No. _____
Term of _____

IN THE
Supreme Court of the United States

Malik Derry,
Petitioner,

v.

United States of America,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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* *Admitted in New York, New Jersey, U.S. District Court of New Jersey, Court of Appeals for the Third Circuit*

QUESTION PRESENTED

A. Whether the Fifth or Sixth Amendments, or Rules 43 and 44 of the Federal Rules of Criminal Procedure, are violated when neither a criminal defendant nor his counsel is present at the hearing at which prejudicial evidence is admitted.

The District Court Judge adopted as the "law of the case" an evidentiary ruling from a separate trial, United States v. Bailey, and decided by a different judge, the result of which allowed the publication to the jury of a murder video whose potential for unfair prejudice was substantially outweighed by any probative value. Compounding the clear error of invoking the Law of the Case doctrine is that neither Petitioner nor his counsel was present at the Bailey trial at which the evidentiary ruling was made, meaning Petitioner was denied his Sixth Amendment right to the assistance of Counsel, his Fifth Amendment right to Due Process of Law, his right under Fed. R. Crim. P. 43 to be present at all critical stages of his trial, and his right under Fed. R. Crim. P. 44 to have his appointed counsel represent him at every stage of the proceedings.

The Third Circuit denied Petitioner's appeal, failing to recognize how the unique circumstances of the misapplication of the Law of the Case doctrine here offends the Constitution and the Federal Rules of Criminal Procedure promulgated by this Court. The Third Circuit

stated that its case law "does not support the claim" of constitutional harm. While it is true that the Third Circuit's jurisprudence holds that Rule 43 does not generally require a criminal defendant's presence at motion hearings, the Third Circuit ignored the fact that its jurisprudence is bereft of instances in which not only was a defendant not present at the motion hearing but neither was defendant's counsel.

Additionally, the Third Circuit's statement that Petitioner "had access to procedures available in his trial to contest the video's admission" fails to recognize that the trial court's misapplication of the Law of the Case doctrine denied Petitioner the benefit of those "procedures" because the District Court expressly stated that it did not have the power to revisit the prior court's admissibility ruling. Reversal on Due Process grounds is required not only by the exceptional procedural fact of one court adopting an evidentiary ruling from a separate trial with a different judge and different defendants, but more importantly also is commanded by adherence to the text, purpose and interplay between the Fifth and Sixth Amendments, as well as between Rules 43 and 44 of the Federal Rules of Criminal Procedure. At the heart of that interplay is the basic idea that every defendant is innocent until proven guilty and is entitled to make a full-throated defense either personally or with the assistance of counsel.

With regard to a video that the Third Circuit deemed extremely prejudicial, Petitioner here was denied those rights.

QUESTION PRESENTED

B. Whether the Government's suppression of information that included co-conspirators' statements impeaching a cooperating witness and casting doubt on the Government's theory that a murder was in furtherance of the conspiracy violated petitioners' due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

This case involves the Government's withholding of evidence in the trial of one of Atlantic City, New Jersey's larger drug-trafficking organizations. Nearly all of the 125 counts against Petitioner focused on the trafficking of heroin, but Petitioner also was charged with possession, use and discharge of a firearm related to or in furtherance of the conspiracy, contra § 924(c). This charge stemmed from the murder of Tyquinn James, a killing caught on surveillance video from stores near the slaying. Yet no physical evidence directly tied Petitioner to the crime. The Government at trial relied on a cooperating co-defendant with serious credibility problems, who was the sole witness to testify to a conspiracy-related reason for the shooting, a supposed "beef" between the leader of the conspiracy and a rival organization. After the verdict was reached, Petitioner learned

the Government had suppressed Federal Bureau of Investigation Form 302 reports showing that co-defendant Jodi Brown had told investigators that she knew of no conspiracy-related reason for the shooting. The District Court denied a motion to vacate the verdict pursuant to Brady, ruling that material evidence was not suppressed, while suppressed evidence was not material.

Later, the Government turned over Form 302 reports of interviews with two more co-defendants who also stated that they knew of no conspiracy-related motive for the shooting. The District Court denied a post-appeal motion brought under Fed. R. of Crim. P. 37 seeking an indicative ruling on the Brady question, categorically refusing to believe that conspiracy members beyond a small inner circle would have known about the conspiracy's so-called beef.

This case represents an egregious violation of Brady and, thus, the due process rights of Petitioner in a trial in which the § 924(c) conviction not only added a mandatory 10-year sentence to be served consecutive to any sentence on the drug-conspiracy convictions, but also provided the basis for increasing Petitioner's offense level to 43 under the Sentencing Guidelines, which calls for a life sentence. The withheld evidence would have cast Petitioner's trial in a "different light." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995). The Third Circuit failed to correct the District Court's error. This Court's intervention is

required to ensure that lower courts correctly apply, and prosecutors faithfully adhere to, the requirements of Brady. The petition for a writ of certiorari should be granted.

CONCLUSION

The Third Circuit's adherence to precedence is, of course, admirable. That said, here it also was misplaced, for the Third Circuit failed to recognize that the unique facts of the procedural history in the matter of the United States v. Malik Derry represented a confluence of circumstances that denied Appellant his rights under the Constitution and the Federal Rules of Criminal Procedure: the right to defend himself against criminal charges and the right to the presumption of innocence. The granting of this petition gives this Court the opportunity to undo the trial court's adoption of a separate court's evidentiary ruling that constitutes a miscarriage of justice and offends the Constitution. The granting of this petition also gives this Court the opportunity to undo the trial court's failure to correct the Government's suppression of impeachment evidence.

PARTIES TO THE PROCEEDINGS

Petitioner is Malik Derry, Appellant below.

Respondent is the United States of America, Appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Rules

Articles

Petitioner Malik Derry respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is unpublished but it is reported at Nos. 16-1321, 16-3489, 2018 U.S. App. LEXIS 16971 (3d Cir. June 11, 2018), and is reprinted in Appendix A to this Petition ("App") at 1a.

JURISDICTION

The Third Circuit filed its decision on June 22, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "no person shall … be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law … ." U.S. Const. amend. V.

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to … be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 43(a) states, "Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing.

Rule 44(a) states, "A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

Malik Derry was one of nineteen people originally charged in a 125-count superseding indictment, the core of which was an alleged conspiracy to possess and sell more than a kilogram of heroin in and around Atlantic City, New Jersey. One count against Petitioner alleged the discharge of a firearm related to or in furtherance of the conspiracy, the discharge being the shooting death of a member of an alleged rival drug group, Tyquinn James.

On September 4, 2014, the Honorable Joseph E. Irenas of the U.S. District Court for the District of New Jersey ordered that defendants named in the superseding indictment be tried in three groups. App.W at 664a.

A so-called Group I trial of four defendants—Kareem Bailey, Lamar Macon, Dominque Venable and Terry Davis—commenced on November 5, 2014 before the Honorable Joseph E. Irenas. During that trial, the Court allowed the publication of a video showing the murder of Mr. James over the objection of defendants. App.X at 673a. After a six-week trial, the Group I defendants were found guilty of conspiring to distribute and possess with the intent to distribute more than one kilogram of heroin within 1,000 feet of a housing facility owned by public housing authority and using a communications facility to further a drug conspiracy; Mr. Davis also was convicted of being a felon in possession of a firearm.

Messrs. Davis, Venable and Macon each were sentenced to an aggregate 240 months in prison, while Mr. Bailey was sentenced to 241

months in prison. United States v. Bailey, 840 F.3d 99, 107 (3d Cir. 2016). The Group I Defendants all timely appealed. The appeals were argued April 28, 2016, with the Court of Appeals for the Third Circuit denying the consolidated appeal on October 18, 2016. Ibid.

The Group II trial included only Petitioner and his half brother, Mykal Derry. The Group II trial commenced on July 7, 2015, roughly five months after the Group I trial ended, before a different judge, the Honorable Noel L. Hillman of the District Court of New Jersey. The Group II Court adopted the Group I Court's evidentiary ruling allowing the video under the Law of the Case doctrine. App.BB at 755a. On August 18, 2015, Malik Derry was found guilty in Count One "of conspiring to distribute and possess with the intent to distribute more than one kilogram of heroin within 1,000 feet of a housing facility owned by public housing authority," in violation of 21 U.S.C. § 846 [21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 21 U.S.C. § 860], in counts 74-76, 84, 85, 106, 107 and 110, all involving the use of a communication facility to further a drug-trafficking crime in violation of 21 U.S.C. § 843(b), and Count Ten, Discharge of a Firearm in Connection with a Drug Trafficking Crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2, which is a Class A felony punishable by a sentence of 10 years to life in prison consecutively and a $250,000 fine. App.B at 12a.

There was no Group III trial.

At Malik Derry's first sentencing hearing, Petitioner moved for an Order Granting Judgment of Acquittal, pursuant to Brady v. Maryland, contending the Government failed to turn over statements by co-conspirator Jodi Brown that, among other things, impeached the credibility of the cooperating witness who linked the James shooting to the drug-trafficking conspiracy. App.D at 116a-145a. The Court denied that Motion at a sentencing hearing on August 19, 2016. App.E at 179a. Malik Derry was sentenced to Life in Prison, plus 10 years on the 924(c) charge. Id. at 283a.

A Notice of Appeal of the Verdict was filed August 25, 2016.

After the Notice of Appeal was filed, the Government provided Defendant with two statements by co-Defendant Ambrin Qureshi that were recorded on Federal Bureau of Investigation Form 302s. On December 9, 2016, Petitioner filed a Motion Seeking an Indicative Ruling Pursuant to Fed. R. Crim. P. 37 as to vacating the conviction on Brady grounds. Co-Defendant Mykal Derry joined the motion. By letter dated December 30, 2016, the Government turned over statements for two additional co-defendants: the FBI 302 report of a November 2013 interview with Laquay Spence, and the FBI 302 for a March 2016 interview of Franklin Simms. On September 28, 2017, the District Court denied the Rule 37 Motion. App.C at 21a.

The Third Circuit denied the appeal on June 11, 2018. This petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

POINT I: PETITIONER WAS DENIED DUE PROCESS BY THE DISTRICT COURT'S ERROR IN ADOPTING AN EVIDENTIARY RULING FROM A DIFFERENT TRIAL WITH A DIFFERENT JUDGE, BECAUSE NEITHER DEFENDANT NOR DEFENDANT'S COUNSEL WAS PRESENT AT THE PRIOR TRIAL'S SIDEBAR HEARING AT WHICH THE MOTION TO SUPPRESS THE BRUTAL MURDER VIDEO WAS DENIED.

The District Court committed multiple procedural errors that allowed the admission into evidence of a brutal murder video in a trial occupied with a drug-trafficking conspiracy. The Third Circuit already has recognized that the District Court failed to perform the required balancing of the video's potential for unfair prejudice against its probative value, as required by Fed. R. Evid. 403. This failure first occurred during the Group I trial and was repeated in the Group II trial that included Petitioner when the Group II Court improperly invoked the Law of the Case doctrine in adopting the evidentiary ruling of the Group I Court. The Government admitted to the Third Circuit that the application of the Law of the Case doctrine was clear error. App.A at 3a. Still, the Third Circuit denied the Due Process claim.

a. Absence of Petitioner and Petitioner's Counsel at Suppression Hearing Constitutes a Violation of Petitioner's Rights Under Rule 43.

Petitioner was denied Due Process of law because the ruling allowing admission of a grossly prejudicial murder video initially was made during the Group I trial, a proceeding at which neither Petitioner nor Petitioner's counsel was present. The Group II Court adopted the Group I ruling as the

Law of the Case, stating that it had no discretion in the matter. Accordingly, Petitioner's suppression motion in the Group II trial was a *fait accompli.*

The Third Circuit stated in a footnote that its "case law does not support the claim that [Defendant's absence] resulted in constitutional harm," though it cited no case or rule for this conclusion. App.A at 3a, n.1. Regardless, while the Third Circuit has indeed consistently held that motions do not fall under the rubric of Fed. R. Crim. P. 43 rights, it failed to take notice that Petitioner's counsel also was not present at this sidebar hearing.

The exception for motions to the rule requiring the presence of the defendant is based on Fed. R. Crim. P. 43(b)(3), which carves out "proceeding[s] involv[ing] only a conference or hearing on a question of law" from the requirement for a defendant's presence. The comment to this section states that the rule "makes clear that the defendant need not be present at a conference held by the court and counsel where the subject of the conference is an issue of law." The crucial phrase here is "Court and counsel." At the District Court level, counsel for Petitioner was not present at the motion hearing at which it was decided that the prejudicial video would be admitted because that decision was promulgated in the Group I trial, in which Petitioner was not a party. Accordingly, neither Petitioner nor Petitioner's counsel was present at that Group I sidebar hearing. Then, the Group II Court erroneously adopted the Group I decision as the Law of the Case.

A review of the Third Circuit's jurisprudence governing Rule 43, as well as the jurisprudence of other circuits holding that the lack of defendant's presence at a proceeding did not violate Rule 43, it is a common feature that the court at some point either explicitly states that defendant's presence was not required because his interests were well represented by counsel or mentions in passing that counsel was present at the proceeding at which defendant was absent. See United States v. Lynch, 132 F.2d 111, 113 (3d Cir. 1942) ("The court, upon being informed of the pendency of the motion and after discussing with the United States attorney and the defendant's formerly assigned counsel the matter raised thereby, entered an order on May 28, 1942, denying the motion for reasons stated."); United States v. Malinowski, 347 F. Supp. 347, 355 (E.D. Pa. 1972) (No violation of the Sixth Amendment found where Defendant was excluded from a pretrial conference and a side-bar conference, where the conferences comprised "merely a meeting of counsel in Chambers two days prior to …. the hearing on the issue of selective prosecution" while the "side-bar conference was on the second day of the trial and pertained to measures to keep the jury away from the public."); Painter v. Peyton, 257 F. Supp. 913, 914 (E.D. Va. 1966) (Where the Court observed both that United States v. Lynch holds an accused has no right to be present at the argument of post-trial motions and that defendant's attorney represented defendant in every proceeding); United States v. Gradsky, 434 F.2d 880, 881 (5th Cir. 1970) (The Court stated that "Appellants were

represented by counsel" who "had ample opportunity for cross-examination during the evidentiary hearings."); United States v. Burke, 345 F.3d 416, 422-24 (6th Cir. 2003) (Where the Court noted that defendant's counsel did not object to a hearing conducted in defendant's absence by a judge appearing via video until the hearing was underway); United States v. Lewis, 420 F.2d 686, 686-87 (5th Cir. 1970) (Where the Court noted that the four conferences at which defendant was not present included two involving discussion of the judge's charge to the jury, one involved a warden's report about the defendant, and involved the potential testimony of a witness, and at each conference defendant's counsel was present); United States v. Johnson, 859 F.2d 1289, 1295 (7th Cir. 1988) (Where court noted that at a suppression hearing for which defendant was absent defendant's counsel expressly consented to that absence); United States v. Pepe, 747 F.2d 632, 652 (11th Cir. 1984) (Where Appellate Court noted that defendant had no right to be present at a James hearing, but defendant's attorney was present throughout the entire hearing, participating fully to protect his client's interests.)

Since Petitioner's counsel was not present at the hearing at which the Group I Court admitted the prejudicial video, it is clear the case at bar should be viewed as an exception to the Third Circuit's Rule 43 jurisprudence that motion hearings generally are not covered by the rule. Because Rule 43 protects a broader right than does the Constitution, any Rule 43 violation necessarily means Petitioner's Constitutional rights also have been

violated. United States v. Gonzales-Flores, 701 F.3d 112 (4th Cir. 2012) (CA4 Va. 2012); see also United States v. Davis, 109 F. Supp. 2d 991 (S.D. Ill. 2000). Thus, the absence of both Petitioner and Petitioner's counsel at the only hearing at which the merits of a video suppression motion were argued before a court constitutes a violation of Petitioner's Fifth Amendment right to Due Process.

b. Absence of Petitioner's Counsel at Suppression Hearing Also Constitutes a Violation of Petitioner's Rule 44 Rights.

It is clear the Law of the Case ruling of the Group II Court not only was clear error, as conceded by the Government and recognized by the Third Circuit, but also that it constituted a violation of Rule 44(b)(3). Rule 44 essentially codifies the Sixth Amendment's right to counsel. Petitioner's counsel was absent from the sidebar hearing at which the Group I Court allowed the publication of the murder video.

In declining to find the murder video's admission violative, the Third Circuit stated in that same footnote that Petitioner "had access to procedures available in his own trial to contest the video's admission, which he did. We see no denial of procedural due process here." App.A at 3a,n.1.

Yet, a review of the relevant trial transcripts shows this conclusion to be in error, for from the very first the Group II Court stated "I don't know that I'm free to change" the Group I Court's evidentiary ruling, App.O at 389a, and then continued that "to rule differently would violate the rule of

the case." Id. at 392a. In other words, the Group II Court came into its hearing on this issue believing the Group I hearing was essentially a part of the Group II case, for the Law of the Case doctrine only covers rulings in the same trial. Indeed, the Group II Court explained, "I view myself as the substitute trial judge here, not to reinvent the wheel." App.BB at 755a.

Rule 44 guarantees a defendant appointed counsel "to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right." Petitioner's counsel was appointed by the District Court under the Criminal Justice Act. Because Petitioner's counsel was not present at the Group I sidebar whose ruling would prove binding on him, Petitioner's Rule 44 rights were violated.

Petitioner did file two pretrial motions seeking, among other things, to have the murder video declared inadmissible on Rule 403 grounds. The first instance was an Omnibus Motion filed before defendants were split into three trial groups. There Petitioner argued that the video "shows no personal identifiers proving that it is Malik Derry who is discharging the weapon," thus demonstrating it to have minimal probative value, while the video was highly prejudicial because it purported to show Petitioner committing a murder he was not charged with in this federal trial. That motion further argued, citing United States v. Lebovitz, 669 F.2d 894, 901 (3d Cir. 1982), that a sensitive balancing test was required because the trial court is in the best position to determine the weight to be given the relevant 403 factors.

The District Court ruled in September 2014 that the Government could not discuss or refer to the video and other evidence of the James murder during opening arguments and that the Court would save a further ruling on the video until the Government had made an evidentiary showing that the murder was intrinsic to the drug-trafficking conspiracy. App.Z at 682a-688a. Also in September 2014, the District Court split the then-19 defendants into three trials, with Petitioner relegated to a Group II trial commencing after the Group I trial concluded. App.W at 664a.

During the Group I trial, on December 10, 2014, the court heard arguments at sidebar on an *in limine* motion to exclude the murder video the Government was at that moment seeking to admit into evidence. App.X at 668a-673a. Present at sidebar were counsel for the Government and counsel for the four Group I defendants. Ibid. Absent, of course, were counsel for Petitioner and Mykal Derry.

Counsel for the Group I defendants objected to the video in part because, as counsel for Lamar Macon stated: "[t] he argument is the same argument that it's always been. In fact, Agent Kopp has testified … that Lamar Macon had absolutely nothing to do with the Tyquinn James murder." Id. at 669a. The court responded that liability was not an issue for the video's admissibility because "[n]o one is arguing, I'm sure it's not that any of these defendants, not just Lamar Macon, I don't think any of the defendants had anything to do with the shooting." Ibid. Indeed, Group I counsel argued that

"the jury knows that Tyquinn James was killed and knows that he was killed by Malik Derry and Mykal Derry." Ibid.

Group I counsel even offered to stipulate that a firearm was discharged in the James murder: "He's shot and he's killed. Of course the firearm was discharged. We don't have to see it. They already have that evidence." Id. at 671a. The Group I court's only bow to the required Rule 403 analysis was that "I don't think this qualifies as excludable under 403. I'm going to let it in." Id. at 673a.

It can not even be said that any counsel at the sidebar hearing argued anything resembling that which had been advanced in Petitioner's omnibus motion filed in June 2014: that the video would not aid a jury in determining whether or not Petitioner was depicted in the video and, more importantly, whether the murder was intrinsic to the drug-trafficking conspiracy. In fact, counsel at sidebar conceded it was Petitioner in the video and that the murder was in furtherance of the conspiracy. Petitioner then was bound by an admissibility ruling based on the Group I court's acceptance of the very points Petitioner would have contested had he or his counsel been present at the Group I hearing.

It is this ruling, against that backdrop, that the Group II court adopted under the Law of the Case doctrine, stating "I don't know that I'm free to change that ruling" App.O at 389a, and then continuing that "to rule differently would violate the rule of the case." Id. at 392a.

It is axiomatic that our adversarial system of justice relies "on litigants to present 'all the relevant considerations.'" Monell v. Dep't of Soc. Servs., 436 U.S. 658, 718 (1978). One way of ensuring that dynamic is Fed. R. Crim. P. 43, which requires a defendant's presence at every trial stage, except for, among enumerated exceptions, "hearings on a legal question." Rule 44, guaranteeing defendants the right to appointed counsel at every proceeding from initial appearance through appeal, serves a broader but similar purpose. As the Eighth Circuit has stated, "If the proceeding at issue addresses or involves factual questions, it is possible that the defendant's absence would thwart a 'fair and just hearing.' By contrast, if the proceeding involves only legal questions, the defendant's absence would not impact his defense because it is likely he would not contribute any expertise on such matters." Gonzales-Flores, 701 F.3d at 119 (quoting United States v. Moe, 536 F.3d 825, 830 (8th Cir. 2008)) (quoting United States v. Gagnon, 470 U.S. 522, 526 (1985)). In other words, the presence of Defendant's counsel is required at every proceeding and Defendant's own physical presence is required only when Defendant could "contribute in some meaningful way to the fair and accurate resolution of the proceedings against him." Gonzales-Flores, 701 F.3d at 118.

Here, neither Petitioner nor Petitioner's counsel was present at the Group I motion hearing at which the admissibility of this brutal video was declared admissible and whose ruling was adopted whole cloth in the Group

II trial under the misapplication of 'Law of the Case" doctrine under which the Group II Court believed it was bound. It simply is not possible to conclude that Petitioner's Due Process right to a fair trial was protected by the adoption of a motion ruling from a different trial with a different judge, from a proceeding at which Petitioner's counsel was excluded and over a matter that Petitioner had expressly raised in its pretrial motions.

Because the Group II Court's adoption of the Group I Court's admissibility ruling was based on the denial of Petitioner's Due Process rights, this Court should grant certiorari, at least as to the § 924(c) counts affected by the video.

i. Because of the Due Process, Law of the Case and Other Errors, a Grossly Prejudicial Murder Video Was Admitted Into a Trial Centered on a Drug Conspiracy.

It is important to remember that it was through the Due Process and other clear errors of the Group II Court that a video showing a brutal murder in a trial focused on a drug conspiracy was admitted into evidence. As the Third Circuit recognized in Bailey, the admission of the video simply did not pass a 403 balancing test. Bailey, supra, 840 F.3d at 122.

First, the video was entirely redundant. In the Group I trial, the Government introduced "abundant evidence" related to the murder of Mr. James "via recorded telephone conversations and testimony at trial." Id. at 99. As the Third Circuit recognized, "probative value is 'informed by the availability of alternative means to present similar evidence.'" Bailey, 840

F.3d at 122 (quoting United States v. Awadallah, 436 F.3d 125, 132 (2d Cir. 2006))

Second, the video was "not merely cumulative, it was a graphic depiction of an event that had already been thoroughly proven." Ibid. Indeed, the video's "*only* value lay in its emotional impact." Id. at 123 (emphasis in the original) (citing United States v. Cunningham, 694 F.3d 372 (3d Cir. 2012) (quoting United States v. Ganoe, 538 F.3d 1117, 1124 (9th Cir. 2008))). In addition to being cumulative and graphic, it was irrelevant as to the conspiracy charges and, "given the availability of other evidence of the exact same crime, it was not needed… to prove" the firearm charges. Id. at 123.

Finally, the Third Circuit ruled that the Group I Court failed to perform a primary obligation as to the video, namely the required 403 balancing "the genuine need for the challenged evidence … against the risk of prejudice to the defendant." Id. at 119, citing United States v. Claxton, 766 F.3d 280, 302 (3d Cir. 2014) (quoting Gov't of Virgin Islands v. Archibald, 987 F.2d 180, 186 (3d Cir. 1993) (internal quotation marks omitted)). A "district court must provide a statement of reasons, on-the-record, explaining why it is admitting evidence over a Rule 403 objection." Id. at 121, citing United States v. Caldwell, 760 F.3d 267, 284 (3d Cir. 2014), *reh'g denied* (2014). The Group I Court did "exactly what Caldwell prohibits," by "merely recit[ing] the text of Rule 403 and conclude[ing] that the evidence was admissible." Ibid. The Third Circuit even chided the Group I Court for rather flippantly suggesting

to counsel, "[W]hy don't you let it in so you have an appeal issue[?]" Id. at 121, n.83.

ii. The Group II Court Adopted the Group I Court's Erroneous Decision to Admit the Murder Video.

All three factors identified by Bailey in the Group I trial were duplicated, if not exacerbated, in Petitioner's Group II trial.

First, the Government in the Group II trial spent extensive time focused on the James murder, rendering the video redundant. Full days of testimony recounted the murder. In addition to testimony, the Government introduced text messages and played phone calls of conspiracy members discussing the run-up to and aftermath of the murder. It was only after an exhaustive set up that the Government showed the video.

Second, the video remained shocking. The video shows a masked man wearing dark, baggy clothes riding a bike on a sidewalk. As the bike approaches Mr. James, a gun is seen in the hand of a gunman, who then aims a gun at Mr. James at point-blank range. Mr. James collapses. App.GG at 799a (video is played to the jury). As the Third Circuit stated in the Group I appeal opinion, "Although no blood is visible in the video, it is nonetheless highly disturbing." Bailey, supra, 840 F.3d at 121. That "disturbing" aspect certainly made an impression on the Group II Court, which described at Petitioner's sentencing hearing how the video shows how the body of Mr. James "falls lifeless, except for a final twitch, as I recall."

App.E at 277a. It is clear the Government charged Petitioner with a drug conspiracy but prosecuted Petitioner for murder, though neither Derry was charged with murder.

Furthermore, at the July 6, 2015 hearing and during the trial the Group II Court replicated the Group I Court's dereliction by failing to perform a 403 balancing test. A word search of the Group II trial transcripts turns up no results for the phrase "unfair prejudice" and only one for "probative value," and not in connection with the admission of the video. App.O at 388a-400a. A word search of the pretrial 104 hearing transcript turns up no results for the phrases "probative value," "unfair prejudice" or even Rule 403. Ibid. In other words, not once in two separate trials with two different judges did a court balance the probative value of this video against its potential for unfair prejudice against Petitioner.

Instead, the Group II Court stated during the July 6, 2015 pretrial hearing, "it seems to me that Judge Irenas already ruled on this [the video]….And I don't know that I'm free to change that ruling." App.O at 389a. The Group II Court further posited "…that for me to rule differently would violate the rule of the case." Id. at 392a. Indeed, the Group II Court stated, "I am convinced here on the record that Judge Irenas's ruling was correct and would in all likelihood stand, and the need to repeat that process unnecessary as a matter of fairness." Id. at 394a. Of course, Bailey tells us the Court's conclusion was in error.

a. Admission of the Murder Video Introduced the Likelihood The Jury Would Determine Guilt on Improper Grounds.

Unfair prejudice is defined by the Advisory Committee responsible for promulgating the Federal Rules of Evidence to be "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." United States v. Robinson, 544 F.2d 611, 618 (2d Cir., 1976), citing Advisory Committee's Note to Fed. R. Evid. 403. The Government argued that the video was needed to prove Count 10: discharge of a firearm in connection with a drug-trafficking crime, contra 18 U.S.C. § 924(c)(1)(A)(iii). App.CC at 757a. While it is generally true that "it is for the prosecutor, not the defendant, to shape the government's trial strategy…the presence of absence of a genuine need for the questioned evidence" is supposed to be a part of the 403 analysis. United States v. Schwartz, 790 F.2d 1059, 1061 (3rd Cir. 1986). The Government conceded it sought that emotional basis in oral arguments before the Third Circuit in the Group I appeal. When asked why it needed the video, the Government stated it was intended to show "how the murder was committed in a way that no other evidence did. It shows that it was committed brazenly, when other people were standing around in a public area. . . ." Bailey, supra, 840 F.3d at 123.

Not one word of that sentence goes to a point at issue in either the Group I or Group II trial, namely whether Petitioner violated § 924(c) by using a firearm in relation to the conspiracy or by possessing a firearm in furtherance of a conspiracy. The video's only value lay in depicting Petitioner

not only as a drug dealer, with all the societal opprobrium that entails, but also as a violent murderer.

As the Third Circuit recognized in Bailey, it was clear error for this graphic video to be published to the Group I jury. Exacerbating the unfair prejudice is that the Government played video of the murder to the Group II jury multiple times, first on the seventh day of trial (7th day, 2113, 14-15) and again on day twenty-two, App.EE at 772a-773a, while the jurors saw the video again during deliberations. In addition, the Government previewed the video in its opening statement, App.R at 469a, and discussed it at length again on Day Seven, App.GG at 799a. On day 22, the Government stopped and restarted the video three times, without comment. App.EE at 771a-772a.

Admission of the video even was cited by the Group II Court as grounds for allowing in a photograph of Mr. James's corpse at the scene of the murder, over the objection of Appellants. App.CC at 759a. As the Group II Court explained, the jury had "already seen a video of the actual shooting. In my view, a view of the corpse on the ground does not make it so significantly prejudiced as to outweigh its probative value." Ibid. This statement is the only time the Group II Court contemplated a 403 balancing test where the murder was concerned, though even here the Group II Court did exactly what the Group I Court did, namely what Caldwell prohibits by "merely recit[ing] the text of Rule 403 and conclude[ing] that the evidence was admissible." Bailey, supra, 840 F.3d at 121.

b. The Murder Video's Probative Value Was Minimized by the Government's Use of Alternative Evidence to Prove Any Points Allegedly Addressed in the Video.

Whether the Government has alternative means of effectively proving something without prejudicial evidence is a pertinent inquiry in the 403 balancing test. United States v. Adams, 375 F.3d 108 (1st Cir. 2004). The Group I Court failed to consider this inquiry. In perfunctorily adopting the Group I Court's ruling, the Group II Court failed to indicate it had considered this required inquiry. This failure is critical because the "[t]ask of assigning potential prejudice is one for which trial judge, considering his familiarity with full array of evidence in case, is particularly suited; practical problems inherent in balancing of intangibles—of probative worth against danger of prejudice or confusion—call for vesting generous measure of discretion in trial judge." Constr., Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427, 431 (3d Cir 1973).

This error stands out because the Government did indeed have a variety of alternative evidence related to the § 924(c) count. The Government put into evidence stills, or pictures, taken from the two surveillance feeds that captured the killing. App.Y at 676a-678a. One still photograph from the video reveals the "distinctive white badge" on the bicycle being ridden by the shooter. App.R at 469a. Another still revealed whether or not the shooter was wearing gloves. App.EE at 772a. The stills show the "hoodie" worn by the masked gunman on a BMX-style bicycle. Ibid.

That there were alternative methods available to the Government is crucial for this inquiry. Old Chief v. United States stands for the proposition that, among other things, the probative value of any evidence can depend upon evidentiary alternatives. "The Committee Notes to Rule 401 explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point conceded. Such a concession, according to the Notes, will sometimes 'call for the exclusion of evidence offered to prove [the] point conceded by the opponent ….'" Old Chief, 519 U.S. 172, 184-85 (1997), citing Advisory Committee's Notes on Fed. R. Evid. 401, 28 U.S.C. App., p. 859. This probative value calculation "should be made not on the basis of Rule 401 relevance but on 'such considerations as waste of time and undue prejudice (see Rule 403) ….'" Ibid. Old Chief further observed that the 403 Notes state "that when a court considers whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may…be an appropriate factor." Ibid., citing Advisory Committee's Notes on Fed. R. Evid. 403, 28 U.S.C. App., p. 860. Furthermore, the Notes to Rule 404(b) reinforce the point: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under 403." Ibid., citing Advisory Committee's Notes on Fed. R. Evid. 404, 28 U.S.C. App., p. 861. The notes leave no question that when Rule 403 confers discretion by providing

that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives. Ibid., *citing* 1 McCormick 782, and n. 41 (suggesting that Rule 403's "probative value" signifies the "marginal probative value" of the evidence relative to the other evidence in the case); 22 C. Wright & K. Graham, Federal Practice and Procedure § 5250, pp. 546-547 (1978). "The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point"). Ibid.

Here, the only value of the video was showing the actual murder of Tyquinn James—to see not discharge of a gun but rather the moment at which Mr. James died. It wasn't to show that the cause of death was bullets recovered from his body, there was ballistic evidence for that. It wasn't to show that the gun recovered from the trap house was the gun used in the murder, again there was a ballistic report to do that. The video was not needed to show the type of bicycle used by the shooter, a video still could have done that. The video was not needed to show whether or not the shooter wore gloves; a video still could have done that. There was not one purpose for the video that could not have been addressed by other evidence.

c. Studies Show that Gruesome Evidence Introduces Unfair Prejudice In a Trial That Can Not Be Overcome by Proper Jury Instructions.

Science reinforces the conclusion that a video showing a disturbing murder introduces unfair prejudice into a trial. Studies show that "[w]hen

jurors are presented with evidence that is particularly gruesome, they are likely to experience a visceral emotionally charged feeling that leads them to be inappropriately punitive." Jules Epstein and Suzanne Manner, *Using Science To Challenge Gruesome Evidence*, 40 Champion 22, 23 (April 2016). The Epstein/Manner discussion of one study is particularly relevant here. In that study, participants "read a fictitious trial transcript about a man killing his ex-girlfriend by stabbing including ambiguous testimony from 10 witnesses. All participants saw a series of photographs, but the experimental group saw additional photographs including images of the actual homicide scene and, the woman's mutilated body, in either color or black and white." Id. Those who saw the graphic photos were more than twice as likely to vote guilty when compared with a control group. Id.

The taint of unfair prejudice from gruesome or shocking evidence can not be corrected by instructions to the jury to ignore the emotional content of the evidence nor be swayed by their passions. Id. at 23. Instead, studies show that the result of such jury instructions can be "ineffective at best and, at worst, make the information more salient. Ibid., citing Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psychol. Pub. Pol'y & L. 677 (2000); Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 Law & Hum.

Behav. 409-438 (1990); and Michelle Cox & Sarah Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 Soc. Behav. 31-55 (1989).

e. Unlike in the Group I Trial, Admission of the Murder Video Was Not Harmless Error Because the Group II Jury Relied on the Video in Rendering Its Verdict.

In Bailey, the Third Circuit held that publication of the murder video, while clear error, was harmless because "it is highly probable that the error did not contribute to the judgment." Bailey, supra, 840 F.3d at 124. But as the Group II Court determined in a post-trial proceeding, it is clear the Group II jury did rely on the video. App.C, supra, at 45a-48a. The Third Circuit stated Petitioner was not prejudiced by this jury's reliance to acquit Petitioner of a brandishing charge. App.A, supra, at 4a. But this overlooks the fact that Petitioner was prejudiced by the jury's reliance on the video to convict Petitioner on all the other 924(c) charges, ignoring significant evidence both that the shooter was not Petitioner and that, assuming *arguendo* that it was Petitioner, the shooting was not in furtherance of the conspiracy to sell drugs.

First, the Government could not directly tie any of the physical evidence recovered at the scene of the shooting or at the trap houses to Petitioner. Consider that the "hoodie" recovered from a trap house and identified as similar to that worn by the gunman in the video was a size medium, while Petitioner is taller than six feet. App.FF at 775a. The bicycle

with the "distinctive white badge" was found in a trap house used by the drug-trafficking conspiracy and thus available to most members. Finally, of the mask, App.DD at 768a, the jacket, Id. at 767a, the gun, the shells and the bullets, App.CC at 760a: none could be tied physically to Petitioner. His fingerprints were not found on any item, and he was expressly excluded as a contributor of any DNA found on this physical evidence. App.DD at 768a.

In short, the Group II jury relied on a video that introduced unfair prejudice into the proceedings but had little probative value because at best it was redundant of evidence introduced during the Government's case in chief and at worst the video caused the jury to overlook the tenuous links of the physical evidence to Petitioner.

f. Conclusion.

Petitioner was denied his Due Process rights because the absence of his counsel from the Group I sidebar at which the video ruling was made violated Rule 43 and Rule 44. Because of these Due Process and other manifest violations, evidence whose probative value was substantially outweighed by its prejudicial effect was admitted into evidence in the Group II trial, evidence that by its graphic nature would have a tendency to encourage the jury to decide the case on improper grounds. Adams, supra, 375 F.3d at 111. It is clear the admission of the murder video that was improper in the Group I trial remained improper in the Group II trial. It also is clear the video's admission in the Group II trial was not harmless error

because the jury relied on the video in finding Petitioner guilty on the § 924(c) count, overlooking the lack of physical evidence connecting him to the gun, the jacket and the bike. This video was introduced by the Government not for its probative value but because of its ability to shock the jury, and it would not have been admitted but for the violations of Petitioner's rights under Rules 43 and 44. Petitioner respectfully contends such circumstances compel a grant of Certiorari to give this Court the opportunity to correct this injustice.

POINT II: THE DISTRICT COURT ERRED IN DENYING PETITIONER'S BRADY MOTION BECAUSE IT BASED ITS RULINGS ON ERRONEOUS FACTUAL CONCLUSIONS.

The Government violated its duties under Brady v. Maryland to turn over to Petitioner favorable evidence. Had the Government timely complied with its Brady responsibilities, Petitioner would have seen that three co-defendants—not including Petitioner and his brother—from the 19-person conspiracy were unable to provide the Government with a conspiracy-related reason for why Tyquinn James had been killed. The ignorance of members of the conspiracy of a conspiracy-related reason for the murder stands in stark contrast to the one witness who testified to such link, a co-defendant who cooperated in order to gain sentencing relief. The withheld evidence would have cast Petitioner's trial in a "different light." Kyles v. Whitley, 514 U.S. 419, 435 (1995). More precisely, Petitioner contends there was a "reasonable probability that the withheld evidence would have altered at least one juror's

assessment" of whether the murder was in furtherance of the conspiracy. Cone v. Bell, 556 U.S. 449, 452, 129 S.Ct. 1769, 1773 (2009). In its opinion in the Rule 37 motion, the District Court cited Turner v. United States for the proposition that "evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." App.C at 55a. In her dissent in Turner, Justice Kagan rated the "reasonable probability" standard as being less than a preponderance of the evidence. Turner v. United States, 137 S. Ct. 1885, 1897 (2017). Justice Kagan then concluded that the reasonable probability standard was perhaps most aptly defined by the "one juror" standard from Cone v. Bell, meaning was there a reasonable probability the withheld evidence could have swayed just one juror assessment of guilt. Ibid. The District Court noted that the Turner Court was quoting Cone v. Bell, but it failed to take into account the "one juror" definition of reasonable probability.

Moreover, the District Court abused its discretion in denying Appellant's Motion to Vacate the Conviction based on conclusions at odds with the facts stated at trial. Specifically, the Court identified co-Defendant Ambrin Qureshi as someone who was not a confidant of Mykal Derry, (App.C at 71a. But the Court's conclusion was directly contradicted by the Government, which informed the jury in its closing that Ms. Qureshi was not just a confidant but "a trusted confidant." App.FF at 776a. Based on this

erroneous conclusion, the Court declared Ms. Qureshi could not have any inculpatory or exculpatory insight into the killing of Tyquinn James. App.C at 83a. Thus, the Court concluded, "there was no reasonable probability that had the evidence been disclosed, the result of the trial would have been different." Ibid.

The Third Circuit compounded this error in somehow finding that the District Court's factual conclusions were supported. App.A at 5a. Yet even assuming, *arguendo*, that Ms. Qureshi was not "a trusted confidant," the District Court still erred in concluding that Ms. Qureshi could not be in a position to know because evidence was introduced at trial showing that Mykal Derry was not the only source of information about the inner workings and motivations of the drug-trafficking conspiracy. While the Group II Court concluded Ms. Qureshi had a "compartmentalized role" in the drug-trafficking conspiracy, namely "allowing [her] apartments to be used as storage sites," App.C at 71a, the Government's evidence showed that it was Ms. Qureshi who told Petitioner that Kim Spellman had "ratted," meaning to cooperate with the Government's investigation. App.GG at 800a, 810a-811a. Ms. Qureshi learned about Ms. Spellman's cooperation with the Government from a phone conversation with the girlfriend of Shaamel Spencer, whom the District Court admits would be expected to know about how the drug-trafficking conspiracy used violence to advance its goals because he was a leader and an enforcer. App.GG at 811a. This is crucial because Petitioner in

the Rule 37 Motion never claimed Ms. Qureshi would have known about any conspiracy-related vendetta against Tyquinn James exclusively from the Derrys. What Petitioner contended is that Ms. Qureshi—and co-Defendants Jodi Brown and Laquay Spence—would have known of a conspiracy-related reason for the murder if one existed by virtue of the fact that they were members of the conspiracy. As the "ratted" factum shows, information had a way of traveling from conspiracy member to conspiracy member even if it did not originate with leader Mykal Derry.

Indeed, the "ratted" information was relayed to Petitioner within days, if not hours, of Petitioner's arrest and the execution of the search warrant at Ms. Spellman's home. In that time, this information traveled from Shaamel Spencer to Mr. Spencer's girlfriend to Ms. Qureshi to Petitioner. App.GG at 810a-811a. The Government's theory was that the February 2013 slaying of Tyquinn James was the culmination of competition for territory with a rival gang that began in early 2011. The Court did not explain how Ms. Qureshi could learn about the "ratted" information in a matter of hours but be ignorant of a conspiracy-related motive for the James killing for nearly two years.

Because the District Court erroneously concluded that Ms. Qureshi could not be in possession of exculpatory or material information about the James shooting that was favorable to Petitioner, ignoring the Government's own evaluation of Ms. Qureshi's role in the conspiracy, the District Court

abused its discretion in denying Petitioner's Motion to Vacate the Conviction pursuant to Brady and the Third Circuit erred in denying relief based on its determination that the District Court's factual conclusions were supported. The holdings of both of the courts below are at odds with the "different light" standard of Kyles, as well as the "one juror" standard from Cone v. Bell.

Federal courts "abhor a Brady violation." Lacerda, 2013 U.S. Dist. LEXIS 86287, at *65 (2013) (citing United States v. Pelullo, 14 F.3d 881, 886 (3d Cir. 1994)). "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, supra, 373 U.S. at 87. As such, as Petitioner argued in support of his pretrial motions, Brady "imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence that is materially favorable to the accused, either as direct or impeaching evidence." Brady is not a rule of discovery; it is a rule of fairness and minimum prosecutorial obligation. United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984).

Even if evidence would not be admissible at trial or if the Government does not believe the evidence is reliable or believable, if it is "favorable to the accused, either because it is exculpatory, or because it is impeaching," it must be disclosed. Banks v. Dretke, 540 U.S. 668, 691 (2004) (citing Strickler v.

Greene, 527 U.S. 263, 282 (1999)). It is for Defense counsel, not the Government, to decide whether or how to employ Brady material at trial.

The Government failed in its Brady obligations because it knew before trial that there were at least four co-defendants, excluding the Derrys, who were unable to provide a conspiracy-related reason for the James killing. Those four included the three co-defendants whose 302s were the subject of the Rule 37 hearing—Ms. Qureshi, Mr. Spence and Ms. Brown—as well as Tyrone Ellis, who told the Government he was aware the Derrys had shot at Mr. James before, but he did not know why Mr. James was killed as Mr. James was no threat to the Derrys because he was homeless and smoked PCP-laced cigarettes. App.J at 369a.[1]

Ambrin Qureshi, a/k/a "Amber," is a one-time paramour of Mykal Derry and self-described "caretaker" for Mykal Derry's daughter. App.I at 362a. The District Court's conclusion that she could not have "impeaching," "exculpatory" or "favorable" knowledge belies the record and the Government's own characterization of Qureshi as a "trusted confidant." App.FF at 776a. First, consider the astonishing level of detail Ms. Qureshi possessed about the inner workings, as well as members, of the conspiracy. From the first 302, which is the 302 that the Defense should have received before trial, we know that Ms. Qureshi:

—met Mykal Derry through his brother Michael Derry;

[1] The Ellis 302 was turned over to Defense before the Group II trial commenced and was not part of the basis for the Rule 37 Motion.

> —knew Mykal Derry's brother, Kalim Selby, and traveled with him;
> —knew "DERRY's uncle, LEON GARRISON," as someone with whom Ms. Qureshi should not hang out;
> —drove often with Tyrone Ellis and Mykal Derry to Patterson, where the Government contends Mykal Derry bought drugs;
> —met Mark Frye and spoke with "Khabir," or Mark Thomas;
> —used an "App" on her cellphone to listen to the police scanner and warn Mykal Derry to avoid areas where police had been located;
> —knew the Back Maryland section of Atlantic City was not a place where a person like her, an associate of Mykal Derry, should be doing her laundry because of the Stanley Holmes-Back Maryland beefs;
> —knew "MYKAL DERRY's 'organization' was 'built' by SPENCER and DERRY [though] SPENCER was not from Stanley Holmes, but lived there because the mother of his child lived there";
> —identified for the Government 24 persons related to or central to the conspiracy, including Tyquinn James. App.I, 362a-377a.

The Government thought so much of Ms. Qureshi's role in the drug-trafficking conspiracy that it described her as "a trusted confidant" of Mykal Derry. App.FF at 776a. Indeed, it was Ms. Qureshi who spoke with Mykal Derry the day after he was arrested; and it was Ms. Qureshi who Mykal Derry told to keep the drug-trafficking conspiracy going by contacting heroin supplier Maurice Thomas in Paterson, New Jersey to buy more drugs for distribution by the conspiracy, telling her "it wouldn't take her long to get ten racks up or 10,000 up," meaning to take in $10,000. App.DD at 765a.

Furthermore, while the District Court focused on what it erroneously stated was the lack of a confidential Qureshi-Derry relationship, the District Court ignored the Qureshi-Spence link. This link is seen in the Spellman "ratted" sequence, in which Ms. Qureshi learned of Ms. Spellman's betrayal from the girlfriend of Mr. Spence. While Ms. Qureshi may not have been a

direct confidant of Mr. Spence and even, *arguendo*, Mykal Derry, she was an indirect confidant of these men via Mr. Spence's girlfriend.

Similarly, the District Court relied on an inaccurate conclusion as to Jodi Brown, saying her statements in the 302 could not be material or exculpable because she not only lacked a confidential relationship with Mykal Derry but also because a "jury would conclude no reasonable person would want the burden of a Derry confidence about their shootings." App.C at 83a-84a. Yet, it was Ms. Brown herself who informed Petitioner of the content of her 302. App.E at 169a. And like Ms. Qureshi, Ms. Brown possessed extensive knowledge about the Derry group's "beefs between the Derry Group and Back Maryland guys and Derry Group and Carver Hall guys, which was a frequent topic of discussion." App.K at 376a. She provided a trap house that was a central meeting place for the conspiracy members and a place for them to stash drugs and weapons. Id. at 371a-372a.

Meantime, Kareem Young, the cooperating witness who supplied the conspiracy-shooting link in return for sentencing leniency, testified that he had no personal knowledge about any "beef" between the Derry group and the Trevin Allen group. He did not know how it started, nor how long the beef existed. App.U at 602a. He knew only that the beef constituted "shooting at each other." Ibid. While Mr. Young testified that at a meeting with a number of other people he heard Mykal Derry say Mr. James was to be "put down," or killed, Mr. Young also testified that what he knew about an alleged "beef"

between the Allen and Derry groups was "from people from around Stanley Holmes." Id. at 602a-603a. Ibid. In other words, the Government at trial relied on, and the District Court relied on the accuracy of, Kareem Young's hearsay testimony heard "from people from around Stanley Holmes," but in the view of the District Court of the 302s for Brady purposes only knowledge directly from Mykal Derry could be material and exculpable. Thus, the hearsay of three co-defendants countering the hearsay of one cooperating witness would not sway one juror's assessment of whether the James killing was in furtherance of the conspiracy.

"Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 678 (1985). As Justice Souter stated about reasonable probability, "the adjective is important." Kyles, supra, 514 U.S. at 434. Thus, the question to be determined here "is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Ibid. Justice Kagan placed "reasonable probability" below "preponderance of the evidence" on the burden-of-proof spectrum. Justice Kagan further defined "reasonable probability" as a question of whether the withheld evidence could have swayed just one juror's assessment of the trial.

Petitioner respectfully contends that the District Court abused its discretion in positing that three witnesses testifying contra Mr. Young and based on the same level of personal knowledge would not have been able to sway at least one juror's assessment of the trial. It is to be remembered that Agent Kopp testified, "From October 2nd until that time, February 10th, Tyquinn James had not been mentioned once in the wire, and he had not been seen in the area." App.DD at 762a. Beyond those four and a half months, Mr. James was not on the FBI's radar for more than a year and a half. Id. at 764a. DEA Special Agent McNamara agreed that there was no evidence that the beef between Tyquinn James and Mr. Derry was related to the drug-trafficking conspiracy. App.U at655a.

Even assuming, *arguendo,* that the District Court was correct in concluding that the 302s from these three co-defendants individually would not result in a reasonable probability that the assessment of one juror would be swayed, the analysis required by Kyles, that conclusion is vastly more difficult to accept when examining the three co-defendant statements cumulatively, as required by Bagley.

CONCLUSION

For all the reasons above, Malik Derry respectfully requests that this Court grant certiorari at the least on the § 924(c) count.

Respectfully submitted,

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