No._____

IN THE

SUPREME COURT FOR THE UNITED STATES OF AMERICA

_____

EDGAR LEOPOLDO GARCIA-MARTINEZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

_____

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

for the Tenth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Jonathan S. Willett
255 Canyon Boulevard, Suite 100
Boulder, Colorado 80302
(303) 832-5648
jwillett@willettlaw.net

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Under *Brady v. Maryland,* is the prosecution and the DEA required to supply information concerning the failure to report income to the IRS and the SSA by the DEA and its confidential informant since the failure to report is an act of false swearing?

Under F.R.E. 704(b), may the lead case agent for the DEA render an expert opinion in a drug conspiracy case that an accused person was a witting participant in the crimes charged?

PARTIES TO THE PROCEEDINGS

The Petitioner is an individual.

The Respondent is the government of the United States of America.

TABLE OF CONTENTS

AUTHORITIES

Cases

Constitution

Statutes

Rules

Other Authorities

REASONS FOR GRANTING THE PETITION

A number of reasons exist for the grant of this Petition, which are elaborated upon in detail below.

This case present novel issues involving important considerations about the application of *Brady v. Maryland*, 373 U.S. 83 (1963), and the scope of expert testimony under F.R.E. 704(b).

As to the *Brady* claim, the appellate court held that a summary letter of *Brady* material offering no negative information about the confidential informant was adequate *in lieu* of actual disclosure of the DEA file on the informant. The informant had been paid approximately $453,000 as a result of his work for the DEA. However, the DEA and the informant did not report the income to the IRS, and the informant testified he collected social security income during the time he worked for the DEA, indicating the income was not reported to the Social Security Admini stration. The appellate court ruled that the request for the DEA file was based upon "sheer speculation" that it contained *Brady* information.

The second basis of the petition presents important considerations regarding the scope of expert testimony offering an opinion the accused was a

knowing participant in a crime. F.R.E. 704(b) specifically excludes expert testimony about whether the defendant did or did not possess a certain mental state that is an element of the offense. In this case, the advisory witness and arresting agent, was qualified as an expert in "drug transportation" and "trafficking" in illegal drugs. Armed with those qualifications, he put the government's proof together, and testified the defendant was a witting participant in the offense. This testimony was impermissible under F.R.E. 704(b) and instruction to lower courts is necessary to provide important guidance on the scope of the rule.

OPINIONS BELOW

The judgment of the district court is attached as Appendix 1. The unreported court of appeals opinion and judgment is attached as Appendix 2 and appears at 2018 U.S. App. Lexis 9127. The order denying the petition for rehearing is attached as Appendix 3.

JURISDICTION

Jurisdiction is invoked upon U.S. Supreme Court Rule 11, and 28 U.S.C. §1254 based upon the following record: The United States District Court for the District of Colorado had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 based upon an indictment alleging six violations of the

federal criminal statutes. Count one alleged a conspiracy of between the Defendant and Javier Octavio Garcia to distribute a controlled substance-methamphetamine in violation 21 U.S.C. §§846 and 2 (Doc. 4, v1, p12). Count two alleged a conspiracy involving the Defendant to distribute a controlled substance-heroin in violation 21 U.S.C. §846 and 18 U.S.C. §2 (Doc. 4, v1, p13). Count Four alleged that the Defendant possessed over one kilogram of methamphetamine with intent to distribute in violation of 21 U.S.C. §§841(a)(1), (b)(1)(a). Count six alleged that the Defendant possessed heroin with intent to distribute in violation of 21 U.S.C. §§841(a)(1) & (b)(1)(a).

A three-day jury trial occurred in July 2015 and the Defendant was convicted of the counts as charged. On October 24, 2015, the trial court sentenced the Defendant to 121 months in the Bureau of Prisons.

The Tenth Circuit Court of Appeals exercised jurisdiction under 28 U.S.C. § 1291 & 18 U.S.C. § 3742. On April 12, 2018, the Tenth Circuit Court issued and opinion affirming the judgment. A petition for rehearing was filed, which was denied on May 15, 2018.

STATEMENT ELABORATING REASONS FOR THE WRIT

Brief Factual Background of the Case.

The case involves a drug buy set up between two confidential informants and a man named Javier Garcia. Javier Garcia was the target. The Petitioner was with Javier Garcia at the time of their arrest. The negotiations leading up to the transaction occurred in two public places between Javier Garcia and the first informant, Roberto Vega. The Petitioner was present sitting about fifteen feet away, but not a participant in the discussions. At the consummation of the transaction when the arrest was made, another informant, Juan Lopez, was present with the first informant and the two defendants. The DEA recovered 6,997 grams of methamphetamine and 1,068 grams of heroin. Oddly, at trial, informant Juan Lopez testified for the government, while informant Roberto Vega, having been suspended or released by the DEA before trial, testified for the defense. Evidence from the two informants was conflicting.

As noted in the Opinion of the Tenth Circuit Court of Appeals (page 5), the government's *Brady* and *Giglio* materials were two summary letters, authors unknown, that provided some details about the "confidential" informants: 1) name, 2) amount of payment for the case and lifetime by the DEA, 3) criminal history, 4) the confidential

source agreement, 4) the DEA's awareness of each confidential informant's history of mental illness, and immigration benefits, which was none. The form letters redacted important personal information such as birthdates, state ID numbers, and criminal history information. The form letters did total up the amounts of money the DEA had furnished the two informants, $453,431 for informant government witness Juan Lopez and $21,481 for defense witness Roberto Vega. The letters summarized that the DEA was unaware about any instances of false testimony for Mr. Juan Lopez, the government witness, while it supplied information about Mr. Roberto Vega's (the defense witness) character traits for dishonesty. The government and the lower courts labeled any additional information cumulative. Lacking details and a known author, the defense objected to the government's disclosure through the summary letters, requesting the raw data.

Mr. Lopez, the government witness, testified that over the twenty years he worked as governmental informant, he did not report the $453,431 DEA income on his taxes and he collected disability income from the federal government. According to his DEA contract, Mr. Lopez was supposed to report the income.

Mr. Vega and Mr. Lopez testified differently about the events leading up to the drug deal, the latter implicating the Defendant-Petitioner directly, and the former describing the Petitioner as simply present and not participating in the transactions.

At the trial, the government offered evidence from its lead investigator and advisory witness, who was qualified as an expert in drug transportation and trafficking of illegal substances. Based upon the evidence in this case, the government's expert witness testified the Petitioner was a witting participant in the offense.

Discussion-*Brady* Claim

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the due process clause of the Constitution requires the United States to disclose information that is favorable to the accused. 373 U.S. at 87. U.S. CONST Amends. V, VI. In *Giglio v. United States,* 405 U.S. 150 (1972), the Court extended the *Brady* doctrine to evidence that is useful in impeaching the government's witnesses. 405 U.S. at 154-155.

It is not necessary for the defendant to request the exculpatory evidence—as long as the favorable evidence is "material." *Kyles v. Whitley,* 514 U.S. 419, 433 (1995). Favorable evidence is material if there is a reasonable probability that had the evidence been disclosed the result of the proceeding would have been different. *Kyles v. Whitely,*

514 U.S. 419, 433 (1995). This standard does not mean it is more likely than not that a defendant would have been acquitted with the evidence; rather, a "reasonable probability" is shown when the suppression undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 676 (1985). It is enough that the suppression had a substantial and injurious effect or influence upon the jury's verdict. (*Kyles v. Whitely, supra.).* It is immaterial whether the suppression of evidence is occasioned by the good or bad faith of the prosecution. *Brady, supra*. The individual prosecutor has an obligation to learn of any favorable evidence known to the others acting on the government's behalf, including law enforcement agencies. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Kyles v. Whitley*, 514 U.S. at 437.

In this case, the prosecution provided only scant summary information about each of the informants, who both testified at trial. The information provided no details about the informants' prior operations working with one another. As to the informant called by the government, neither the trial court or the appellate court found that the failure of the DEA and its informant to report $453,431 in income to the IRS was important. These issues went directly to the credibility of the DEA "handler" of the informant; however, neither the appellate or the trial court found that such information was useful for the defense.

Moreover, the appellate court found that since DEA "was unaware"

whether disability and immigration benefits were given to its informant, such disclosure was sufficient to satisfy *Brady* and *Giglio* whether or not the benefits were accorded. Both informants were born in Mexico and had achieved some type of immigration status in the United States after their arrival in this country. The disclosure actually impeded the defense's investigation of the prosecution witness since it redacted all state and federal identifying numbers in his criminal history. The letter provided did not identify the author or any documents, and was pre-packaged in a manner that the defense was unable to effectively use it to cross examine any witness. It is difficult to fathom that the courts can condone false swearing to other federal agencies as matters of little use to the defense in cross-examining the DEA agent and the confidential informant-both government witnesses.

Wherefore, this case presents an important opportunity for the Court to clarify the proper scope of the prosecution's *Brady* and *Giglio,* which were violated in this case.

Discussion-F.R.E. 704(b)

The circuit courts of appeal have left to construe the practical meaning of Federal Rule of Evidence 704(b). An increasingly common prosecutorial tactic is to have a government investigator deemed an expert in the type of crime under

investigation, and then have the expert provide opinions that invade the province of the jury to decide guilt or innocence. The Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals[1] have construed Rule 704(b) according to its plain language that:

> In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes and element of the crime charged or a defense.

In this case, as in many, the expert, who was the government's advisory witness and the case agent, was able to testify that the Defendant was a "witting" participant in the offense. As the crimes at issue require a *mens rea* of "knowingly," the expert was permitted to provide the jury with his conclusion that the crime was committed knowingly. "Wittingly" is defined by Black's Law Dictionary as "with knowledge and by design."

It is black letter law that an expert witness may testify about the meaning and circumstances of a case to determine that an accused has the requisite intent; however, and expert may not cross the line and testify that the defendant has the

[1] *United States v. Richard*, 969 F.2d 849, 854-855 (10th Cir. 1992); *United States v. Arenal*, 768 F.2d 263, 269 (8th Cir. 1985).

requisite state of the mind in the case. 4 JACK B. WEINSTEIN & MARGARET A. BECKER, WEINSTEIN'S FEDERAL EVIDENCE §704.06(2)[c](Joseph McGlaughlin, ed., 2nd ed. 2009)(collecting cases).

There is a dearth of guidance from this Court as to the proper application of Rule 704(b), which is frequently ignored in prosecutions where the case agent is accepted as an expert in the area of his investigation. To allow the case agent to provide an expert opinion that a defendant was a witting participant in the offense clearly violates the Defendant's right to a jury determination of his guilt.

Conclusion

Petitioner respectfully requests that the Court issue a writ of certiorari to the Tenth Circuit Court of Appeals on the two issues outlined above.

Respectfully submitted,

Dated: August 9, 2018

s/Jonathan S. Willett
Attorney for Petitioner
255 Canyon Boulevard, Suite 100
Boulder, Colorado 80302
Telephone: (303) 832-5648
Facsimile: (303) 832-7813
jwillett@willettlaw.net

Certificate of Compliance

I hereby certify that this Petition complies with the word count limit set by Supreme Court Rule 33(i) and specifically contains 2143

words. I used my Microsoft Office Word program to determine the word count. I further certify that the Petition has been scanned for viruses and malware using the McAfee Security System installed on my computer.

s/ Jonathan S. Willett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served by depositing a true and correct copy of the Petition in the United States Mail on August 9, 2018 to:

J. Bishop Grewell, AUSA
Attorney General's Office for the District of Colorado
1801 California Street, Suite 1600
Denver, Colorado 80202
bishop.grewell@usdoj.gov
(also by email December 9, 2017)

Solicitor General of the United States
Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W.,
Washington, DC 20530-0001

s/ Jonathan S. Willett

UNITED STATES DISTRICT COURT

District of COLORADO

UNITED STATES OF AMERICA
V.

EDGAR LEOPOLDO GARCIA-MARTINEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 13-cr-00302-CMA-02

USM Number: 39776-013

Lisabeth Perez Castle, appointed
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to Count(s) _____

☐ pleaded nolo contendere to Count(s) _____ which was accepted by the Court.

☒ was found guilty on Counts 1, 2, 4, and 6 of the Indictment. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A)	Conspiracy to Possess with the Intent to Distribute One Kilogram or More of a Mixture or Substance Containing Heroin, a Controlled Substance	07/16/2013	1

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on Count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 27, 2015
Date of Imposition of Judgment

Christine M Arguello
Signature of Judge

Christine M. Arguello, U.S. District Judge
Name and Title of Judge

October 30, 2015
Date

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2	Conspiracy to Possess with the Intent to Distribute 500 Grams or More of a Mixture of Substance Containing Methamphetamine, a Controlled Substance and Aiding and Abetting	07/16/2013	2
21 U.S.C. § 841(a)(1) and (b)(1)(A)	Possession with Intent to Distribute One Kilogram or More of a Mixture or Substance Containing Heroin	07/16/2013	4
21 U.S.C. § 841(a)(1) and (b)(1)(A)	Possession with Intent to Distribute 500 Grams or More of a Mixture or Substance Containing Methamphetamine	07/16/2013	6

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
One hundred twenty-one (121) months, as to each of Counts 1, 2, 4, and 6, all to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 12 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: five (5) years as to each of Counts 1, 2, 4 and 6, all terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, unless deported, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician. Except as authorized by court order, the defendant shall not possess, use or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). Without the prior permission of the probation officer, the defendant shall not enter any marijuana dispensary or grow facility;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and
14) the defendant shall provide access to any requested financial information.

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

SPECIAL CONDITIONS OF SUPERVISION

1. If the defendant is deported, he shall not thereafter reenter the United States illegally. If the defendant reenters the United States legally, he shall report to the nearest U.S. Probation Office within 72 hours of his return.

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Count 1	$ 100		
Count 2	$ 100		
Count 4	$ 100		
Count 6	$ 100		
TOTALS	**$** 400.00	**$** 0.00	**$** 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following Court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,(5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and Court costs.

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The Court adopts the presentence investigation report without change.**

B ☒ **The Court adopts the presentence investigation report with the following changes.**

(Check all that apply and specify Court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 ☒ **Chapter Two of the U.S.S.G. Manual** determinations by Court (including changes to base offense level, or specific offense characteristics):

Because the Court determined that the defendant should receive a minor role, this results in a base offense level of 34, pursuant to 2D1.1(a)(5)(A) and (B)(iii).

2 ☒ **Chapter Three of the U.S.S.G. Manual** determinations by Court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple Counts, or acceptance of responsibility):

The defendant was a minor participant in the offense and as such should receive a 2-level reduction pursuant to §3B1.2(b); his involvement was primarily as a driver although his fingerprints were found on a few of the packages of drugs.

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by Court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation,or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A ☐ No Count of conviction carries a mandatory minimum sentence.

B ☒ Mandatory minimum sentence imposed.

C ☐ One or more Counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the Court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C. § 3553(e))

☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 32
Criminal History Category: I
Imprisonment Range: 121 to 151 months
Supervised Release Range: 5 years
Fine Range: $ 17,500 to $ 40,000,000

☒ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

STATEMENT OF REASONS

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the Court finds no reason to depart.**

B ☒ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.**

The sentence is sufficient but not greater than necessary, pursuant to 18 U.S.C. 3553(a) factors including that it was the defendant's first offense, he was in the U.S. legally, he has stability in Mexico, his cousin was the codefendant and apparent leader, the case involved a significant amount of drugs, and to avoid disparity in sentencing.

C ☐ **The Court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.**
(Also complete Section V.)

D ☐ **The Court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one.):
☐ below the advisory guideline range
☐ above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
☐ 5K1.1 plea agreement based on the defendant's substantial assistance
☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
☐ binding plea agreement for departure accepted by the Court
☐ plea agreement for departure, which the Court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
☐ 5K1.1 government motion based on the defendant's substantial assistance
☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected

3 **Other**
☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

☐	4A1.3 Criminal History Inadequacy	☐	5K2.1 Death	☐	5K2.11 Lesser Harm
☐	5H1.1 Age	☐	5K2.2 Physical Injury	☐	5K2.12 Coercion and Duress
☐	5H1.2 Education and Vocational Skills	☐	5K2.3 Extreme Psychological Injury	☐	5K2.13 Diminished Capacity
☐	5H1.3 Mental and Emotional Condition	☐	5K2.4 Abduction or Unlawful Restraint	☐	5K2.14 Public Welfare
☐	5H1.4 Physical Condition	☐	5K2.5 Property Damage or Loss	☐	5K2.16 Voluntary Disclosure of Offense
☐	5H1.5 Employment Record	☐	5K2.6 Weapon or Dangerous Weapon	☐	5K2.17 High-Capacity, Semiautomatic Weapon
☐	5H1.6 Family Ties and Responsibilities	☐	5K2.7 Disruption of Government Function	☐	5K2.18 Violent Street Gang
☐	5H1.11 Military Record, Charitable Service, Good Works	☐	5K2.8 Extreme Conduct	☐	5K2.20 Aberrant Behavior
		☐	5K2.9 Criminal Purpose	☐	5K2.21 Dismissed and Uncharged Conduct
☐	5K2.0 Aggravating or Mitigating Circumstances	☐	5K2.10 Victim's Conduct	☐	5K2.22 Age or Health of Sex Offenders
				☐	5K2.23 Discharged Terms of Imprisonment
				☐	Other guideline basis (*e.g.*, 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

STATEMENT OF REASONS

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A **The sentence imposed is** (Check only one.):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the Court

☐ plea agreement for a sentence outside the advisory guideline system, which the Court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense motion to the Court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))

☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use page 4 if necessary.)

DEFENDANT: EDGAR LEOPOLDO GARCIA-MARTINEZ
CASE NUMBER: 13-cr-00302-CMA-02

STATEMENT OF REASONS

VII COURT DETERMINATIONS OF RESTITUTION

A ☒ Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

FILED
United States Court of Appeals
Tenth Circuit

April 12, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDGAR LEOPOLDO GARCIA-MARTINEZ,

Defendant - Appellant.

No. 15-1432
(D. Colo.)
(D.C. No. 1:13-CR-00302-CMA-2)

ORDER AND JUDGMENT[*]

Before **HOLMES**, **KELLY**, and **MORITZ**, Circuit Judges.

Following a three-day trial, a federal jury convicted Defendant-Appellant Edgar Leopoldo Garcia-Martinez ("Garcia-Martinez") of conspiracy to possess and possession with the intent to distribute over a kilogram of heroin and 500

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[*] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* FED. R. APP. P. 34(f); 10TH CIR. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

grams of methamphetamine, and the district court sentenced him to 121 months' imprisonment. Garcia-Martinez challenges his conviction, arguing (1) that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by failing to disclose certain impeachment information concerning two confidential informants,[1] and (2) that the district court erred by permitting an expert witness to offer an opinion on Garcia-Martinez's "mental state," in contravention of Federal Rule of Evidence 704(b).

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's judgment.

I[2]

This drug-trafficking case arises from a confidential sting operation involving the Drug Enforcement Administration ("DEA") and two confidential informants, Roberto and Juan (together, the "CIs").

A

The undercover operation began in July 2013, when the DEA received information that Javier Garcia ("Garcia")—a co-defendant in the underlying

[1] As explicated *infra*, the disclosure obligations that the Supreme Court established in *Giglio* with respect to impeachment information fall under *Brady*'s general rubric. For shorthand purposes only, this order and judgment frequently refers only to the name "*Brady*" when discussing materials that the government is constitutionally obliged to disclose; such references should be understood to include the impeachment materials that the Supreme Court addressed in *Giglio*.

[2] We include as background only those limited aspects of the factual and procedural history that relate to the issues we address.

criminal case—claimed an ability to deliver "pound" and "multiple ounce" quantities of methamphetamine and heroin from Oregon to Denver. R., Vol. III, at 277 (Trial Tr., dated July 20, 2015). Roberto told the DEA that Garcia drives a black BMW convertible and gave the agency a phone number for him.

Pretending to be a drug buyer, Roberto met Garcia in Oregon on July 12, 2013, and arranged for Garcia to deliver drugs to Colorado. During these negotiations, Roberto recognized Garcia-Martinez sitting "[m]aybe 10[or] 15 feet" away. *Id.* at 641 (Trial Tr., dated July 22, 2015). On the day of the Colorado delivery, the DEA tracked Garcia's phone and car to a Comfort Inn in Wheat Ridge, Colorado. At that time, DEA Special Agent Cronin ("Agent Cronin") identified two vehicles in the Comfort Inn parking lot—a "black BMW convertible" and a "red Chevy Cobalt"—with out-of-state plates, both registered to Garcia. *Id.* at 282. In the meantime, Roberto met Garcia at a nearby Taco Bell to discuss the logistics of the drug transaction. During these discussions, Roberto again recognized Garcia-Martinez sitting "maybe 12 or 14 feet" from their table. *Id.* at 644.

After the meeting, Garcia and Garcia-Martinez picked up the vehicles from the Comfort Inn, and returned to the Taco Bell (with Garcia driving the BMW and Garcia-Martinez driving the Cobalt). From there, Roberto led Garcia and Garcia-Martinez to a DEA-controlled warehouse, where the drug transaction was supposed to be consummated with Juan, the other confidential informant. Once

they arrived inside the warehouse, a video captured Garcia-Martinez opening the hood of the Cobalt, while Garcia opened the trunk. After Garcia and Garcia-Martinez revealed the drugs to Roberto and Juan, DEA agents arrested Garcia and Garcia-Martinez.

Following the arrest, DEA agents discovered approximately two pounds of heroin and seventeen pounds of methamphetamine "in the front end of the [Cobalt], specifically behind the headlights, the front headlight units." *Id.* at 305. Subsequent forensic analysis revealed that Garcia-Martinez's fingerprints were on the drugs' "internal packaging." *Id.* at 361 (Trial Tr., dated July 21, 2015); *see id.* at 618 (answering Garcia-Martinez's name, when the prosecutor asked, "So, in your expert opinion, whose fingerprints were located on four separate wrappings, which would be the two separate plastic wraps and the two separate Ziplock bags?").

B

On July 22, 2013, a federal grand jury in the District of Colorado returned an indictment charging Garcia-Martinez with conspiracy to distribute heroin and methamphetamine and possession with intent to distribute heroin and methamphetamine. In anticipation of trial, on August 29, 2014, Garcia-Martinez moved for the "timely" disclosure of *Brady* and *Giglio* materials, *id.*, Vol. I, at 87–98 (Def.'s Unopposed Mot. for Timely Disc. of *Giglio* Materials, dated Aug. 29, 2014), which the district court granted on September 3, 2014.

Shortly thereafter, however, the government opposed certain aspects of Garcia-Martinez's discovery requests and the district court directed the parties to "simultaneous[ly] re-brief" issues concerning the scope of the government's disclosure of *Brady* and *Giglio* materials. *Id.*, Vol. III, at 50 (Tr. Mots. Hr'g, dated Dec. 22, 2014). In its supplemental submission, the government explained that its summary disclosures—primarily in the form of two letters—to Garcia-Martinez included the following information regarding the two CIs:

Juan	**Roberto**
1. His full name; 2. The amount he was paid for participation in this case ($4,000); 3. The amount he had been paid by the DEA, in total, for all of his work in this case and in prior cases ($453,431); 4. That the DEA did not provide him with any further consideration or benefits besides these payments; 5. His criminal history; 6. A redacted DEA Form 473 ("Confidential Source Agreement") and a blank DEA Form 473; 7. Impeachment information (specifically, that the DEA is unaware of any instances where he testified falsely or dishonestly); 8. That the DEA is not aware of any history of mental illness or	1. His full name; 2. The amount he was paid for participation in this case ($9,000 by the DEA and an additional $1,000 by the Rocky Mountain High Intensity Drug Trafficking Area ("HIDTA") program); 3. The amount he has been paid by the DEA, in total, for all of his work as a confidential informant, including his work in this case and prior cases ($21,481); 4. That the DEA did not provide him with any further consideration or benefits besides these payments; 5. His criminal history (specifically noting that he had a history of marijuana use); 6. A redacted DEA Form 473 ("Confidential Source Agreement");

substance abuse; 9. That he did not receive any immigration benefits; and 10. That he had never worked for another law enforcement agency.	7. Impeachment information regarding his traits for honesty and/or issues with his integrity (specifically including four instances when federal agencies questioned his honesty, which eventually led to his termination as a CI by the DEA); 8. That he received no immigration benefits and that the DEA believed he had entered the country "in a status described as Conventions Against Torture"; and 9. That the DEA was aware of his use of marijuana, but not of any history of mental illness.

See id., Vol. I, at 173–76 (U.S.'s Mot. Concerning Outstanding Issues, dated Jan. 16, 2015).[3] Given the avowed breadth of these disclosures, the government labeled any additional information that Garcia-Martinez requested cumulative or immaterial.

[3] As to Roberto's prior instances of misconduct and dishonesty, the summary specifically revealed: (1) Roberto "was involved in illegal activity in December of 2013 and lied to DEA agents," (2) "another allegation in 2011 of dishonesty in which [Roberto was] reported to be manipulative and not to be trusted," (3) "[i]n December of 2010 [Roberto] met with targets of an investigation without notifying the agents, in violation of his agreement," and (4) "[i]n 2009 an ICE [i.e., Immigration and Customs Enforcement] agent reported [Roberto] was unreliable and had integrity issues." R., Vol. I, at 233 (Def.'s Mot. for Recons. of Ct.'s Ruling Regarding Disclosure of Information of Confidential Informants, dated Mar. 3, 2015).

Garcia-Martinez challenged the adequacy and completeness of the government's disclosures on essentially two grounds: *first*, he claimed that the summary information was too sparse to enable his counsel to impeach the CIs *or* to conduct an impeachment-related investigation into their backgrounds; and *second*, Garcia-Martinez speculated, based on the contents of the summary disclosures, that the DEA *must* have additional, but undisclosed, *Brady* and *Giglio* materials. Accordingly, defense counsel demanded production of additional information, including the CIs' unredacted cooperation agreements, the CIs' tax returns, records regarding the DEA's payments to the CIs, and information regarding the informants' history of criminal activity, especially outside of Colorado. *See id.* at 160–67 (Def.'s Mem. Regarding Disclosure & Disc. of Confidential Informants & *Giglio* Materials, dated Jan. 16, 2015).

Crediting the veracity of the government's representations, the district court initially denied these requests as essentially cumulative. *See id.* at 206 (Order Den. Def.'s Mot. for Disclosure & Disc. of Confidential Informants & *Giglio* Materials, dated Feb. 11, 2015). More specifically, the court stated that "a close comparison between what Defendant has already received from the Government and what he currently requests reveals that much of what he requests is cumulative and would reveal no substantial additional information." *Id.* at 211. Notably, the court underscored the government's representations that "the DEA did not provide either informant [i.e., Roberto or Juan] with any further

consideration or benefits besides the monetary payments," and, more specifically, that the DEA did not provide either CI with immigration benefits. *Id.* at 212–13.

The district court, however, granted Garcia-Martinez's motion to reconsider its discovery ruling. As a result, the court conducted an *in camera* review of the DEA's files with respect to the CIs. The district court confirmed that the government had properly honored its disclosure obligations with respect to Juan; as to him, no further disclosures were required. However, as to Roberto, the court found (without significant discussion) that the disclosures the government had already made should be supplemented in a limited fashion with certain information that generally (1) clarified the precise amount of money that Roberto had been paid by the DEA and the HIDTA, and (2) elaborated on the disclosed impeachment information that attacked Roberto's truthfulness and integrity.

C

Following these pretrial rulings, the case proceeded to trial, during which the government introduced the testimony of Juan (one of the government's two confidential informants), Agent Cronin, and various task force officers and forensic specialists, while Garcia-Martinez relied only on the testimony of Roberto (the government's other confidential informant). Agent Cronin testified, in particular, concerning his factual familiarity with the underlying investigation into Garcia-Martinez's drug activities, and—as an expert—regarding "drug transportation and trafficking of illegal substances" and on the investigative use

of "confidential sources." *Id.*, Vol. III, at 266–67. As part of that expert testimony, Agent Cronin discussed the "methods . . . used in the transportation and trafficking of drugs"—including secreting drugs in "batteries, . . . bumpers, [and] the back door panels of private vehicles"—and explained that in certain instances "people can transport drugs without their knowledge." *Id.* at 268–69.

Specifically, Agent Cronin explained that some transporters have "knowledge of the drugs being secreted in the vehicle" but "most often . . . no contact with the true controllers of the drugs." *Id.* at 269. Others "are not told what they're carrying"; that is, they have "no exact knowledge" of "the criminal activity of transporting drugs," but are simply paid "to drive a vehicle [with unknown contents] from one point to another." *Id.* at 269, 354. According to Agent Cronin, law enforcement refers to the latter group as "unwitting participants." *Id.* at 354.

Applying that knowledge distinction, Agent Cronin then testified, as an expert, that Garcia-Martinez's involvement failed to fall within "the definition of an unwitting person" because surveillance captured Garcia-Martinez accompanying Garcia "at the Taco Bell," "subsequently driving the red Cobalt . . . to the warehouse," and then "opening up the hood of the vehicle and being present at the" intended location of the drug transaction. *Id.* at 356. Defense counsel objected, arguing that Agent Cronin's expert testimony improperly

"defin[ed] . . . the elements of the offense" and "crosse[d] into the purview of the jury's decision." *Id.* at 356. The district court overruled the objection.

Agent Cronin later added, without objection, that a fingerprint analysis identified Garcia-Martinez's fingerprints on the drugs' "internal packaging"—a fact which, in Agent Cronin's view, proved inconsistent with an "unwitting individual" because "it would be obvious that [the individual] actually handled the dope." *Id.* at 361. A forensic expert confirmed the presence of Garcia-Martinez's fingerprints on the packaging.

The CIs then testified to different recollections concerning Garcia-Martinez's involvement in the drug transaction. Specifically, Juan testified that Garcia-Martinez "lift[ed] the hood of the red Cobalt," and then "[brought the drugs] over to [him]." *Id.* at 552–53. Roberto testified, by contrast, that he recalled Garcia-Martinez's presence at the negotiations and the ultimate drug transaction, but denied observing Garcia-Martinez "tak[ing] anything out from under the hood" or "hand[ing] anything" to Juan. *Id.* at 652–53.

Following the presentation of evidence, the jury convicted Garcia-Martinez on all counts, and this appeal followed.

II

On appeal, Garcia-Martinez raises two separate challenges: *first*, he claims that the government suppressed material impeachment information in violation of *Brady* and *Giglio*; and *second*, he submits that the district court improperly

admitted certain aspects of Agent Cronin's expert testimony. We review each issue in turn.

A

In a nutshell, Garcia-Martinez argues that "it is clear the United States suppressed the necessary *Brady and Giglio* evidence contrary to the due process and confrontation clauses of the United States Constitution by providing a simple summary letter that could not be effectively used in court." Aplt.'s Opening Br. at 22–23. He asks us to conduct an *in camera* review of "the actual files of the DEA" to confirm that such suppression has taken place and, based on that suppression determination, to reverse the district court's judgment and remand for a new trial. *Id.* at 23. We reject Garcia-Martinez's *Brady*/*Giglio* challenge for three distinct and independent reasons. First, because he relies on speculation and conjecture, Garcia-Martinez has not made an adequate showing to warrant our engaging in an *in camera* review of the DEA documents. Second, having taken the step in an abundance of caution of engaging in a properly circumscribed *in camera* review of the DEA documents—*viz.*, a review focused on the documents pertaining to the *government's* CI witness, Juan—we find no merit in Garcia-Martinez's argument that the DEA has suppressed material impeachment information. And, third, we conclude as a matter of law that even if the government had suppressed impeachment information with respect to CIs Roberto and Juan, such suppression could not have prejudiced Garcia-Martinez because

the government introduced ample evidence of Garcia-Martinez's guilt quite apart from the CIs' testimony. In other words, even if Garcia-Martinez's access to, and use of, suppressed impeachment information had convinced the jury to disregard entirely the testimony of CIs Roberto and Juan, there is no reasonable probability that the outcome of the trial would have been different. That is, any suppressed impeachment information could not have been material as a matter of law under the facts and circumstances of this case.

Before addressing these three grounds for upholding the district court's *Brady* ruling, we begin by discussing the basic principles that the Supreme Court established in *Brady* and its progeny. Specifically, in *Brady*, the Court concluded that "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." 373 U.S. at 87. For *Brady* purposes, exculpatory evidence includes evidence usable only for impeachment purposes. *See United States v. Tracy Smith*, 534 F.3d 1211, 1222 (10th Cir. 2008) ("Impeachment evidence is exculpatory for *Brady* purposes."). Further, the prosecution's *Brady* obligation carries an underlying "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see William Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995) ("[T]he 'prosecution' for *Brady* purposes encompasses not only the individual

prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." (citation and footnote omitted)); *accord McCormick v. Parker*, 821 F.3d 1240, 1246–47 (10th Cir. 2016).

In order to establish a *Brady* violation, "the defendant must prove by a preponderance of the evidence [that]: (1) the government suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material." *United States v. Garcia*, 793 F.3d 1194, 1205 (10th Cir. 2015) (quoting *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014)), *cert. denied*, 136 S. Ct. 860 (2016). "Evidence is 'material' under *Brady* '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. Mendez*, 514 F.3d 1035, 1046 (10th Cir. 2008) (quoting *United States v. Robinson*, 39 F.3d 1115, 1118 (10th Cir. 1994)). A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Robinson*, 39 F.3d at 1118).

It is important to underscore that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In this regard, the Supreme Court explained:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a

> miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

United States v. Bagley, 473 U.S. 667, 675 (1985) (footnotes omitted). Simply because information may aid a defendant in the preparation of his or her case does not mean that the prosecution is obliged under *Brady* to disclose it. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 109–10 (1976) ("Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. . . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); *William Smith*, 50 F.3d at 823 ("The Constitution, as interpreted in *Brady*, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant."); *United States v. Smaldone*, 544 F.2d 456, 462 (10th Cir. 1976) ("[Defendant's] argument [under, *inter alia*, *Brady*] is, for all practical purposes, simply that the Government prosecutor has an obligation to produce evidence which may or might in any manner aid in his defense. The contention is without merit. It fails to recognize the basics of our adversary system."). In order to prevail on his or her *Brady* claim, a defendant must marshal arguments that are more than "merely speculative" that demonstrate by a preponderance of the evidence that the three *Brady* criteria are satisfied—*viz.*, the

government suppressed the information and it "constituted material, exculpatory evidence." *Sandoval v. Ulibarri*, 548 F.3d 902, 915 (10th Cir. 2008); *see Garcia*, 793 F.3d at 1205.

1

In his appellate briefing, Garcia-Martinez relies on speculation and conjecture in requesting that we conduct an *in camera* review of the DEA's CI files. That is not enough. As a general matter, *Brady*'s "holding places no investigative obligation on *courts*, but rather only mandates that *the prosecution* must turn over all potentially exculpatory evidence in its possession." *United States v. Dabney*, 498 F.3d 455, 459 (7th Cir. 2007); *see United States v. Bland*, 517 F.3d 930, 935 (7th Cir. 2008) ("The district court is under no general independent duty to review government files for potential *Brady* material."). Moreover, *in camera* review is frequently time-consuming and may tax limited judicial resources; therefore, it is not a remedy to be unstintedly granted. *Cf.* 6 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 24.3(b), at 447 (4th ed. 2015) (noting that "[c]ourts tend to be reluctant to undertake pretrial review of *Brady* requests," *inter alia*, because such "in camera inspection can 'impose an intolerable burden on already taxed judicial resources'" (quoting Bennett L. Gershman, PROSECUTORIAL MISCONDUCT § 5:17 (2d ed. 2015))).

To justify a court undertaking an *in camera* review for *Brady* material, at the very least, a defendant must make a "plausible showing" that the government

files at issue contain "material" exculpatory or impeachment information. *United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009); *accord Riley v. Taylor*, 277 F.3d 261, 301 (3d Cir. 2001) (en banc) ("A defendant seeking an in camera inspection to determine whether files contain *Brady* material must at least make a 'plausible showing' that the inspection will reveal material evidence." (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987))); *see Godlock v. Fatkin*, 84 F. App'x 24, 29 (10th Cir. 2003) (unpublished) (noting that "we are not obligated to remand for an *in camera* review of the medical report to determine whether it contains *Brady* material" because the habeas petitioner's "conclusory allegations and speculation about what the medical report might contain fail to meet the *Brady* standard"); *see also United States v. Prochilo*, 629 F.3d 264, 268–69 (1st Cir. 2011) (noting that to merit *in camera* review of disputed *Brady* materials, the defendant must "articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material," and, in this regard, his "showing cannot consist of mere speculation"); *Bland*, 517 F.3d at 935 (noting that "mere speculation that a government file might contain *Brady* material is not sufficient" to justify *in camera* review); *cf. United States v. Moralez*, 908 F.2d 565, 567–69 (10th Cir. 1990) (where the only contested matter was the identity of the informant still insisting that "the defendant must present more than mere speculation about the possible usefulness of an informant's

testimony," and concluding that "[u]nder the circumstances [there], an *in camera* hearing will best accommodate the competing governmental and individual interests in this case," where the defendant "clearly stated how the informant's testimony was essential to [his] defense").

Garcia-Martinez's request that we conduct an *in camera* review does not satisfy the above-noted plausibility standard; instead, it is based on sheer speculation and conjecture. For example, Garcia-Martinez asserts that there is a "likelihood"—despite the government's contrary representations in its disclosure materials—that the government gave CI Juan "immigration benefits"—*viz.*, there is a likelihood that the government suppressed information regarding such immigration benefits and that this information is contained in the DEA's CI files. *See* Aplt.'s Opening Br. at 19.

However, this assertion is entirely conclusory and Garcia-Martinez offers nothing more than speculation in an effort to substantiate it. He simply reasons, without any evidentiary support that, though it is "possible" CI Juan (a Mexican national) became an American citizen prior to his DEA-informant work, as Juan testified at trial, Garcia-Martinez had no "immigration information" "to counter" Juan's testimony on this point. *Id.* at 19–20. Presumably, he speaks of information that would tend to establish that the DEA—or some federal immigration agency at the DEA's behest—gave Juan immigration benefits that helped him to become a citizen, or even "extended [immigration benefits] to [his]

family," in exchange for Juan's CI work. *Id.* However, these speculative arguments do nothing to plausibly indicate that such immigration-benefit information exists in the DEA's CI files.[4]

Garcia-Martinez is correct in contending that the prosecution also may be held accountable under *Brady* for material exculpatory information that is in the files of "governmental agencies closely aligned" with it. *See id.* at 20 (quoting *United States v. Harry*, 927 F. Supp. 2d 1185, 1209 (D.N.M. 2013), *aff'd*, 816 F.3d 1268 (10th Cir. 2016)); *see, e.g.*, *Kyles*, 514 U.S. at 437 (discussing the prosecution's *Brady* "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"). However, he does not even attempt to demonstrate that any federal immigration agency was closely aligned with the prosecution in this case— *viz.*, part of "the prosecution team." *McCormick*, 821 F.3d at 1242 (imputing knowledge of material impeachment information regarding a sexual assault nurse examiner, who was not an employee of a criminal law enforcement agency, to the prosecutor, because "under the circumstances of this case" the nurse "was a member of the prosecution team"); *accord William Smith*, 50 F.3d at 824. Perhaps more to the point, Garcia-Martinez does not tell us how the requested *in camera* review would shed light on

[4] Garcia-Martinez offers similar, non-specific speculation regarding the "immigration benefits" that were allegedly "promised" and then "withdrawn" from CI Roberto. Aplt.'s Opening Br. at 20.

any such alignment or lead to the discovery of material exculpatory information. In sum, Garcia-Martinez's arguments regarding possibly undisclosed immigration benefits do not satisfy the plausibility standard.

Similarly, Garcia-Martinez observes that, because it is undisputed that CI Juan worked for the DEA for "over [] twenty years," the DEA must have "many prior statements" of Juan "memorialized through de-briefings," and criminal-history information regarding Juan that is more specific and detailed than the information that the government already had provided. Aplt.'s Opening Br. at 18. Garcia-Martinez argues that such criminal-history information "would have yielded some fertile ground for investigation." *Id.* However, Garcia-Martinez does not offer a plausible explanation for why he believes Juan's allegedly numerous prior statements and any more detailed criminal-history information about him may contain material impeachment information within the meaning of *Brady* and its progeny.[5]

[5] Notably, Garcia-Martinez has not alleged on appeal that the government violated its distinct and independent duty under the Jenks Act to produce statements of CI Juan or any other government witness. *See* 18 U.S.C. § 3500 ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."); *United States v. Carter*, 613 F.2d 256, 261 (10th Cir. 1979) ("[T]he [Jencks] Act assures defendants their Sixth Amendment rights to confront their accusers by compelling the Government to produce 'statements' that may be useful for impeachment of Government witnesses.").

Garcia-Martinez also makes much of the fact that, during his trial testimony, CI Juan indicated that he had not paid taxes on the money that the DEA had paid to him for informant work and had collected disability payments from the federal government despite working during this period for the DEA. Garcia-Martinez states that Juan's testimony in this regard indicates that he lied to the U.S. Internal Revenue Service ("IRS") and the U.S. Social Security Administration ("SSA") during his DEA service and, yet, the government in its summary disclosure indicated that the "DEA was not aware of any instances of false testimony or falsity" involving Juan. *Id.* at 19. These events have led Garcia-Martinez to wonder: "If the DEA was not disclosing these crimes, what else . . . were [they] complicit in covering up to protect their source?" *Id.* Garcia-Martinez leaves the question hanging, however; he makes no effort to offer a plausible theory of what information the DEA might be covering up and how it might qualify as favorable and material within the meaning of *Brady*. In short, he has not carried his burden of establishing an adequate basis for *in camera* review.

To be sure, we recognize that, at bottom, Garcia-Martinez's argument is that, *if* the DEA knew of allegedly material impeachment information regarding CI Juan with respect to these tax and disability matters and did not disclose the information, it is reasonable to believe that the DEA may have other impeachment information in its CI file regarding Juan that it has not disclosed. However, even

assuming *arguendo* that there is some cogency to the logic of this argument, it depends in substantial part on a central proposition—that the DEA actually knew of CI Juan's apparently false statements to the IRS and SSA and failed to disclose this information. Yet, Garcia-Martinez has provided no information that tends to establish this point. (Nor has Garcia-Martinez argued that either the IRS or the SSA was part of the prosecution team of the criminal investigation leading to his indictment such that the prosecution might be held responsible for inquiring of either agency, to avoid a possible *Brady* violation, whether it possessed impeachment information regarding CI Juan.) Accordingly, Garcia-Martinez's arguments related to CI Juan's purported false statements to the IRS and SSA do not provide a plausible theory justifying our *in camera* review.

Further, Garcia-Martinez repeatedly complains that the summary disclosure (primarily in the form of two letters) that the prosecution provided to him in carrying out its *Brady* duty was inadequate because "the summary document was hearsay and could not be used to impeach or discredit the witnesses." *Id.* at 21. Garcia-Martinez underscores that he "asked for the original documents and raw data concerning each informant's activities [] because the summaries provided were largely ineffective to impeach the Government's informant witnesses." *Id.*

At the outset, we note that Garcia-Martinez's suggestion that hearsay rules barred his use at trial of the summary disclosures to impeach the government's witnesses is misguided; when used solely for impeachment purposes, the

disclosures would not be hearsay at all. *See Foster v. Ward*, 182 F.3d 1177, 1188 (10th Cir. 1999) ("Evidence presented to impeach the witness rather than establish the truth of the matter asserted is not hearsay."); *cf.* FED. R. EVID. 801(c) (noting that hearsay "means" evidence that is offered "to prove the truth of the matter asserted in the statement").

Moreover, Garcia-Martinez has not supplied any plausible, non-speculative reason to believe that the "original documents and raw data" in the DEA's CI files contain material impeachment information (or something likely to lead to such impeachment information) that would be additive of, or go beyond, the impeachment information that the government had already provided to him in the summary disclosures. Furthermore, Garcia-Martinez has not cited any authority, and we are not aware of any, that entitled him to receive *Brady* material in the form of originals and raw data. In other words, if the summary disclosures satisfied the prosecution's *Brady* obligations in this case—*viz.*, communicated to Garcia-Martinez the necessary material exculpatory (i.e., impeachment) information—Garcia-Martinez has not demonstrated that he was legally entitled to independently receive originals and raw data containing, at least in substance, the same information. *Cf. United States v. Greatwalker*, 356 F.3d 908, 911–12 (8th Cir. 2004) (per curiam) (rejecting for a lack of prejudice the defendant's *Brady* claim based on the government's failure "to provide agents' handwritten notes of witness interviews" where the defendant "was provided with typed

accounts of the interviews" and did "not indicate how the handwritten notes were *additionally* exculpatory" (emphasis added)).

True, Garcia-Martinez has "complained that the summary letters did not contain any significant identifying information" and, consequently, he was rendered "unable to investigate the informant's activities that may bear upon their credibility." Aplt.'s Opening Br. at 21. However, as a general matter, the government was not obliged under *Brady* to provide Garcia-Martinez with information that would assist him in gathering impeachment material to bolster his case. *See United States v. Ashley*, 274 F. App'x 693, 697 (10th Cir. 2008) (unpublished) ("[T]he Due Process Clause does not require the government to disclose before trial the names of its witnesses, just so the defense can have sufficient time to investigate their backgrounds for impeachment information."); *cf. United States v. Nevels*, 490 F.3d 800, 803 (10th Cir. 2007) ("The Supreme Court has established that no *constitutional* right to pretrial discovery of witnesses exists in non-capital cases."). The germane question is whether the government was actually in possession of material information bearing on the CIs' credibility that it had *not* already disclosed. Garcia-Martinez responds to this question with only speculation and conjecture. And that is not good enough to warrant our *in camera* review.

In sum, our conclusion that Garcia-Martinez has not made a "plausible showing" that the DEA's CI files contain "material" exculpatory (i.e.,

impeachment) information warrants our rejection of his request for *in camera* review. *Williams*, 576 F.3d at 1163. Admittedly, Garcia-Martinez is in "a tough position" in making this plausibility showing without having an idea of what materials are in the DEA's CI files. Aplt.'s Reply Br. at 6. But he must nevertheless offer us more than speculation and conjecture. *Cf. United States v. Phillips*, 854 F.2d 273, 278 (7th Cir. 1988) ("[A] *Brady* request does not entitle a criminal defendant to embark upon an unwarranted fishing expedition through government files . . . ."). His failure to do so provides an independent basis for rejecting Garcia-Martinez's *Brady* claim because it asks us to find error in the district court's *in camera* review by conducting our own such review.

2

To ensure that we had the requisite materials to dispose of this appeal, we previously granted the government's unopposed motion to provide us with the DEA's CI files under seal and also set forth procedures that would control any *in camera* review of those materials. Under the reasoning of Part II.A.1, *supra*, Garcia-Martinez would have no entitlement to our *in camera* review of those materials and his *Brady* claim would consequently be rendered fatally infirm. However, even if we put aside that conclusion, we still must reject Garcia-Martinez's *Brady* claim. Specifically, we have conducted a careful, time-intensive review of the DEA's CI files, subject to a significant substantive restriction noted below. The volume of these materials is not insignificant. They

consist of papers organized in file folders; when the folders are stacked one on top of another, they reach a height of approximately one foot (i.e., twelve inches). Based on that *in camera* review, we conclude that the government did not suppress material impeachment information favorable to Garcia-Martinez. Accordingly, we also uphold the district court's *Brady* ruling on this ground.

As noted, our review of the DEA's CI files was circumscribed in one significant substantive respect. Specifically, though we ultimately examined each piece of paper in the DEA's CI files to avoid overlooking anything relevant to our inquiry, the focus of that inquiry was solely on whether the government suppressed material impeachment information with respect to *its* witness, CI Juan. Though CI Roberto helped to arrange the controlled buy of narcotics that resulted in Garcia-Martinez's prosecution, Roberto testified as a *defense* witness for Garcia-Martinez, not as a witness for the government. And this accounts for our narrowing of the aperture for our inquiry.

Garcia-Martinez has not cited any controlling precedent, and we are not aware of any, that would have obliged the government under *Brady* to disclose information that is exculpatory—in a purely impeachment sense—with respect to a *defense* witness.[6] *See United States v. Green*, 178 F.3d 1099, 1109 (10th Cir.

[6] Quite apart from this point, we would decline to conduct an *in camera* review with respect to CI Roberto because Garcia-Martinez's stated reasons for seeking information regarding him fall outside of the ambit of the government's disclosure obligations under *Brady*. Garcia-Martinez's principal (continued...)

[6](...continued)
contention is that "[t]he issue [he] was precluded from exploring under *Brady*" is whether the government really terminated Roberto's CI status and declined to call him as a witness because of his CI integrity issues and misconduct—as the government claimed—or because of "the substance of his testimony" that portrayed Garcia-Martinez as "not [being] involved to the degree necessary to establish the government's case." Aplt.'s Reply Br. at 4. However, it follows *a fortiori* from the proposition that "*Brady* did not create" a "general constitutional right to discovery in a criminal case," *Weatherford*, 429 U.S. at 559, that it did not establish a right to the disclosure of information simply because it may shed light on the prosecution's litigation strategy. *See* LaFave, *supra*, § 24.3(b), at 432 (citing *Weatherford* and noting that "the due process duty to disclose extends only to evidence, not strategy"). Moreover, insofar as Garcia-Martinez suggests that the government's decision to terminate Roberto as a CI and not to call him as a trial witness signals that the DEA's files regarding him contain undisclosed information favorable to the defense, he engages in pure speculation and conjecture, and we decline to do likewise. *See Ashley*, 274 F. App'x at 696 n.2 ("[W]e are unwilling to infer the existence of material impeachment evidence within the meaning of *Brady* and *Giglio* by engaging in a high degree of speculation about the government's litigation decision-making. In particular, we will not speculate that at the time of the initial trial the government decided not to call the three individuals at issue as witnesses because their testimony was unfavorable to its case (and, thus, presumably favorable to the defense) . . . .").

Furthermore, Garcia-Martinez insists that he would have benefitted from the government disclosing information covering the period when the DEA had deemed CI Roberto reliable (i.e., the period before the DEA found CI Roberto's integrity and veracity unacceptably flawed); that positive information, says Garcia-Martinez, would have been "germane and material." Aplt.'s Reply Br. at 4. However, *Brady* does not oblige the government to furnish information to the defense simply because it is relevant and helpful. *See Agurs*, 427 U.S. at 112 n.20 ("It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. Such a standard would be unacceptable for determining the materiality of what has been generally recognized as '*Brady* material' . . . ." (citation omitted)); *Ashley*, 274 F. App'x at 697 ("[T]he Due Process Clause does not require the government to disclose before trial the names of its witnesses, just so the defense can have sufficient time to investigate their backgrounds for impeachment information."); *see also*
(continued...)

1999) (noting that "both the discovery order and *Giglio* apply only to impeachment information relating to a government witness," and that they were "inapplicable because the government did not ever call" the witness the defendant hoped to impeach); *Hatch v. Oklahoma*, 58 F.3d 1447, 1469 (10th Cir. 1995) ("In *Giglio*[], the Supreme Court held that the due process protection announced in *Brady* includes evidence that undermines the credibility of the *prosecution's* witnesses." (emphasis added) (citation omitted)), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001) (en banc); *see also United States v. Kimley*, 60 F. App'x 369, 372 (3d Cir. 2003) (unpublished) ("[T]here is no requirement that the government must disclose to the defense that material which would allow the defendant to impeach his own witness."); *cf. In re Sealed Case No. 99-3096*, 185 F.3d 887, 893 (D.C. Cir. 1999) ("In the usual case there is a conceptual difference between the impeachment of a government witness and the impeachment of a defense witness. Evidence that impeaches the former is almost invariably 'favorable' to the accused, because by making the government's case less credible it enhances the defendant's chances of acquittal.

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[6](...continued)
Wardius v. Oregon, 412 U.S. 470, 474 (1973) (noting that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded"); *accord Nevels*, 490 F.3d at 803. Therefore, in light of Garcia-Martinez's stated rationale for seeking material impeachment information regarding *his* witness, CI Roberto, the government was not obliged to disclose it under *Brady*, and we likewise have no need in our *in camera* review to determine whether the government suppressed such information.

Evidence that impeaches a defense witness, by contrast, is not generally favorable to the accused; by reducing the credibility of the defendant's own witness, such impeachment reduces the probability that he will obtain a not guilty verdict. It is ordinarily the prosecutor rather than defense counsel who wants to use the latter kind of evidence . . . .").

Indeed, in his opening brief, Garcia-Martinez recites this general proposition. Aplt.'s Opening Br. at 15 (noting that evidence is material within the meaning of *Brady*/*Giglio* "when it is impeachment of a critical and essential witness *for the government*" (emphasis added)). And, when the government affirmatively argued in its answer brief that it had no obligation to disclose impeachment information regarding defense witnesses, Garcia-Martinez did not directly respond in its reply brief; he simply faulted the government for adopting "a very literal interpretation of *Brady*." Aplt.'s Reply Br. at 3.[7] Consequently, our *in camera* inquiry was properly focused on whether the government suppressed material impeachment information with respect to *its* informant

[7] For inscrutable reasons, Garcia-Martinez attempts to bolster his (indirect) response to the government's position regarding the absence of a duty to disclose impeachment information with respect to *defense* witnesses by quoting the standard of Federal Rule of Criminal Procedure 16(a)(1)(A), and noting that "the standard is not actually called witnesses, but intended witness." Aplt.'s Reply Br. at 3 (emphasis omitted). This rule, however, is patently inapposite for a number of reasons, most salient among them being that it relates to the disclosure of relevant statements made by the *defendant*, if the government intends to use the statements at trial; Garcia-Martinez has not suggested that any statements made by him were used at trial but not disclosed upon request.

witness, Juan. And, after a careful and time-intensive review of the DEA's CI files, we conclude that it did not.

3

We now turn to our third independent ground for upholding the district court's *Brady* determination. Specifically, even though we have undertaken *supra* a careful *in camera* review of the DEA's CI files to determine whether the government suppressed material impeachment information, we need not rely on the results of that review to uphold the district court's rejection of Garcia-Martinez's *Brady* challenge. That is because even assuming *arguendo* that the government suppressed some favorable impeachment information with respect to the CIs, we would be hard-pressed to conclude in light of the government's ample evidence of Garcia-Martinez's guilt that such information was material. Put another way, given the strength of the government's case against Garcia-Martinez, there is not a reasonable probability that our confidence in the soundness of the outcome would be undermined, even if any suppressed impeachment evidence caused the jury to disregard *entirely* the CIs' testimony—especially that of the government's witness, Juan. *See United States v. Buchanan*, 891 F.2d 1436, 1443 (10th Cir. 1989) ("[W]here a witness' credibility is not material to the question of guilt, failure to disclose impeachment evidence does not violate *Brady*."); *cf. United States v. Gonzalez-Montoya*, 161 F.3d 643, 649 (10th Cir. 1998) (noting that an alleged coconspirator, turned

cooperating witness, was "a material witness whose credibility, or lack thereof, played a critical role in the determination of [the defendant's] guilt or innocence").

"The potential impact of the undisclosed evidence should be weighed in light of the whole record. What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." *Robinson*, 39 F.3d at 1119. We recognize that the materiality inquiry asks more than whether a rational jury would have found the evidence sufficient to support a guilty verdict. As the Court stated in *Kyles*, "the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." 514 U.S. at 453. Nevertheless, logical reasoning strongly indicates that when the government has a "strong case" in support of a guilty verdict—quite apart from the undisclosed evidence—it becomes less likely that this evidence could engender a reasonable probability of a different outcome—*viz.*, less likely that this evidence could be deemed material under *Brady*. *Robinson*, 39 F.3d at 1119; *see Hammond v. Hall*, 586 F.3d 1289, 1319 (11th Cir. 2009) (noting that "the stronger the evidence of guilt to begin with, the more favorable to the defense the undisclosed evidence will have to be to create a reasonable probability that a jury would have acquitted had the evidence been disclosed" (quoting *Derrick Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1347 (11th Cir.

2009))). In this regard, we underscore that Garcia-Martinez only contends that the government had a constitutional obligation to disclose the information because it could have significantly facilitated the impeachment of the CIs—either directly or indirectly. There is no contention here that the evidence was otherwise exculpatory. *Cf. Robinson*, 39 F.3d at 1118–19 (upholding the district court's decision to grant a new trial under *Brady* where the government failed to disclose eyewitness testimony regarding the description of the person who picked up the narcotics that "tend[ed] to support the inference that one of the two main witnesses against [the defendant] may in fact have committed the [drug] crime of which [the defendant] was convicted").

Yet, even if Garcia-Martinez could have effectively nullified through cross-examination the CIs' testimony—armed with the favorable impeachment information that the government supposedly suppressed—there is not a reasonable probability that the jury would have reached a different verdict—*viz.*, the information was not material. Specifically, the government caught Garcia-Martinez, along with his alleged co-conspirator Garcia, on camera, in a non-public setting of a warehouse, trying to sell large quantities of narcotics to the CIs, and Garcia-Martinez's fingerprints were found on the internal packing of the drugs. Contrary to Garcia-Martinez's suggestion, this is not a situation where he was merely present at the scene of a drug deal, and his guilt depended on CI testimony regarding his participation in the drug conspiracy. Morever, even

Garcia-Martinez's own authority makes clear that, though "[m]ere presence at the scene of the crime does not, by itself, prove involvement," it is still "a material factor." *United States v. Esparsen*, 930 F.2d 1461, 1472 (10th Cir. 1991). And, as noted, there was significantly more evidence of Garcia-Martinez's guilt than his mere presence.

Under these circumstances, the CIs' testimony—in particular, regarding Garcia-Martinez's role in the drug transaction—would not have been material to the jury's determination of Garcia-Martinez's guilt. Our survey of cases involving similar fact patterns allows us to conclude without hesitation that there is not a reasonable probability that our confidence in the soundness of the outcome would be undermined, even if suppressed impeachment evidence caused the jury in this case to disregard entirely the CIs' testimony—especially, the more incriminating testimony of CI Juan. *Cf. United States v. Williamson*, 53 F.3d 1500, 1515–16 (10th Cir. 1995) (holding that the evidence supported defendant's conviction of aiding and abetting distribution of cocaine, even though defendant claimed that she was merely present at the wrong place at the wrong time, where the jury could have considered that defendant "was present during a drug transaction taking place at night, that the transaction occurred within her line of sight and that she counted a sum of money totalling $2,800"); *United States v. Hooks*, 780 F.2d 1526, 1532 (10th Cir. 1986) (upholding defendant's conviction of possession with intent to distribute where the defendant was arrested while

driving a vehicle, not his own, containing a concealed bundle of twenty-two ounces of PCP valued at $10,000); *see also United States v. Armour*, 112 F. App'x 678, 681 (10th Cir. 2004) (unpublished) (finding sufficient evidence to support a jury's guilty verdict for possession with intent to distribute cocaine where (1) defendant was the only person found in the apartment where the cocaine was discovered and (2) his thumb print was discovered on the box containing the cocaine); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 n.4 (10th Cir. 2000) ("[W]e have repeatedly stated that possession of a large quantity of narcotics is sufficient to establish the element of intent to distribute.").

Thus, there is a third independent ground for upholding the district court's *Brady* ruling. Specifically, even disregarding our conclusion—based on careful *in camera* review of the DEA's CI materials—that the government did not suppress material impeachment information, we would conclude that Garcia-Martinez cannot prevail on his *Brady* claim because there is no reasonable probability under these facts that, if Garcia-Martinez had been given access to any suppressed impeachment information with respect to the two CIs, the result of the proceeding would have been different.

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In sum, we conclude that Garcia-Martinez's *Brady* challenge must fail.

B

Garcia-Martinez next argues that the district court erred by permitting Agent Cronin to testify, as an expert, that Garcia-Martinez's activities in the underlying drug transactions did not resemble the agent's definition of an "unwitting" drug participant. *See* Aplt.'s Opening Br. at 26–27; *accord* Aplt.'s Reply Br. at 7–8. Garcia-Martinez claims that Agent Cronin's testimony ran afoul of Federal Rule of Evidence 704(b), by allegedly directing "the jury what to conclude from [the expert's] own investigation." Aplt.'s Opening Br. at 28.

Ordinarily, we review a district court's admission of expert testimony for an abuse of discretion; we will reverse only if the district court reached a "manifestly erroneous" decision. *United States v. Schneider*, 704 F.3d 1287, 1293 (10th Cir. 2013) (quoting *United States v. Dazey*, 403 F.3d 1147, 1171 (10th Cir. 2005)). But the government asserts that the standard of review is "difficult to ascertain" here because Garcia-Martinez contended at trial only that "the expert's answer invaded the jury's decision-making . . . by defining the offense's elements," but did not reference Rule 704's restrictions. Aplee.'s Resp. Br. at 15. Indeed, Garcia-Martinez forthrightly recognizes that "it is possible" that we might conclude that he forfeited his Rule 704 objection and that plain-error review is thus appropriate.[8] Aplt.'s Opening Br. at 25. However, he insists that "he

[8] To satisfy the stringent plain-error standard, a defendant must show (continued...)

properly preserved the issue in the court below." *Id.* at 27. We need not—and thus do not—opine on this preservation question. That is because even under the abuse-of-discretion standard—which is comparatively more favorable to Garcia-Martinez—his Rule 704 challenge fails.

Opinion testimony is "not objectionable" simply "because it embraces an ultimate issue." FED. R. EVID. 704(a). Rule 704(b), however, carves out a limited exception to that general proposition, providing that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." FED. R. EVID. 704(b).

> As we have explained, "Rule 704(b) *only* prevents experts from expressly stating the final conclusion or inference as to a defendant's mental state. The rule does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state."

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[8](...continued)
"[1] an 'error' [2] that is 'plain' and [3] that 'affect[s] substantial rights.'" *United States v. Olano*, 507 U.S. 725, 732 (1993) (fourth alteration in original) (quoting FED. R. CRIM. P. 52(b)). If these requirements are satisfied, we may exercise our discretion to reverse if we determine that "[4] the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (second alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)); *see also United States v. Story*, 635 F.3d 1241, 1244 (10th Cir. 2011) (setting forth the same framework).

United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011) (emphasis added) (quoting *United States v. Richard*, 969 F.2d 849, 854–55 (10th Cir. 1992)); *see United States v. Orr*, 68 F.3d 1247, 1252 (10th Cir. 1995) (explaining that Rule 704(b) "prohibits an expert witness from testifying that a defendant did or did not possess the requisite mental intent at the time of the crime"). More specifically, "Rule 704(b) commands the expert to be silent" concerning "*the last step in the inferential process*—a conclusion as to the defendant's *actual mental state*." *Goodman*, 633 F.3d at 970 (emphases added) (quoting *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988)).

Agent Cronin's challenged testimony remained well within these parameters. Agent Cronin testified that, in his expert opinion, Garcia-Martinez's presence during the various phases of the drug transaction—e.g., the negotiation of the sale and the transportation of the drugs—combined with Garcia-Martinez's opening of the hood of the vehicle containing the drugs at the situs of the sale and the presence of his fingerprints on the drug packaging, suggested that Garcia-Martinez had a level of involvement in the transaction beyond that of "an unwitting person." *See* R., Vol. III, at 355–56, 361. To be sure, Agent Cronin's testimony, based upon the factual circumstances of this case, established a firm foundation for the jury to infer that Garcia-Martinez knew about the drug transaction and, indeed, was an active participant in it. But Agent Cronin's testimony stopped short of "necessarily dictat[ing] the final conclusion" that

Garcia-Martinez "possessed the requisite mens rea" for conspiracy to possess and possession with the intent to distribute heroin and methamphetamine. *United States v. Wood*, 207 F.3d 1222, 1236 (10th Cir. 2000).

Rather, Agent Cronin merely opined, in light of his experience and training, that the evidence in the case was not logically consistent with a finding that Garcia-Martinez was an unwitting participant. *See* R., Vol. III, at 357 (testifying that it was "not common and illogical for an unwitting to participate" in drug-trafficking negotiations and to be present at the point where the drugs are to be sold). Agent Cronin left it up to the jury to decide whether to actually reject the inference that Garcia-Martinez was an unwitting participant—*viz.*, to decide whether Garcia-Martinez possessed the requisite mental state for the charged offenses. *See Schneider*, 704 F.3d at 1294 (explaining that Rule 704(b) does "not prevent an expert from drawing conclusions about intent, so long as the expert does not profess to know a defendant's intent"); *Goodman*, 633 F.3d at 970 (explaining that testimony only violates Rule 704(b) when it "attempt[s] to bring forth expert opinion as to the very mental state at issue in the case—the defendant's mens rea when he committed the crime"). And the district court's instructions made clear to the jury that it was not constrained by Agent Cronin's expert testimony to reach a result favorable to the government on this question (i.e., to find that Garcia-Martinez was not an unwitting participant). In this regard, the court informed the jurors that they should give "each expert opinion

received in evidence . . . such weight, if any, as you may think it deserves." R., Vol. I, at 375.

In *Richard*, we rejected the defendants' Rule 704(b) challenge and upheld the district court's admission of analogous expert testimony. *See Richard*, 969 F.2d at 855. There, we reasoned

> [The expert] testified that based on his experience, a drug dealer will not invite others to participate in this type of transaction who are not aware of the nature of the transaction. Further, he offered his opinion that [the defendants] performed certain roles typically performed in similar drug transactions. While these remarks may have implied a belief that the [the defendants] were in fact aware of the nature of the transaction, [the expert] did not expressly draw that conclusion or inference for the jury. Hence, the testimony was not prohibited by Rule 704(b), and the district court did not err in admitting it.

Id. (footnote omitted).

This reasoning is fully in step with other decisions of our circuit. *See United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1137 n.16 (10th Cir. 2014) (finding no Rule 704(b) violation, where the expert's opinion "left for the jury the ultimate inference on [the defendant's] intent"); *Orr*, 68 F.3d at 1252 ("Although the jury could have inferred defendant's criminal intent from [the expert's] statements, [the expert] did *not* testify that defendant had the requisite criminal intent for fraud. Admitting [the expert's] testimony was not error under Rule 704(b)."); *see also United States v. Becknell*, 601 F. App'x 709, 714 (10th Cir. 2015) (unpublished) (finding no abuse of discretion in the district court's

admission of expert testimony, where the expert "did everything *but* state th[e] final inference" that the defendant "possessed the gun in furtherance of drug trafficking" (emphasis added)). We should accordingly embrace that reasoning here. Consequently, we conclude that Rule 704(b) did not prohibit Agent Cronin's testimony, and the district court did not abuse its discretion in admitting his testimony.

III

Based on the foregoing, we **AFFIRM** the district court's judgment.

Entered for the Court

JEROME A. HOLMES
Circuit Judge

No. 15-1432, United States v. Edgar Leopoldo Garcia-Martinez

KELLY, Circuit Judge, concurring.

I join parts I and II.B of the court's opinion. I also join the court's statement that the government was not obligated to disclose information that would impeach Roberto, ultimately a defense witness. Ct. Op. at 25. With that understanding, I join part II.A.1 of the court's opinion holding that the contentions on appeal are "based on sheer speculation and conjecture" and do not undermine the district court's resolution of the Brady/Giglio issue. Thus, an *in camera* review on appeal is not required, notwithstanding that both parties requested one. I would affirm on this basis.

No. 15-1432, *United States v. Garcia-Martinez*

MORITZ, Circuit Judge, concurring.

I agree with the majority that the district court didn't abuse its discretion in admitting Agent Cronin's expert testimony. *See* Maj. Op. 35–40. Likewise, I agree with the majority that Garcia-Martinez's *Brady* claim fails because he relies solely on conjecture and speculation in asking us to conduct an *in camera* review. *See* Maj. Op. 16–30. But because I would reject Garcia-Martinez's *Brady* claim on this basis, I see no reason to conduct our own *in camera* review to evaluate whether the government suppressed any favorable impeachment evidence. *See* Maj. Op. 26–30. Nor do I see any reason to determine whether—even assuming the government did suppress favorable impeachment information—that suppressed information was material. *See* Maj. Op. 30–35. Accordingly, I join all but Part II.A.2 and Part II.A.3 of the majority opinion.

FILED
United States Court of Appeals
Tenth Circuit

May 15, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDGAR LEOPOLDO GARCIA-MARTINEZ,

Defendant - Appellant.

No. 15-1432

ORDER

Before **HOLMES**, **KELLY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk