
Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUANE T. KENNEL,

Petitioner,

vs.

CINDY GRIFFITH, Superintendent,
Jefferson City Correctional Center,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this non-capital habeas case, Missouri prisoner Juane Kennell advanced a multi-faceted due process/perjured testimony claim that alleged that the state failed to disclose material impeachment evidence involving several inducements and benefits that were given to the prosecution witness, Jeffrey Shockley. Among other things, the state failed to disclose that the prosecution and Shockley had an understanding that he would receive probation on unrelated pending felony charges, that he received over \$2,000.00 for relocation and moving expenses, and committed perjury.

After extensive discovery and a two day evidentiary hearing, the district court and Court of Appeals denied relief, finding that there was no suppression of impeachment evidence because Shockley did not have a formal or informal agreement for the disposition of his pending charges. On the monetary payment issue, the courts below denied relief by finding that this non-disclosure was not material. The courts below also held that another aspect of petitioner's claim was procedurally barred and lacked merit because trial counsel could have uncovered the undisclosed exculpatory evidence through other channels.

Based on the foregoing facts, this case presents the following questions:

1. Whether a defendant can establish a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), when the prosecution fails to disclose an informal understanding with a witness for a favorable disposition on an unrelated pending charge that is later fulfilled after he testified.
2. Whether the Court of Appeals' finding that petitioner was not prejudiced by the state's non-disclosure of significant monetary payments to a prosecution witness, whose credibility was vital to the prosecution's case, conflicts with this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004) and decisions from other circuits.
3. Whether a reviewing court may deny a *Brady* claim by finding that the undisclosed evidence could have been uncovered by trial counsel through the exercise of due diligence.
4. Does due process require the state to correct the perjured testimony of a prosecution witness as required by *Napue v. Illinois*, 360 U.S. 264 (1959), despite the fact that trial counsel knew or should have known that the testimony was false at the time it was given?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juane Kennell respectfully requests that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals below, which affirmed the judgment of the District Court denying his Petition for a Writ of Habeas Corpus challenging his Missouri convictions for the offenses of murder in the first degree, assault in the first degree, and two counts of armed criminal action.

OPINIONS BELOW

The October 17, 2017, opinion of the Eighth Circuit Court of Appeals is published as *Kennell v. Dormire*, 837 F.3d 637 (8th Cir. 2017), and is published in the Appendix at A-1. The March 31, 2016 Order and Judgment of the United States District Court for the Eastern District of Missouri is unpublished and is published in the Appendix at A-8. The December 12, 2017, Order of the Eighth Circuit Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is unpublished and is published in the Appendix at A-52.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its judgment on October 17, 2017. Petitioner's petition for rehearing and rehearing en banc was denied on December 12, 2017. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition for Writ of Certiorari was required to be filed by petitioner within ninety days. Upon application of petitioner under Rule 13, Associate Justice

and Eighth Circuit Justice Neil Gorsuch extended the time for filing the petition for Writ of Certiorari in this cause up to and including May 11, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: “no state shall . . . 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.”

This case also involves 28 U.S.C. § 2254, which provides, in pertinent part:

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

...

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of the state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim---

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was charged by way of information in the Circuit Court of St. Louis City, Missouri with one count of murder in the first degree, one count of assault in the first degree, and two counts of armed criminal action. (L.F. 13-14). Codefendant Christopher White was charged with the same offenses. These charges arose from a gun battle that occurred in the early morning hours of June 21, 2002, in which a young man named Freddie Chew was shot and killed.

Two other young men involved in this shootout, Jeffrey Shockley and Robert Stewart, later identified petitioner and Christopher White as two of the three persons that exchanged gunfire with them and became the state's star witnesses at petitioner's trial. Public defender Steven Reynolds was originally appointed to represent petitioner. He was later replaced by a different public defender, Afocha Ibe.

Petitioner's case proceeded to trial before Judge Robert Dierker and a jury on January 5, 2004. The jury convicted petitioner as charged and he was subsequently sentenced to life without parole, fifteen years, and two sentences of

life imprisonment. (L.F. 71-74). Petitioner's convictions and sentences were affirmed on direct appeal in 2005 in *State v. Kennell*, ED84222 (unpub. op.).

Petitioner subsequently filed a timely motion for post-conviction relief before the trial court pursuant to Missouri Supreme Court Rule 29.15. After counsel was appointed and an amended motion filed, Judge Dierker denied this motion, after conducting an evidentiary hearing, on September 26, 2006. The primary issue raised in the amended 29.15 motion was an ineffectiveness claim regarding how trial counsel handled petitioner's alibi defense. The motion court's decision was affirmed on appeal in 2008 in *Kennell v. State*, ED89087 (unpub. op.).

After transfer was denied by the Missouri Supreme Court, the Court of Appeals issued its mandate in petitioner's 29.15 appeal on March 21, 2008. Mr. Kennell commenced the present federal habeas corpus proceeding by filing a timely *pro se* motion for a writ of habeas corpus on March 11, 2009. (8th Cir. App. 23-96). Soon thereafter, Mr. Kennell retained undersigned counsel who was granted leave to file an amended petition for a writ of habeas corpus, which was filed on September 17, 2009. (*Id.* 97-112).

Thereafter, protracted litigation ensued before the district court regarding petitioner's requests for discovery seeking access to documents and evidence from

court files, the prosecution's files, and the public defender files to bolster his *Brady* claim advanced in his habeas petition. (8th Cir. App. 5-15).

After two days of evidentiary hearings were conducted on September 3 and 4, 2015, the district court issued a final judgment, accompanied by a memorandum and order, denying the petition. (A-8-52). The district court subsequently denied petitioner's timely post-judgment motion pursuant to Rule 59(e) on May 26, 2016. (8th Cir. App. 355-357). In this same order, the district court granted petitioner a certificate of appealability on his *Brady v. Maryland*, 373 U.S. 83 (1963) claim. (*Id.*). Petitioner filed a timely notice of appeal on June 23, 2016. (*Id.* at 358).

B. Summary Of Evidence Adduced At Trial

In the early morning hours of June 21, 2002, a gun battle occurred in the City of St. Louis involving Freddie Chew, Jeffrey Shockley, Robert Stewart, and three other men. At the conclusion of this shootout, Freddie Chew was killed. (Trial Tr. 215). An autopsy revealed Mr. Chew suffered gunshot wounds to his face, chest, and arms. After police arrived, they discovered a crime scene that extended for six or seven houses in each direction from Chew's home. The police recovered forty-nine shell casings, along with live 9mm ammunition and bullet fragments. A subsequent examination of the casings found that at least five separate guns had been fired. (*Id.* 216, 263-291). No weapons were recovered at the scene. (*Id.*).

Petitioner Juane Kennell and his codefendant Christopher White were charged with the murder of Chew and an assault upon Shockley, as well as two accompanying counts of armed criminal action, after Shockley and Stewart identified them as two of the persons who were shooting at them. At trial, Shockley and Stewart became the star witnesses for the prosecution and identified Kennell as one of the shooters. These same two witnesses gave similar testimony at Christopher White's trial, that occurred the week following petitioner's trial.

Petitioner's theory of defense at trial was alibi, which was supported by his trial testimony and the testimony of his grandmother. (*Id.* 683-689, 794). The defense also argued that Shockley and Stewart were lying and falsely identified Kennell due to prior incidents between Shockley and petitioner that also involved petitioner's brother. At defense counsel's request, the jury was also instructed that they could acquit petitioner if he acted in lawful self-defense.

C. Post-Conviction Proceedings

The *Brady/Giglio* claims before this Court for review were not advanced in petitioner's direct appeal or his 29.15 action. This claim was first advanced by petitioner in his federal habeas corpus petition based upon a conflict form¹ that his

¹ This form stated: "Bob Taaffe represents Jeff Shockley in 021-0715. SR has just learned that Bob negotiated a deal for Jeff Shockley to testify against [Petitioner], who was just arraigned on 1/13/03, as well as possibly another defendant, Christopher White (who may also be coming down the pike, as I think we just interviewed that guy today)." (A-67).

codefendant Christopher White obtained from Daryll Smallwood, indicating that petitioner's first public defender Steven Reynolds had a conflict of interest because one of his colleagues, Robert Taaffe, had arranged a deal for Jeffrey Shockley on pending charges to testify against petitioner and Christopher White. (A-67).

After filing his *pro se* petition, petitioner retained the undersigned counsel to represent him in the court below. Counsel conducted further investigation of this *Brady* claim and obtained a copy of Shockley's guilty plea transcript, which established Shockley received probation on pending drug and weapons charges on February 9, 2004, shortly after he testified against petitioner and Mr. White.² (A-53-64).

The transcript of Mr. Shockley's guilty plea makes for some interesting reading. Although Mr. Shockley's attorney Robert Taaffe insisted at the initiation of the plea colloquy that no agreement has been made with the State of Missouri, the record refutes this statement. When asked by the court for a sentencing recommendation, the State's attorney recommended a two year suspended sentence and two years of probation. (*Id.* at 57). After the Court accepted petitioner's guilty plea to both felony charges, Mr. Taaffe gave a lengthy argument in favor of an even more lenient disposition of the charges. In this regard Mr. Taaffe stated: "For the past few years, Mr. Shockley has cooperated with the State of Missouri in

² Mr. White's trial commenced on January 12, 2004, the week after petitioner's trial took place. (A-10).

the prosecution of two murder first cases. He came to court on time for two years, cooperated with Mr. Craddick, showed up when the cases were to go to trial and for two years he hung in with the state... As a result of this testimony, Judge, the state secured two first degree murder convictions, and Mr. Shockley did this not just as a concerned citizen, which would be his normal duty, but did this when his life was threatened. And he cooperated with the state. They moved him. He's out of the neighborhood, Judge, he's out of that element, and he did what he ought to or should have done as a citizen.” (*Id.* at 61-62).

Although Mr. Taaffe stated that Shockley did not have a formal plea agreement with the state, Mr. Taaffe argued that, because Shockley's testimony was critical to the convictions of Mr. Kennell and his co-defendant, that Shockley should receive an SIS and six months of unsupervised probation. (*Id.* at 62). Thereafter, Judge John Garvey sentenced Shockley to an SIS on both counts and one year of unsupervised probation and waived all court costs and other normal requirements of probation. (*Id.* at 56).

After an amended petition and traverse was filed by undersigned counsel, counsel filed numerous discovery motions on Mr. Kennell's behalf before the district court seeking to obtain additional information and evidence to bolster his *Brady* claim. (8th Cir. App. 6-14, 157-224). The discovery requests specifically sought, among other things, documents from court files involving Shockley and

Stewart, public defender files regarding Shockley and Stewart, and police and circuit attorney files regarding Shockley and Stewart. (*Id.*). The district court ordered that the court and police files be turned over to counsel for inspection. (*Id.* 188-189). However, after the circuit attorney and public defender's office opposed release of these documents to counsel, the district court ordered that these documents from both agencies be submitted to the court for *in camera* review. (*Id.* 200-201).

While the discovery process was ongoing, counsel for petitioner and Mr. White conducted an independent investigation for additional evidence and witnesses to support their *Brady* claims and other claims for relief. Through the discovery process, a written plea agreement was discovered in the prosecution's files disclosed to counsel that clearly indicates that Jeffrey Shockley was offered probation on his pending charges in exchange for his testimony against petitioner and Mr. White and against Shockley's brother in a pending vehicular manslaughter case. (*Id.* 211-214).

In addition, counsel located Robert Stewart, who was incarcerated on pending charges in the Panhandle of Florida. Counsel hired a private investigator from Florida, David Haubrich, who interviewed Mr. Stewart in jail on August 2, 2012. Although Mr. Stewart refused to provide an affidavit to Mr. Haubrich, Haubrich provided his own affidavit that was submitted to the court below

indicating that Stewart told him he could not positively identify Mr. Kennell and Mr. White as the shooters, that he was coached into identifying Kennell and White by Jeffrey Shockley, and that it was apparent to Stewart that Shockley had a deal with the state to testify against both Kennell and White. (*Id.* 207-210). Counsel for Mr. White also located and interviewed Jerome Johnson, who provided a sworn declaration that corroborated Stewart's statements to Mr. Haubrich that Shockley and Stewart could not positively identify the shooters. (*Id.* 216-218).

Mr. Johnson's affidavit provides further proof that the state suppressed exculpatory and impeaching evidence regarding Mr. Kennell's possession of a 9mm Glock after the shooting of Freddie Chew that could have been the murder weapon. (*Id.*). The disclosure of this evidence would have established Mr. Shockley lied when he testified at trial that he disposed of the Glock he possessed and fired on the date Mr. Chew died and never subsequently retrieved it. (Trial Tr. 552).

Before discovery was ordered by the district court, there were three compelling pieces of evidence indicating that the state withheld material exculpatory and impeaching information from petitioner in violation of their obligation of disclosure required by the due process clause of the Fourteenth Amendment under *Brady*. First, the internal memorandum from the public defenders' office established that a conflict of interest existed requiring that office

to remove themselves from Mr. Kennell's case because assistant public defender Robert Taaffe had worked out a "deal" for Jeffrey Shockley to testify against Mr. Kennell and Mr. White. (A-67). Second, the district court was provided with a copy of the transcript of Mr. Shockley's guilty plea to drug and weapons charges in which he received a suspended imposition of sentence ("SIS") and one year of unsupervised probation. (*Id.* at 53-64). This transcript also suggested that the state had paid Mr. Shockley's expenses to move to another neighborhood before he testified against Mr. Kennell and Mr. White. (*Id.* at 61-62).

Third, petitioner provided the district court with undisclosed police reports from a July 1, 2002 arrest where Mr. Shockley and Mr. Stewart were linked to a 9mm Glock handgun found in a car in which they were passengers. (8th Cir. App. 146). Subsequent ballistics testing linked this weapon to the crime scene of the Freddie Chew murder.

After obtaining the affidavit of Mr. Haubrich regarding his interview with Robert Stewart, the statement of Jerome Johnson, and the unsigned plea agreement, Mr. Kennell requested an evidentiary hearing on his *Brady* claim, which the district court granted. (*Id.* 236-240). Two days of evidentiary hearings were conducted before the district court on September 3 and 4, 2015. (*Id.* 13-14). After the hearing concluded, on October 5, 2015, the court ordered respondent to disclose documents to petitioner that the state received from the circuit attorney's

office documenting payments made by the state to Mr. Shockley. (*Id.* 16-18). These documents indicate that the circuit attorney's office, through some sort of slush fund the police department runs for prosecution witnesses, paid over seven hundred dollars to Mr. Shockley and three other persons to stay in the Drury Inn at Union Station between July 28 through August 5, 2002 and then paid over one thousand dollars to move Mr. Shockley and his mother to a new apartment in St. Louis County in October of 2002. (See Dist. Ct. Exh. 11; A-68-88).

The following evidence, adduced through the testimony of the following witnesses at the September 2015 evidentiary hearing, provided additional support for the *Brady/Giglio* claims currently before this Court.

1. Steven Reynolds

Mr. Reynolds, who was an assistant public defender in St. Louis City from 1998 through 2004, testified that he was the author of the public defender conflict form introduced into evidence as Hearing Exhibit 1. (A-67). (Tr. Vol. I, 18-26). Mr. Reynolds was also Mr. Kennell's first assigned public defender. (*Id.* 24-25). The language Mr. Reynolds put in this form regarding a deal with Jeffrey Shockley, which created the conflict, would have been based on what Mr. Taaffe had told him at that time. (*Id.* 25-26).

2. Jeffrey Shockley

Mr. Shockley was originally called as a hostile witness by petitioner at the recent hearing. (*Id.* 41). Shockley repeatedly insisted that he never had any informal deal or understanding with prosecutors and Mr. Taaffe that he would avoid going to jail on his pending drug and weapons charges if he agreed to testify against petitioner and Christopher White. This aspect of Mr. Shockley's testimony was contradicted by the subsequent testimony of Robert Taaffe, Robert Craddick, Darryl Smallwood, and Jerome Johnson. This aspect of Shockley's testimony was also inconsistent with petitioner's Hrg. Exhibit 9, which is a two page memorandum authored by Mr. Taaffe in the public defender files indicating that Mr. Shockley had an understanding, that if he testified against Kennell and White, he would possibly get the charges dismissed and, at worst, would get probation. (A-65-66).

Regarding the relocation/payment issue, Mr. Shockley admitted that the state put him up in a hotel near Union Station for approximately two weeks before the trial and gave him other money for meals and other incidental expenses. (Tr. 57-58, 71). Mr. Shockley, however, denied that the state paid him and his mother to move into an apartment out of the neighborhood where they resided. (*Id.* 58, 72). Mr. Shockley's testimony regarding the apartment is refuted by the aforementioned records, designated as Exhibit 11, that indicates that the prosecutor's office paid at

least \$1,060.00 to obtain an apartment for Mr. Shockley and his mother.³ (A-68-89). These sealed records also corroborate the fact that Mr. Shockley stayed at the Drury Inn at Union Station at the prosecution's expense for approximately eight days prior to trial. (A-68-74). These documents noted that these payments were made because Shockley was a witness in the Christopher White homicide case that was being prosecuted by Mr. Craddick. (*Id.* 74). It appears that the prosecutor's office, after depositing \$1,380.00 received from police in the Lindell Bank, wrote a check on the same account for \$1,060.00 to Mr. Shockley's new landlord. (80-82). Where the other \$320.00 went remains a mystery.

The final pertinent fact that Mr. Shockley admitted in his testimony involved his agreement to become a state's witness against his brother in a vehicular homicide case that was pending trial around the same time as the trials of petitioner and Mr. White. (Tr. Vol. I, 75, 187). This is corroborated by the aforementioned written plea agreement that came to light during discovery. (8th Cir. App. 211-212). Mr. Shockley insisted that the only reason he agreed to do this was because his brother told him it was okay because his brother wanted him to avoid going to jail or prison. (Tr. Vol. I, 77-78). Finally, Mr. Shockley admitted he lied at

³ This payment appears to cover the first and last month's rent and the security deposit for this apartment. There is another check written to the prosecutor's office from the police for \$320.00. There are no other documents to explain where or to whom this money was directed. However, there is a deposit slip containing a figure of \$1,380.00, which is the sum total of both checks. This strongly suggests that this second check was for Mr. Shockley's moving expenses.

petitioner's trial when he said he had disposed of the Glock that he had fired the night of the Freddie Chew shooting. (*Id.* 62-63). He also admitted that the Glock that was found in the car when he was arrested on July 1, 2002 with Jerome Johnson and Robert Stewart was the same weapon he fired the night of the Chew shooting. (*Id.*).

3. Robert Taaffe

Mr. Taaffe was the assistant public defender who represented Jeffrey Shockley on his drug and weapons charges. (*Id.* 105-106). Mr. Taaffe testified that the St. Louis Circuit Attorney's Office offered Jeffrey Shockley a plea bargain for probation in exchange for his testimony against petitioner and Christopher White. (*Id.* 107-108). After Mr. Shockley had agreed to testify, Mr. Taaffe continued the case for plea and sentencing until after Mr. Shockley testified at petitioner's and Mr. White's trials. (*Id.* 107).

After the noon recess on the first day of the evidentiary hearing after the district court ordered disclosure to petitioner and Mr. White of the public defender records from Shockley's trial file, Mr. Taaffe identified Exhibit 9 (A-65-66) as his notes and emails regarding plea negotiations in Mr. Shockley's case. (Tr. 130-131). After refreshing his recollection with his notes from Hrg. Exhibit 9, Mr. Taaffe testified that, at a November 2003 meeting in which Mr. Shockley and prosecutor Robert Craddick were present, Mr. Craddick hinted that he might

dismiss the charges if Mr. Shockley agreed to testify at the upcoming trials of petitioner and Mr. White. (*Id.* 131-132). During this meeting, Mr. Shockley agreed to become a state's witness. Based upon this meeting Mr. Taaffe testified that it was clear that if Mr. Shockley testified, the state would, at best, dismiss his pending charges and, at worst, he would get probation. (Tr. 130-132).

4. Robert Craddick

Mr. Craddick was the assistant circuit attorney who prosecuted petitioner and Mr. White on murder charges and obtained convictions through the use of Mr. Shockley's testimony. Mr. Craddick testified he did not recall any conversations with Mr. Shockley or his counsel regarding the aforementioned meeting in which an agreement was reached for Mr. Shockley to testify. (*Id.* 222). He also testified he never saw any of the written plea agreements that were provided by another circuit attorney to Mr. Shockley's attorney. (*Id.* 236-237).

In response to the Attorney General's question regarding whether he was aware of Mr. Shockley receiving any money from the state for his testimony, Mr. Craddick answered: "Absolutely not." (*Id.* 225). Mr. Craddick also testified he was unaware of whether the prosecutor's office moved Shockley to a new place of residence. (*Id.*). This testimony is contradicted by the documents contained in Exhibit 11, which indicate, as noted earlier, that the Circuit Attorney's Victims Services Unit in collaboration with the St. Louis Police Department gave Mr.

Shockley and his mother more than two thousand dollars for a hotel stay and a new apartment in 2002 when Mr. Craddick was prosecuting the case against petitioner and Christopher White. (A-74-89).

Finally, Mr. Craddick testified that he had no incentive to offer Mr. Shockley a formal plea bargain agreement in exchange for his testimony. He took this position because it was understood by himself and Mr. Taaffe that Mr. Shockley would undoubtedly get probation given his age, lack of criminal record, and the nature of the pending charges. As a result, Mr. Craddick did not want to offer a definite plea bargain to Shockley because it would hurt his credibility before a jury. (Tr. Vol. I, 232-233).

5. Jerome Johnson and Daryll Smallwood

Mr. Johnson testified regarding the incident of July 1, 2002 in which he, Jeffrey Shockley, and Robert Stewart were arrested in a car and the Glock belonging to Mr. Shockley was seized by police. (*Id.* 86-88). Mr. Johnson testified that, after he was formally charged with a weapons charge involving this Glock that was found in Mr. Shockley's mother's car, he learned that this weapon was linked to the Chew murder. (*Id.* 89). Mr. Johnson also testified that, after the murder of Freddie Chew, both Mr. Stewart and Mr. Shockley told him they could not identify who did it because the shooters had ski masks on. (*Id.* 85-86, 94, 99). However they thought, due to a prior incident, that the shooters were "Smurf" and

“50C,” which were the nicknames for Juane Kennell and Christopher White. (*Id.* 85-86, 94).

Darryl Smallwood provided testimony that corroborated the testimony of petitioner and Christopher White, that he was the person who obtained the public defender conflict form while he was incarcerated with Jeffrey Shockley. (Tr. 198-201). After Mr. Shockley gave him this document, Mr. Smallwood, thereafter, gave the form to Christopher White in 2007 or 2008 when they were in prison together. (*Id.* 195-198). Although Mr. Shockley was recalled to the stand by respondent to deny that he gave Mr. Smallwood this form, there is no other possible explanation how this form came into Mr. Smallwood’s possession unless Mr. Shockley gave it to him. This fact is corroborated by Shockley’s prior testimony that he knew Mr. Smallwood, a.k.a. “D-Blue,” from meeting him in the city jail. (*Id.* 66-67). Mr. Smallwood explained that Mr. Shockley’s motive for giving him this form was to avoid being labeled as a “snitch” when he went to prison. (*Id.* 201-202). Finally, Mr. Smallwood, like Mr. Johnson, stated that Mr. Shockley admitted to him that he lied when he identified petitioner and Mr. White as the shooters in order to get a favorable deal on his pending charges. (*Id.* 202-204).

6. Juane Kennell and Christopher White

Both Mr. Kennell and Mr. White, consistent with the testimony of Darryl Smallwood, testified that they did not obtain the conflict form (Hrg. Exh. 1; A-67) that put them on notice that they had a possible *Brady* claim until it was too late to raise that claim in either their direct appeal or 29.15 motion. (Tr. 152-183). Mr. Kennell also testified that neither he nor his trial attorney were provided any evidence or knew that either Mr. Stewart or Mr. Shockley had previously been arrested or had any pending charges at the time they testified at trial. (*Id.* 154). Mr. Kennell's testimony in this regard was corroborated during respondent's cross-examination in which they referenced Hrg. Exhibit YY, which is a letter Mr. Kennell wrote to his trial counsel in July of 2003 indicating he had heard a rumor regarding the July 1, 2002 incident where Shockley and Stewart were arrested with Jerome Johnson. (*Id.* 160-161). As with the conflict form, Mr. Kennell did not obtain the police reports regarding the Glock seized on July 1, 2002 until it was too late to utilize them in either his direct appeal or 29.15. (*Id.* 160). (*See also* Hrg. Exh.'s 5, 6, 7).

The testimony of Christopher White regarding the conflict form also corroborated the other evidence that this form did not come into his possession until it was given to him by Mr. Smallwood when they were incarcerated together at the Bonne Terre prison in 2008 or 2009. (Tr. Vol. I, 174-176). Once he

obtained this form from Mr. Smallwood, he mailed a copy of it to Mr. Kennell at Jefferson City Correctional Center. (*Id.* 177-178).

7. Robert Stewart

The final witness who testified at the hearing was Robert Stewart. (Tr. Vol. II, p. 4). Mr. Stewart was flown into St. Louis at the expense of the Attorney General to testify regarding the allegations advanced by petitioner that, among other things, Stewart and Shockley perjured themselves at trial when they positively identified Mr. White and petitioner as the shooters and that Mr. Shockley coached him at the pretrial identification procedure to pick out the photos of White and Kennell at the police department.

Mr. Stewart denied that he told Jerome Johnson or investigator David Haubrich that he could not identify the shooters. (*Id.* pp. 9-17). However, Mr. Stewart offered no reason why Mr. Johnson or Mr. Haubrich had any motive to lie. The most telling passage from Mr. Stewart's testimony that indicates he lied at the hearing when he denied telling Mr. Haubrich that he could not identify the shooters, that Mr. Shockley had a deal, and that there were irregularities in the lineup procedure, was his admission that he did in fact speak with Mr. Haubrich at the jail in Florida for approximately thirty to forty-five minutes. (*Id.* 19).

8. District Court Opinion

On March 31, 2016, the district court issued a Memorandum, Order, and Judgment denying the petition. (A-8-51). Although the district court found there was no procedural bar to the *Brady* claim, (*Id.* 37-38) the court denied relief primarily on the basis that any nondisclosures were not material, except for the aspect of the claim involving the disposition of Shockley's charges. (*Id.* 38-45). After denying petitioner's post-judgment motion, the district court granted a certificate of appealability on the *Brady* claim. (App. 355-357).

9. Eighth Circuit Decision

Petitioner filed a timely notice of appeal to the Eighth Circuit. After briefing and argument, the Eighth Circuit affirmed the District Court's judgment and subsequently denied rehearing. (A-1, 52). Regarding the monetary payment component of the *Brady* claim, the panel affirmed the district court's finding that this *Brady* violation was not material. (A-4). Regarding the disposition of Shockley's pending charges, the panel affirmed the district court finding that no *Brady* violation occurred because there was no formal or informal agreement with Shockley for leniency in exchange for his testimony. (*Id.* 3). Finally, the panel, unlike the district court, found that *Brady*/perjured testimony claim involving Shockley's gun was procedurally barred. (*Id.* 4-6). This petition for discretionary review ensues.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT'S DECISION DENYING RELIEF ON PETITIONER'S BRADY CLAIM CONFLICTS WITH PRIOR DECISIONS FROM THIS COURT AND OTHER CIRCUITS.

Petitioner's multi-faceted and factually complex *Brady/Giglio*⁴ claim was given short shrift by both the District Court and the Eighth Circuit below. Both of these courts disposed of the aspect of the claim involving the disposition of prosecution witness Jeffrey Shockley's pending charge by finding that there was no suppression of exculpatory evidence under *Brady* because there was no formal or informal plea agreement given to Mr. Shockley in exchange for his testimony for the prosecution. (A-3). On the monetary payment aspect of the claim, viewing the claim in isolation, the Court of Appeals held that this *Brady* violation was not material. (A-4). This Court's intervention is necessary because the Court of Appeals' resolution of these two aspects of this claim cannot be reconciled with prior decisions from this Court and also conflict with the views of other circuits in addressing similar *Brady* claims.

On the issue of whether the nondisclosure of Mr. Shockley's agreement to become a prosecution witness, arranged by his public defender, and his subsequent

⁴ *Giglio v. United States*, 405 U.S. 150 (1972).

guilty plea where he received probation constituted a *Brady* violation, discretionary review is warranted because the evidence presented at the recent hearing establishes that a due process violation occurred. There was undoubtedly a meeting of the minds between Mr. Shockley, his attorney, and the state, that he would avoid jail on his pending charges if he agreed to testify against Mr. White and Mr. Kennell. The Court of Appeals failed to recognize that a formal plea agreement or contract with such a witness is not required to establish a *Brady* violation.

As this Court has noted, the key question is not whether there is an effective agreement, but whether the witness “might have believed that [the state] was in a position to implement...any promise of consideration.” *Napue v. Illinois*, 360 U.S. 264, 270 (1959). Mr. Craddick, the prosecutor, testified that no formal plea bargain was consummated because he was concerned that a formal plea bargain agreement would undermine Mr. Kennell’s credibility with the jury. (Hrg. Tr. 232-233).

Regardless of whether there was a formal enforceable contract, there was clearly an understanding as to the outcome of a future prosecution that would have undermined Mr. Shockley’s credibility. See *Giglio*, 405 U.S. at 155. As the record clearly indicates, a formal agreement was strategically not offered by the

prosecution to unfairly enhance Shockley's credibility in order to mislead the jury. *See Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

In addressing whether two other *Brady* violations regarding the payments and Shockley's agreement to testify against his brother warranted relief, the Court of Appeals affirmed the district court's finding that neither of these nondisclosures violated *Brady*. (A- 4). On the payment issue, the panel erroneously credited the district court's finding that this evidence could have invited further speculation by the jury that these payments were necessary because Shockley had been threatened. (*Id.*). However, Shockley never testified at trial or, at the more recent evidentiary hearing, that petitioner or anyone else threatened his life. (Hrg. Tr. 70). Therefore, the finding that the payment evidence may have harmed the defense is "pure speculation." *See Browning v. Baker*, 875 F.3d 444, 465, (9th Cir. 2017).

Regarding Shockley's agreement to testify against his brother, both the Eighth Circuit and the district court overlooked the uncontradicted testimony of Mr. Shockley where he indicated that he agreed to testify for the prosecution, after having conversations with his brother, who advised him that it would be in Mr. Shockley's interest to testify against him to avoid going to jail on his pending charges. (Hrg. Tr. 75-79). Other courts have found that the suppression of similar

impeachment material warranted relief under *Brady*. See *State v. Wright*, 91 A.3d 972, 989-990 (Del. 2014).

The Court of Appeals' decision also conflicts with *Wearry v. Cain*, 136 S. Ct. 1002 (2016). The district court's effort to distinguish this case from *Wearry*, by invoking a phrase from *Wearry* that the evidence against petitioner was not a "house of cards" is also unpersuasive. (A-41, 45). The Court of Appeals and the district court below overlooked the undisputable fact that there are striking parallels between the evidence the State of Louisiana presented to convict Mr. Wearry of murder and the evidence that the state presented to convict petitioner. Mr. Wearry, like petitioner, was convicted based upon the testimony of two witnesses, who were impeached with prior inconsistent statements. Similar to the fingerprint evidence in this case, the state also presented additional circumstantial evidence in *Wearry* connecting the defendant to the murder. 136 S. Ct. at 1003. As in *Wearry*, petitioner's primary defense at trial also was alibi. *Id.* at 1003-1004.

In addition, the undisclosed *Brady* material in *Wearry* is similar to the suppressed exculpatory evidence in this case. In *Wearry*, one aspect of the *Brady* violation involved the state's failure to disclose that one of the key witnesses against Wearry had twice sought a deal with the state to reduce his existing sentence in exchange for his testimony against Wearry. *Id.* at 1004. Another aspect of the *Brady* violation in *Wearry* was the fact that one of the eyewitnesses

had tried to coach another witness into implicating Wearry in the murder. *Id.* This evidence in *Wearry* is similar in substance to the evidence presented here that Shockley coached Mr. Stewart into identifying petitioner and Mr. White at the lineup. (8th Cir. App. 207-210). These similar facts led this Court to conclude that Mr. Wearry deserved a new trial because the suppressed evidence undermined confidence in the verdict. 136 S. Ct. at 1006. This Court in *Wearry* also stressed the fact that the defendant was entitled to a new trial under the proper materiality standard even if “the undisclosed information may not have affected the jury’s verdict.” *Id.* at n.6.

This Court in *Wearry* also concluded that the evidence against Wearry “resembles a house of cards, built on the jury crediting Scott’s account rather than Wearry’s alibi.” *Id.* at 1006. Substituting Mr. Shockley’s name for Scott, the key witness against Mr. Wearry, and substituting Mr. Kennell’s name with Wearry in this passage would also aptly describe the facts surrounding the prosecution’s case and the impact of the *Brady* violations here.

Both the Court of Appeals and the district court also failed to take into account, in assessing the strength of the evidence, as respondent candidly conceded, both Shockley and Stewart had credibility problems that were brought out at trial involving their use of drugs, prior inconsistent statements, and motives for falsely implicating petitioner. (8th Cir. App. 112). Ironically, the district court

did mention Shockley's lack of credibility in another context in an attempt to minimize the impeachment value of Shockley's admitted lie to petitioner's jury that he had disposed of his Glock 9mm handgun after Mr. Chew was shot. (A-43, n.9).

In *Wearry*, as here, the facts did not involve a formal deal with the prosecution witness. Instead, as here, the evidence in *Wearry* was that the witness "had twice sought a deal" in exchange for his testimony. *Id.* at 1004.

In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court explained that the key question is not whether the prosecutor and the witness entered into an effective and binding agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration. *Id.* at 270. *See also Giglio v. United States*, 405 U.S. 150, 154-155 (1972). It is clear under this Court's *Brady/Giglio* cases that "evidence of any understanding or agreement as to a future prosecution would be relevant to the witness's credibility." *Id.* at 155. As the Fifth Circuit noted in a similar case, the key issue is not whether "the promise was indeed a promise." The key question is "the extent to which the testimony misled the jury." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

The evidence adduced at the evidentiary hearing, particularly from Mr. Taaffe and Mr. Craddick, whom the district court found to be credible in other respects, removes any doubt that these two attorneys and Mr. Shockley had an

understanding that, if Mr. Shockley testified for the prosecution, he would certainly get probation and possibly get his charges dismissed. The following exchange between the undersigned counsel and Mr. Taaffe at the recent hearing removes any doubt that this understanding existed:

“Q: And it was clear, is it not, that [Shockley] was not going to get anything worse than probation and you had hoped you could talk the state into dismissing the charges after he testified; is that a fair statement?

A: Well, yeah. I think the recommendation before he testified was for probation. But in answer to your question, yes.”

(Hrg. Tr. Vol. I, 132). This understanding’s existence was corroborated by Mr. Craddick’s testimony where he indicated, because it was a certainty Mr. Shockley would get probation because of his age and lack of a criminal record, he chose for strategic reasons not to offer him a formal plea bargain to testify in order to unfairly enhance Mr. Shockley’s credibility in the eyes of the jury. (*Id.* 232-233). Such tactics that are calculated to mislead the jury are prohibited by *Brady*. See *Tassin, supra*, 517 F.3d at 778.

In addition to the fact that the Eighth Circuit’s opinion cannot be reconciled with *Giglio*, *Napue*, *Wearry*, and *Tassin*, discretionary review is also warranted because the Eighth Circuit’s opinion conflicts with the recent Ninth Circuit decision in *Browning, supra*. In *Browning*, the Court granted a Nevada prisoner habeas relief on a multi-faceted *Brady/Giglio* claim in large part due to the fact that

the state and a key prosecution witness had an understanding, under which the witness testified with an expectation (that was later fulfilled), of favorable treatment in connection with a pending charge. 875 F.3d at 462-463. The Court in *Browning* reached this result despite the fact that both the prosecutor and the prosecution witness testified that there was no explicit promise or plea bargain offered in exchange for testimony against petitioner. (*Id.* at 461-462). In light of this factual scenario that is indistinguishable from the facts here, the Court in *Browning* found that the state suppressed material impeachment evidence. (*Id.* at 462-463).

The Court of Appeals' disposition of the monetary payment component of petitioner's *Brady* claim also cannot be reconciled with this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004). In *Banks*, the state failed to disclose that a key prosecution witness was paid \$200.00 for his testimony. *Id.* at 685. In light of this fact, this Court in *Banks* held that it was beyond genuine debate that this witness's paid informant status qualified as evidence advantageous to *Banks*. *Id.* at 691. Other courts have found *Brady* violations were material in similar circumstances where government witnesses were paid prior to their trial testimony and this fact was not disclosed to the defense at trial. *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). In *Benn*, among the other undisclosed impeachment evidence that was considered by that court, a key prosecution witness was given

\$150.00 by the police in exchange for his promise to incriminate Benn. *Id.* at 1056-1057.

Both the district court's and the Eighth Circuit's conclusion that the payments to Shockley, viewed in isolation, were not material cannot be reconciled with *Banks* and decisions from other circuits. As noted earlier, the conclusion of the courts below that this payment issue could have been a "double edged sword" because the jury could have speculated that the payments were made because Shockley had been threatened or feared for his life, is based upon pure speculation because Shockley never testified at trial or, at the recent evidentiary hearing that petitioner or anyone else had threatened him.

This speculation about the harm that the evidence may have induced in the collective minds of the jury also ignores the fact that petitioner had been in jail several months before the state paid Shockley and his mother nearly \$2000.00 for a new apartment and moving expenses. The Court of Appeals' materiality analysis also ignores the indisputable fact that the jury had no reason to question Mr. Shockley's motives for testifying. In this regard, the district court found that Shockley was motivated to testify because the victim of the homicide was his best friend. (A-41). Had the jury heard of the monetary payments, coupled with the other *Brady* material, they would have had more than ample reasons to believe that Mr. Shockley was testifying in his self-interest rather than friendship. *See Thomas*

v. Westbrook, 849 F.3d 659, 662, 665 (6th Cir. 2017); *See also Robinson v. Mills*, 592 F.3d 730, 738 (6th Cir. 2010).

In *Thomas*, the court granted a Tennessee death row inmate a new trial on a *Brady* claim that involved the suppression of evidence that a key prosecution witness was paid seven hundred and fifty dollars (\$750.00) by the FBI before trial. 849 F.3d at 661-666. Like this case, because there was no dispute that this payment was in fact made to the prosecution witness, the dispositive issue before the court in *Thomas* was *Brady* materiality. Like Mr. Shockley in this case, the witness who was paid in *Thomas* was pivotal to the prosecution's case. *Id.* at 664.

The court in *Thomas* also rejected an argument by the warden that is similar to an argument advanced by respondent here, that the undisclosed payment evidence was not material because the witness was effectively impeached in other ways at trial. The court in *Thomas* emphatically rejected this argument by noting that “impeachment on the basis of pecuniary bias is fundamentally different than impeachment on the basis of character for dishonesty or other bad acts.” *Id.* at 666. The court in *Thomas* also noted that undisclosed evidence regarding a prosecution witness' financial relationship with the prosecutor “was different in kind” from impeachment based upon prior inconsistent statements. *Id.* The court in *Thomas* concluded by finding that “the fact that [prosecution witness] had been

thoroughly impeached on other grounds is no bar to a finding that evidence of her pecuniary bias against *Thomas* is material under *Brady*.” *Id.*

The aforementioned passages from *Thomas* also aptly describe the situation involving the payments to Mr. Shockley. If anything, the facts in this case are stronger because Mr. Shockley was paid a great deal more than \$750.00 and was paid directly from a bank account controlled by the St. Louis Circuit Attorney’s Office. When this *Brady* violation’s prejudicial effect is considered cumulatively with all other aspects of petitioner’s *Brady/Giglio* claims, it is clear that a new trial is warranted. Certiorari should be granted because the Court of Appeals resolution of the monetary payment aspect of the *Brady* claim conflicts with *Banks* and *Thomas*.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A DEFENDANT CAN PREVAIL ON A BRADY/PERJURED TESTIMONY CLAIM INVOLVING A MATERIAL PROSECUTION WITNESS DESPITE THE FACT THAT DEFENSE COUNSEL EITHER KNEW OR SHOULD HAVE KNOWN THAT THE WITNESS WAS COMMITTING PERJURY DURING HIS TESTIMONY.

As noted earlier, the district court granted petitioner leave to amend his petition after the hearing, after Mr. Shockley admitted during his hearing testimony that he lied at trial regarding the fact that he disposed of the gun that was involved in the shootout. (A-9, n. 2, 8th Cir. App. 243). The district court subsequently

found that there was no *Brady* violation arising from Shockley's false testimony that he disposed of the gun and was subsequently arrested on July 1, 2002. (A-42-43). The district court reached this conclusion because Mr. Kennell could have learned about this lie, and about the gun "through other channels." (*Id.* at 43, n. 9). On appeal the Eighth Circuit found that this *Brady/Giglio* claim was procedurally barred, and also declined to address the related due process claim involving the prosecution's failure to correct the perjured testimony of Shockley regarding his gun. As a result, it is fair to assume that the Eighth Circuit tacitly adopted the findings of the district court in the adjudication of this claim. *See Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

Although the Court of Appeals did not explicitly cite respondent's brief, it is clear they must have based their holding that this *Brady/Giglio* claim was procedurally barred upon arguments advanced by respondent that the trial transcripts indicate that trial counsel must have known of Shockley's lie about the gun. These cited excerpts from the transcripts show no such thing. In addition, the Eighth Circuit ignored the testimony and affidavit of petitioner and the declarations of direct appeal and state post-conviction counsel that they had no knowledge of Shockley's lie about the disposal of the gun when reviewing the files in the case. (8th Cir. App. 145-154).

The cited excerpts from trial counsel's cross examination of Shockley and her closing argument, according to respondent, establishes that trial counsel knew about Shockley's arrest, the retrieval of the gun, and the ballistics match. However, in the excerpts from the trial transcript, where trial counsel was cross-examining Mr. Shockley, the only details that were brought to light was that Shockley knew Jerome Johnson and that Shockley tossed his gun into an alley after the shooting and never got it back. (Tr. 549, 552) Later, in closing argument, trial counsel did argue that Shockley retrieved the gun. (Tr. 857). In these cited passages, trial counsel did not present any evidence or argument regarding the fact that Shockley's July 1, 2002, arrest and the subsequent ballistic testing of the gun recovered from the car, proved that Shockley lied about disposing of the gun.

Although trial counsel and petitioner may have received information about the arrest, it is clear that all of the police reports and ballistics reports were not disclosed to trial counsel because, if they had been, trial counsel would have undoubtedly utilized them to conclusively establish that Shockley was a liar. As a result, the basis for finding a procedural bar, that trial counsel knew all the circumstances surrounding the gun and Shockley's arrest, is clearly erroneous and lacks support in the record.

The Court of Appeals undoubtedly also relied upon the district court's finding that there was no *Brady* violation because Mr. Kennell could have learned

about Shockley's lie about disposing of the gun based upon his July 1, 2002, arrest "through other channels." (A-42-43, n. 9) This conclusion by the district court is legally erroneous because it clearly conflicts with this Court's decision in *Banks*, that imposes no requirement on a defendant or defense counsel to attempt to seek exculpatory evidence that the prosecution has not disclosed, even if it could be obtained through other sources. 340 U.S. at 695-696. The Third Circuit *en banc* recently rejected a similar argument that no *Brady* violation occurred because the defendant could have found the exculpatory evidence through other sources because adopting a due diligence exception to *Brady* would be contrary to the purposes of the *Brady* rule and essentially grafts a fourth element onto the settled *Brady* test that would conflict with Supreme Court precedent. *Dennis v. Sec'y Pa. Department of Corrections*, 834 F.3d 263, 289-291 (3rd Cir. en banc 2016).

Even if trial counsel knew or should have known about Shockley's arrest and the gun, that knowledge is also immaterial to the perjured testimony aspect of the claim under *Napue v. Illinois*, 360 U.S. 264 (1959). Numerous courts have held that *Napue* imposes a duty upon the government to correct perjury by its witness regardless of whether defense counsel knew or should have known that the testimony is false. *See, e.g., Crutcher v. State*, 481 S.W.2d 113, 115-116 (Tex. Crim. App. 1972); *Mills v. Scully*, 826 F.2d 1192, 1195 (2nd Cir. 1987); *In re Sakarias*, 106 P.3d 931, 947 (Cal. 2005) (prosecutor's presentation of false

evidence and argument violated due process even though the information had been “disclosed to the defense” at trial.).

As the Ninth Circuit correctly pointed out, the policy behind this interpretation of *Napue* is obvious:

“All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial....A prosecutor has a special duty commensurate with the prosecutor’s unique power, to assure that defendants receive fair trials. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one.”

United States v. LaPage, 231 F.3d 488, 492 (9th Cir. 2000). (citations omitted).

Therefore, it is simply irrelevant to the appropriate due process analysis that defense counsel could have exposed this instance of perjury regarding Shockley’s gun. The only requirement that a prisoner must meet to prevail on a *Napue* claim is that false testimony was presented and that there is a reasonable likelihood that these falsehoods could have affected the judgment of the jury. *Giglio*, 405 U.S. at 154. In this regard, the Second Circuit has held that due process is violated where the prosecutor presents false evidence even if the defense counsel knows of the falsity beforehand. *See United States v. Valentine*, 820 F.2d 565, 571 (2nd Cir. 1997).

The facts of this case present the Court with an ideal vehicle to address two important unanswered questions regarding the scope of the *Brady/Napue/Giglio* rule that has divided and confused inferior courts. First, this case provides the Court with the opportunity to address whether it is appropriate for reviewing courts to graft a due diligence requirement onto the suppression prong of the three part *Brady* test. Although this position was correctly rejected by the Third Circuit *en banc* in *Dennis*, other courts of appeal have reached the opposite conclusion. See *e.g. Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002); *United States v. Coplen*, 565 F.3d 1094, 1097 (8th Cir. 2009).

Second, the facts of this case provides the Court with an avenue to address a conflict between the circuits as to whether a perjured testimony claim is constitutionally viable in situations where trial counsel knew or should have known that a key prosecution witness was lying when he testified at trial. See *e.g. Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002). This is an issue that will undoubtedly resurface with regularity in future cases. This Court's discretionary intervention is warranted here, not only to rectify a clear injustice to petitioner, but to settle important unresolved issues that are critical to the administration of criminal justice in this country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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