclusion of that evidence violated the right to cross-examine the thoroughness and good faith of law enforcement investigation, just as the Ninth Circuit’s did in this case. App. 3. Even if the outcome in *Watson* is correct, the Second Circuit’s decision offers additional insight into why due process and the right to confront witnesses were violated in this case.

Watson concluded that the defendant’s right to confront witness was not violated because the trial court did not prohibit “*all* inquiry into an issue that is important to the jury’s assessment of a witness’s credibility.” *Watson*, 640 F.3d at 509 (emphasis in original) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). In *Van Arsdall*, the trial court excluded evidence of a prosecution’s witness in a murder trial that the witness had a charge of “being drunk on a highway” dismissed by the prosecution in order to secure the witness’s testimony. *Van Arsdall*, 475 U.S. at 676. The Court concluded that by excluding “*all* questioning” of a prosecution’s witness “about an event that the State conceded had taken place and the jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court’s [evidentiary] ruling violated respondent’s right secured by the Confrontation Clause.” *Id.* at 679 (emphasis added).

Watson also noted the Court’s decision in *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the Court reversed the defendant’s conviction for a violation of the Confrontation Clause because the trial court prohibited the defense from cross-examining a prosecution witness on a prior juvenile record. *Watson*, 640 F.3d at 509 n. 9 (citing *Davis v. Alaska*, 415 U.S. at 317). *Watson* emphasized that the trial court’s exclusion in *Davis* “entirely” prohibited cross-

examination into the witness's prior juvenile record. *Id.*

The Court in *Davis* stated:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis, 415 U.S. at 316.

When the district court sustained the prosecution's objection precluding defense counsel's inquiry into Killen's description of her supplier as a "Mexican or Native" to Agent Osborne, a description that more resembled Anthony Costello than McGuire, that ruling shut down *all* inquiry into the existence of another suspect known by the DEA. This ruling essentially shut down all impeachment evidence attacking the thoroughness and good faith of the investigation. It prevented defense counsel from establishing that the DEA failed to investigate Anthony Costello and expose the investigation's bias against McGuire. Had the district court permitted such inquiry, the questioning would have explained to the jury the significance of the fact that Costello's phone had been in contact with Killen's phone numerous times on September 21, around the time of the undercover purchase by DEA.

Just as in *Van Arsdall* and *Davis*, the trial court's exclusion of this impeachment evidence violated the Confrontation Clause. This case, therefore, presents the Court with an excellent opportunity to apply the same principles of due process, including the rights to confront and examine witnesses, to a trial court's decision to exclude evidence that is material and favorable to a defendant at trial.

The difference between this case and the cases like *Kyles* is that the question presented here centers on the trial court's exclusion of the same type and quality of evidence excluded in *Kyles* where the prosecution withheld evidence relevant to attacking the thoroughness and good faith of a law enforcement investigation. The petition in this case arises from a direct appeal based on the trial court's ruling excluding an examination material to the defense, rather than in a post-conviction proceeding based on a *Brady* violation. The same due process principles should, however, be applied consistently regardless of the procedural posture of a case.

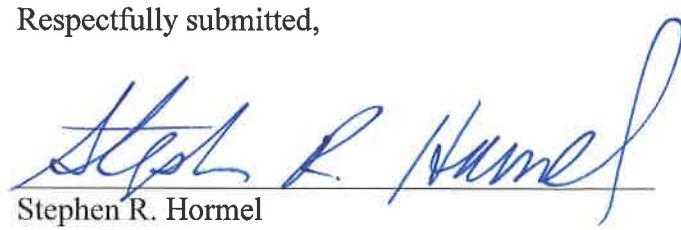
The Court's decisions in *Chambers*, *Kyles*, *Van Arsdall* and *Davis* are important to resolution of the question presented. The Ninth Circuit's decision in this case conflicts with the constitutional principles laid down in these decisions. This case is an ideal vehicle for resolution of the question presented.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari. It is requested that the Court order briefing on the merits of the question presented and hold that a defendant has a due process right to a fair trial that includes the Sixth Amendment rights to confront and examine law enforcement witnesses at trial in an effort to attack the thoroughness and good faith of an investigation into other known suspects, regardless of whether these due process rights were violated by the prosecution's exclusion of evidence before trial resulting in a *Brady* violation or the same due process rights are violated by a ruling of the trial that effectively precludes such examination.

Dated this 21st day of November, 2022.

Respectfully submitted,



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