

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

EDWARD JAMESON PURRY, II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RENE L. VALLADARES
Federal Public Defender

* AMY B. CLEARY
* CRISTEN C. THAYER
* KATHERINE A. TANAKA
Assistant Federal Public Defenders
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Amy_Cleary@fd.org
Cristen_Thayer@fd.org
Katherine_Tanaka@fd.org

* Counsel for Petitioner,
Edward Jameson Purry, II

Question Presented For Review

The government untimely disclosed *Brady* evidence to Purry two days prior to trial. Purry's defense counsel proffered she would have presented a different defense had the *Brady* evidence been disclosed earlier. The district court initially held Purry could use the *Brady* evidence at trial, but after Purry's repeated attempts to do so, the district court precluded Purry from using the *Brady* evidence in any way.

Did the Ninth Circuit err in holding a defendant's unsuccessful "attempts" to use *Brady* evidence is sufficient to defeat a *Brady* claim without considering whether the defendant was able to effectively use the evidence or whether the defendant otherwise suffered any prejudice from the untimely disclosure?

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Petition for Certiorari

Prosecutors jeopardize due process by suppressing evidence that is material to guilt or to punishment of the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Yet, violations of this disclosure obligation plague criminal trials throughout the country. Courts must therefore assess the consequences of a prosecutor's failure to disclose material evidence to the defense. To avoid a *Brady* violation for failing to disclose material evidence, prosecutors often push the timing of their constitutionally-required *Brady* disclosures. In turn, defendants frequently face scenarios where prosecutors try to skirt their *Brady* obligations by withholding material evidence until the eve of, or possibly during, trial. In many cases, the delayed *Brady* disclosure is not due to a prosecutor's inadvertence or mistake, but rather, is a calculated trial tactic used to gain an unfair advantage over the defense. Defendants and their counsel are thus left to scramble with minimal time to rearrange trial strategy and conduct what little investigation is possible in the time available, inevitably forced to choose between delaying trial against a detained defendant's speedy trial rights and foregoing presentation of a stronger possible defense.

As it stands, this Court's law does not discourage prosecutors from engaging in this troubling trial tactic. It is unclear when untimely disclosure of *Brady* evidence, as opposed to its complete suppression, falls within *Brady's* definition of "suppression." Moreover, this Court does not yet have precedent addressing when delayed disclosure constitutes a *Brady* violation. Nor has this Court offered

significant guidance to lower courts on how to address and assess the prejudice to the defense from last-minute disclosure. As a result, lower courts have had to fashion their own tests to determine whether untimely-disclosed *Brady* evidence violates a defendant's due process right to a fair trial. Some of the tests lower courts have created and applied, however, fail to consider the full array of consequences that result from a prosecutor's delayed disclosure of *Brady* evidence.

In the instant case, for example, the Ninth Circuit evaluated the prosecutor's untimely disclosure of *Brady* and *Giglio* evidence based on an unreasonably narrow test of whether the defense was able to *attempt to use* the untimely-disclosed evidence at trial. The Ninth Circuit concluded that because defense counsel repeatedly attempted to use and introduce the untimely-disclosed documents at trial, the attempt alone was sufficient to show the evidence remained "of value" to Purry. The court reached this conclusion despite the government's disclosure of the evidence two days before trial and the district court's complete exclusion of the evidence at trial.

The Ninth Circuit's analysis was erroneous and gives way for precarious prosecutorial practices. The mere fact that defense counsel *attempted to use* the untimely-disclosed *Brady* evidence does not adequately assess the prejudicial impact the disclosure had on Purry's right to a fair trial. The Ninth Circuit failed to consider how the delayed disclosure affected defense counsel's ability to defend Purry or whether the delayed disclosure had a prejudicial effect on the outcome of Purry's trial. Most critically, the Ninth Circuit also ignored how timely disclosure of the evidence could have assisted defense counsel in presenting a defense had it been introduced at

trial and, instead, unreasonably focused on whether defense counsel had the opportunity *to attempt to use* the evidence.

Left uncorrected, the Ninth Circuit's test will allow prosecutors to continue to withhold *Brady* evidence until the eve of trial. There will be no incentive to timely disclose exculpatory or impeachment evidence because prosecutors can easily avoid a *Brady* violation by pointing to defense counsel's attempt to use the untimely-disclosed evidence. Doing so eliminates any claim that the defendant was prejudiced by the timing of the disclosure.

Certiorari is requested to offer lower courts guidance on the proper test to apply and factors to consider when evaluating whether a prosecutor's delayed disclosure of *Brady* evidence amounts to a due process violation. Otherwise, the "timeliness" of a prosecutor's *Brady* disclosures will continue to have no significance or consequences.

Citations of Opinions Below

The Ninth Circuit's opinion, *United States v. Purry*, 702 F. App'x 511, 513 (9th Cir. 2017), is attached as Appendix A. The Ninth Circuit's November 21, 2017 Order denying Purry's request for panel rehearing and rehearing en banc, is attached as Appendix B.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order on this case on November 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This Petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

Pursuant to Supreme Court Rule 14.1(f), the relevant constitutional and statutory provisions are reprinted in attached Appendix C.

Statement of the Case

A. District Court Proceedings

In 2014, the government indicted Purry on four counts of illegal acquisition of a firearm by making a false statement under 18 U.S.C. §§ 922(a)(6) and 924(a)(2). ER 130-133. The indictment alleged Purry purchased firearms from Big Gun Enterprises, LLC (“Big Gun”), by knowingly and falsely representing he was a Nevada resident with a Nevada address on the Firearms Transaction Record—commonly referred to as a “Form 4473.” ER 130-133, 755, 758, 764, 768, 771.

Two days before trial, the prosecutor disclosed to defense counsel that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) discovered Big Gun committed nearly one hundred federal violations for failing to properly complete the Form 4473s for the sales of its firearms—the very type of forms underlying Purry’s indictment. ER 16-23, 130-133, 733-748. The violations included Big Gun’s failure to properly record its purchasers’ places of residence—the very type of violations

alleged in Purry's indictment. ER 130-133, 744. In three separate instances, Big Gun failed to ascertain either the correct state of residence or any state of residence for the purchaser. ER 744. Big Gun's ATF violations all occurred during the same time period covered by Purry's indictment. ER 23, 130-133 (indictment alleged conduct from July 27, 2013, through August 31, 2013), 733-748 (ATF inspection period and violations ranged from June 26, 2013 through September 24, 2013).

Defense counsel objected to the prosecutor's untimely disclosures, arguing the prosecutor's actions prevented the defense from exploring an alternative theory at trial because the ATF violations revealed Big Gun's Form 4473s improperly contained blank or incorrect answers as to the state of residence. ER 18-19. Additionally, the prosecutor's untimely disclosure prevented the defense from investigating and effectively using the ATF's violation evidence to impeach Big Gun owners and employees (who were government trial witnesses) regarding their possible participation in directing Purry to fill out the forms a particular way. ER 18-20.

In light of the defense counsel's proffer, the district court did not believe the untimely disclosure prejudiced Purry, stating "I think the defense can still elicit any relevant line of questioning" defense counsel proffered about Big Gun's "conduct and whether [Big Gun employees] somehow induced" Purry's conduct in filling out the Form 4473s. ER 24-25. However, despite counsel's repeated attempts to introduce Big Gun's ATF violations on the Form 4473s at trial, the district court precluded defense counsel from using that evidence, stating Big Gun's ATF violations were an irrelevant "side show." ER 48-55. Purry was unable to pursue the defense that Big

Gun would have completed sales with Purry no matter what Purry answered on the Form 4473s regarding his state of residence or even if he was asked those questions.

It would have been powerful evidence for the jury to learn that Big Gun sold firearms during the same time period it sold Purry firearms, yet failed to determine the correct state of residence in those firearm sales. The violations would have also been powerful evidence for Purry to use in questioning Big Gun employees as to whether they informed purchasers like him to fill out the forms incorrectly or accepted blank forms—scenarios which would have negated the government’s claim that Purry acted knowingly. *See* ER 18 (“ . . . I would have been able to prepare a different defense in this case. I would have been able to put knowledge at issue, I would have been able to question all of these sellers. . . .”). The prosecutor’s late disclosure of the evidence prejudiced Purry by preventing defense counsel from exploring and presenting viable defenses and impeachment avenues. However, and even though evidence of Big Gun’s violations was both independently constituted both exculpatory and impeachment evidence, the district court prohibited Purry from using it at trial.

B. Ninth Circuit Proceedings

Purry timely appealed to the Ninth Circuit Court of Appeals, arguing the prosecutor’s failure to disclose exculpatory and impeachment information regarding Big Gun’s ATF violations only two days before trial violated *Brady*, 373 U.S. 83, and *Giglio v. United States*, 405 U.S. 150 (1972). *United States v. Purry*, 702 F. App’x 511, 513 (9th Cir. 2017). The Ninth Circuit affirmed Purry’s conviction and sentence, specifically finding no *Brady* or *Giglio* violation. *Id.*

The Ninth Circuit reasoned that, despite its late disclosure, the Big Gun violation information “was still of value to [Purry]” when he received it, and thus, there was no *Brady* claim. *Purry*, 702 F. App’x at 513. According to the Ninth Circuit, “Purry repeatedly sought to use the evidence at trial, which confirms that the evidence remained of value to Purry, despite its late disclosure.” *Id.* The Ninth Circuit took the position that, although the district court ultimately “refused to allow Purry to actually use the evidence at trial,” this result is “immaterial for purposes of *Brady*” because the only relevant consideration in cases of late disclosure is whether “Purry received the evidence from the government with sufficient time to utilize it at trial.” *Id.*

In concluding there was no *Brady* violation because the untimely-disclosed evidence still had value to Purry, the Ninth Circuit failed to assign any worth to the term “value.” Instead, the Ninth Circuit narrowly construed value by asking whether Purry was able to *use* the untimely-disclosed evidence at trial. In doing so, the Ninth Circuit likewise assigned no worth to the term “use.” The Ninth Circuit’s application of its “use-value” test, if left uncorrected, will eviscerate all of *Brady*’s intended protections in cases where the timeliness of a prosecutor’s disclosure of *Brady* material arises.

Purry accordingly seeks certiorari from this Court so that parameters may be established for lower courts to properly address untimely-disclosed evidence. Purry respectfully requests this Court develop a non-exhaustive list of factors for lower

courts to consider when determining when a prosecutor's untimely disclosure of *Brady* evidence violates due process.

Reasons for Granting the Writ

The Ninth Circuit's Assessment for Evaluating Prejudice Caused by a Prosecutor's Untimely Disclosure of *Brady* Evidence Failed to Protect Purry's Due Process Right to a Fair Trial.

In *Brady v. Maryland*, this Court mandated that prosecutors have a duty to disclose all favorable evidence to the accused that is material to guilt or punishment, and that suppression of such evidence, which results in prejudice to the defendant, amounts to a due process violation. 373 U.S. at 87. *Brady's* obligations apply equally to impeachment evidence. *Giglio*, 405 U.S. at 154. However, *Brady* did not address whether untimely-disclosed evidence may be deemed "suppressed" for purposes of a *Brady* violation.

Most lower courts have concluded a prosecutor's untimely disclosure of *Brady* evidence can prejudice a defendant's right to a fair trial resulting in a *Brady* violation. However, without guidance from this Court defining the parameters of suppression—specifically, whether and when the untimely disclosure of *Brady* evidence rises to a due process violation—circuit courts throughout the country have developed unclear, inconsistent, and conflicting tests that neglect the consequences delayed disclosure has on a defendant's right to a fair trial. Without defined parameters for assessing suppression, prosecutors have been empowered to delay disclosure of *Brady* evidence, hindering defendants' preparation for trial and ultimately violating their due process rights.

A. The Ninth Circuit's "Use-Value" Test Fails to Measure the Prejudicial Effects of Untimely-Disclosed Evidence.

The Ninth Circuit's application of its "use-value" test to the facts of Purry's trial is an example of the consequences of this Court's lack of guidance. When addressing a prosecutor's failure to timely disclose *Brady* evidence, the Ninth Circuit has consistently held a prosecutor's untimely actions do not amount to a due process violation so long as the disclosure is "made at a time when disclosure would be of *value to the accused*." *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985) (emphasis added); *Tennison v. City & Cty. of San Francisco*, 570 F.3d 1078, 1093 (9th Cir. 2009); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000). This test is amorphous. Though this test has been in place for over 30 years, the Ninth Circuit has not identified factors to consider for defining value and ultimately determining whether delayed disclosure equates to a *Brady* violation. Absent specifically identified factors to guide *Brady's* suppression analysis and any resulting prejudice, the "use-value" test applied to Purry's case lacked a meaningful barometer to adjudicate the prejudicial impact the prosecutor caused by disclosing *Brady* evidence the weekend before trial.

In considering the value of the untimely-disclosed evidence, the Ninth Circuit simply looked at Purry's futile *attempt* to introduce the untimely-disclosed evidence at trial to conclude that the evidence still had value to Purry's defense. *See Purry*, 702 F. App'x at 514. The Ninth Circuit made a conclusory determination that "Purry

repeatedly sought to use [the untimely-disclosed] evidence at trial, which confirms that the evidence remained of value” *Id.* The Ninth Circuit never considered the impact the untimely disclosure had on the fairness of Purry’s trial, and was unconcerned Purry never actually had the opportunity to put the untimely-disclosed evidence to effective use. Rather, the Ninth Circuit reasoned the trial court’s refusal “to allow Purry to actually use the evidence at trial . . . is immaterial for purposes of *Brady*” because Purry’s attempts to use the evidence demonstrated “Purry received the evidence from the prosecutor with sufficient time to utilize it at trial.” *Id.*

The absence of recognized, articulable factors allowed the Ninth Circuit to apply the “use-value” test without attributing meaning to either term, without considering whether the defense could *effectively* use the evidence in any way, and without considering how the defense intended to use the evidence despite defense counsel’s proffer for its intended use.

As Purry’s defense counsel argued, had the prosecutor timely disclosed Big Gun’s ATF violations, defense counsel could have “prepare[d] a different defense,” could have used the evidence to challenge the knowledge element of the crime, could have used the evidence to question Big Gun sellers, and could have used the evidence to raise doubt as to the practices and trustworthiness of Big Gun employees in correctly filling out the Form 4473s. *See* ER 18-19. Each of defense counsel’s proffered uses are reasonable and articulable means that would have supported a viable defense for Purry, and the Ninth Circuit erred in failing to consider them. Thus, contrary to the Ninth Circuit’s opinion, defense counsel’s unsuccessful attempts

to use the *Brady* evidence at trial rendered the *Brady* evidence useless and without any value to Purry.

Brady is intended to protect defendants against abusive prosecutorial practices that lead to unfair criminal trials. If this Court upholds the Ninth Circuit's "use-value" test, it will effectively eviscerate the considerations *Brady* was designed to protect. The Ninth Circuit's belief that evidentiary value can be measured based simply on an unsuccessful attempt to admit evidence applies an erroneously narrow lens to the nuances of defending a criminal trial. Left uncorrected, defendants will have no protections against prosecutors' abusive delay tactics in the Ninth Circuit.

B. The Court Must Establish Clear Guidance to Define When Untimely-Disclosed Evidence Violates *Brady*.

Unlike the Ninth Circuit's application of its "use-value" test in this case, other federal circuit courts have attempted to recognize the nuances that arise from belatedly-disclosed evidence, particularly as it affects defense trial strategy, and have created their own tests to evaluate whether a *Brady* violation occurred. A circuit review is helpful to demonstrate the varying approaches.

Some circuits focus on whether the defendant suffered prejudice following the prosecutor's untimely disclosure. The assessment of prejudice differs, however, from circuit to circuit. The First, Third, and D.C. Circuits examine whether the defendant was prejudiced by the late disclosure but do so by examining if the defendant was actually able to *effectively use* the evidence at trial. *See United States v. Duval*, 496 F.3d 64, 73 (1st Cir. 2007) ("When the issue is one of delayed disclosure rather than of nondisclosure . . . the test is whether defendant's counsel was prevented by the

delay from using the disclosed material effectively in preparing and presenting the defendant's case."); *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) ("No denial of due process occurs if *Brady* material is disclosed to appellees in time for its effective use at trial."); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case.").

The Sixth Circuit holds "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose and that a delay only violates *Brady* when the delay itself causes prejudice." *United States v. Kuehne*, 547 F.3d 667, 698 (6th Cir. 2008) (internal quotations omitted).

The Second Circuit addresses the prejudice of a belated disclosure by considering "the extent to which the defense was hindered by the late revelation, and the curative steps taken in response," "to determine if the earlier disclosure would have altered the outcome of the trial." *United States v. Romero*, 54 F.3d 56, 61 (2d Cir. 1995). The Eighth Circuit is more limited, considering only whether there is a reasonable probability that timely disclosure of the evidence would have changed the result of the proceeding. *See United States v. Cheatham*, 899 F.2d 747, 752 (8th Cir. 1990).

The Fifth and Eleventh Circuits consider both whether the defendant was able to effectively use the untimely-disclosed evidence and whether the defendant suffered any prejudice from the untimely disclosure. *See United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("[T]he inquiry is whether the defendant was prejudiced

by the tardy disclosure. If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been.”); *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991) (“A *Brady* violation can also occur if the prosecution delays in transmitting evidence during a trial, but only if the defendant can show prejudice, e.g., the material came so late that it could not be effectively used.”).

The Tenth Circuit holds “[a]s long as ultimate disclosure is made before it is too late for the defendant[] to make use of *any* benefits of the evidence, Due Process is satisfied.” *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984) (emphasis added). The Tenth Circuit’s use of the term “any benefits” has led to the Tenth Circuit rejecting *Brady* claims where the prosecutor disclosed exculpatory material near the end of trial. *See, e.g., United States v. Scarborough*, 128 F.3d 1373 (10th Cir. 1997) (affirming conviction despite “revelation of exculpatory information just prior to end of trial”).

The Ninth Circuit’s test, though it originally reflected a conglomeration of other circuits’ tests, disintegrated over time to the *Purry* “use-value” test. *See, e.g., United States v. Vgeri*, 51 F.3d 876, 881 (9th Cir. 1991) (holding *Brady* disclosure remained of value to the defense because defense counsel cross-examined witness on the disclosed information); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (finding no violation when *Brady* material disclosed before trial because of a three-week holiday break during trial and defense had ample opportunity to prepare for in-

court cross-examination); *United States v. Browne*, 829 F.2d 760, 765 (9th Cir. 1987) (finding defendant “made ‘effective use’ of the police report to extrinsically impeach the prosecution’s key witnesses”); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985) (finding defendant “had access to the exculpatory information from the beginning of trial and made use of it in cross-examining a witness”).

Left uncorrected, the Ninth Circuit’s cursory “use-value” test will continue to give prosecutors the opportunity to avoid the consequences of a *Brady* violation by simply pointing to any attempt by the defendant to futilely use untimely-disclosed *Brady* evidence at trial. And, lacking Supreme Court authority addressing the issue, prosecutors can do so while purporting to act within the bounds of their constitutional obligations. Such strategic attempts to maintain an evidentiary advantage while simultaneously evading the consequences of a *Brady* violation must be closely scrutinized.

Additionally, on a broader scale, the varying tests among the Circuits have led each in different directions when evaluating whether a prosecutor’s delayed-disclosure amounts to a *Brady* violation, creating inconsistent tests and inconsistent grants of relief. The significant number of *Brady* cases involving the untimely disclosure of evidence demonstrates the need for this Court to create a workable, consistent test. And though a prosecutor’s *Brady* obligations are not contingent upon an individual prosecutor’s good faith, a consistent set of criteria upon which to apply the test will provide responsible prosecutors a meaningful guidepost and discourage others from strategically withholding *Brady* evidence until the last possible moment.

To this end, Purry proposes any test this Court adopts should include the requirement that the defendant put the *Brady* evidence to “effective use.” To assist courts in determining whether the defendant was able to effectively use the evidence, Purry suggests the following criteria may be helpful with this assessment:

- (1) whether, by recalling witnesses, the defense had a substantial opportunity to cure any prejudice caused by the delayed disclosure;
- (2) whether there was ample opportunity for the defense to prepare for in-court examination of witnesses with the newly-disclosed evidence;
- (3) whether the defense-proffered purpose for the *Brady* material was actually achieved;
- (4) whether the defendant was detained or would suffer other prejudice if the proceeding were continued to allow defense counsel additional time to review and investigate the untimely-disclosed evidence; and
- (5) the reason why the prosecutor did not timely disclose the *Brady* evidence.

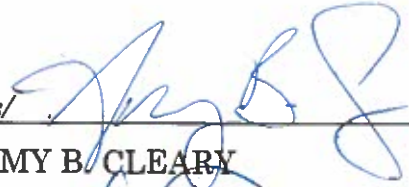
This proposed criteria would assist courts in determining whether the defendant’s due process rights were violated by the untimely-disclosure and, if so, the appropriate remedy. Without a cognizable test to determine whether a prosecutor disclosed *Brady* materials at a meaningful time to the defense and criteria to assess that test, the timing of *Brady* disclosures will remain amorphous and unchecked, and will continue to violate defendants’ due process rights.

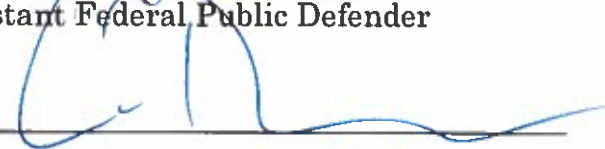
Accordingly, review by this Court is necessary to ensure *Brady* remains a constitutional safeguard.

Conclusion

For the above reasons, Purry requests the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ 
AMY B. CLEARY
Assistant Federal Public Defender

/s/ 
CRISTEN C. THAYER
Assistant Federal Public Defender

/s/ 
KATHERINE A. TANAKA
Assistant Federal Public Defender

Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Amy_Cleary@fd.org
Cristen_Thayer@fd.org
Katherine_Tanaka@fd.org

* Counsel for Petitioner,
Edward Jameson Purry, II

Certificate of Service

Attorney Amy B. Cleary, pursuant to Supreme Court Rule 29, certifies she served the within Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit on counsel for Respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

- 1) Noel Francisco, Solicitor General of the United States
Office of Solicitor General
Room 5614
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530; and
- 2) Elizabeth White, Assistant United States Attorney - Appellate Chief
Adam Flake, Assistant United States Attorney
United States Attorney's Office
100 West Liberty, #600
Reno, NV 89501;

and depositing same with the United Parcel Service in Las Vegas, Nevada, this 12th day of February, 2018, and further certifies that all parties required to be served have been served.



AMY B. CLEARY
Assistant Federal Public Defender