No. 22-826

In The

Supreme Court of the United States

LORI D. MCLAUGHLIN,

Petitioner,

v.

MERRICK B. GARLAND, in his official capacity as United States Attorney General,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Are law enforcement officers entitled to due process rights prior to a Giglio determination?

Does the DOJ Giglio Policy violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution?

RELATED CASES

Lori D. McLaughlin v. William B. Barr, Case No. 1:20:CV:230, U.S. District Court for the Middle District of North Carolina. Judgment entered November 23, 2020.

Lori D. McLaughlin v. Merrick B. Garland, Case No. 21-1399, U.S. Court of Appeals for the Fourth Circuit. Judgment entered November 30, 2022.

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Petitioner Lori D. McLaughlin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

Refusing to consider the merits of the case, the court of appeals affirmed the district court's

decision on the wrongful dismissal based on a technicality of untimeliness. The decision is available at *Lori D. McLaughlin v. William B. Barr*, Case No. 1:20:CV:230, 2022 U.S. App. LEXIS ___, 2022 WL ___ (4th Cir. 2022).[1]

JURISDICTION

On November 30, 2022, the Fourth Circuit filed its decision. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] A copy of the decision is attached as Appendix A.

STATEMENT OF THE CASE

I.

In February 2001, Lori D. McLaughlin (African American) was sworn in as an ATF Special Agent in Baltimore, Maryland. During which time, she accepted the duty to protect and serve the American people. The oath of office didn't require, and Lori D. McLaughlin did not agree to, "service" men inside our U.S. Department of Justice. After reporting sexual misconduct in the ATF Charlotte Field Division, SAC Wayne Dixie and ASAC C.J. Hyman both sought to remove Lori D. McLaughlin from the division. Even though another special agent (White/Female) had previously reported sexual misconduct (i.e., grinding his groin against office furniture, requesting her to straddle his back for a massage, etc.) against the same supervisor. She wrote a statement in support of the complaint filed by Lori D. McLaughlin, after the ATF Charlotte Field Division refused to investigate or discipline the supervisor in 2013.

Due to the ongoing stress and anxiety created by the hostile work environment, Lori D. McLaughlin repeatedly requested to be removed from his supervision with negative results. It appeared that ATF management officials were attempting to destroy her mental health in hopes that Lori D. McLaughlin would simply resign her position. As a former EEO specialist, she is aware of this strategy or tactic because it has long been used by ATF management officials to punish women (i.e., G/S Tarrance Jones, A/S Marsha Baker, Freddie

Moore, etc.) who summon the courage to report sexual misconduct or sexual harassment. However, Lori D. McLaughlin elected to seek EAP counseling and reported SAC Wayne Dixie to the ATF Deputy Associate Director in Washington, DC for his failure to address the hostile work environment in the Fayetteville Field Office. As a result, the supervisor was removed from the office and Lori D. McLaughlin was finally reassigned to the ATF Greensboro Field Office in 2015. Thus, SAC Wayne Dixie and ASAC C.J. Hyman began their revenge campaign.

II.

On August 16, 2017, Lori D. McLaughlin filed a civil action lawsuit in the Middle District of North Carolina citing employment discrimination and retaliation by ATF management officials. *(Reference: Civil Action Complaint # 1:17-CV-759, Middle District of North Carolina)* Lori D. McLaughlin also highlighted unethical conduct committed by DOJ attorneys inside the civil action lawsuit. In fact, Lori D. McLaughlin filed a court motion accusing DOJ attorneys of misrepresenting facts and intentionally misleading the court regarding the Defendant's Motion to Extend Time to Respond to the Complaint. *(Reference: Defendant's Motion to Extend Time to Respond to the Complaint, # 1:17-CV-759, Middle District of North Carolina)* Specifically, Lori D. McLaughlin stated in her court motion that she would forward the aforementioned violation to the appropriate legal bar association for their interpretation regarding the Defendant's actions. *(Reference:*

Plaintiff's Reply to the Federal Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration Filed on April 23, 2018, # 1:17-CV-759, Middle District of North Carolina)

In October 2017, the Department of Justice recused the United States Attorney's Office (USAO) for the Middle District of North Carolina (MDNC) from defending Lori D. McLaughlin's civil action lawsuit to avoid the appearance of a "conflict of interest." For litigation purposes, the Department of Justice transferred the civil action lawsuit to the Western District of North Carolina (WDNC). Furthermore, the USAO decided that Lori D. McLaughlin could not conduct any criminal investigations or have any contact with the MDNC. On October 11, 2017, the written instructions were forwarded to ATF management officials (i.e., SAC C.J. Hyman, RAC Jason Walsh, etc.) by Acting United States Attorney Sandra Hairston. *(Reference: Email from Sandra Hairston/October 11, 2017)*

As a result, ATF notified Lori D. McLaughlin that it was temporarily reassigning her criminal cases and/or investigations to another criminal investigator pending the conclusion of the civil action lawsuit. In retaliation, ASAC Ernie Diaz and RAC Jason Walsh falsely represented a "conflict of interest" with the Eastern District of North Carolina (EDNC) and the Western District of North Carolina (WDNC) in order to maliciously remove Lori D. McLaughlin from her "field" criminal investigator's position in the ATF Greensboro Field Office. *(Reference: Memorandum from Ernie Diaz/October 13, 2017)* During the official meeting,

Lori D. McLaughlin informed both ASAC Ernie Diaz and RAC Jason Walsh that she had never indicted any criminal investigations in the EDNC. Based on this fact, the USAO could not support any "conflict of interest" with Lori D. McLaughlin in the EDNC. Therefore, the ATF could request the transfer of the civil action lawsuit to the EDNC in order to allow Lori D. McLaughlin to continue conducting criminal investigations in her assigned counties in the WDNC without removing her from a "field" criminal investigator's position. At a minimum, ATF could have allowed Lori D. McLaughlin to conduct criminal investigations in the EDNC.

There is no doubt that RAC Jason Walsh received the written email instructions from Acting United States Attorney Sandra Hairston with no mention of any "conflict of interest" with the EDNC or the WDNC. *(Reference: Email from Sandra Hairston)* As the supervisor in the ATF Greensboro Field Office, RAC Jason Walsh was definitely aware of the instructions given by the USAO regarding Lori D. McLaughlin's criminal investigations. In addition, RAC Jason Walsh was clearly aware that she was assigned several counties in the WDNC for which Lori D. McLaughlin could have continued to conduct criminal investigations. Despite being the primary vault custodian, Lori D. McLaughlin was still the top-producing ATF special agent in the ATF Greensboro Field Office at the time she was wrongfully removed from her "field" criminal investigator's position. *(Reference: Greensboro Field Office – Case Production Statistics/FY2017)*

As such, Lori D. McLaughlin immediately forwarded the ATF memorandum containing the false "conflict of interest" accusations to Acting United States Attorney Sandra Hairston. During the EEO investigation, she acknowledged receiving Lori D. McLaughlin's email but Acting United States Attorney Sandra Hairston failed to take any appropriate actions to remedy the matter. Under oath, AUSA Sandra Hairston finally admitted that she never gave ATF management officials any directive or had any discussions regarding Lori D. McLaughlin's assignments in the EDNC or WDNC. *(Reference: Supplemental Affidavit of Sandra Hairston, page 1, question 4)* Meaning, the ATF did not have "just cause" to remove Lori D. McLaughlin from her "field" criminal investigator's position, as she could have conducted criminal investigations in the EDNC or WDNC in October 2017. For years, DOJ/ATF management officials refused to correct this malfeasance and Lori D. McLaughlin continued to be barred from conducting criminal investigations.

According to the ATF memorandum, Lori D. McLaughlin would return to her "field" criminal investigator's position at the conclusion of the civil action lawsuit. Subsequently, the lawsuit was dismissed by the court on June 8, 2018. *(Reference: Court Decision # 1:17-CV-759, Middle District of North Carolina)* Given that Lori D. McLaughlin was the highest producing special agent in the ATF Greensboro Field Office and only removed because of her civil action lawsuit, RAC Jason Walsh should have made every attempt to have Lori D. McLaughlin placed back into her

"field" criminal investigator's position. In retaliation, SAC Wayne Dixie decided to reassign Lori D. McLaughlin to the National Center for Explosives Training and Research (NCETR) without "just cause" in June 2018. As planned, SAC Wayne Dixie was attempting to force Lori McLaughlin out of the Charlotte Field Division to work from her personal residence. *(Reference: Emails from S/A Lori McLaughlin/July 5, 2018)* Again, Lori D. McLaughlin reported the retaliation and the NCETR reassignment was rescinded by the ATF Executive Staff in Washington, D.C. *(Reference: Email from DAD William Temple/July 12, 2018)*

III.

Based on the failed NCETR reassignment, the ATF Charlotte Field Division orchestrated another "conspiracy" to permanently remove Lori D. McLaughlin from her "field" criminal investigator's position. Most telling, SAC Wayne Dixie instructed DOJ Attorney Barry Orlow to review ATF files for any potential impeachment information regarding S/A McLaughlin in July 2018. *(Reference: Affidavit of Barry Orlow, page 3, question 4)* Subsequently, the Office of Chief Counsel forwarded Lori D. McLaughlin's ATF Internal Affairs Investigative records to the USAO in order to get her placed into a "Giglio" status. *(Reference: Email from Bobby Higdon/November 1, 2018)*

In retaliation, SAC Wayne Dixie falsely stated in his MSPB sworn declaration that all three (3) U.S. Attorneys advised him that they would not prosecute any

criminal investigations conducted by Lori D. McLaughlin. *(Reference: SAC Wayne Dixie/MSPB Sworn Declaration, page 2, question 9)* During the EEO counseling process, Lori D. McLaughlin rightfully requested to know the "information" that prevented her from testifying in Federal court. However, the three (3) U.S. Attorneys failed to cooperate with the administrative process and refused to identify the aforementioned "information" in violation of EEO policy. *(Reference: Email from EEO Counselor Brenda Bryant/March 7, 2019)* In fact, the EEO Office took no steps to gain compliance with DOJ/ATF policy requiring employees to cooperate with the EEO administrative process. Again, Lori D. McLaughlin reported this noncompliance to DOJ/EEO, EEOC, OSC, and GAO with negative results. *(Reference: Email, Request to Extend EEO Counseling/March 18, 2019)* In addition, Lori D. McLaughlin reported this unethical conduct to DOJ/EEO, EEOC, and OIG with negative results. *(Reference: Email, Request for Extension of EEO Investigation/June 26, 2019)* Somehow, Lori D. McLaughlin had participated in the full extent of the ATF "administrative process" and she was still clueless regarding the "information" that prevented her from testifying in Federal court.

Most courageous, U.S. Attorney Robert Higdon admitted (under oath) that EDNC had made no such decision (to not prosecute) regarding criminal investigations conducted by Lori D. McLaughlin. *(Reference: Affidavit of Robert Higdon, page 3, question 2)* His testimony is a direct contradiction to the sworn testimony of SAC Wayne Dixie. Most outrageous, U.S. Attorney

Andrew Murray stated "given the pro se allegations of Special Agent McLaughlin in the lawsuit against Attorney General Sessions, and the fact that those allegations were not substantiated by the court, that I could not foresee any circumstances where I would be willing to voluntarily call her as a government witness at trial." *(Reference: Affidavit of Andrew Murray, page 3, question 4)* In retaliation, USA Andrew Murray based his decision on the fact that Lori D. McLaughlin's allegations were not substantiated by the court, when the Defendant refused to respond and the court did not require/force the Defendant to respond to her allegations. Most importantly, the court did not allow any opportunity for Lori D. McLaughlin to prove her allegations with any discovery process.

Lastly, Lori D. McLaughlin was most appalled by the decision of U.S. Attorney Matthew G.T. Martin to not prosecute her criminal investigations. Specifically, USA Matthew G.T. Martin stated "based upon Agent McLaughlin's actions and disciplinary record related to the ATF Internal Affairs Division investigations, which would have to be disclosed if Agent McLaughlin were to serve as a case agent and witness in a criminal prosecution, I informed SAC Dixie that our office would not be able to prosecute cases that she presented for prosecution." *(Reference: Affidavit of Matthew G.T. Martin, page 4, question 4)* As a former EEO Specialist, this is perhaps the most mind-boggling example of demonstrable retaliation that Lori D. McLaughlin has seen in many years.

Prior to filing the civil action lawsuit, the MDNC had absolutely no issues or concerns with prosecuting criminal investigations (10 case reports/13 defendants) conducted by Lori D. McLaughlin from October 2016 – October 2017. *(Reference: Email from DOO Winfred Pressley/February 6, 2018)* In fact, AUSA Terry Meinecke was aware of the misconduct investigations and he previously advised Lori D. McLaughlin that the misconduct investigations did not present any "Giglio" issues for her. Coincidentally, Lori D. McLaughlin's last suspension, which was also associated with her last internal affairs investigation, occurred on May 20, 2016. *(Reference: S/A Lori McLaughlin's SF-50, Notification of Personnel Action)* A year later, the MDNC was still prosecuting Lori D. McLaughlin's criminal investigations (i.e., ATF #17-0025, Shemar ANDERSON, Jalen HAIRSTON, Marcus MCINTOSH, Anthony STEELE; #17-0031, Christopher JACKSON; #17-0046, Christopher LEACH; #17-0048, Rick THOMPSON; #17-0050, Diangello STRONG; #17-0081, Mandrail WOODBERRY; #17-0090, Jesse BUCHANAN; #17-0092, Kalio JOHNSON). Given the sworn testimony of USA Matthew G.T. Martin and USA Andrew Murray, the defense attorneys in the above cases should have been notified of Lori D. McLaughlin's "Giglio" impairment, as these cases were all prosecuted after the ATF Internal Affairs investigations. In the interest of justice, the court should order a full review of these criminal cases for possible "Giglio" violations, as the government never disclosed Lori D. McLaughlin's misconduct investigations.

IV.

The district court ruled that the complaint and referenced exhibits establish that Ms. McLaughlin did not timely raise her current discrimination claims with the EEO Office. Her claims are untimely and will be dismissed. To the extent she raises other claims outside the scope of the relevant EEO charge, those claims will be dismissed for failure to exhaust her administrative remedies.

On appeal, Lori D. McLaughlin argued that her contact with the EEO Office was timely and she had exhausted the administrative remedies regarding the Giglio issue. As a Pro se litigant, Lori D. McLaughlin submitted an Informal Brief to support her appeal. APP-C at 23 A year later, the court of appeals reassigned the case to a Court-Appointed Amicus Counsel without any discussion or communication with Lori D. McLaughlin (Pro se litigant). For some reason, the court of appeals only requested to be briefed on the Giglio issue and not the timeliness issue.

The court of appeals affirmed the district court's dismissal of McLaughlin's discrimination and retaliation claims as time-barred because she did not exhaust her administrative remedies. The court of appeals also affirmed the district court's dismissal of McLaughlin's claims as implausible.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

The U.S. Court of Appeals for the Fourth Circuit erred in affirming the district court's dismissal of Lori D. McLaughlin's discrimination and retaliation claims as time-barred because she did not exhaust her administrative remedies. Given "the Federal Rules simplified standard for pleading, [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that be proved consistent with the allegations." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) In light of these principles, the court has repeatedly cautioned against *sua sponte* dismissals of *pro se* civil rights complaints prior to requiring the defendants to answer. For over five (5) years, Lori D. McLaughlin has waited for the U.S. Department of Justice (DOJ) to respond to the allegations made inside her lawsuit. District Judge Catherine C. Eagles has never requested or required DOJ to provide a response to allegations in the lawsuit. Yet, she ruled that "the record establishes legitimate, non-discriminatory reasons for prosecutorial decisions that cannot plausibly be attributed to discriminatory or retaliatory motives." APP-B at 20 Perhaps, the DOJ will identify this evidence inside their response to this brief.

First of all, the court of appeals incorrectly stated that "the DOJ determined that, to avoid any appearance of a conflict of interest if its employees were called as witnesses, McLaughlin should not conduct criminal investigations for ATF in North Carolina pending the

resolution of the lawsuit." APP-A at 3 The court's assessment is not supported by the record or any government witness. Again, AUSA Sandra Hairston admitted that she never gave ATF management officials any directive or had any discussions regarding Lori D. McLaughlin's assignments in the EDNC or WDNC. *(Reference: Supplemental Affidavit of Sandra Hairston, page 1, question 4)* Also, USA Robert Higdon admitted that EDNC had made no such decision (to not prosecute) regarding criminal investigations conducted by Lori D. McLaughlin. *(Reference: Affidavit of Robert Higdon, page 3, question 2)* Based on the testimony of these "government" witnesses, Lori D. McLaughlin could have conducted criminal investigations in both the EDNC and WDNC in October 2017. The opportunity to depose these witnesses would have provided clarification of the official record. For this reason, the U.S. Supreme Court ruled that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

Secondly, the court of appeals incorrectly stated that "on March 11, 2020, McLaughlin filed the instant lawsuit alleging that ATF's reassignment of her to CGIC was an adverse employment action based on her race, sex, and age." APP-A at 4 When in fact and truth, Lori D. McLaughlin filed a four (4) count complaint, including race, sex, age, and retaliation. To which, the very first allegation in the individual counts stated that "in 2018, DOJ/ATF officials (USA Matthew G.T. Martin, USA Andrew Murray, SAC Wayne Dixie, ASAC

Ernie Diaz, RAC Jason Walsh, etc.) conspired with one another to place the Plaintiff into a "Giglio" status in order to permanently remove her from a "field" criminal investigator's position without any official notification or "due process rights" to defend her career." *(Reference: Civil Action Complaint # 1:20-CV-230, Middle District of North Carolina)* This statement was copied verbatim throughout the complaint, as the Giglio issue was the foundation of the lawsuit. Given the agenda to shield the U.S. Attorney's Office, the court failed to make mention of the Giglio issue that was clearly identified in the lawsuit.

Third, the court of appeals incorrectly stated that SAC Wayne Dixie explains, "the United States Attorneys were not willing to accept cases investigated by McLaughlin due to the disparaging remarks that McLaughlin had made against officials with the DOJ, ATF, and USAOs." APP-A at 8 When in fact and truth, this statement does not appear in the sworn declaration signed by SAC Wayne Dixie. Moreover, the statement is contradicted by the testimony of both USA Robert Higdon and USA Matthew G.T. Martin. It reflects very poorly on this court to misrepresent the evidence to support their wrongful dismissal of this lawsuit. We can only imagine how many other *pro se* lawsuits have been railroaded in the same manner to shield the U.S. Attorney's Office. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing

opposition or dissention. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (1951).

Further, the court of appeals stated that "the court subsequently appointed amicus counsel to brief the issues in support of McLaughlin." APP-A at 9 If taken at face value, the phrase "in support of McLaughlin" would lead someone to believe that amicus counsel was going to help or assist Lori D. McLaughlin. Based on a conversation with amicus counsel (Adam Farra), it appears that he was assigned to the case "in support of" the U.S. Attorney's Office. As Adam Farra explained that Ms. McLaughlin did not have any attorney-client privileges when discussing her case with amicus counsel, she could not have any input on the argument contents, she could not review the brief filed in her case and amicus counsel did not represent Lori D. McLaughlin. APP-D at 48 It appears that the court of appeals was hijacking her case under the pretext of needing an oral argument. With the assignment of amicus counsel, the court of appeals could ignore the compelling argument and evidence submitted with the Informal Brief filed by Lori D. McLaughlin. We can only imagine how many other pro se lawsuits have been hijacked with the abuse of oral arguments to shield the U.S. Attorney's Office.

For the official record, Lori D. McLaughlin submitted her written input for the Reply Brief to amicus counsel. APP-E at 59, APP-F at 60 However, the Reply Brief did not contain pertinent information from legal cases involving possible "Brady" violations committed by the U.S. Attorney's Office. APP-G at 80 Once the

Court-Appointed Amicus Counsel was allowed to water down the briefs, the oral argument was no longer needed by the court of appeals to decide the case. It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal protection under the law. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (1951).

As previously stated, the U.S. Court of Appeals for the Fourth Circuit erred in affirming the district court's dismissal of Lori D. McLaughlin's discrimination and retaliation claims as time-barred because she did not exhaust her administrative remedies. According to the U.S. Supreme Court, Title VII charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdiction prescription delineating the adjudicatory authority of the courts. *Fort Bend County v. Davis*, 587 U.S. ___ (2019). Based on the evidence, Lori D. McLaughlin fully exhausted her administrative remedies and her contact with the EEO Office was timely in accordance with 29 C.F.R. 1614.105. Specifically, the Informal Brief contained an email requesting informal EEO counseling on January 8, 2019. Most importantly, the email states that "the USAO and ATF management officials have terminated my criminal investigator's career and placed me in a "Giglio" status without any "due process rights" to defend myself or communication regarding the matter." Somehow, the

court has deemed the "Giglio" issue to be new to the lawsuit. When in fact and truth, the Giglio issue was the primary basis for the lawsuit.

As evidence, the EEO Formal Complaint was also attached to the Informal Brief. This complaint also states that "three (3) United States Attorney's Offices located in North Carolina decided not to prosecute any criminal investigations conducted by Lori McLaughlin based on information" without giving her any official notification or "due process rights" to defend against the "information." The complaint also named ATF management official, ASAC Ernie Diaz. Based on the informal EEO counseling request and the Formal EEO Complaint, the Giglio determination was the basis for the lawsuit. As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 (1972), a *pro se* complaint, "however inartfully pleaded, must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 520-521 (1972) *Estelle v. Gamble*, 429 U.S. 97 (1976).

The question now becomes, when did Lori D. McLaughlin receive notification of the Giglio determination. The record is clear and convincing that the DOJ failed to issue any verbal or written notification to Lori D. McLaughlin. There is absolutely no testimony from any government witness to contradict this fact. Based on the testimony of the government's witness, SAC Wayne Dixie instructed DOJ Attorney

Barry Orlow to review ATF files for any potential impeachment information regarding S/A McLaughlin in July 2018. *(Reference: Affidavit of Barry Orlow, page 3, question 4)* Therefore, the court of appeals has erred in stating that Lori D. McLaughlin was given notification of the Giglio determination during a meeting with SAC Wayne Dixie on June 29, 2018. As SAC Wayne Dixie did not initiate the Giglio search of her personnel records until July 2018 and he did not forward the personnel records to the USAO until late 2018. Thus, Lori D. McLaughlin learned of the Giglio determination from the sworn declaration signed by SAC Wayne Dixie on December 18, 2018. In accordance with 29 C.F.R. 1614.105, Lori D. McLaughlin contacted the EEO Office within 45 days of when she became aware of the discrimination on January 8, 2019.

As the court is well aware, Lori D. McLaughlin has no control over whether the agency conducts an investigation or of the contents of said investigation. Clearly, Lori D. McLaughlin met her only burden to give the agency the "opportunity" to investigate when she raised the issue of the Giglio determination inside her Formal EEO Complaint and the informal EEO counseling process. Nonetheless, the EEO Counseling Report was also attached to the Informal Brief which documented contact interviews with the three (3) U.S. Attorney's and the ATF Giglio Official. Indeed, it is very disheartening that the court of appeals discounted all this evidence in their efforts to shield the U.S. Attorney's Office and deny justice to Lori D. McLaughlin.

II.

In *Giglio*, the Supreme Court has held that criminal defendants have a due process right to be informed of evidence affecting a government witness's credibility. *Giglio v. United States*, 405 U.S. 154 (1972). However, the court did not address the officer's constitutional rights in the context of being Giglio impaired by government officials. It appears that we lack standards for what conduct is Giglio, whether the information must be substantiated, whether the officer is given notification and whether the officer is entitled to a hearing. The federal courts are the appropriate forum for ensuring that the constitutional mandates of due process are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the "harsh fact" of "incorrect or ill-advised" personnel decisions. *Bishop v. Wood*, 426 U.S. 341 (1976).

Absent such standards, the U.S. Department of Justice (DOJ) will continue violating the "due process rights" of Federal law enforcement officers in connection with their Giglio responsibilities. In 2019, Lori D. McLaughlin attempted to challenge the Giglio determination, but the ATF Giglio Official confirmed that DOJ did not have any official notification process or formal mechanism for such a challenge. *(Reference: Affidavit of Barry Orlow, page 4, question 7)* With respect to occupations controlled by the government, the 5th circuit has said that "the public has the right to expect

its officers to observe prescribed standards and to make adjudications on the basis of merits." The first step toward ensuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

As evidence of abuse, DOJ has failed to identify a single integrity violation affecting the credibility of Lori D. McLaughlin. In fact, amicus counsel (third party) reviewed Lori D. McLaughlin's lawsuit filed in the Middle District of North Carolina. In the court brief, they stated that "as a special agent for ATF, McLaughlin has been involved in hundreds of criminal cases over her 20+ years, frequently serving as the lead investigator and case agent." Based on the record, amicus counsel concluded that "in none of those prosecutions has there ever been any suggestion that Special Agent McLaughlin's integrity and credibility as a testifying witness or case agent is anything other than sterling." *(Reference: Brief of Court-Appointed Amicus Curiae Supporting Reversal, Case No. 21-1399, U.S. Court of Appeals For the Fourth Circuit, Lori D. McLaughlin vs. Merrick Garland)* In response, DOJ has never refuted the assertion or provided any evidence of any integrity violation against Lori D. McLaughlin. APP-H at 85 The court states that "it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." *Board of Regents v. Roth*, 408 U.S. 589 (1972).

Also, the DOJ failed to issue Lori D. McLaughlin any verbal notification and refused to issue written documentation in connection with their Giglio determination. The court has found that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Most importantly, DOJ failed to adhere to the notification guidelines set by the Office of Personnel Management (OPM). Specifically, OPM requires the agency to furnish written notice of any personnel action taken against employees. According to OPM, the agency has the obligation to inform its employees when a change has occurred in their condition of employment. The agency may not transfer this obligation to the employee requiring employees to ask whether or not a personnel action has been affected. When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct. *Board of Regents v. Roth*, 408 U.S. 592 (1972).

Furthermore, "the courts have required that the claimant be accorded notice of the charges against him and an opportunity to support his allegations by argument however brief, and, if need be, by proof, however informal." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 17 (1978). In this case, DOJ violated OPM regulations with their failure to provide notification to Lori D. McLaughlin in connection with their Giglio determination. Conversely, DOJ provides timely

notification to other Federal law enforcement officers at the United States Department of Homeland Security. As the Chief AUSA sent a letter to the agency, confirming that Mr. Nguyen could no longer testify or declare under oath in their criminal prosecutions. *Nguyen v. Dept of Homeland Sec.*, No. 2013-3024 (Fed. Cir. 2013).

In addition, USA Matthew G.T. Martin and USA Andrew Murray violated the "Giglio" policy issued by the U.S. Department of Justice. According to the ATF Giglio Policy, "**DOJ's Giglio Policy does not authorize USAOs to initiate a general record check of special agents** or other personnel in a field division or other ATF offices. Requests must be individualized, in writing, and **must concern potential affiants or witnesses in a specific investigation or case**. As noted in the Attorney General's memorandum (5-12-2014), much of the information in the Giglio system of records is sensitive information which if released or reviewed without a case-related need could negatively impact the privacy and reputation of the agency-employee to whom it relates and could violate the Privacy Act."

In retaliation, USA Matthew G.T. Martin states, "would the Giglio policy allow us to do a Giglio request to ATF – to see what else may be there?" The answer to his question should have been absolutely not, as Lori D. McLaughlin was not occupying a testifying position and she was already wrongfully barred from participating in any criminal investigations. There was no legitimate reason, as USA Matthew G.T. Martin did not

have a "case-related need" to read or seek any information concerning Lori D. McLaughlin. Based on the ATF Giglio Policy, the USAOs should have never participated in a "Giglio" search of Lori D. McLaughlin's records in violation of her privacy rights. Accordingly, courts have held that the right to pursue one's chosen profession free from unreasonable government interference comes within the liberty concept of due process. *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

In support, Senior Judge Kermit V. Lipez (1st Circuit) stated that "the potential for misuse highlights the need for due process protection for police officers affected by Brady and Giglio determinations." In 2021, Judge Lipez wrote that "I simply note that there are potential ways to reconcile defendants' Brady and Giglio rights with police officers' due process rights." Those possibilities merit attention. Furthermore, Judge Lipez did acknowledge that "a prosecutor's determination that a police officer is generally Brady or Giglio impaired has serious consequences for the police officer's reputation and employment." That determination – which effectively renders an officer unable to testify not only in a particular case, but also in future cases – will likely, at a minimum, result in loss of the officer's duties as an investigator and, as here, may lead to the termination of employment. The potential for abuse also exists. *Roe v. Lynch*, No. 20-1702 (1st Cir. 2021).

The abuse of discretion against Lori D. McLaughlin was not an isolated incident. Likewise, S/A Johnnie Meadors (African American/Male) was removed from

his "field" criminal investigator's position based on false information by ATF management officials for approximately three (3) years. In August 2018, SAC Robert Cekada offered S/A Johnnie Meadors the choice of working administrative assignments in Group III or being assigned to the Tactical Operations Office, Baltimore Field Division. The EEOC found that Complainant's claims of discrimination based on race, reprisal and harassment are sustained and the Decision Finding Liability against the Agency in favor of the Complainant was issued on March 4, 2021. The EEOC also ruled that "as of the hearing, the Agency has not returned Dr. Meadors to a position and the Agency has not proffered any reason for the delay." *(Reference: EEOC Decision, EEOC Case No: 531-2020-0001X, Johnnie Meadors v. Dept. of Justice, page 13, #87)* In addition, S/A Antonio Johnson (African American/Male) and S/A Rondell Campbell (African American/Male) both received Giglio determinations without timely notification and without any due process rights in the Atlanta Field Division. Upon requesting reassignment, they were informed of the Giglio determinations that were made by the U.S. Attorney's Office two years prior and never communicated by DOJ.

Certainly, the potential for abuse is a concern but the negative impact on public safety should be paramount. The American people are faced with soaring cases of gun violence in this country, not to mention the number of mass shooting incidents. Thus, Lori D. McLaughlin would argue that the abuse tends to amount to reckless conduct by DOJ. Acting Director

Marvin Richardson standing silent as ATF agents are wrongfully removed from our streets and placed behind desks based on LIES told by ATF management officials is no doubt a danger to public safety. In this day and time, we need ATF agents in our communities fighting gun violence and enforcing our gun laws. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. *Board of Regents v. Roth*, 408 U.S. 589 (1972).

As a sworn law enforcement officer, AD Marvin Richardson was clearly aware of the intentional and malicious abuse of discretion with this Giglio determination and others, and he refused to place Lori D. McLaughlin back into her testifying position. In fact, DOJ Policy Memorandum #2015-04 states, "the policy directs managers and supervisors to take immediate and appropriate corrective action to address all allegations of harassment and retaliation and to be accountable for failure to do so." Moreover, this policy states, "disciplinary action will be taken against supervisors and managers who either condone or fail to act promptly to report or correct harassing conduct brought to their attention." *(Reference: DOJ Policy Memorandum/Prevention of Harassment in the Workplace)* If AG Merrick Garland is going to hold the American people accountable for their violation of the rules and laws, he should be willing to hold AD Marvin Richardson and other ATF management officials

accountable for their failure to follow or enforce DOJ/ATF policies.

Based on his lack of action, Attorney General Merrick Garland has allowed AD Marvin Richardson and other DOJ officials to weaponize "Giglio" against Federal law enforcement officers (i.e., ATF whistleblowers, EEO complainants, etc.). For years, Lori D. McLaughlin has written numerous correspondence to DOJ/ATF management officials in her chain-of-command regarding her wrongful removal from her "field" criminal investigator's position, including AG Merrick Garland (03-01-2022), DAG Lisa Monaco (05-28-2021), AD Marvin Richardson (02-16-2021) and DAD Mickey Leadingham (05-01-2020) without the benefit of any corrective action or official DOJ/ATF misconduct investigation. In fact, AD Marvin Richardson doubled down on the abuse, and he refused to settle her lawsuit without the retirement (Constructive Discharge) of Lori D. McLaughlin.

Given the lack of due process rights, Lori D. McLaughlin and other law enforcement officers rely very heavily on the assistance of "oversight" agencies (i.e., OSC, MSPB, OIG, etc.) to investigate and to correct discriminatory or retaliatory decisions made in connection with Giglio determinations. Accordingly, Lori D. McLaughlin filed an IRA with the Merit Systems Protection Board (MSPB) to seek a reversal of the Giglio determination. Since 2019, she has been waiting for a merit-based hearing with the MSPB with negative results. Similarly, Lori D. McLaughlin filed several complaints with the Office of Special Counsel (OSC) for

a mere investigation into the Giglio determination with negative results. In addition, Lori D. McLaughlin filed two (2) formal complaints with the DOJ/OIG and IG Michael Horwitz refused to investigate the misconduct violations committed by DOJ/ATF management officials. OSC and DOJ/OIG have a long history of refusing to investigate misconduct violations reported by ATF whistleblowers and EEO complainants, leaving the American people without important oversight at the DOJ. Without due process rights or misconduct investigations, law enforcement officers are left without any protection from discriminatory or retaliatory Giglio determinations.

Unfortunately, Lori D. McLaughlin lost her position as a "field" criminal investigator, her professional reputation, her professional self-esteem, and she was forced to endure great emotional/physical pain and suffering. We (law enforcement officers) risk our lives, and we sacrifice our personal health and our family relationships to protect the American people. Yet, we are sworn to protect a U.S. Constitution that does not protect us. This egregious misconduct by DOJ is very disturbing and a huge betrayal of public trust.

In closing, Judge Henry F. Floyd (Fourth Circuit) offered a rare public rebuke of federal prosecutors in North Carolina, who, the court found, has engaged in a pattern of misconduct. "Yet, the United States Attorney's Office in this district seems unfazed by the fact that discovery abuses violate constitutional guarantees and misrepresentations erode faith that justice is

achievable," he added. "Something must be done." *United States v. Bartko*, 728 F.3d 327 (4th Cir. 2013).

CONCLUSION

The court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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