No. ____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SUPERINTENDENT, GREENE SCI; THE DISTRICT ATTORNEY OF BERKS COUNTY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Dated: November 7, 2023

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QUESTION PRESENTED

In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Court recognized that a prosecutor must disclose evidence that can be "used to impeach the Government's witnesses by showing bias or interest." An open-ended inducement provided to a witness is evidence relevant to that witness's bias or interest. "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction." *Id.* at 683 (Blackmun, J., joined by O'Connor, J.).

The prosecutor in Petitioner David Sattazahn's case told a key witness that "there are no deals" in connection with the witness's pending criminal charges. Nevertheless, he immediately followed his disclaimer with the offer to "see what he could do in [the witness's] case coming up." However couched, the offer of assistance in the "case coming up" constituted a clear incentive for cooperation; only three weeks after Petitioner's trial, the witness sought the benefit of the prosecution's offer and the witness's cooperation was rewarded with an agreement for a lenient sentence.

The inducement was never made known to the defense. Rather, the prosecution elicited misleading testimony from its witness that he had not been "promised anything for [his] pending case" and that he was not "expecting anything" in return for his testimony. The prosecution took no corrective action when its witness testified similarly on cross-examination.

In the federal habeas corpus proceedings below, Petitioner sought relief under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), in light of the prosecution's failure to reveal the inducement and to correct the witness's false testimony. The Third Circuit affirmed the denial of relief, reasoning due process requires disclosure of a witness's inducement only when there is a "true agreement" under which "both the witness and the prosecutor . . . understand that the witness will receive favorable treatment in exchange for their testimony." App. A14.

The ruling below, then, sanctions an end-run around the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases: so long as the prosecution avoids reaching an express "deal" with express terms, it may grant powerful inducements to its witnesses without disclosing those inducements to the defense. The question presented is as follows:

> Because there is a split in the Circuits on the issue, should this Court instruct the lower courts to uniformly apply the law that, under *United States v. Bagley*, 473 U.S. 667 (1985), and *Giglio v. United States*, 405 U.S. 150 (1972), a prosecutor must disclose an important prosecution witness's bias or interest when the prosecutor induces that witness to testify by holding out the hope of favorable treatment, even if the inducement does not take the form of an agreement with specific terms?

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The Opinion of the United States Court of Appeals for the Third Circuit is unpublished and accompanies this petition as Appendix A. *See also Sattazahn v. Sec'y Pa. Dep't of Corr.*, No. 21-2372, 2023 WL 3676782 (3d Cir. May 26, 2023). The Third Circuit's order denying a timely petition for rehearing en banc, dated August 9, 2023, is attached as Appendix B.

The June 3, 2021, Memorandum of the United States District Court for the Eastern District of Pennsylvania denying the underlying petition for writ of habeas corpus is unpublished. *See Sattazahn v. Wetzel*, No. 17-3240, 2021 WL 2291334 (E.D. Pa. Jun. 3, 2021). The District Court's Order dated July 20, 2021, granting a certificate of appealability (COA) on one of Petitioner's habeas claims, is also unpublished. *See Sattazahn v. Wetzel*, No. 17-3240, 2021 WL 11511532 (E.D. Pa. Jul. 20, 2021).

The Opinion of the Supreme Court of Pennsylvania is reported as *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008), and is attached as Appendix C.

The Memorandum Opinion of the Berks County Court of Common Pleas dated June 16, 2023, is unreported and is attached as Appendix D.

JURISDICTION

The Court of Appeals affirmed the denial of Petitioner's amended petition for writ of habeas corpus on May 26, 2023, and denied a petition for rehearing on August 9, 2023. App. A; App. B. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

This case implicates the Due Process Clause of the Fourteenth Amendment, which prevents States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Procedural History

In May 1991, Petitioner David Sattazahn was tried before a jury in the Berks County Court of Common Pleas for murder, robbery, and related charges arising out of the April 12, 1987, robbery of the Heidelberg Restaurant in which the manager, Richard Boyer, was killed. On May 9, Sattazahn was convicted of first, second, and third-degree murder; robbery; two counts of aggravated assault; possession of an instrument of crime; carrying a firearm without a license; and several counts of conspiracy. Sattazahn received a life sentence.

In 1993, the Pennsylvania Superior Court reversed Sattazahn's convictions because of an unconstitutional jury instruction directing the jury to find intent to commit crimes of violence. *Commonwealth v. Sattazahn*, 631 A.2d 597 (Pa. Super. 1993). At a retrial in 1999, Sattazahn was found guilty of first-degree murder and related charges and sentenced to death.

In 2000, the Supreme Court of Pennsylvania upheld Sattazahn's conviction and death sentence. *Commonwealth v. Sattazahn*, 763 A.2d 359 (Pa. 2000). This Court granted certiorari on the issue of whether the death sentence following the earlier life sentence violated the double jeopardy clause and, in a five-to-four decision, affirmed the judgment below. *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

Sattazahn timely filed for Post-Conviction Relief Act (PCRA) relief. In 2006, the PCRA court denied all claims of guilt-phase relief but granted Sattazahn a new penalty hearing. The Supreme Court of Pennsylvania affirmed the lower court in all respects and remanded for a new penalty trial. App. C. In 2017, Sattazahn was resentenced to life imprisonment without parole.

Sattazahn filed a *pro se* petition for writ of habeas corpus in 2017, followed by an amended petition for writ of habeas corpus in 2018, which the District Court denied in 2021. *See*

Sattazahn, 2021 WL 2291334. Later, it granted a COA encompassing the claim at issue here. *See Sattazahn*, 2021 WL 11511532.

Sattazahn appealed the denial of habeas corpus relief to the Third Circuit in July 2021. The Third Circuit affirmed the District Court's judgment on May 26, 2023. App. A. Sattazahn petitioned for rehearing, which the Third Circuit denied on August 9, 2023. App. B. This timely petition follows.

B. Background and Trial

The Third Circuit's Opinion in this case identifies "three important characters." First, Sattazahn, as Petitioner, stands convicted of first-degree murder for the death of Richard Boyer. Second, Jeffrey Hammer, a co-defendant, testified against Petitioner in return for a plea deal to third-degree murder and avoiding the death penalty. Third, Fritz Wanner, testified about a conversation he said he overheard between Sattazahn and Hammer in which Sattazahn allegedly admitted to shooting Boyer. App. A3.

Jeffrey Hammer was arrested on unrelated charges before the trial and was interviewed by the police. Initially, he denied all involvement in the Boyer robbery/homicide. Def. PCRA Exh. 25, Appellee's Supplemental Appendix in the Third Circuit. To test his story, the police gave Hammer – and Hammer consented to – a polygraph examination. During the exam, he denied being present when Boyer was shot and denied being the shooter. Hammer was asked these questions three times and his denials were found to be deceptive. *Id*.

Only after learning that his answers were rejected by the police did Hammer change his statement, admitting his involvement in the robbery and murder of Richard Boyer, but putting most of the blame on Sattazahn. Relevant to the defense theory that the .22 caliber Ruger used in the murder was purchased by Sattazahn *for* Hammer, Hammer acknowledged that he was present

at the gun shop when Sattazahn bought the weapon. NT 1/20/99, at 301. Hammer was underage and could not legally buy a handgun at the time. NT 5/6/91, 558.

The Commonwealth served Hammer with notice of intent to seek the death penalty, *id*. at 330, but pursuant to a plea agreement in exchange for his testimony, permitted him to plead guilty to third-degree murder and a sentence of 19 to 55 years. *Id*. at 314, 331. At the time he entered into the plea agreement, Hammer was facing additional charges in a number of counties. Hammer is now out of prison.

Hammer testified that, on April 12, 1987, he and Sattazahn traveled on an all-terrain three-wheeled vehicle along a railroad track to the rear of the Heidelberg Restaurant, planning to rob it. NT 1/20/99, 268-69, 271. The two had previously cased the restaurant on multiple occasions and chose Sunday as the day on which the cash receipts were likely to be greatest. Between 9:00 pm and 9:30 pm, they left from Hammer's father-in-law's home, taking the three-wheeler from the "barn." They brought with them two guns, a .41 caliber revolver and a .22 caliber Ruger semiautomatic pistol, the latter of which was shown to have fired the lethal shots. They also brought masks, gloves, and extra ammunition. The two hid among the pine trees behind the rear parking lot. After closing, the manager, Richard Boyer, emerged from a rear door carrying a bank deposit bag. *Id.* at 282. According to Hammer, it was Sattazahn who had the .22 caliber gun; Hammer had the .41. Their plan was simply to rob Boyer and to handcuff him, unhurt, in the back of his truck to give them time to effectuate their getaway. *Id*. at 277. When the manager came out, the two emerged from where they were hiding and Sattazahn told him to drop the bank bag.

According to Hammer, the plan went awry when Boyer failed to comply, throwing the bag toward the restaurant, and then again toward the roof of the restaurant as he ran. Hammer

claimed it was Sattazahn who fired a shot as the decedent ran and that he only fired one over the manager's head. *Id*. at 286-87. Hammer heard two to three more shots and saw the manager fall. *Id*. at 288. Hammer denied that he was the one who shot Boyer, instead placing the blame on Sattazahn. *Id*. at 315-16. The two men then grabbed the bank deposit bag and fled. *Id*. at 285.

The prosecution called Fritz Wanner as a witness to confirm its theory that it was Sattazahn who shot Boyer. The day before Wanner testified, DA Baldwin told the trial court:

> We would be bringing in Fritz Eugene Wanner from Greensburg Prison. He should be here this afternoon. I have not talk – spoken to Mr. Wanner in several years. . . . If Mr. Wanner is cooperative we would ask [to] give [the] Court an offer of proof [on] what we deem limited to the admissions he overhead the defendant would say relevant in this case.

NT 1/20/99, 256-57.

Wanner testified. He stated that a few days after the homicide, when he was 15, he was in the garage, or "barn," of the home owned by Hammer's father-in-law, Phil Long. Wanner explained that Hammer's wife, Katie Long, babysat him. Wanner said he overheard a conversation in the barn between Hammer and Sattazahn and that Sattazahn confessed to shooting Boyer. Wanner ascribed the voice to Sattazahn because claiming to have actually seen Sattazahn in conversation with Hammer. NT 12/21/99, 373-76. Wanner also said that another person was present during the conversation. Wanner testified he first told the police the other person was a "Mr. Simmons," but later told the police it was "Joe from the pizza shop." *Id*. at 378. Wanner explained that he did not originally say it was Joe from the pizza shop because he "was scared" as he "thought Joe was in the mafia" and Wanner "didn't want to get him involved." *Id*.

Wanner, an adult facing criminal charges at the time of his testimony, testified on direct that he was not promised consideration in his pending criminal case and was not expecting anything for testifying:

Q. You also currently have a charge pending here in Berks County?

A. Yes, I do.

Q. And that charge involves criminal attempt to commit burglary also?

A. Yes.

Q. And conspiracy?

A. Yes.

Q. Does that in any way involve Jeffrey Hammer?

A. No.

Q. Sir, have you been promised anything for your testimony today?

A. No, I have not.

Q. Have you been promised anything for your pending case?

A. No, I haven't.

Q. Are you expecting anything today for testifying?

A. No.

Id. at 379-80.

Wanner provided similar testimony on cross-examination:

Q. Now, Mr. Wanner, you now face once again more charges in Berks County, correct?

A. Yes.

Q. And you are aware that based upon your lengthy criminal record that you are facing a lot of time in jail, is that a fair question?

A. Um-hum.

Q. You would agree with me on that, correct?

A. Yes.

Q. And you realized that your story to this jury is going to help you that it may help you in this pending case, correct?

A. No.

Q. Not at all?

A. No.

Q. You don't think this is going to help at all?

A. No, I don't.

Id. at 392-93. The prosecutor made no attempt to correct or qualify this testimony, either on direct or cross.

In his closing, the prosecutor capitalized on Wanner's testimony, specifically arguing the testimony amounted to an admission of guilt by Sattazahn and, further, that it buttressed Hammer's account:

> You heard Fritz Wanner testify. Fritz Wanner told you about a conversation he heard several days after he learned about the Heidelberg murder . . . from the newspaper and television. And what did he hear, he was in Phil Long's garage or barn, Katie Long's house. He heard two men. He heard this defendant tell Jeffrey Hammer words about dropping the black bag. *He heard David Sattazahn admit to shooting the manager.* He made other statements about if he got caught what he would do to Jeffrey Hammer and Hammer's family. You must decide whether or not that statement corroborates Jeffrey Hammer.

NT 1/21/99, 489 (emphasis added); *see also id*. at 493-94 (linking Wanner's testimony with Hammer's testimony that Hammer fired the .41, not the .22).

When instructing the jury, the trial judge explained that it should view Hammer's testimony as coming from a corrupt and polluted source. The court charged the jury that the

testimony of a Commonwealth witness – here, Hammer – who was involved in a crime as an accomplice is "to be judged by special precautionary rules." NT 1/22/99, 518. The Court emphasized that "[e]xperience shows that . . . an accomplice who when caught would often try to place the blame falsely on someone else." *Id*. Such a witness "may testify falsely in the hopes of obtaining favorable treatment for some corrupt or wicked motive." *Id*. The Court added that the witness might be truthful, but that special rules apply:

> First you should view the testimony [of] the accomplice with disfavor because it comes from a corrupt and polluted source. Second, you should examine the testimony of a [sic] an accomplice closely and accept it only with caution and care. Third, you should consider whether the testimony [of] an accomplice is supported by in whole or in part by evidence.

Id. at 519 (emphasis supplied). In sum, the jury was instructed that Hammer's testimony, coming from a co-defendant, should be "viewed with disfavor."

C. Post-Conviction Hearing

The post-conviction evidence shows that the trial prosecutor, District Attorney Mark Baldwin, failed to disclose that he had provided an inducement to Wanner, specifically that he might be rewarded in exchange for favorable testimony.

Unbeknownst to the jury and trial counsel, Baldwin had a discussion with Wanner before Wanner testified in which Baldwin represented that a benefit could accrue to Wanner for his cooperation. Sattazahn was sentenced to death on January 22, 1999. Three weeks later, Wanner appeared for sentencing on his own case and recounted the interaction with Baldwin to his sentencing judge: "He [Baldwin] just said there are no deals but *he would see what he could do in my case coming up*." Def. PCRA Exh. 7 (*Commonwealth v. Wanner*, No. 0341-99 (Berks C.P.), NT 2/12/99, 14) (emphasis added); *accord* NT 10/25/04, 70 (Wanner PCRA testimony: "When I talked to the Berks County District Attorney about my testifying against Sattazahn, he

said he would not make any deal – make a deal but said he would see what he could do in my upcoming case."). The Assistant District Attorney at Wanner's sentencing, Dennis Skayhan, claimed no personal knowledge of this understanding but affirmed Wanner's assertion, acknowledging it "sound[ed] exactly like" what Baldwin would say:

> Your Honor, I have no doubt that that sounds exactly like the kind of thing that Mr. Baldwin would say. That's our general policy with regards to cooperation.

Id. at 14-15. Nor did the prosecution contest the assertion of Wanner's counsel that Wanner's testimony formed a "substantial part of the verdict." *Id*.

The court interpreted ADA Skayhan's acquiescence as confirmation of the incentive given Wanner, and suggested modifying the terms of the negotiated plea deal of two to four years so as to permit the imposition of a lesser sentence: "Now Mr. Skayhan has made his position known. You see, if it were an open plea, then, you know, it would be one thing. It isn't. So maybe you need to talk to your client briefly and see if he wants to change it to an open plea." *Id.* at 16. The court continued, inquiring of the prosecutor, "Are you willing to have it be a charge bargain to Count 2 [conspiracy]?," to which Mr. Skayhan assented. *Id.* at 17.

Thus, although Wanner had initially agreed to a two-to-four-year sentence, he received a guideline sentence of 16 months to 4 years – or eight months less than the minimum sentence previously agreed to. *Id*. at 22.

D. The *Napue/Giglio* Claim

In state post-conviction proceedings, Sattazahn asserted that Baldwin's failure to reveal the inducement to Wanner and the concomitant failure to correct Wanner's false testimony violated due process under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). The materiality standard for a *Napue*/*Giglio* claim is more lenient than the standard for a *Brady* claim. *See, e.g.*, *Haskell v. Superintendent SCI Greene*, 866 F.3d 139, 149

(3d Cir. 2017); *United States v. Gonzales*, 90 F.3d 1363, 1368 n.2 (8th Cir. 1996); *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). False testimony is deemed material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Napue*, 360 U.S at 271; *Giglio*, 405 U.S. at 154.

E. Pennsylvania Supreme Court Decision

The state courts denied Petitioner's *Napue*/*Giglio* claim. Rejecting the claim, the trial-level state court held that "disclosure rules only apply when an actual agreement exists." App. D23. The lower court further stated the post-conviction evidence "falls short of proving" that the suppressed evidence "would have been determinative of . . . guilt or innocence." App. D29.

In its decision, the Pennsylvania Supreme Court relied on the lower court's decision. It started by summarizing the PCRA court's opinion. It stated that "the PCRA court determined that [Sattazahn] failed to satisfy his burden of establishing that an agreement, promise, or inducement in fact existed." *Sattazahn*, 952 A.2d at 651. The state supreme court added that "the court recognized that the district attorney's office may have maintained some general policy, . . . the statements made on the record by Commonwealth agents did not specifically discuss whether that policy was employed in the case against Wanner." *Id*. The Pennsylvania Supreme Court added that the lower state court "highlighted that the assistant district attorney prosecuting Wanner's case had no knowledge of any agreement." *Id*. It noted that the lower post-convicton court concluded that "[t]he Commonwealth cannot be found to have failed to disclose an agreement which has not been proven to exist or for failing to correct testimony which has not been proven to be false." *Id*.

The state supreme court went on to hold, though, that it was "not entirely clear from the [PCRA court's] opinion" whether the state PCRA court "accepted Wanner's post-conviction

testimony." *Id*. at 659-60 n.14. The Pennsylvania Supreme Court explained that Sattazahn argued on appeal "that the PCRA court actually accepted Wanner's post-conviction testimony, since the court recited the representation by the prosecutor in Wanner's case concerning the general policy of the district attorney's office." *Id*. The state supreme court acknowledged, "While it is not entirely clear from the opinion, however, this reference appears to be in the context of an alternate analysis that the asserted representation, even if it applied to Wanner's case, did not rise to the level of a 'promise, reward, or inducement' for purposes of *Giglio*." *Id*. The court concluded, "We do not read the additional and alternative dispositions as undercutting the PCRA court's central finding, based upon its evaluation concerning the post-conviction evidence including witness credibility, that [Sattazahn] failed to establish that a promise, reward, or inducement actually existed." *Id*.

The Pennsylvania Supreme Court then denied relief based on the PCRA court's factual determination. *Id*. at 660. It reached no conclusion regarding materiality of the suppressed evidence.

F. Third Circuit Opinion

Sattazahn presented his *Napue/Giglio* claim to the District Court in his habeas petition. That court denied it, but granted COA. The Third Circuit affirmed the denial. In its opinion, the court observed that, under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150, 154 (1972), "prosecutors have a duty to "correct a witness' testimony when they know it to be false." App. 15. The court further noted that a "falsehood is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury'" and that "[t]his is a more lenient materiality standard than *Brady*, which requires that suppressed evidence be sufficient to 'undermine confidence in the verdict.'" *Id.* (quotations omitted).

The Court of Appeals added that, with respect to Sattazahn's claims about the conversation between Baldwin and Wanner, the Pennsylvania Supreme Court denied the claims by "adopting the post-conviction court's analysis . . . in its entirety." App. A8 (citing *Sattazahn*, 952 A.2d at 651, 659).

The Third Circuit adopted the same reasoning as the state courts, holding there was no due process violation, even though Wanner denied under oath at trial that there was any inducement. The court held that, for there to be a due process violation, there "must be a true agreement [that was undisclosed] – both the witness and the prosecutor must understand that the witness will receive favorable treatment in exchange for their testimony." App. A14.

The court determined that DA Baldwin's statement to Wanner – "I'll see what I can do" – was "ambiguous in context" so there was no *Brady* or *Napue*/*Giglio* violation. App. A15. According to the court, the statement was "not proof of a tacit agreement, it [was] not *Brady* evidence, and accordingly Wanner's testimony did not require correction under *Napue*/*Giglio*." App. A16.

The Court of Appeals held that the Pennsylvania Supreme Court did not make an unreasonable determination of fact that Baldwin gave no inducement to Wanner. In an internally inconsistent footnote, the court stated:

> A court may determine that no agreement existed while still finding evidence of an inducement requiring disclosure under *Brady*. Here, however, the main question facing the post-conviction court was whether the prosecutor's statement qualified as a promise or suggestion of leniency. In determining that no agreement existed, the post-conviction court had to conclude that there was no inducement.

App. A16 n.4.

The circuit court held that, even if the prosecution had failed to disclose information it was required to disclose, the suppression was not material under *Brady*. The panel stated that Warmer had been impeached on other grounds and the jury had credited Hammer.

It went on to caution, however, that the *Napue*/*Giglio* claim was different. "Whether information about a deal could have affected the jury's judgment – the more lenient *Giglio* standard – may be a closer call." App. A16. The panel concluded that, because its review of the state post-conviction court's denial of the *Napue*/*Giglio* claims was deferential under AEDPA, it would not reverse the district court. App. A16-17.

G. A Pattern of Intentional Prosecutorial Misconduct by District Attorney Baldwin.

While Petitioner's case was pending in the District Court, the Court of Common Pleas of Berks County, Pennsylvania issued a decision in two other cases that DA Baldwin had personally prosecuted. *Commonwealth v. Roderick Johnson*, 0118-97; 1537-97 (Berks County Court of Common Pleas, October 29, 2020). In that opinion, the court held that Baldwin intentionally suppressed evidence that would have impeached the key witness in two separate homicide cases. Specifically, Baldwin suppressed police reports of multiple investigations of the witness who, despite evidence against him, was never charged. Like the suppressed evidence here, the undisclosed police reports in *Johnson* were evidence of a witness's bias and interest. The court in *Johnson* found that Baldwin's actions were not merely the product of negligence, but that he "made a conscious, intentional, and purposeful decision to not disclose the determined *Brady* material." *Id*. at 30. Sattazahn brought this decision to the attention of the District Court and it was part of the record on appeal to the Third Circuit.

DA Baldwin was also found to have committed similar *Brady* violations in *Bridges v. Beard*, 941 F. Supp.2d 584 (E.D. Pa. 2013), *aff'd*, 2017 WL 3834740 (3d Cir. Sept. 1, 2017).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI SO THAT LOWER COURTS WILL UNIFORMLY APPLY THE LAW THAT *GIGLIO* AND *BAGLEY* REQUIRE DISCLOSURE OF INDUCEMENTS PROVIDED BY A PROSECUTOR TO WITNESSES EVEN IN THE ABSENCE OF AN AGREEMENT WITH EXPRESS TERMS, AND RESOLVE A SPLIT IN THE CIRCUITS ON THIS ISSUE.

This Court's decisions in *United States v. Bagley*, 473 U.S. 667 (1985), and *Giglio v. United States*, 405 U.S. 150 (1972), require prosecutors to disclose inducements given to a witness, with or without specific agreements. These inducements are evidence of the witness's bias or interest, evidence of which a criminal defendant has the right to know.

A. *Bagley* and *Giglio* Require Disclosure of Inducements that Are Not Agreements and, here, the Suppression of the Inducement was Material.

Bagley expressly states that the prosecution must disclose evidence of its witnesses' bias or interest. This Court held:

> In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing *bias or interest*. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. . . . Such evidence is "evidence favorable to an accused," . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

Bagley, 473 U.S. at 676 (citations omitted) (emphasis supplied). In that case, the undisclosed contracts between government agents and their witnesses were blank contracts. As noted by Justice Blackmun, "[w]hile the Government is technically correct that the blank contracts did not constitute a 'promise or reward,' the natural effect of the [witnesses'] affidavits [saying the witnesses had received no promise or reward] would be misleadingly to induce defense counsel to believe that [the witnesses] provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any 'inducements.'" *Bagley*, 473 U.S. at 684 (Blackmun, J., joined by O'Connor, J.). Thus, the facts and language used in *Bagley* show that it applies to a circumstance like this case where there is an inducement but no express

quid pro quo. The Court in *Bagley* recognized that the lack of an express agreement with specific terms enhances the witness's incentive to skew his testimony in the prosecution's favor: "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely[.]" *Id.* at 683.[1]

In *Giglio*, the prosecutor told a co-conspirator witness that there would be no deal and that the witness would have to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted. *Giglio*, 405 U.S. at 153. Under those circumstances, the Court decided the duty to disclose includes any facts bearing on a witness's motivation that would likely affect the judgment of a jury, *id.* at 154, including any "possible agreements or arrangements for prosecutorial leniency," *id.* at 151, and any "implication" of a reward for testifying, *id.* at 153 n.4.

The law and facts of *Bagley* and *Giglio* demonstrate that there does not need to be a "true agreement" between prosecutor and witness for the prosecutor to be under a disclosure obligation. DA Baldwin was required to disclose to the defense his communications to get Wanner to be "cooperative." Baldwin's prefacing the inducement with the disclaimer that "there are no deals" did not shield the communication from disclosure.

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[1] In *Bagley*, all the justices supported the conclusion that the prosecution improperly failed to disclose evidence. The majority of five remanded for a determination of materiality. The three dissenters agreed that the evidence should have been disclosed. Their opinions went to the issue of the appropriate legal standard for determining materiality. *See id.* at 704-07 (Marshall, J., joined by Brennan, J., dissenting) (advocating for use of a harmless error analysis); *id.* at 713 (Stevens, J., dissenting) (objecting to the result-focused materiality standard). (Justice Powell did not take part in the decision.)

Accordingly, the state supreme court's determination that there was no due process violation was also contrary to and/or an unreasonable application of this Court's precedent set out in *Bagley* and *Giglio*. 28 U.S.C. § 2254 (d)(1). Further undermining the conclusions of the state supreme court and the lower state court upon which it relied, the trial-level post-conviction court based its decision on a legal principle that "disclosure rules only apply when an actual agreement exists." PCRA Op., App D23. However, this Court's opinions state that a prosecutor must disclose to a defense evidence of a witness's bias or interest. It could not be otherwise. If it were, prosecutors would be able to couch their enticements as the prosecutor did here and not be obligated to disclose them.

In addition, the state court's determination that there was no promise, reward, or inducement given Wanner does not survive review under the Antiterrorism and Effective Death Penalty Act (AEDPA), as it was an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). Wanner's relating of the conversation with Baldwin at his sentencing was accepted by the prosecutor present, ADA Skayhan, and the sentencing judge. A determination that Wanner received no inducement blinks reality. *See Banks v. Dretke*, 545 U.S. 231, 265-66 (2005) (state court applied "dismissive and strained interpretation" of the evidence that "blinks reality" and "was wrong to a clear and convincing degree").

Finally, Baldwin's failure to correct Wanner's misstatement was material. Wanner's testimony was the only evidence to support Hammer's assertion that Sattazahn shot Boyer. As explained above, Hammer's testimony was tainted; he was a corrupt and polluted source. This Court's decision in *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam), is instructive on the materiality of Wanner's testimony.

In *Wearry*, this Court awarded a new trial because of *Brady* violations. Those violations included undisclosed police statements to a witness, Eric Brown, who corroborated another witness, Sam Scott. Of the two, Scott – like Hammer here – testified at greater length about the crime. After trial, the defense discovered that the police told Brown before trial they would "talk to the D.A. if he told the truth." *Id*. at 390. The jury was deprived of this evidence. This Court reasoned:

> [A]ny juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister – as the prosecution had insisted in its closing argument – but by the possibility of a reduced sentence on an existing conviction.

Id. at 393-94. Similarly, here, any jurors who, because of Wanner, found Hammer credible on the question of who shot the victim might have thought differently if they knew that, contrary to Wanner's repeated denials, he was given a powerful incentive to provide testimony favorable to the prosecution.

B. The Second, Fourth, Fifth, and Eighth Circuits Correctly Hold that Disclosure is Required.

Four federal circuit courts have correctly determined that an inducement given to a witness triggers the prosecutor's duty to disclose with or without an actual agreement.

In *United States ex rel. Washington v. Vincent,* 525 F.2d 262 (2d Cir. 1975), the Second Circuit adjudicated a *Napue* claim. After trial, the defense discovered that, pre-trial, the prosecutor had told a key witness facing charges: "[He] would see what [he] could do to help him." When testifying, however, the witness denied any expectation he would be rewarded for his testimony and the prosecutor did not correct him. Granting a new trial, the court of appeals held that the defendant was prejudiced by "the egregious and highly damaging prosecutorial misconduct." *Id.* at 268.

To similar effect is *Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008), in which a key witness was facing charges and was told by the judge on the witness's case that her sentence would be reduced from 15-30 years to ten years if she testified consistently with her statement. A representative of the district attorney's office was present when the judge made that statement in chambers. At trial, the witness testified she did not know that her testimony would affect her sentence and the prosecutor argued the witness had no reason to lie. In federal habeas proceedings, the district court held that the state court denial of post-conviction relief was contrary to *Giglio* and *Napue* and granted a new trial. The Fifth Circuit affirmed, reasoning: "Although *Giglio* and *Napue* use the term 'promise' in referring to covered-up deals, they establish that the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary." *Id.* at 778.

The Eighth Circuit has likewise held that there need not be a true agreement between prosecutor and witness for due process to require that an inducement be disclosed to the defense. In *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989), the court determined that there was a *Brady* violation even though there was no express or implied agreement proven. There, the prosecution failed to disclose that the witness had applied for commutation and that his commutation hearing was twice rescheduled without explanation and set for a date soon after the defendant's trial. Although there was no express or implied agreement, the court found a *Brady* violation, reasoning:

> The fact that there was no agreement . . . is not determinative of whether the prosecution's actions constituted a *Brady* violation requiring reversal under the *Bagley* standard. We hold that, viewed in the context of petitioner's trial, the fact of [the witness's] impending commutation hearing was material in the *Bagley* sense and that petitioner therefore is entitled to relief.

Id. at 582.

Finally, two Fourth Circuit decisions support the conclusion that Baldwin should have disclosed his conversation with Wanner. In *Boone v. Patrick*, 541 F.2d 447 (4th Cir. 1976), a police officer offered to put in a good word for a witness – who was facing charges – but could not guarantee that the prosecutor would take the advice. This conversation was not disclosed to the defense. Reversing the conviction, the court reasoned: "rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy," explaining that "a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced." *Id*. at 451; *accord Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979) ("The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment.").

The precedent from the Second, Fourth, Fifth, and Eighth Circuits demonstrates that, even in absence of a "true agreement" with a witness, the prosecution is still obligated to disclose communications relevant to the witness's bias or interest.

C. The Third and Eleventh Circuits Improperly Require Disclosure of an Inducement Only When Reflected in a Specific Agreement.

By contrast, the Third and Eleventh Circuits have held that a prosecutor is not required to disclose an inducement in the absence of a express agreement.

In this case, as set forth above, the Third Circuit held that there "must be a true agreement [that was undisclosed] – both the witness and the prosecutor must understand that the witness will receive favorable treatment in exchange for their testimony." [App. A14].

Similar to the Third Circuit, the Eleventh Circuit in *United States v. Curtis*, 380 F.3d 1311 (11th Cir. 2004), held that certain "promises, agreements or understandings do not need to

be disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count." *Id*. at 1316 n.7 (citing *Tarver v. Hopper*, 169 F.3d 710, 717 (11th Cir.1999)). Both of those Eleventh Circuit cases rely on a pre-*Bagley* en banc decision by the Eleventh Circuit, *McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir. 1985) (en banc). *McCleskey* was decided January 29, 1985, and *Bagley* on July 2, 1985. In *McCleskey*, a police officer told a prosecution witness he would put in a word for him. An en banc majority of seven judges held there was no *Giglio* violation because there was no promise and non-disclosure was harmless. *Id*. at 883. Even so, five of the circuit judges concluded there was a *Giglio* violation. *Id*. at 906 (Godbold, C.J., joined by Johnson, Hatchett, & Clark, JJ., dissenting) (*Giglio* violation and would have ordered a new trial); *id*. (Kravitz, J., concurring) (*Giglio* violation, but no prejudice). The dissent has the better argument: a jury is entitled to know what law enforcement officials tell a witness to gain his testimony. *Id*. at 907 (Godbold, C.J., dissenting). Since *McCleskey* pre-dates *Bagley*, it and the cases relying on it are no longer authoritative.

There is an established conflict among the federal circuit courts as to whether the due process clause requires a prosecutor to reveal his inducements to a witness that stop short of an agreement. The split undermines the Court's decisions in *Bagley* and *Giglio*. The Court should therefore grant review to bring the federal circuit courts into alignment.

CONCLUSION

Before trial in this case, the prosecutor told an important witness "there [were] no deals but he would see what he could do in [the witness's] case coming up." The prosecutor improperly suppressed this conversation and went on to fail to correct the witness's testimony false and misleading trial testimony that he did not expect to get any benefit from his testimony. The Court should grant the writ to bring the lower courts into alignment recognizing that due process requires prosecutors to reveal inducements given to important witnesses, even those incentives that are not express agreements, because such communications are evidence of those witnesses' bias or interest.

Respectfully submitted,

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