No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BROWN and DERRICK CARTER, Petitioners,

vs.

UNITED STATES, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioners, through counsel, ask leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs, and to proceed *in forma pauperis*. Their respective counsel were both appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Dated: August 16, 2019

Respectfully submitted,

MYRA SUN
Attorney for JOHN BROWN

Respectfully submitted,

JAY A. NELSON
Attorney for DERRICK CARTER

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QUESTION PRESENTED

In the context of a duress defense, is the government's untimely disclosure of exculpatory evidence that (1) corroborates the defendants' well-grounded fear of harm and lack of reasonable opportunity to escape, while also (2) impeaching contrary evidence, material under *Brady v. Maryland*, 373 U.S. 83 (1963), or is it irrelevant?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John Brown and Derrick Carter petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

I. OPINION BELOW

The unpublished memorandum decision issued by the United States Court of Appeals for the Ninth Circuit, and its order denying rehearing, are attached as Appendix 1 and Appendix 2 respectively.

II. JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 22, 2019. (App. 1:1) A timely petition for rehearing was denied on May 20, 2019. (App. 1:2) This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law[.]"

IV. STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF QUESTION PRESENTED.

1. Petitioners' Duress Defense.

Petitioner John Brown and his younger brother, Petitioner Derrick Carter, were convicted by a jury of conspiracy to possess, and of possessing with intent to distribute, approximately 30 kilograms of cocaine in November 2014. Petitioners lived in Bellingham, Washington, near the Canadian border. (App. 2:3) They helped transport the cocaine to Canada, where it was seized. Petitioners were arrested about seven months later. (App. 2:12-14)

At trial, Petitioners presented a duress defense based on their fear of Curtis Coleman, a Seattle-area pimp and gang member, and the Vancouver, B.C.-based U.N. Gang, with whom Coleman often worked. In the late 1990s, Petitioner Brown became involved in cross-border smuggling between the

United States and Canada, transporting firearms with and for Coleman, as well as Coleman's companions. (App. 2:4) During this time Petitioner Brown also came to know the principals of the U.N. Gang, whose members worked with firearms dealers like Coleman and drug dealers like one Donnie Seale, who had also been arrested for the rape of a 13-year old girl. The gang had a long reach: it knew "what's going on with everything, who's doing what" in cross-border crime. Its leaders, who operated a Vancouver front company, American Fabricators ("AMFAB"), included the two Adiwal brothers, three members of the Kline family, a company marketing officer named Fernando, and a computer designer named Garrett Ho. (App. 2:4-5) The Border Patrol knew of the U.N. Gang and the people with whom it worked as having a violent reputation. (App. 2:7) By the time of Petitioners' trial, the U.S. government was investigating both the U.N. Gang and AMFAB. (App. 2:4-5)

From Petitioner Brown's experience with the U.N. Gang, as he described it at trial, the gang was like a many-headed snake or "hydra." It committed inter-gang killings, and killed a friend of Brown’s. AMFAB personnel would note news reports of disappearances for which they were responsible. The gang’s individual members were themselves violent.

Petitioner Brown knew of Ho hitting an AMFAB employee with a piece of sharp metal; afterward, the man looked like "Frankenstein with staples on his head," but came back to work nonetheless. Mr. Brown also once saw two gang members "hitting on a girl" in the back of a car "until she decide who she wanted to be with," referring to them sexually abusing her to bring her into prostitution. (App. 2:4-5)

In March 2011, Petitioner Brown learned that a friend, Wendy Pleadwell, had been drawn into storing firearms for Curtis Coleman. He first tried to report Coleman to local authorities, and was ignored, then found his way to the U.S.-Canada border to tell federal authorities about him. Though at first forcibly detained, Brown was able to talk to Dave Than, an agent for the Department of Homeland Security ("DHS"). Than and his co-workers already knew Coleman, who had been previously arrested in 2002 or 2003 carrying "diamonds, guns, and cash" in "one of the more significant" seizures along the border. Than also knew of the U.N. Gang being a "big" organization involved in smuggling drugs and guns. Petitioner Brown told Than about Coleman, the U.N. Gang, and their weapons dealing, and he "offered to help "take Coleman down." When he was finished, agents apologized and released him. (App. 2:6-7)

Agent Than emailed "a summary" of Petitioner Brown's information in April 2011 to DHS Agent Thomas Penn. Penn then began investigating both Petitioner Brown and Coleman. (App. 2:7) Meanwhile, in May 2011, Petitioner Brown learned that the U.N. Gang had given Coleman and Seale a 25-pound marijuana load to sell; Coleman had given it to Pleadwell to store until its sale. (App. 2:7) Penn caused Pleadwell's home to be raided, the marijuana was seized, and Petitioner Brown, who was there at the time, was detained. (App. 2:7, 16-17) Eight days later, Penn himself arrested Coleman, who had a state firearms prosecution pending. Penn became the case agent when the federal government took over Coleman's prosecution. (App. 2:18)

Petitioner Brown learned after the raid at Pleadwell's home that the U.N. Gang was holding him personally responsible for the lost marijuana load, and it wanted to be reimbursed for its value. Petitioner Brown was told he had to pay this "debt" off by bringing a kilo of heroin from Canada to Washington state, and then bringing ten kilos of cocaine from Washington into Canada. He refused. (App. 2:8) Then, when he was detained at the U.S. border in August 2011, he received an unsolicited visit from Penn and another agent there. The agents showed Brown "a gallery of pictures" that

included Coleman and a number of people from Brown's personal life, including the mother of one of his daughters. Penn then dropped a bombshell on Mr. Brown: the government "had credible information that [his] life had been threatened" by Coleman. The agents even had him sign papers "saying that I've been informed, and I didn't want protective custody." In view of what he had learned about Coleman's threat, Mr. Brown decided to tell them "everything I knew" about the U.N. Gang. He specifically told how it wanted him to bring a kilo of heroin from Canada and bring 10 kilos of cocaine back to Canada. His decision to talk to the agents again was motivated by a desire to avoid these smuggles. Rather than moving drugs to pay his $60,000 debt to the gang, he regarded it as a "better deal" to "help the police take them all down." Petitioner Brown talked about the activities of Coleman, the two Adiwal brothers, the Klines (who later would pay for his hotel room in connection with the charged cocaine transport in this case), and Garrett Ho (who also later sent money orders to support the cocaine charged transport). (App. 2:7-9)

After his discussion with Penn, taking the warning about Coleman seriously, Petitioner Brown left the Pacific Northwest in August 2011. He finally returned in 2013, thinking his "debt" was "getting kind of old," and

that the police would have done something about the gang. He also did not think his family's whereabouts were known to the gang, so that they were safe. (App. 2:10) However, during Halloween 2014, U.N. Gang member Fernando located Colleen Cruz, the mother of one of Petitioner Brown's daughters. Cruz testified that Fernando visited her at her home in Canada multiple times, telling her he needed to speak with Petitioner. Only after Fernando began going to her home did Petitioners engage in the charged drug transport. That conduct first involved picking up the drugs in Los Angeles and bringing them to Washington state. (App. 2:12) A few days later Petitioners assisted with smuggling the drugs into Canada only after Fernando went to Cruz's home one last time looking for Petitioner Brown, and told her to tell Petitioner Brown that he, Fernando, knew "where his daughter lays her head." (App. 2:12-13) On the night of the drug transport into Canada, American authorities detained Petitioner Carter at the border while he was waiting to pick up Petitioner Brown. Law enforcement contacted the Canadian authorities, and the drugs were seized after they were brought across the border. (App. 2:11)

At least two government witnesses who participated in the drug transport were generally aware that Petitioners were involved in the

transaction due to concern over the safety of Petitioner Brown's family. Witness C.H., who was with Petitioners during the Los Angeles-to-Washington leg of the journey, believed Brown was involved because he was concerned about his daughter's safety. Another witness, Corey Williams, a cooperator who assisted in bringing the drugs to the Canadian border, told case agent Steven Ausfeldt that he had heard one of Mr. Brown's daughters was being held for "ransom." (App. 2:13-14)

Petitioners were arrested in June 2015. At their jury trial, the district court gave a duress instruction. Petitioners were convicted. (App. 2:14)

2. Untimely Discovery.

Soon after their arrest, Petitioners asked the government for the recordings of Coleman's 2011 telephone calls from the Seatac, Washington Federal Detention Center ("FDC") while he was detained there on the firearms charge. The request specifically described Penn's disclosure, during his August 2011 meeting with Petitioner Brown, of threats by Coleman against Brown contained in those calls. (App. 2:17)

About two weeks before trial, in June 2016, and after insisting for a year that no Coleman FDC calls existed, the government disclosed hundreds of FDC call recordings – both Petitioners' own calls, made

during their pretrial detention, *and* Coleman's 2011 calls.[1] (App. 2:17-19) In a call Coleman made on May 18, 2011, a week after his arrest, he did, indeed, speak of Petitioner Brown, whose nickname was "DJ":

> CURTIS: . . . [T]his is what the Feds told me.
>
> LISA: What?
>
> CURTIS: They picked up D.J. a week prior to this.
>
> LISA: Mm-hmm.
>
> CURTIS: They said they grabbed D.J. D.J. told them I'm still running guns up to Canada.
>
> LISA: Yeah.
>
> CURTIS: Then that made them put out the warrant for me. He told me himself. He said, "Man, we wasn't going to even come after you." He said, "We wasn't thinking about you or nothing until John Brown" -- because John Brown is his real name.
>
> LISA: Right. I kind of figured that was it.
>
> CURTIS: He said, "We wasn't even thinking about you until John Brown said that you was the main guy and you're still running guns in Canada."

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[1] Petitioner Brown wrote the district court a letter prior to sentencing citing the audio filenames for 21 of these calls, several of which were calls to Canadian area codes, by date and time. He and Petitioner Carter moved to have these audio files transmitted to the court of appeals for review and consideration during this appeal under Ninth Cir. R. 27-14. This request was denied. (App. 3:2-10)

…CURTIS: Because I was like, what, are you fucking serious? He was like -- the Fed, he was like, "Man, I'm going to be straight-up with you." He said, "John Brown is the one told us that you were still bringing guns up here (inaudible)."

Now, they said they had been watching me, too, after he told them that. Because, remember, he got caught a week before they came and got me. I said, "I'm going to tell you" -- I told him straight-up. I said, I'm going to tell you like this, "He fucked me over now, but when I see him I'm going to kill his motherfucking ass."

LISA: Why would you say that? Don't say that. Don't say that shit. Come on. Whatever. Now we got to get off the phone, because you're not supposed to say that shit.

CURTIS: Then I told him -- then I said, no, I wasn't going to do it. I said it at first, then I said, "No, I'm not going to kill him, but I am going to hurt him." I said –

LISA: You're not going to do nothing like that. Shut up.

CURTIS: No. I'm telling you what I said to them.

LISA: Mm-hmm.

CURTIS: I said, "No, I'm not going to kill him." I said, "I would never let no dummy like that make me put myself in a position where I'm going to prison for life."

LISA: Oh my God.

CURTIS: I said, "He's not worth it." I said, "But I do want to hurt him bad." I did tell them that.

(App. 2:19)

The defense did not present the call as evidence at trial.[2] The defense did, however, call Penn. He denied telling Petitioner Brown that Coleman had made any violent threats against him. Asked if he remembered "how much [he] talked about Mr. Brown and safety," Penn answered, "I did not talk to Mr. Brown about [his] safety." Asked if his notes showed they discussed threats against Petitioner Brown by Coleman, Penn said, "No, I did not tell him about threats." Without mentioning the Coleman calls, he said the only Coleman communication of which he knew in 2011 was an FDC-intercepted letter from Coleman that called Petitioner Brown a "snitch." Penn said he did not regard that as a threat, and instead merely as a warning to his recipients to stay away from Petitioner Brown. (App. 2:9) Despite these responses, the defense argued that Petitioner Brown's account – of being told about the Coleman threats, and of unburdening himself to Penn

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[2] Petitioners interviewed Penn before trial, and he denied having heard any of Coleman's FDC calls in 2011, saying he had only heard some of them shortly before the interview, when one of the prosecutors played several of them for him. (App. 2:20) Petitioners did introduce the call in connection with a post-trial motion for a new trial; counsel for Petitioner Carter acknowledged that neither attorney was aware of the call before trial. Counsel for Petitioner Brown noted that he simply believed the government's assertions that "they had no knowledge of a threat." (App. 2:23)

because of his fear of the gang – was true. The government, for its part, mounted a vigorous attack on Petitioner Brown's credibility. (App. 2:42-44)

Petitioners were found guilty of the drug offenses in the indictment. (App. 2:14) After the verdict, they submitted the May 18 call transcript in connection with their motion for new trial. (App. 2:17-18) When the government filed its surreply, the defense learned of even more untimely disclosed evidence: an email string from July 2011 involving Stephen Hobbs (Coleman's prosecutor), an FDC staff member, and Penn. The email string began on July 26, when, citing an earlier request from Hobbs, the FDC staff member sent Coleman's inmate e-correspondence in an email attachment, also saying that Coleman's FDC call recordings would be produced the next day, July 27. Hobbs forwarded this email and the attachment to Penn on July 26. The two men thereafter exchanged comments in the email string about a reference to Petitioner Brown in one of Coleman's inmate emails.[3] (App. 2:21) As for the calls, there is no evidence from the FDC indicating that it

[3] Petitioners had also sought production of any Coleman inmate email correspondence regarding Petitioner Brown, such as the one referenced in the Hobbs-Penn exchange. (App. 2:17)

failed to send them, as promised, on July 27. Penn's conversation with Petitioner Brown took place about two weeks after this, on August 8.

On appeal Petitioners contended that Coleman's call, *combined* with the undisclosed email string, was improperly withheld evidence supporting Petitioners' duress defense under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioners argued that it was exculpatory support for a duress defense, because it corroborated Petitioner Brown's testimony about hearing from Penn about Coleman's threats, and the impact on Petitioners when the gang ultimately approached them about engaging in the charged offenses. Petitioners also argued that it powerfully impeached Penn: it demonstrated Penn's access to Coleman's calls not long before he met with Petitioner Brown, increasing the likelihood that, contrary to Penn's trial testimony, he *had* heard them, and had, as Petitioner Brown testified, warned him about Coleman's threats. (App. 2:26-35)

Petitioners argued that the threats themselves were the origin of Petitioners' well-grounded fear of serious harm from the U.N. Gang, with which Coleman worked. However, Coleman also spoke in the May 18 call of learning about Petitioner Brown's part in his prosecution from the government's own agents. This made it plain that the government would not

and did not use Petitioner Brown's proffered information to investigate the gang, and, by 2014, its inaction exposed his family to the gang's intimidation once its members tracked them down in 2014. This part of the May 18 call, too, was evidence supporting Petitioners' claim that they lacked any reasonable opportunity to escape committing the charged offense. (App. 2:26-35)

Yet the United States Court of Appeals for the Ninth Circuit found that untimely disclosing the call and email string did not violate the government's *Brady* obligations. Specifically, citing *Strickler v. Greene*, 527 U.S. 263 (1999), the panel reasoned that Coleman's threats against Petitioner Brown arose from animus unrelated to the U.N. Gang, that the withheld evidence was not material, and that there was no "'reasonable probability' that the jury would have acted differently had they learned of the Coleman materials at trial." (App. 1:3-4)

V. REASONS FOR GRANTING THE WRIT

This case illustrates the need for certiorari to apply the principles articulated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) to evidence in the government's possession that supports a duress defense. Petitioners claimed below that the evidence at issue was exculpatory because it supported their duress defense, in part by corroborating Petitioner Brown's account of how the duress traced back to 2011, while also impeaching Penn, whose testimony undermined the defense. *See Brady, supra*, 373 U.S. 83 at 87 *and United States v. Bagley*, 473 U.S. 667, 676 (1985).

Few cases have engaged in meaningful analysis of when withheld evidence of duress will prejudice a defendant. This Court's most recent *Brady* precedents tend to analyze the exculpatory value of evidence that aids an attack on the government's proof regarding the elements of the offense, often bearing on the basic question of a defendant's identification. *See Kyles v. Whitley*, 514 U.S. 419 (2005); *Strickler, supra*, 527 U.S. at 281-282 (withheld impeachment evidence of highly inconsistent statements by an eyewitness about the defendant's conduct during a kidnapping, which bore both on whether the incident was a kidnapping and his role for purposes of the jury's consideration of the death penalty); *Smith v. Cain* 565 U.S. 73 (2012); *Turner v. United*

States, 137 S. Ct. 1885 (2017); *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (withheld evidence of eyewitness's motive to fabricate). Duress, by contrast, does not "controvert any of the elements of the offense" charged. Instead, it excuses knowingly-committed, otherwise criminal acts because the defendant has come forward with evidence of "coercive conditions . . . negat[ing] a conclusion of guilt." *Dixon v United States*, 548 U.S. 1, 12 (2006).

This Court has recognized, moreover, that rather than being shaped as a reaction to the government's inculpatory proof, the contours of a duress defense generally originate, as was so here, with the defense. It has held, for example, that the defense carries the burdens of initial production and ultimate proof on duress partly because it is usually based on "facts . . . peculiarly in the knowledge of" a defendant, rather than the government. *Dixon*, *supra*, 548 U.S. at 15-17. Yet, as this case illustrates, corroborating evidence to prove these facts may still be in the government's possession. When this evidence is withheld, *Brady* prejudice must be analyzed in light of the unique role that duress plays in ensuring a fair trial that features the most basic component of due process, the right to present a defense. This Court should grant certiorari to make clear that evidence corroborating the existence of "coercive conditions" that help establish duress is material where it creates the reasonable

probability of a different result. *Strickler*, *supra*, 527 U.S. at 290, 300-301, *citing Kyles*, 514 U.S. at 435.

Two aspects of the *Brady* materiality analysis have particular bearing on withheld evidence of duress.

A. THE NINTH CIRCUIT'S MATERIALITY ANALYSIS WAS EXCESSIVELY NARROW.

First, as this Court has reiterated in *Kyles* and *Strickler*, the touchstone requirement of a "reasonable probability" of a different result is not equated with a showing that a defendant's acquittal was more likely than not. Instead, the question is much less black-and-white, asking whether the withholding of the evidence undermines confidence in the fairness of the trial and the resulting verdict. In the context of a duress defense, the question must be whether the withheld evidence thwarted the defendant's effort to corroborate any of the three elements of duress as defined by the Ninth Circuit and most other courts of appeals:[4] (1) an immediate threat of death or serious bodily injury, (2) a

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[4]*See* NINTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS, No. 6.5 (2019) *and United States v. Lopez*, 913 F.3d 807, 813 (9th Cir. 2019); COMMITTEE ON FEDERAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, No. 6.08, (2018); JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS, No. 9.02 (2017). *See also United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997); *United*

well-grounded fear that the threat would be carried out, and (3) no reasonable opportunity to escape the threatened harm.

On this first question, certiorari is needed to make clear that a defendant's burden of proof on each of these factors calls for a broader, not a narrower, materiality assessment. Evidence of duress in the government's possession, whether it is exculpatory in and of itself (like Coleman's angry threats) or impeaching (like the email string, which showed that Penn well might have heard these threats, and then undermined his credibility when he

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States v. Rodriguez-Duran, 507 F.3d 749, 759 (1st Cir. 2007), n. 13; *United States v. Portillo-Vega*, 478 F.3d 1194, 1197-1198 (10th Cir. 2007). Other circuits add to, but never omit, these factors. *See United States v. Hernandez*, 894 F.3d 496, 504 (2d Cir. 2018); COMMITTEE ON MODEL JURY INSTRUCTIONS, 3D CIRCUIT MODEL JURY INSTRUCTIONS, No. 8.03 (2015) (also requiring a showing that the defendant "did not recklessly place[ ]" him or herself in circumstances that would have "forced" commission of the offense); FIFTH CIRCUIT DISTRICT JUDGES' ASSOCIATION, COMMITTEE ON PATTERN JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), No. 1.36 (2015) (defendant may not have "recklessly or negligently" acted so as to make it "probable that he would be forced to choose the criminal conduct") (2015); SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS, No. 6.05 (2019) (same); COMMITTEE ON PATTERN JURY INSTRUCTIONS OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS, No. S16 (2016) (defendant's "negligent or reckless conduct" may not have "create[d] a situation" forcing the defendant to commit the offense).

flatly disputed Petitioner Brown's testimony), should be deemed material even if it alone does not satisfy the preponderance standard for proof of duress.

Here, the Ninth Circuit's materiality analysis undervalued the withheld evidence because Coleman expressed his 2011 threats upon learning that Petitioner Brown was accusing him to federal agents, not because of the lost marijuana load that more directly led the U.N. Gang to pressure Petitioners at the time of the charged offenses. But the call – and the email string making Penn's awareness of the call more likely – were plainly material to establishing the well-grounded nature of Petitioners' fear. To establish as much, Petitioners sought to first link the gang to Coleman (Petitioner Brown had angered them both by drawing attention to the seized marijuana, and by talking about Coleman's conduct), then Coleman to Penn (Penn's awareness of the threats and communication of them to Petitioner Brown), and the warning to Petitioner Brown (who was alarmed because the warning came from the government). The forging of all of these connections bore on whether Petitioners' fear was well-grounded because it was evidence of "the objective situation in which the defendant allegedly was subjected to duress." *Lopez*, *supra*, 913 F.3d at 815-816. The "objective situation" takes into account both proof of here-and-now threats and matters uniquely informing the defendant's perception that the

threat will really be carried out unless he cooperates. He is entitled to show that his experience "with those applying the threat is such that [he] can reasonably anticipate being harmed on failure to comply." *Id*. Factors related to *his* "situation," not merely to the source of the threat, can be part of the reasonableness of his belief that the threat will be carried out if he does not do as he is told. *Id*. at 816.

The Ninth Circuit's analysis gave too little regard for the fact that every piece of favorable evidence, including the email string showing Penn's likely access to the Coleman calls, was needed for Petitioners to establish a well-grounded fear by a preponderance of the evidence. It was not enough to present testimony about the gang's reputation for violence and demand for payment of a "debt." The visceral evidence of Coleman's anger was powerful corroborating proof of the pressure Petitioners saw from all sides, just as subject to renewal as the gang's threat at the time Petitioners finally agreed to commit the charged offense. This evidence strongly supported both the genuineness, and reasonableness, of Petitioners' fear. The email string presented proof that Penn knew of the calls, so it corroborated Brown's account of how a law enforcement agent's warning ultimately translated the gang's threats into an immediate and well-grounded risk of death or serious injury.

Moreover, because Penn and the government vociferously *denied* warning Brown about Coleman's jail-call threats, the email string in particular served to utterly contradict Penn's claim. Evidence impeaching his credibility on this point would have been helpful to the defense under *Brady*. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972).

With the call and the email string, the defense need not have called Penn at trial and addressed his denials with only meager concessions from which it could infer that he disclosed the Coleman threats to Petitioner Brown. The defense could instead have met its burden of showing a well-grounded fear by supporting Petitioner Brown's testimony about the source of the gang's demand that he engage in a drug offense with the call and the email string.

Because the email string was withheld, however, the government was free to do what it did: fiercely attack Mr. Brown's credibility, claiming his testimony lacked any corroboration. Indeed, the government wholly escaped being put on the spot – to put Penn on itself to explain how, when the email showed he had the calls shortly before he met with Mr. Brown, he could credibly insist he knew nothing of the threats in them, and did not mention them in their conversation. The withheld email string deprived Petitioners of a powerful weapon to impeach Penn’s denials of having discussed the threats.

In sum, the withheld evidence was thus undeniably "relevant to the related issue of rehabilitating" Petitioner Brown's credibility as to the well-grounded nature of his fears. *Lopez*, *supra*, 913 F.3d at 823. The government's relentless attack on the credibility of Mr. Brown's account regarding the Penn-Brown meeting thus went utterly unanswered. In the parlance of evidentiary relevance, the Coleman threats made the existence of a fact in dispute – whether Petitioners' fear of imminent, serious bodily injury was well-grounded – more likely than it was without the evidence. *See* Fed. R. Evid. 402.

The Ninth Circuit's too-narrow focus on the relevance of the withheld evidence, despite its bearing on two prongs of Petitioners' duress defense, was an unconstitutional reading of *Brady*, because the evidence fell squarely within the true focus of *Brady* materiality analysis: whether the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, *supra*, 514 U.S. at 435. This case presents a vehicle for this Court to make clear that withheld evidence of duress is material if it hobbled in *any* degree the defendant's ability to meet its burden of establishing the defense. Certiorari is proper.

B. THIS COURT'S STRONG VOICE IS NEEDED TO CLARIFY THAT IN THE DURESS CONTEXT, PROSECUTORS' *BRADY* OBLIGATIONS EXTEND EVEN—IF NOT ESPECIALLY—TO EVIDENCE REFLECTING THE UNRELIABILITY OF LAW ENFORCEMENT ACTORS.

Finally, for prosecutors assessing the parameters of their obligations under *Brady*, the materiality of withheld evidence is considered "collectively, not item by item." *Kyles*, 514 U.S. at 436. Although a defendant may know what the parameters of his duress defense are, the government, "which alone can know what is undisclosed," bears the "responsibility to gauge the likely net effect" of any given piece of evidence. *Id*. at 437. Certiorari should be granted here to clarify how the government should do so when a defendant makes it known that he will assert a duress defense. The "collective" body of *Brady* evidence on duress should be evaluated in light of pattern instructions or judicial precedents setting out the elements the defendant must establish. Any relevant evidence that supports the elements of duress makes a different result "reasonably probable."

The defense case relied on Petitioner Brown's testimony that he learned about Coleman's threats from Penn, which added to what he had heard from the gang in August 2011; hearing these threats prompted him to provide extensive information to Penn about the U.N. Gang, including its associate Coleman;

Brown thought his information would result in a government investigation neutralizing the threat they posed; and he absented himself from the gang's area of influence, the Pacific Northwest, to let them do this before returning in mid-2013. On his return, the gang found him – and his family – to renew the threat.

With respect to evidence admissible to establish the third element of the defense – the lack of a reasonable opportunity to escape threatened harm – the Ninth Circuit's analysis was, again, overly narrow in omitting the materiality of the email string, which showed that Penn very likely knew the contents of Coleman's FDC calls, including the threats against Petitioner Brown. Whether there was a reasonable opportunity to escape "often focuses on why the defendant did not call the police at the first opportunity." *Lopez*, *supra*, 913 F.3d at 822. Any assessment of the reasonableness of a defendant's inaction "must take into account [his] 'particular circumstances[.]'" *Id*., *citing United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016). Whether those circumstances include a defendant's past experiences in witnessing police inaction, or making futile, regularly-ignored police reports, is relevant to the "assessment of reasonableness." *See Lopez*, 913 F.3d at 822-823. And evidence of past experiences with law enforcement bear on "the related issue of rehabilitating a defendant's credibility" as to why he saw no reasonable

opportunity to escape. *Lopez*, *supra*, 913 F.3d at 823. Yet prosecutors might be particularly reluctant to disclose *Brady* evidence demonstrating that law enforcement actors were inattentive and/or unreliable.

In this case, the email string was a critical first link in establishing Petitioners' lack of reasonable opportunity to escape. It was relevant to establish that the government could not and would not, in fact, protect Petitioners when the gang found their family. The email string showed that in Penn's review of Coleman's inmate emails, the government was aware of the animosity between Coleman and Petitioner Brown. Given that Coleman claimed to have learned about Petitioner Brown's role in his arrest from the government itself, the email string was relevant to show that Penn, far from being prepared to assist and protect Petitioner from Coleman or the gang, was instead inclined to play the two against each other.

Of equal importance, without the email string Petitioners could not impeach Penn's claimed ignorance, not just of threats from Coleman, but also of *any* danger to Petitioners from Coleman's cohorts in the U.N. Gang. This considerably weakened Petitioners' ability to meaningfully counter the government's attacks on Mr. Brown's credibility. With the evidence from 2011, by contrast, the full 2014 picture could be put in context – that the gang's

success in tracking Petitioner Brown down again, despite his efforts to assist an investigation, established the futility of any hope of assistance from law enforcement. Such an experience plainly bore on establishing Petitioners' reasonable belief that going to the police in 2014 would not protect them from the gang's renewed threat. In these critical ways, the combination of the email string and calls constituted affirmative proof that Petitioners lacked a reasonable opportunity to escape by reporting the renewed threats. This Court should clarify that *Brady* extends to such critical evidence.

VI. CONCLUSION

The Coleman call and email string were undoubtedly material to Petitioners' duress defense under *Brady*. Their untimely disclosure prejudiced Petitioners, and this Court should grant certiorari to reconsider the Ninth Circuit's overly narrow interpretation of the *Brady* analysis as applied to a duress defense.

Dated: August 16, 2019

Respectfully submitted,

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Respectfully submitted,

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United States v. John Brown and Derrick Carter

United States Court of Appeals for the Ninth Circuit
Consolidated Nos. CA 16-30297, 16-30298

A P P E N D I X 1

MEMORANDUM DISPOSITION
(Dkt. No. 86)
ORDER DENYING PETITION FOR REHEARING
(Dkt. No. 95)

FILED

FEB 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, Jr., Defendant-Appellant.	No. 16-30297 D.C. No. 2:15-cr-00211-MJP-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DERRICK LOUIS CARTER, Defendant-Appellant.	No. 16-30298 D.C. No. 2:15-cr-00211-MJP-2

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted February 5, 2019[**]
Seattle, Washington

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,[***] Judge.

John Brown and Derek Carter appeal their convictions for possession of cocaine with intent to distribute and conspiracy to distribute more than five kilograms of cocaine pursuant to 21 U.S.C. §§ 841(a), (b)(1), and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

1. Brown and Carter argue that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by providing a recording of a telephone call from Curtis Coleman only a few weeks before trial and by failing to produce a copy of an email (showing that the Coleman telephone call had been forwarded) until after trial. *Brady* claims require proof of prejudice—i.e., that there is a "reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

[1] Because the parties are familiar with the background of this case, we do not describe the facts in detail here.

Here, Brown and Carter fail to show prejudice because they have not demonstrated that the recorded telephone call and the email are relevant to their duress defense. Brown and Carter argued that they only agreed to smuggle cocaine into Canada because the U.N. Gang was threatening Brown's family. But the Coleman telephone call and forwarded email showed Coleman was upset with Brown for unrelated reasons. The record does not show that Coleman was part of the U.N. Gang. And Brown and Carter's decision to smuggle cocaine for the U.N. Gang would have done nothing to allay Coleman's ire toward Brown. Accordingly, Brown and Carter have failed to show that there is any "reasonable probability" that the jury would have acted differently had they learned of the Coleman materials at trial. *Strickler*, 527 U.S. at 281.

2. Brown and Carter also allege that the government violated *Napue v. Illinois*, 360 U.S. 264 (1959), by presenting what amounted to false testimony. Specifically, Brown and Carter argue that the government failed to correct one of Brown's witnesses, Agent Penn from the Department of Homeland Security, when he testified that he had only reviewed a particular report in preparing for his testimony and that he only remembered a non-threatening letter Coleman sent to Brown (without mentioning the recorded Coleman telephone call). *Napue* claims require a showing of materiality, meaning the defendant must show that there is a

"reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005).

Even assuming that Agent Penn's testimony was actually false and that the government had an obligation to supplement the direct testimony of Brown's own witness, Brown and Carter's *Napue* claim, like their *Brady* claim, fails because the relevant testimony is about the Coleman materials, and that evidence is not probative of Brown and Carter's duress defense. Coleman was not part of the U.N. Gang and his threats against Brown were not related to the reason Brown and Carter offered as a justification for their participation in the cocaine smuggling endeavor. Accordingly, even if the government had supplemented Agent Penn's testimony with information about Coleman's recorded call, Brown and Carter have failed to show that information would likely have been material to the jury.

3. Brown and Carter allege that the government's closing argument misstated the law and improperly vouched for certain witnesses while denigrating the defense. We are not persuaded. The government did not misstate the rule from *United States v. Verduzco*, 373 F.3d 1022, 1030-31 (9th Cir. 2004), about assessing how a reasonable person would act; the prosecutor simply explained that the jury need not accept Brown's own subjective beliefs. And the prosecutor did not improperly vouch or denigrate when she argued that certain witnesses and theories

were consistent or inconsistent with the evidence at trial. That is well within the scope of permissible closing argument.

AFFIRMED.

FILED

MAY 20 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, Jr., Defendant-Appellant.	No. 16-30297 D.C. No. 2:15-cr-00211-MJP-1 Western District of Washington, Seattle ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DERRICK LOUIS CARTER, Defendant-Appellant.	No. 16-30298 D.C. No. 2:15-cr-00211-MJP-2 Western District of Washington, Seattle

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,* Judge.

The Appellants' petition for panel rehearing (Dkt. No. 93) is DENIED. The Appellants' motion for leave to file a separate submission in the public record (Dkt. No. 94) is also DENIED.

* The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

United States v. John Brown and Derrick Carter

United States Court of Appeals for the Ninth Circuit
Consolidated Nos. CA 16-30297, 16-30298

A P P E N D I X 2

EXCERPTED CONSOLIDATED OPENING BRIEF
(Dkt. No. 23)

CA NO. 16-30297
CA NO. 16-30298

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, DERRICK CARTER, Defendants-Appellants.	[D.Ct. # CR-15-211-MJP]

APPELLANTS' CONSOLIDATED OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE MARSHA J. PECHMAN
Sr. United States District Judge

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I. ISSUES PRESENTED

1. Whether the government violated *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by suppressing favorable evidence material to Appellants' duress defense, warranting vacatur and remand for a new trial?

2. Whether the government violated *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Napue v. Illinois*, 360 U.S. 264 (1959), and their progeny, by presenting and failing to correct false testimony material to Appellants' duress defense, warranting vacatur and remand for a new trial?

3. Whether the government presented improper closing arguments unduly prejudicial to Appellants, warranting vacatur and remand for a new trial?

II. STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status.

John Brown and Derrick Carter ("Appellants") appeal their convictions after a jury trial on Counts 1 and 2 of a three-count superseding indictment charging them with violating 21 U.S.C. §§841, 846 and 18 U.S.C. §924(c). (ER 33-35[1]) They were sentenced on December 5, 2016 and each filed a notice of appeal the next day. (ER 1-18) The district court had jurisdiction under 18 U.S.C. §3231. This Court has jurisdiction under 28 U.S.C. §1291. Appellants are in custody; Mr. Brown's Bureau of Prisons release date is February 23, 2024, Mr. Carter's February 25, 2024.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

[1]"ER" is Appellants' Excerpt of Record (cited by page) and "CR" is the Clerk's Record (cited by docket number:page). Reporter's citations are "RT" (cited by date:page for pretrial hearings, or trial day:page for trial dates).

Appellants were charged by superseding indictment with conspiracy to distribute more than five kilograms of cocaine; two added counts charged possession with intent to distribute that cocaine and possession of a firearm in furtherance of the charged drug offenses. (ER 33-35) *See* 21 U.S.C. §846, 841(a), (b)(1), 18 U.S.C. §924(c)(1). The trial occurred over 13 days between June 27, 2016 and July 25, 2016. The jury convicted Appellants on Counts 1 and 2 but could not reach a verdict on Count 3; the district court declared a mistrial (ER 287) and later granted Appellants' motions for judgment of acquittal on that count. (ER 1000, CR 215-216) On December 5, 2016, the district court denied Appellants' motion for a new trial. (ER 19-32) The court imposed concurrent 120-month sentences and five years' supervised release on each for both counts, and $200 in special assessments. (ER 5-18) They both timely appealed. (ER 1-4)

III. STATEMENT OF FACTS

A. Appellants' Duress Defense.

At trial, Appellants presented a duress defense arising out of the following background.

John Brown and his younger brother Derrick Carter were born in Arkansas into an "economically stressed" environment, where a "track still exists" and residents "don't cross sides." Mr. Brown finished the seventh grade there. (ER 799, 647-648) In 1993, in his early 20s, he left for the Pacific Northwest, finding seasonal work in the maritime industry. The next year he brought Mr. Carter, then age 13 or 14, to live with him in Bellingham, Washington and enrolled him in local schools, which Mr. Carter attended through the tenth or eleventh grade. (ER 643-644) Both settled in the Bellingham area; both have children. Mr. Brown has four daughters: Vanessa, Cheyenne, Naomi, and Keziah. (ER 800-802) Mr. Carter also has a daughter. (ER 646)

Mr. Brown eventually became a cocaine user, and this became his "sickness for almost 20 years." (ER 813) He knew his brother felt "shame" watching his addiction, but Mr. Brown "was still always [his] brother," and Mr. Brown felt that Mr. Carter always stood up for him. (ER 647)

Beginning in the late 1990s, Mr. Brown moved into nightclub security. Through two men he met in Whidbey Island and Bellingham nightclubs, he also gradually became involved in cross-border smuggling between the United States and Canada. Initially, he transported marijuana and body-builders' steroids from this country into Canada, and marijuana from Canada back to this country, often being paid with marijuana. (ER 805-808) From there, he became involved in transporting marijuana for distribution as far south as the Bay Area, and in the transportation of guns. (ER 815-817) He came to know Curtis Coleman, a pimp who transported firearms and women between Canada and the U.S. Mr. Brown helped Mr. Coleman move back and forth across the U.S.-Canada border and was paid in drugs. (ER 817-821)

Eventually, in the early- and mid-2000s—beginning from a position providing security for entertainment figures in the Pacific Northwest—Mr. Brown was introduced to a Vancouver crime organization, the U.N. gang, its affiliates, and other gangs. The U.N. gang was a like a many-headed snake or "hydra," operating through a company called American Fabricators (“AMFAB”), run by two brothers (the Adiwals), three members of the Kline family, a company marketing officer (Fernando), and a computer designer (Garrett Ho). (ER 809-811) They would always "know what's going on with everything, who's doing what" in cross-border marijuana trafficking with dealers like one Donnie Seale, who was also arrested for the rape of a 13-year old girl, and through the drug trade with gun traffickers and pimps like Coleman. (ER 808-812, 850-853, 859) By the time of trial, the United

States government was aware that AMFAB operated as a front for the U.N. gang, and was investigating the company. (ER 917, 764-765)

The U.N. gang and the people with whom it worked had a violent reputation known to the Border Patrol (ER 951-952) and to Mr. Brown. They committed inter-gang killings. (ER 565-567) The gang killed a friend of his. AMFAB staff noted news reports of disappearances for which they were responsible. Ho hit an AMFAB employee with a piece of sharp metal; the man looked like "Frankenstein with staples on his head," but came back to work nonetheless. Mr. Brown once saw two gang members—Trey and Lee—"hitting on a girl" in the back of a car "until she decide who she wanted to be with," referring to them sexually abusing her to bring her into prostitution. (ER 853-854)

In 2009, Mr. Brown was released from prison on a drug charge,[2] found work as a licensed commercial crabber, and was living with his youngest daughter Keziah and her mother, Giselle Creswell. (ER 821) Then, in March 2011, he saw Donnie Seale with the 12- or 13-year old daughter of a friend, Wendy Pleadwell. Mr. Brown knew Ms. Pleadwell from getting her assistance, on prior occasions, with border pick-ups or drop-offs for himself and Curtis Coleman; he had known her daughter from infancy. He was "curious" when he saw the child with Seale, and went with her to visit Ms. Pleadwell. (ER 821-822) He understood from Ms. Pleadwell that she was "talking to Curtis Coleman," who, it turned out, had given her two weapons to bring to Donnie Seale. Mr. Brown did not know whether Ms.

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[2]That case involved a 2003 cocaine sale at which Mr. Brown was present--though he had been "high for…two days, itching"--with Eric Frances, who was apparently an undercover police officer. Two years earlier, Mr. Brown explained, Frances said he would "let me out if I would get" a suspect for him. Frances's betrayal later, in the 2003 case, perturbed Mr. Brown: "I know Eric Frances personally… And for him to turn around and say I sold him drugs was kind of like…I don't know." (ER 813-815)

Pleadwell was with Coleman "on a sexual level," since Coleman was a pimp, or if she was helping him move contraband; either way he "kind of felt responsible" for Pleadwell and had "an issue" with Coleman getting her involved with weapons. By bringing the two together previously, Mr. Brown felt he had "put people in her life that shouldn't be there." (ER 823-825)

Acting on this sense of responsibility, Mr. Brown began a mini-odyssey to contact the authorities about Coleman and the U.N. gang. A March 2011 Bellingham police report detailed his efforts to offer information to law enforcement "about firearm's [sic] trafficking that was occurring across the border." (ER 978) On March 9, 2011, for example, he went to the Whatcom County courthouse looking for Eric Holbrook, "a prosecutor that [he] knew there" who had prosecuted him before, "to tell them about Curtis Coleman and the U.N. gang" and the weapons Coleman had left with Ms. Pleadwell. When he told them he was there to discuss "grenade launchers and some handguns," however, he was sent downstairs to the office of the regional task force office, but no one responded to his buzzing. When he returned to Holbrook's office, they laughed, not "taking me serious," and told him to go to the FBI. (ER 826-829) Mr. Brown dutifully went to the address he was given, which was the federal courthouse, but again "I buzzed and buzzed, and no one came." (ER 831)

Now "irritated," Mr. Brown got Ms. Creswell to drive him to the border with the goal of finding "anyone that would listen to what I had to say." Instead, at the border, multiple agents approached and "drew guns on me and put me down on the ground." Though he was unarmed and not a criminal suspect, he was put in "a quiet cell" for about one hour. Though he wanted to offer the authorities helpful information, he felt he was being mistreated because he was African-American, and was angrily "kicking the door" on his cell (ER 831-833) before two agents outside

finally listened to why he was there. (ER 835) One was Dave Than, a Department of Homeland Security ("DHS") agent whom Mr. Brown had met before. (ER 530-531)

Mr. Brown told Than that Coleman was an "active firearms smuggler" between the United States and Canada; Coleman sold guns to the U.N. gang, and Mr. Brown offered to help "take him down." (ER 533-534, 835-836) Mr. Brown talked at length about how the U.N. gang was seeking out Coleman for weapons in an upcoming gang fight, and about Vancouver gangs such as the Independent Soldiers and the Red Scorpions. When he was finished, the agents apologized and released him. (ER 837-838) Than and his co-workers at the time knew Coleman, who was arrested in 2002 or 2003 carrying "diamonds, guns, and cash" in "one of the more significant" seizures along the border. They also knew of the U.N. gang being a "big" organization involved in smuggling drugs and guns. (ER 535-536) Than took no notes of his conversation with Mr. Brown, however, and did not write a report; he emailed "a summary" of it in April 2011 to DHS Agent Thomas Penn, who was in the appropriate unit to open an investigation on the matter—Than's "last involvement" in the case. (ER 538-539)

In May 2011, Mr. Brown—not having been contacted by law enforcement about the information he had given, and now estranged from Giselle Creswell—was again visiting Ms. Pleadwell. (ER 840) Donnie Seale was there as well, because Ms. Pleadwell was holding a 25-pound marijuana load that AMFAB gang gave Coleman and Seale to sell and then reimburse them. Ms. Pleadwell, who was then on court supervision, expected a visit from her supervising officer around the same time. Instead, however, some eight police cars arrived in a surprise show of force; the offices arrested both Seale and Mr. Brown and seized the marijuana. (ER 850, 59-60, 841-842) Seale was wanted for a sex offense against a child, and was sent

back to Canada. Coleman too was arrested in May, and eventually prosecuted federally for being a felon in possession of a firearm. (ER 843, 449) Penn, who participated in Coleman's arrest, became the Coleman case agent, working with Stephen Hobbs, an AUSA from the same office as the prosecutors in Appellants' case. (ER 449, 485-486)

In the summer of 2011, Mr. Brown entered Canada to visit his daughter Naomi, who was ill; Canadian authorities detained him. He learned from a gang member-killer in the jail that AMFAB held Mr. Brown responsible for the lost Coleman-Seale marijuana load seized during the May arrests at Ms. Pleadwell's home. The gang believed the police went there to arrest Mr. Brown for a domestic violence warrant based on a complaint by Ms. Creswell. They did not know Ms. Creswell, however, and blamed someone they did know—Colleen Cruz, the mother of Mr. Brown's daughter Naomi. (ER 843, 848-852) AMFAB wanted Mr. Brown to pay his alleged debt by bringing a kilo of heroin from Canada to Seattle, and then bringing ten kilos of cocaine back to Canada. (ER 857)

Canadian authorities sent Mr. Brown to a U.S.-side immigration detention center at the border, where he expected to be released. (ER 855) However, on August 8, 2011, while he was still there, he received an unsolicited visit from Penn and another agent. The discussion began with them showing Mr. Brown "a gallery of pictures" that included Coleman and a number of people from Mr. Brown's personal life, including Giselle Creswell. (ER 855) Penn then dropped a bombshell on Mr. Brown: the government "had credible information that [his] life had been threatened" by Coleman. The agents even had him sign papers "saying that I've been informed, and I didn't want protective custody." (ER 857) In view of the agents' telling him about the threat, Mr. Brown decided to respond in kind by telling them " everything [he] knew about American Fabricators at that point[.]"

He specifically told how AMFAB wanted him to bring a kilo of heroin from Canada to Seattle, and bring 10 kilos of cocaine back to them, as his debt repayment. He talked to the agents because he wanted no part of that. Rather than moving drugs to pay his $60,000 debt to the gang, he regarded it as a "better deal" to "help the police take them all down." (ER 847-858)

Penn, called as a defense witness and asked if he remembered "how much [he] talked about Mr. Brown and safety," answered, "I did not talk to Mr. Brown about safety." (ER 493) Asked if his notes showed they discussed Coleman threats, he said, "No, I did not tell him about threats." (ER 495)

Yet Penn also agreed that Mr. Brown “was being honest in telling me what he knew” while debriefing. (ER 473) His report said, and he testified, that Mr. Brown spoke of a person, Fan—Penn did not know if that was short for Fernando—who "wanted him" to transport 10 kilos of cocaine. (ER 466-468) Mr. Brown talked about his methods, locations, and practices for U.S.-Canada border crossing; he gave the names of AMFAB/U.N. gang members and specific people involved in smuggling; he described the gang's operations, including the types of guns they smuggled, such as semi-automatic handguns and rifles; and he traced how the proceeds from gun and drug sales were financing AMFAB's business. Among the AMFAB-related individuals Mr. Brown named were the Klines (who later paid for his hotel room in connection with the 2014 events of this case), the two Adiwal brothers, and Garrett Ho (who also sent money orders in connection with this case), and Coleman. (ER 455-460, 970-973, 975-976, SER 1-2) When Mr. Brown brought up the possible international sale of a weapon, Penn contacted a different agent, Linwood Smith, whose area this was, and they interviewed Mr. Brown together several days later. (ER 498)

The government agents who dealt with Mr. Brown in 2011 said they would have investigated threats against him or his daughters if he had reported them. For example, the government called Smith as a witness in its case-in-chief. Smith said Mr. Brown did not mention threats to his daughter during their interview; if he had, Smith would have noted this and would have had "a duty" to warn her about them. (ER 898-899) Penn said that as an agent and "human being," he would act upon threats to a child, and that Mr. Brown could have reported any additional information or any threats against his family to Penn. (ER 478, 524) Agent Than also gave Mr. Brown a phone number to call. Mr. Brown called him twice after their encounter in March 2011; Than felt they had a "rapport." (ER 539, 541-542)

Nonetheless, Mr. Brown decided to leave the Pacific Northwest in August 2011 in light of Penn's warning, and for a time worked in the fishing industry in the southeastern United States, where he had family. When Hurricane Isaac hit the Gulf Coast in 2012, he was working in Louisiana, assisting with sandbagging for flood prevention. (ER 865-866, 974) He did, however, eventually return to Bellingham. He believed his alleged debt was "getting kind of old," that the police would do something about the gang, and he did not think the gang knew where his family lived. (ER 868) In mid-2013 he even went to Canada to see two of his daughters, who were visiting Vancouver. (ER 867)

Toward the end of October 2014, however, the situation changed. Fernando—an AMFAB executives and a U.N. gang member—called Colleen Cruz, the mother of Mr. Brown's then-15- or 16-year old daughter Naomi. The first calls occurred around Halloween. (ER 780, 787) Fernando called twice at this point, each time trying to reach Mr. Brown. (ER 869-870) Having people call her to find Mr. Brown, in and of itself, was not unusual, and Ms. Cruz thus tried to call Mr. Brown to let him know. (ER 780-781) Among the people to whom she reached

out were his brother and co-defendant, Derrick Carter, who promptly tried to contact Mr. Brown as well; and, later, Kelley Andrews, a long-time friend of Mr. Brown's who got a call from Ms. Cruz and gave the receiver to Mr. Brown some time in early November. (ER 877, 966-967)

Mr. Brown originally did not respond to the Halloween call because he believed Fernando did not know where to physically find Ms. Cruz and his daughter. (ER 868) However, Fernando then began coming to Ms. Cruz' home, in person, looking for Mr. Brown, beginning in the first couple days of November. (ER 780-782) Ms. Cruz was now concerned, worried, because Fernando knew where she lived. The first time she dealt with him at her home he appeared "a little stressed." When she finally reached Mr. Brown, she understood from him that she was not to worry, he would deal with it, and Fernando would not come again. (ER 781-782) The second time, however, Fernando was "really agitated" and said "'I need to see John today," with his fist clenched. Ms. Cruz told Fernando that she would try to find Mr. Brown, but that he should not to come any more. (ER 782-783)

On learning of Fernando's first visit to Ms. Cruz' home, and realizing the U.N. gang knew where she and his daughter lived, Mr. Brown called Fernando, who had him speak with Trey. Trey eventually directed him to meet Trey's cousin, Kyle Provo, who had come from Canada to Bellingham. Mr. Brown was directed to give him a cell phone, which he did, and to "take care of him," which he apparently did not do to the group's satisfaction, because the group, through Fernando, contacted Ms. Cruz yet again. Mr. Brown then was directed to Garrett Ho. Ho told Mr. Brown the gang regarded him as disrespectful for saying he would pay his debt off by handling a smuggle, but then not getting back to them to arrange it. (ER

871-875, 877) Accordingly, Mr. Brown was instructed to take Provo to Los Angeles to "pick up something." He drove; Provo could not drive. (ER 552, 960)

Ho sent Ms. Andrews money, which she used on November 3 to rent a car. (ER 762) On November 4 Mr. Brown and Provo drove the car to Los Angeles. With them were C.H., who viewed Mr. Brown as a father figure, and her friend she invited, L.D. (ER 962, 969) The four travelers stayed in a Los Angeles hotel between November 4 and November 5, with the bill charged to a Kline family member's credit card. (ER 906-908, 962-964, 972-974)

After checking out, they picked up the drugs. Mr. Brown learned then that Fernando's threatening conduct had not subsided: while the drugs were being loaded, told to call Ms. Cruz, Mr. Brown learned that Fernando was again "in her yard." (ER 590-591) Mr. Brown did not take responsibility for handling the drugs: when they were received, L.D. saw Provo, whom she knew as Mason, stick a knife into one brick to test the product. (ER 961-962) Thereafter, a short distance from the pickup area, Mr. Brown stopped and Provo/Mason shifted the drugs to L.D.'s bag. (ER 954-955) The reason was poor planning: Mr. Brown did not know they would be picking up drugs in such quantity, so he did not bring a bag big enough to hold them. (ER 587, 597-598)

Anxious, Mr. Brown called his brother, Mr. Carter, for help. As requested, Mr. Carter met Mr. Brown, Provo, L.D., and C.H. in another car; L.D. and C.H. took their belongings and went with Mr. Carter. (ER 591-593, 955-956) Mr. Brown drove with Provo, who was on the cell phone talking to others in the gang, when Mr. Brown explained that he would store the drugs on rural property belonging to Ms. Creswell's mother. He did this because he had no driver's license; if he were stopped the drugs would be seized; he told Provo and the gang they could arrange for the drugs to be picked up by "somebody with a license[.]" (ER

595-597) Back in Bellingham, Mr. Brown and Provo eventually met back up with Mr. Carter, C.H., and L.D. at the aquatic center. (ER 958)

At this point, Mr. Brown considered himself finished with his alleged debt to the gang. However, within the next two days (approximately November 6 and 7), Mr. Carter came to him, and let him know that the gang was looking for him again. Mr. Brown was concerned, once again, because "they wanted to try to sit on top of my daughter until I did what they wanted me to do, until the rest of the deal was done." (ER 600-601) During this time, Fernando did indeed visit Ms. Cruz again. This time he was "looking all around," and told her to inform Mr. Brown that he, Fernando, knew "where his daughter lays her head at night." (ER 783) Ms. Cruz regarded Fernando's words as a threat. (ER 789) Deeply "upset [and] scared," she called Mr. Brown again. (ER 783) In order that the gang could not find her, at least for a short time, Mr. Brown told her to visit him in Bellingham, which she did the day after, with her daughter Naomi and Naomi's then-boyfriend. They returned to Canada the same day. (ER 605-607, 784-785) This was likely November 8. (ER 790-791)

That night, Mr. Brown tried to get Provo and the drugs into Canada, as directed, helped by Corey Williams, Appellants' cousin Victor Peal, and Mr. Carter, who was to pick Mr. Brown up when he came back. (ER 608, 611-612) However, Mr. Carter was stopped by the police on the U.S. side; suspicious, the officers alerted the Border Patrol about the stop. (ER 949-950) Canadian authorities set up a perimeter, arrested Provo and Peal, and seized the drugs and other evidence. (ER 914, 935-937, 932-933)

Mr. Brown, by contrast, escaped arrest. (ER 622) On December 5, 2014, he went to the state courthouse in Bellingham to a court appearance for a friend. There, he spoke with Chris Freeman, a sheriff's deputy he knew in the corrections

unit. He told Freeman about a botched drug smuggle; about the loss of a gun and $2.4 million in "product"; of being harassed by drug dealers to "make it right"; and talked of "some threats to him and his daughters." (ER 889-890, 897) Freeman reported his December contact with Mr. Brown, and Agent Steven Ausfeldt, who eventually became the case agent against Mr. Brown and Mr. Carter, learned of it. (ER 901-903) About a month later, Corey Williams was arrested on an unrelated charge and began cooperating with Ausfeldt. (ER 943-946) Mr. Brown and Mr. Carter were arrested and charged with participating in the smuggle in June 2015. (ER 904-905)

At least two government witnesses who participated in the smuggling effort were generally aware Mr. Brown was involved in the transaction due to concern for one of his daughters. C.H., for example, believed he was involved because he was concerned about his daughter's safety. (ER 926-927) Similarly, at Williams' was debrief he told Ausfeldt that he had heard one of Mr. Brown's daughters was being held for "ransom." Ausfeldt did not investigate this possibility because he took it only as a rumor. (ER 921-922)

The court gave a duress instruction as to both Appellants. (ER 290-291) The jury convicted Mr. Brown and Mr. Carter of Counts 1 and 2. (ER 286-287)

IV. SUMMARY OF ARGUMENT

This Court should vacate the district court's judgments and remand for a new trial because:

First, the government violated *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing favorable evidence material to Appellants' duress defense: (1) May 2011 jail-call recordings in which AMFAB associate Curtis Coleman boasted about threatening Mr. Brown to federal authorities, coupled with (2) email evidence establishing that the government subpoenaed the calls as of July 2011. The jail-call recordings powerfully corroborated Mr. Brown's recitation that he so believed in the threats' seriousness that he left the Pacific Northwest, only to be threatened again on his return in 2014. The email evidence put the calls in the government's hands as of July 2011, which (a) corroborates Appellants' contention that Agent Penn personally alerted Mr. Brown to the threats in August 2011, and (b) impeaches Penn's testimony that he perceived no threats to Mr. Brown. For these reasons, and others set forth below in greater detail, the suppressed evidence materially affected the verdict, thus warranting vacatur and remand.

Second, the government failed to correct—and indeed seized upon—Penn's false, misleading testimony that he neither perceived threats to Mr. Brown in 2011, nor alerted him to them, nor knew of any such threats even by the time of trial. Penn's improper testimony not only undermined Mr. Brown's accurate narrative about the threats—an obviously critical feature of Appellants' duress defense—but also shielded the government from criticism that it contributed to Mr. Brown's difficulties with AMFAB and its affiliates by (i) orchestrating the May 2011 marijuana seizure based on Mr. Brown's intelligence, and (ii) brazenly alerting Coleman that Mr. Brown informed on him. These facts, *inter alia*, corroborate Appellants' contention that the government, not taking Mr. Brown seriously, left

him no reasonable opportunity for Appellants to escape. The false and misleading testimony thus struck at the heart of Appellants' duress defense, and warrants vacatur and remand.

Third, the government persistently presented improper closing arguments—both in its initial summation and in rebuttal—including vouching, denigrating the defense, and misstating the law. Because these improper arguments took square aim at Appellants' duress defense, they materially affected the verdict and warrant a new trial.

For these reasons, the Court should vacate Appellants' convictions and remand for a fair trial.

V. ARGUMENT

A. The government violated Brady v. Maryland, 373 U.S. 83 (1963) and its progeny by suppressing favorable evidence material to Appellants' duress defense.

Mr. Brown testified that in their August 2011 meeting, Agent Penn made a presentation to him—including a picture of the mother of one of his daughters—about "credible evidence" that Coleman threatened his life. Mr. Brown received this warning already aware of the police seizure of Coleman's marijuana—in which AMFAB had a financial interest—only a few months before; AMFAB was demanding that he transport cocaine to repay the alleged debt for the lost load, as he ultimately did in the charged 2014 smuggle. Penn contradicted him. He said he "did not talk to Mr. Brown about safety" at the meeting, nor did he "talk to him about threats."

Although the jury did not know it, there *was* a connection between Mr. Brown's contacts with Agents Than and Penn, the marijuana seizure, Coleman's threats, and AMFAB's demands. In a court-ordered pretrial interview with

Appellants' trial counsel, Penn disclosed that after getting Than's summary report, he regarded Coleman and Mr. Brown equally as suspects, and arranged for trap-and-trace tracking on both their cell phones. The tracking led to Mr. Brown's and Seale's May 2011 arrests and the seizure of the Coleman/AMFAB marijuana load. (ER 52, 54) Penn's response to Mr. Brown's candid disclosure of information thus led directly to Mr. Brown's problems with the gang.

After the verdict, the defense moved for a new trial, citing *Brady v. Maryland*, 373 U.S. 83 (1963). In pertinent part, the argument focused on recordings of Coleman's 2011 in-custody telephone calls from the Federal Detention Center ("FDC") in Seatac, Washington. In them Coleman did—contrary to Penn's testimony at trial—openly threaten harm to Mr. Brown, just as Mr. Brown testified. (ER 164-165)

Mr. Brown first requested production of Coleman's FDC phone calls eight months before trial; his then-lawyer told the government why: that at their August 2011 meeting, Penn told Mr. Brown Coleman had threatened his life in prison phone calls. Counsel sought the "phone calls that contained the threats." (ER 97) Yet the government did not turn over Coleman's FDC calls, nor had it done so by more than three months before trial, when the defense asked for even more Coleman-related discovery.[3] (ER 230)

Seven weeks before trial, the defense filed two more motions under Rule 16 and *Brady*, again referencing the calls. One expressly asserted that "Coleman

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[3]The discovery request sought Coleman's PSR, his statements to the government, and any of his discovery mentioning Mr. Brown. Coleman's PSR referenced an October 2011 Coleman FDC call to a woman who, it was said, worked as a prostitute with or for him. (SER 28-29, 33-34) The government also had a prison report citing September-October 2011 calls on this topic, but noted none of those calls related to Mr. Brown. (ER 98-99, 113-123)

discussed Mr. Brown in recorded phone calls made from the Federal Detention Center- Sea-Tac. This discovery is relevant to Mr. Brown's duress defense." (ER 231) Another said of the August 2011 meeting that Mr. Brown learned from Penn of "a graphic threat against him recently voiced by Curtis Coleman in a recorded phone call from FDC SeaTac, where Coleman was incarcerated." (ER 229)

However, at the motion hearing, held a little over three weeks before trial, Erin Becker, the AUSA assigned to Appellants' prosecution, denied the existence of these calls altogether:

> [W]ith respect to Curtis Coleman and whether there are jail phone calls relating to Mr. Coleman, I have spoken with the assistant U.S. attorney who handled the Coleman prosecution. He recalls no such phone calls. I have reviewed everything in our file about Mr. Coleman, in the Coleman prosecution by our office. There's no reference to jail phone calls, and there's no recordings. I've spoken with the agent, Thomas Penn, who also recalled no such phone calls.
>
> They did locate – when directed as to what I was looking for, they located this letter that Mr. Coleman wrote to somebody else and was seized by FDC, that referred to Mr. Brown.

(ER 258-259)

The district court had a common sense response: it told Becker to ask the FDC directly about the Coleman calls. (ER 259) The next day the FDC told Becker they had them, but she did not get and disclose them till June 10. (ER 146-150) The disclosure included 85 audio files of Coleman's calls *and* 481 more audio files of Mr. Brown's and Mr. Carter's own FDC calls from their own pretrial custody, plus 59 pages of documents. The Coleman files alone required 21 hours to review; the audio files in total required 58 hours to review. [4] (ER 166-168) This

[4]After trial started, the government produced more calls— 96 telephone calls

production included the following May 18, 2011 Coleman call, which indeed contained the kind of "graphic threat" referenced in Mr. Brown's discovery requests:

> CURTIS: …This is what the Feds told me. They said they grabbed D.J. D.J. told them I'm still running guns up to Canada.
> …
> CURTIS: Then that made them put out the warrant for me. He told me himself. He said, "Man, we wasn't going to even come after you." He said, "we wasn't thinking about you or nothing until John Brown" – because John Brown is his real name.
> …
> CURTIS: He said, "We wasn't even thinking about you until John Brown said that you was the main guy and you're still running guns in Canada."

(SER 11-12) Coleman's reaction was as follows:

> CURTIS: …I said, I'm going to tell you like this, "he fucked me over now, but when I see him I'm going to kill his m-----f------ a--.
>
> LISA: Why would you say that? Don't say that.…Now we got to get off the phone, because you're not supposed to say that s---.
>
> CURTIS: Then I told him -- then I said, no, I wasn't going to do it. I said it at first, then I said, "No, I'm not going to kill him, but I am going to hurt him."
> …
> I said, "he's not worth it." I said, "But I do want to hurt him bad." I did tell them that.

(SER 15)

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requiring over 15 hours more to review. From June 1 to July 14 (with a trial break between July 7-17), the government produced 762 calls from Coleman, Brown, and Carter requiring 73 hours' listening time, and over 2,900 pages of documents, some needing comparison to earlier-produced versions for changes or inconsistencies. (ER 167-168)

This call, part of the June 10 disclosure, came four days before a court-ordered pretrial defense interview of Penn, but the defense did not hear this recording until after trial. (ER 197-198) The prosecution team did know of it, however; in fact it knew of three calls in which Coleman threatened Mr. Brown, and AUSAs Becker and Kate Vaughan agreed Penn should hear them before the defense interview, (ER 36) as reflected in this exchange between defense counsel, Penn, and AUSA Vaughan during the interview:

> MALE SPEAKER [defense lawyer questioning Penn]: In your contact with Mr. Brown and your involvement with Mr. Coleman's case, were you aware of jailhouse calls that Mr. Coleman had made referencing Mr. Brown or…D.J.?
>
> PENN: I don't remember listening to any calls. I've heard now since that there were phone calls. All I recall is that letter that was sent.
>
> VAUGHAN [AUSA]: Okay. Do you *know or have any knowledge of Mr. Brown being told* about Mr. Coleman's jailhouse calIs, threatening calls?
>
> PENN: No. I mean, *we listened to it today*, that the -- we listened today to the call from Mr. Coleman to somebody, I don't know who it was he was speaking with. But I don't recall listening to that during that time. I don't remember listening to jailhouse calls.

(ER 86-87) (emphasis added).

This exchange showed Penn reviewed Coleman's threatening calls before he testified at Appellants' trial. It also made it clear that, if asked, Penn would deny any recollection of their contents. Throughout trial, the defense team had no information to contradict this denial—to show Penn in fact knew about or had the calls before his August 2011 meeting with Mr. Brown, and thus could very well have alerted him to a threat, as Mr. Brown asserted.

Only after trial—in the government's surreply to the new trial motion, and in a second declaration from AUSA Becker—did the government disclose the following: in 2011 during Coleman's prosecution, Penn knew the government subpoenaed and received Coleman's FDC calls, including the "hurt him bad" call, *before* his meeting with Mr. Brown in August 2011. This evidence was contained in a July 2011 e-mail string between AUSA Steve Hobbs, Coleman's prosecutor; Penn; and FDC staff. The email string reflected that AUSA Hobbs subpoenaed both Coleman's FDC calls and his emails from the inmate email system. On July 26, 2011, an FDC staffer, Wynton Dillard, emailed Hobbs attachments with the emails and a log, saying the phone calls would be ready in response to the subpoena the next day. On July 27, AUSA Hobbs forwarded the log and emails—*including* Dillard's message about the calls being on the way—to Penn and another agent, asking if "any names pop[ped] out" for them. Penn's response referenced "D.J.," or Mr. Brown. (ER 162-163) The email string thus put Coleman's FDC calls in government hands at the end of July 2011, before the Penn-Brown meeting on August 8.[5]

Even though AUSA Becker did not produce this email string until after the verdict, she conceded it came to her from AUSA Hobbs about two weeks *before* the pretrial discovery hearing—when she told the court no Coleman calls existed. Becker recognized that her receipt of the email made her assertions at the discovery hearing wrong. She said she "did not recall receiving or reviewing" the email string until preparing the government's surreply to the new trial motion, and did not find the calls referred to in the email in the Coleman file. (ER 101-102)

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[5]At the new-trial motion hearing, First Assistant United States Attorney Helen Brunner "assume[d]" that the government received a disc containing the Coleman calls, as Dillard said, in July 2011, although she claimed to have looked for it (after she was brought into the case post-verdict) and had not found it. (ER 208-209)

The government also disclosed in its surreply a portion of its discovery index for Coleman's prosecution, reflecting that Mr. Brown's unredacted identity as a source of information to Penn featured prominently in the discovery produced to Coleman. (ER 111-112) This was in line with Coleman's recounting, in the call, of how he learned from an arresting agent that Mr. Brown had been a source of information against him. Although Penn acknowledged in the defense interview that he helped arrest Coleman and talked to him, he did not address what *he* said to Coleman, or what Coleman said in response. Defense counsel—armed with Penn's report on Coleman's arrest—asked him about that interrogation, resulting in the following exchange:

> PENN: So when we brought Mr. Coleman to his initial hearings in federal court we interviewed him….
>
> FLENNAUGH: Is there anything that he told you that was not in this report?
>
> PENN: He told me a lot of things.
>
> FLENNAUGH: Okay. Anything of significance?
>
> PENN: Well, he's not a nice guy. And what he was doing wasn't -- I mean, he's -- he had a lot of things to say documented in my report.
>
> FLENNAUGH: Okay.
>
> PENN: Significant things.
>
> FLENNAUGH: Okay. *Anything significant that he told you that was not in the report?*
>
> PENN: *No.*

(ER 60-61) (emphasis added.) At trial Penn testified about the interrogation, but not about threats like those Coleman recounted in the call. (ER 484)

At the hearing on the new trial motion, the district court's primary focus was on what the defense did with the Coleman calls once it got them. The court especially wanted to know why, at the Penn interview, Mr. Brown's trial counsel had not pursued Penn's reference to having heard a threatening call with Ms. Vaughan. (ER 184-185) Counsel responded, "…I can tell you exactly what I was thinking, which is, on June 2nd and earlier, I was told that people looked in the [Coleman] files, and there weren't any threats. So I certainly was not anticipating Agent Penn almost saying, 'I think there's threats.'" (ER 186) Later, counsel reiterated that he listened to some but not all of the calls because he was led to believe the government "had looked through the files and talked to the U.S. attorneys [in the Coleman prosecution] about the case, and they had no knowledge of a threat." He thought of the June 10 audio file production as "a data dump that says, 'Here. Oh, but by the way, there is nothing in here.'" Counsel believed these events showed "the government didn't want us to find the recordings." (ER 221)

The district court did not explore the full meaning to the defense of Penn's pretrial interview. Yet it signaled that (1) he would not admit having heard any of Coleman's FDC calls as of his August 2011 meeting with Mr. Brown, and (2) would not admit having told Coleman that Mr. Brown was a law enforcement source, or (3) to hearing Coleman respond by threatening Mr. Brown. Nor did it explore how the July 2011 email string would have affected how Appellants would have handled these denials: it showed Penn was copied on the email reflecting that the calls were coming from the FDC, so he knew they existed; and he clearly had Mr. Brown on his mind at that point in Coleman's investigation, as shown by his observation on seeing one of Coleman's FDC emails about Brown. The court ultimately did not consider that the untimely-disclosed email string itself substantially raised the likelihood that, before meeting with Mr. Brown, Penn in fact either knew about Coleman's threats in

the calls, or heard Coleman utter them upon learning about Mr. Brown's role in his prosecution—and thus told Mr. Brown about them, just as Mr. Brown testified.

The district court agreed with the defense that Coleman's talking about hurting or killing Mr. Brown represented "favorable" evidence because it "add[ed] support to Defendant Brown's version of events, and thus [was] relevant" to duress. Moreover, the evidence had impeachment value because "the defense could have…used the evidence to argue that the threat was so memorable that a jury could conclude that Agent Penn was not being entirely truthful in his recollection." (ER 29) However, it declined to find that the evidence had been suppressed by the government, because:

> (a) the production of the evidence occurred 16 days prior to the commencement of trial, (b) the log of the electronic file was labeled "Curtis Coleman calls," and (c) there is incontrovertible evidence that both defense counsel were present in an interview on June 14 (13 days before the start of trial) where the Coleman call was specifically referenced and they did nothing to follow up on that information.
>
> This last point is, frankly, fatal to Defendants' Brady claim as regards this evidence. It is one thing to argue (as Defendants did initially) that the evidence of the Coleman phone call was buried in a "data dump" strategically timed just before the start of trial to escape the notice of the overworked defense counsel. Whatever appeal that argument has is completely wiped out by the proof that counsel for Defendants were made directly and specifically aware of the existence of the very phone call they were looking for nearly two weeks before trial started (and nearly six weeks before the opening

of the defense case).

(ER 30) The court declined to rule on the third *Brady* issue[6]—whether the call was material evidence that, if presented, would have undermined confidence in the verdict. (ER 30)

1. Standard of review and legal standard.

This Court reviews *de novo* the denial of a new trial motion based on a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009). To establish a *Brady* violation, a defendant must show that: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the government, regardless of whether the suppression was willful or inadvertent; and (3) the evidence is material to the guilt or innocence of the defendant. *See Brady*, 373 U.S. at 87, *United States v. Bagley*, 473 U.S. 667, 676 (1985) (evidence is "favorable" if it either exculpates or impeaches).

The Coleman FDC calls were favorable, as the district court found. However, the court erred in finding they were not suppressed. The evidence was also material, an issue the court did not reach.

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[6] The court also denied other grounds for a new trial, all on the basis that none materially affected the verdict. The court agreed that one error—the skirting of an in limine order not to bring out L.D.'s under-18 age, by Becker's asking questions that effectively elicited this, such as what grade she was in at school—constituted misconduct, but was not prejudicial. (ER 20-21) The court similarly did not find misconduct, or prejudice, in a Canadian law enforcement witness describing Mr. Brown as "armed and dangerous" in his testimony. It also found no misconduct or prejudice in Agent Miller's communication with Ms. Creswell--in which he promised to protect Ms. Cruz' family--which prompted Ms. Creswell to text Ms. Cruz and urge her (unsuccessfully) not to testify as a defense witness. (ER 22-23)

2. The undisclosed email string showing the calls were available to Agent Penn 12 days before he met with Mr. Brown, *together with* the disclosed calls, comprised favorable corroboration of Mr. Brown's testimony about the meeting.

Appellants' duress defense, about which the government knew as early as eight months before trial, was supported by Mr. Brown's learning from Penn, in August 2011, of Coleman's death threat against Mr. Brown; by Mr. Brown's and Ms. Cruz' testimony about the threatening behavior of Coleman's U.N. gang/AMFAB associates—Fernando, Trey, and Ho, in fall 2014, which raised a renewed good-faith fear that the threat would be carried out against Appellants' family; and by the perception that there was no escaping the threat, since—despite the extensive information Mr. Brown gave in 2011 to help shut down the group—it was alive and well to demand Appellants' participation in the drug smuggle) in 2014. These contentions, and others, if established, would have presented a valid duress defense. *See United States v. Zaragosa-Moreira*, 780 F.3d 971, 978 (9th Cir. 2015).

There is no dispute that at least one of Coleman's FDC calls captured him bragging about uttering a death threat to Mr. Brown to federal agents. The district court agreed, at least in part, with why this evidence was favorable. Combined with Mr. Brown's testimony that Coleman was connected to the AMFAB-fronted U.N. gang—whose members were the ones demanding that Mr. Brown pick up the drugs and take them across the border—it bore on the first and second prongs of the defense: that the requisite threat existed, and, given the government's own expression of concern, a good-faith belief that it could be carried out.

The court believed the call alone was enough to undermine Penn's testimony denying the existence of the threat, but it was wrong to stop its analysis there. With only the call, and not the email string, the defense had no meaningful way to attack

Penn's denials of knowing about the call and of having warned Mr. Brown about it. The email string was therefore critical—as made clear in the defense requests and motions all along—to show the government *knew* about the threat in the call in August 2011 too, and adjudged it serious enough to warn Mr. Brown about it. The assessment that the threat was credible enough for Penn to visit Mr. Brown and issue that warning was strong support both for the threat's existence and Appellants' good-faith belief that it could be carried out—it was crucial corroboration for a foundational (and contested) aspect of Appellants' duress defense. To present the theory that Penn knew about the threats in the call, *and* was concerned enough to warn Mr. Brown about them, the defense needed not just the calls, but *also* the July 2011 email string. It showed that Penn knew the government had subpoenaed the calls back then; that he himself explored the email logs; and that he had noticed something in them about Mr. Brown, so Mr. Brown was on his mind. It gave every reason to think the calls were produced, and that Penn knew of them, 12 days before he met with Mr. Brown.

"*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably considered favorable to the accused." *Price*, *supra*, 566 F.3d at 907 (undisclosed evidence of a witness' record for theft offenses fell under *Brady*). The email string enhanced the impeachment value of the calls in a number of ways. The defense could have successfully refreshed Penn's memory about whether he in fact knew about the calls in general, and thus knew about the threats in them when he met with Mr. Brown. More likely, however, since his testimony favored the government, the email string—which made clear he would have known about the calls' production—would have presented persuasive impeachment, even beyond the visceral, hard-to-forget threat, that Penn really knew about Coleman's threats against Mr. Brown.

Beyond this, the email string also would have been useful as impeachment to demonstrate Penn's bias or interest. This category of evidence, too, falls under *Brady*'s purview; such evidence, timely disclosed, can make the difference between conviction and acquittal. *Bagley*, *supra*, 473 U.S. at 676. The email string (and only the email string) showed that, of all the names Penn noticed while looking at Coleman's FDC material, it was Mr. Brown's that "popped out." This did more than impeach Penn about a purported memory lapse. Since he was answering AUSA Hobbs's question about people of interest, Penn was likely thinking about Mr. Brown as a prosecution target, notwithstanding the helpful information he had offered—a fact supporting bias against Mr. Brown. Or, because Coleman had accused agents, possibly Penn, of "outing" Mr. Brown to Coleman as a source, Penn's bias could come from either a desire to conceal his own error in saying too much, or to deny playing Mr. Brown again Coleman through such an "outing."

Thus, the e-mail string showing Penn's access to and awareness of the call's contents before the meeting, as well as his view of Mr. Brown as essentially expendable, was itself producible under *Brady*. It was even more important after Penn's defense interview, when he said nothing about a threat against Mr. Brown coming up in Coleman's interrogation. The disclosed calls *coupled with* the undisclosed email string were the favorable evidence the defense was seeking.

3. The government suppressed the combined evidence of the calls *and* the email string showing Agent Penn had access to them before his August 2011 meeting with Mr. Brown, because both had to have been disclosed before trial to be of use to the defense.

Brady evidence is not considered suppressed if it is produced, whether before or during trial, while it is still of value to the defense. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991). The district court's ruling—that the calls were not

suppressed—was predicated on the timing of only the calls' production, which clearly occurred before trial. However, this was error. The importance to the defense of Coleman's "hurt-him-bad" call hinged in large part on whether Penn knew of it before he met with Mr. Brown, since Mr. Brown said he learned of it from Penn. And Penn's awareness was evident from the July 2011 email string, which was suppressed until after trial. It did not matter that AUSA Becker—much like Penn regarding Coleman's call—claimed no recollection of the email string. Whether the nondisclosure was inadvertent, deliberate, or otherwise, the email string was suppressed under *Brady*. *See Price*, *supra*, 566 F.3d at 907-908. Nor would it matter if Becker did not personally know about the email string. The government is obligated to disclose "relevant information in the possession of *any* of its agents," which included AUSA Hobbs and Agent Penn. *Id.* This it did not do.

In concluding that the defense bore the responsibility here by not inquiring about the call after Penn mentioned it at his pretrial interview, the court, again, focused too much on the call alone. Penn denied having his memory refreshed even after hearing a call Vaughan played for him, and reiterated his denial of knowledge of any Coleman threat against Mr. Brown. Under the circumstances, defense counsel did not act unreasonably. This case bears important similarities to *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), in which this Court concluded that the fault lay with the government. There, the contested *Brady* material—a state fire marshal's accidental-cause conclusion on a trailer fire—undermined the state's theory for aggravated murder, that the petitioner killed his two victims to cover up an arson insurance-fraud plot. The state gave the defense two reports tentatively finding the fire to be accidental, or the cause inconclusive, but not—despite a *Brady* request—the final, favorable report. *Id*. at 1061. The Court rejected the state's contention that the defense could simply have interviewed the fire investigators to

learn of it. *Id*. The district court's finding here is like the state's position, and should also be rejected.

As in *Benn*, the government's caveats about its discovery disclosures matter. There the state "actually misled the defense" by its selective disclosure of the arson investigators' conclusions. *Id*. at 1062. Here, the government made a disclosure that was equally misleading and incomplete. Appellants' issue was not just that the call contained a threat, but *also* that Penn knew about the threat in it and warned Mr. Brown of it. After the calls were disclosed, Vaughan elicited Agent Penn's denial of having previously listened to them. This effectively led defense counsel to conclude "there was nothing there." It lulled the defense into giving them less attention—when the email string would have shown he likely did hear them. The call was less valuable without the email evidence, which gave a basis for challenging Penn's denial of having heard it, and his even broader denial of any recollection of any threat to Mr. Brown as of the time of their meeting. The failure to disclose the email string—showing Penn had access to them before meeting with Mr. Brown—*combined with* the late disclosure of the calls, was suppression, in the form of partial disclosure and misdirection, regarding favorable evidence. The result was that "the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.'" *United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978), *citing United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976).

4. The calls, together with the email, were material to Appellants' duress defense.

Suppressed *Brady* evidence is evaluated for materiality collectively, not item by item. *Kyles v. Whitley*, 514 U.S. 419, 436-437 (1995). It is material when its admission would have created a "reasonable probability" of a different result—not

that acquittal would have become "probable," but that the evidence's admission would have undermined confidence in the verdict. *Price*, *supra*, 566 F.3d at 911; *Kyles*, *supra*, 514 U.S. at 434; *Bagley*, *supra*, 473 U.S. 667, 680 (1985). While much of the trial evidence described the Los Angeles trip and the subsequent cross-border smuggling effort, that "is not where [the] materiality focus should be. The issue at trial, and the only issue, was [the] duress defense." *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995).

Here, a critical aspect of the government's attack on the credibility of Mr. Brown's testimony about duress[7] was Penn's insistence that in 2011, he knew only of an allegedly non-threatening intercepted Coleman letter mentioning Mr. Brown, and thus he did not mention any Coleman threat against Mr. Brown when they met. Ultimately, weighing the call and the email string collectively, "in the context of the entire record," *Price*, *supra*, 566 F.3d at 913, they were material.

Initially, two possible initial barriers to a finding of materiality do not exist here. First, FDC staffer Dillard's email could be authenticated, and the call evidence itself was admissible: Coleman's out-of-court statements represented evidence of his state of mind—he wanted to kill M. Brown or "hurt him bad"—and his threatening state of mind was an issue in the case. *See United States v. Sayetsitty*, 107 F.3d 1405, 1414-1415 (9th Cir. 1997), *citing United States v. Pheaster*, 576 F.2d 353, 376 (9th Cir. 1976). Secondly, the evidence was not cumulative. That Mr. Brown had informed on Coleman with Penn was already in

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[7] Other evidence cited by the government to show that Appellants were not under duress was even weaker, and could easily be attributed to expressions of relief that the operation had gone smoothly: L.D. testified that Mr. Brown was "calm" and "satisfied" on the return trip from Los Angeles, and a cell-phone video captured his upbeat comment about "$7.2 million" while patting the bag holding the drugs. (ER 954, 595-596)

evidence, but the email string—showing Penn had access to the Coleman calls before he met with Mr. Brown—was otherwise-unavailable corroboration for Mr. Brown's claim that Penn heard the call containing the threat and warned him about it at their meeting. *Compare United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2011) (no materiality because the defendant witness' poor memory was substantially attacked with other proof besides the withheld evidence).

With both the email string and the call, the defense could have sought to refresh Penn's memory; if he remembered hearing the call and warning Mr. Brown about the threat, his refreshed memory would have been important corroboration for Mr. Brown's version of events about the origin and seriousness of the threat, and his good-faith belief that threats could be carried out against his family in 2014. More likely, if Penn maintained ignorance about the call in the face of evidence that he was copied on an email about its production just 12 days before he met with Mr. Brown, at least one juror may well have disbelieved him. *See United States v. Sedaghaty*, 728 F.3d 885, 902 (9th Cir. 2013) (withheld impeachment evidence was material; the witness was the main support for the government's claim of willful misstatement of information in tax filings). The timing in the email string *and* the call's contents strongly supported a finding that (1) Mr. Brown was in danger from U.N. gang affiliates, (2) Penn met with Mr. Brown at least in part to warn him about that threat, and thus, contrary to his denials, (3) Penn *did* "talk to Mr. Brown about safety" and "tell him about threats." Both pieces of evidence taken together were material to this showing.

The materiality of the call and email string can be measured by what was and was not said in the parties' closing arguments. Unaware of the evidence that could have undermined Penn's claim that he remembered no Coleman threat—and given that his denial of having mentioned one while meeting with Mr. Brown—defense

counsel could only bolster Mr. Brown's testimony through a negative inference: that Penn must have had evidence of a Coleman threat, and warned Mr. Brown, because it was illogical to believe that Mr. Brown would

> "just decide[ ], 'Hey, let's talk about gangs and Ali, offer so much information about the gangs and Ali and grenade launchers and the U.N. Gang, just because.'…[T]hat's what the government wants you to believe."
>
> Here's what happens…[H]e's told…there's a person named Curtis Coleman that was making threats. He…goes, 'Oh, wow, if there's threats against me, I'm going to tell you something.'" First, he tells them about his daughter. What he also tells them is everything else that he knows. That's what he tells them."

(ER 336-337) Similarly, without the July 2011 email string, which would have been critical to refreshing Penn's memory—or outright impeaching him—defense counsel emphasized the one, slight piece of corroboration available to him: the few agent notes that did exist about Mr. Brown making *some* reference to a daughter. In fact, counsel began his closing argument by speaking of this. (ER 327) In arguing it, however, he had to rely on more negative inferences—Penn's claimed lack of memory, the absence of contemporaneous notes, the failure to record the interview—to say that Mr. Brown was right (and Penn was wrong) about whether Coleman's threat was discussed. (ER 340) In this context, the only corroborating reference that did exist was much weaker, because the notes said Mr. Brown mentioned the daughter but not threats.

The full import of the combined email-call evidence would have been significant against the government's argument regarding the existence of the threat in other ways as well. Government counsel ridiculed the seriousness of the threat, arguing that Mr. Brown "never tells you what the threat was. He just tells you these people are scary." (ER 322) Though Mr. Brown and law enforcement agents such

as Than, Mendoza, and Ausfeldt acknowledged knowing about the gang's violent reputation—and Ausfeldt was even investigating it—the "hurt him bad" call plus the email string would have been powerful, personal, and specific corroboration of *his* perception of the danger facing him and his family. Similarly, the government dismissed Colleen Cruz's description of her fear of Fernando—and her concern about his knowing where she lived—as not imminent, but a vague, future possibility. (ER 323) But Penn's recognition of the seriousness of the threat would have corroborated the sinister nature of the intimidation she perceived from Fernando's clenched fist and reminder that the gang knew where Mr. Brown's "daughter lays her head." Moreover, it would have strengthened her testimony on the well-founded nature of her fear, given the link between Coleman's threat in 2011 and his affiliate's presence at her home in 2014.

Finally, without evidence from which the jury could infer that Penn knew of the call and its contents, Appellants were deprived of support on the third prong of the duress defense—the lack of a reasonable opportunity to escape from participating in the smuggle. In the call, Coleman claimed to have uttered the threat *in front of* arresting agents, including Penn, after learning from them that Mr. Brown helped their investigation. With the email evidence making it much more likely that Penn knew about the call, the defense could have confronted Penn much more directly about his presence at Coleman's arrest, the possibility that he was the one who initially disclosed Mr. Brown as a source to Coleman, and the reasons he might have done so.

If the jury inferred that Penn actually engineered this state of affairs, it might have believed Penn put Mr. Brown in danger in the first place—possibly to play him and Coleman against each other and get cooperation from one or both of them. Certainly Penn's disclosure of Mr. Brown's role deviates dramatically from the great

lengths the government normally purports to undertake to protect citizen informants, underscoring his improper incentive to downplay the existence of threats against Mr. Brown. *See, e.g.*, *Roviaro v. United States*, 353 U.S. 53 (1957). However, there was more. Even Coleman was suspicious that the "fed" told him about Mr. Brown because he wanted Coleman to turn informant. (SER 19) Penn never even prepared a report on Mr. Brown's 2011 intelligence until 2014. (ER 917) Nor did the government did begin investigating AMFAB in earnest until *after* the attempted smuggle, and Appellants' arrest for the conduct they insisted was unlawfully coerced by the group. (ER 764-765) All of this would have been strong evidence that Appellants could not escape participating in the smuggle by going to law enforcement such as Penn for help. Mr. Brown's efforts to call attention to AMFAB had fallen on uninterested ears, and no law enforcement authorities, federal or otherwise, gave him cause to believe otherwise Who would trust law enforcement after that?

In sum, obtaining concessions or outright attacking Penn on these points made it reasonably probable that at least one juror's assessment of Appellants' defense would have been altered. This undermines confidence in the verdict. *Price*, *supra*, 566 F.3d at 914. The *Brady* violation warrants a new trial. The district court's order denying Mr. Brown's new trial motion must be reversed.

B. The government presented and failed to correct false testimony.

The record of Mr. Brown's meeting with Penn was very sparse. Penn testified that neither he nor Bruce Farlin, the Border Patrol officer with him, recorded it; Penn took no handwritten notes; he only memorialized it in writing three years later, using Farlin's typed notes. (ER 469, 471, 917) Farlin did not testify. Penn remembered "parts of the interview" but refreshed his memory from this report to prepare to testify. (ER 479, 453-454) He never told the jury his preparation had

also included review of Coleman's FDC calls in the previous month with AUSA Vaughan, who later conducted his cross-examination.

In Penn's telling, he went to see Mr. Brown "for intelligence purposes" only, as a follow-up to Than's report. (ER 452) He thus never talked to Mr. Brown about safety concerns because "it did not occur to [him] that he was threatened in any way." (ER 494) Indeed, he professed only to remember one Coleman FDC communication about Mr. Brown—an intercepted letter he got on July 27, 2011 (interestingly, the same day as Dillard said the government would get the call recordings). The FDC called the letter to his attention as a possible threat to Mr. Brown. (ER 482-485) In it, Coleman told the recipient Mr. Brown was an informant. Despite lengthy questioning about whether the FDC referral meant Coleman was threatening Mr. Brown, Penn steadfastly denied reading it that way, even "[a]fter reading -- like, *preparing for my testimony* and looking at the information, from what -- the FDC said that he thought -- there was never, like, the word 'threat.'" (ER 491) (emphasis added). That is, Penn made no mention in his testimony of hearing the "hurt him bad" call shortly before trial with AUSA Vaughan, or any effect on his opinion the call could have had.

At the post-trial hearing on Appellants' new trial motion, Mr. Carter's counsel contended that the verdict was premised on false, uncorrected, material testimony by Penn:

> I believe there is a follow-up consideration, though, that goes beyond what is a straightforward *Brady* violation, and it's the more serious concern of the probability here that key testimony by a critical government witness was false, and likely had a material impact on the verdict. That, to me, is –
>
> THE COURT: So your position is that Agent Penn was telling a falsehood when he said he did not remember?

> MR. NANCE: You know, it is hard to draw any other conclusion. I don't like to come in and call people liars.…

(ER 201) Counsel concluded, nonetheless that

> [N]ow we have verdicts supported by this testimony. And it's not just probably false testimony. It's testimony about a critical thing. The heart of our defense -- the very heart of our defense was John Brown. That's how we put on duress. …John Brown's credibility was central here, and this smoking-gun tape would have bolstered that credibility.
>
> THE COURT: Well, --
>
> MR. NANCE: Who are you going to believe when you've got an admitted drug/handgun runner that the government has argued is, basically, somehow a delusional misfit, or are you going to believe a polished case agent with Homeland Security? I mean, it goes right to the heart of the case.

(ER 204) The court made no other comment, and did not rule on this contention in its written order.

1. Standard of review and reviewability.

Counsel's argument below presented a claim that Appellants' convictions derive from false testimony by Agent Penn—a violation of due process under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935) (*per curiam*). The due process principle articulated in *Mooney* and *Napue* requires reversal of "a conviction obtained through use of false evidence, known to be such by the State," with "[t]he same result…when the State…allows it to go uncorrected…". *Napue*, *supra*, 360 U.S. at 269.

A motion for a new trial based on a *Napue* claim is reviewed *de novo*. *United States v. Rodriguez*, 754 F.3d 1122, 1132 (9th Cir. 2014). To establish a *Napue* claim, a defendant must show that (1) the testimony was actually false, (2) the

prosecution knew or should have known this, and (3) the false testimony was material. *Rodriguez*, *supra*, 754 F.3d at 1142.

2. Penn testified falsely by testifying that he remembered no evidence of Coleman threatening Mr. Brown except an intercepted, non-threatening letter, by omitting his own access to the "hurt-him-bad" call before he met with Mr. Brown, and by omitting his awareness of it or some similar call in preparing for his testimony.

A criminal conviction obtained by the use of false evidence known to be such by the government, creating a deliberate deception of the court and the jury, is inconsistent with the rudimentary demands of justice. *Mooney*, 294 U.S. at 112; *Napue*, 360 U.S. at 269. Due process protects defendants against the knowing use of any false evidence by the government, whether it be by document, testimony, or any other form of evidence—even if it is carefully orchestrated to avoid perjury. *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005). Testimony that leaves a false impression falls into this category. *See Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (in a murder prosecution arising from a relationship triangle, the lover's testimony "gave the jury the false impression that his relationship with petitioner's wife was…casual friendship" where the prosecutor told him only to answer questions about their true relationship if asked).

The due process prohibition against false testimony, "implicit in any concept of ordered liberty, does not cease to apply where the falsity goes to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.] *Napue*, *supra*, 360 U.S. at 269. Penn's testimony, as a whole, deceived the jury by omission on issues bearing critically on his own credibility. He told the jury he used only his report of the August 2011 meeting to prepare his testimony, completely omitting his review of Coleman's calls with the prosecutor who cross-examined him, and claimed to

remember no information that Coleman ever threatened Brown, except a letter that was not a threat. Penn effectively invited the jury to infer not just that he remembered no threats, but that, in fact, no evidence of threats actually existed, when it manifestly did. It followed from this that he would never have warned Mr. Brown about threats, when—given the evidence that Penn had access to the calls before their meeting—the evidence suggests otherwise.

The omissions here were thus not merely inconsistencies making Penn's testimony something less than "actually false." *Cf. United States v. Houston*, 648 F.3d 806, 914 (9th Cir. 2011) (omissions were merely "prior inconsistent statements"). Nor was this a situation in which any "inconsistencies were fully explored and argued to the jury." *Houston*, 648 F.3d at 814. The jury never got to evaluate Penn's credibility consistent with the due process requirements of *Napue*. Instead, Penn testified flatly to knowing of no threat to Mr. Brown from Coleman in 2011—leaving out the fact of his access to Coleman's call containing just such a threat at that time. He insisted the Coleman letter did not constitute a threat, but left out that in preparing for his testimony to the jury, he had listened to this very call. The jury thus never even had the chance to evaluate if his judgment about the letter should be believed if viewed in full context. The "false impression" left by Penn's testimony satisfies the first prong for finding a *Napue* violation—he gave actually false testimony.

3. Though AUSA Vaughan knew Penn's testimony was incomplete in its failure to reference the "hurt-him-bad" call as part of his preparation for his testimony, she failed to correct the false impression this omission testimony left, and instead supported it when she cross-examined him.

The government has a free-standing constitutional duty to correct false impressions left by a witness's testimony, independent of its obligation to ensure the fairness of any given defendant's trial. The duty arises from the gravity of depriving a person of liberty on the basis of false testimony, and the applicable rules courts have fashioned against false testimony are designed to prevent it from happening at all. *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). Even if the government does not deliberately solicit false evidence, it may not allow it to go uncorrected when it appears. *Napue*, 360 U.S. at 268.

The government failed in its duty to correct Penn's testimony here. AUSA Vaughan knew that Penn prepared for trial by reviewing more than his report because he also listened—*with her*—to at least one Coleman call recounting a threat against Mr. Brown. However, she did not correct this testimony, which would have told the jury about the call's existence and invited its consideration alongside the letter that Penn claimed presented no threat to Mr. Brown. Vaughan further compounded this failure by eliciting two points that actually supported the false impression Penn's testimony left. First, she had Penn describe the letter itself, letting him offer the interpretation that Coleman was simply telling his family to stay away from Mr. Brown—that this was not itself a threat. (ER 515) Secondly, as to the broader likelihood that Penn would have spoken to Mr. Brown about any aspect of the Coleman investigation, she asked the following:

> Q So following up on Mr. Brown's statements to law enforcement, when a member of the public comes to you, or other agents in Homeland Security, and they provide information about criminal activity, do you then keep that member of the public updated about the investigation as it unfolds?
>
> A No.
>
> Q Is that because they're not law enforcement?
>
> A That's correct.

> Q And it's an open investigation, and so you just need to work on that investigation, and not tell the public about that; is that correct?
>
> A Yes, that's true.

(ER 523-524)

This questioning reinforced, rather than corrected, Penn's deceptive testimony. First, Vaughan let stand the false impression Penn's testimony left—that the only Brown-related Coleman communication in existence that could have been a threat was the letter, while omitting mention of the call, recorded around the same time, that recounted an explicit threat; and she let stand his opinion that the letter did not constitute a threat, without the contrary context provided by the call. Secondly, she elicited that Penn would never have talked to a civilian, Mr. Brown, about an investigation—a direct rebuke to Mr. Brown's testimony that Penn warned him about the threat Coleman posed. In short, the government stood by, allowed Penn to testify untruthfully by omission, and then burnished it.

The government was not excused from its duty to correct the false impression left by Penn's testimony simply because it produced the calls. In *Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005), the state "fail[ed] to correct a witness' false assertion that he had never been 'busted' before." This Court rejected the state's contention that it had no duty to correct because defense counsel knew about the impeachment information. "Whether defense counsel is aware of the falsity of the statement is beside the point." *Id*. The prosecutor's responsibility to make the correction did not depend on that, but on the prosecutor's free-standing duty, when put on notice of falsity, to correct it.

Compounding the government's failure here is its withholding of the email string establishing Penn's access to Coleman's call before he met with Mr. Brown. Thus the jury did not know what the government knew: that Coleman did, in fact,

threaten Mr. Brown in a recorded call; that the government subpoenaed this call around the very same time that the FDC intercepted the purportedly harmless letter; that Penn had access to and thus knew about both the call *and* the letter before he saw Mr. Brown—that this core aspect of Appellants' defense was verifiably true. The government thus failed in its independent duty to "correct what it [knew] to be false and elicit the truth," regardless of what defense counsel did, in its examination of Agent Penn. *Belmontes*, *supra*, 414 F.3d at 1115. The second prong for the finding of a *Napue* violation is met.

4. The government's failure to correct the testimony was material.

When false testimony has gone uncorrected, the falsity is material if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. This standard is, "in effect, a form of harmless error review, but a far lesser showing…is required under *Napue*'s materiality standard than under ordinary harmless error review. *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013). *See Napue*, *supra*, 360 U.S. at 271, *United States v. Agurs*, 427 U.S. 97, 103 (1976), *and Bagley*, *supra*, 473 U.S. at 667. This is because of the paramount importance of the rule that a criminal conviction simply cannot stand on false evidence.

AUSA Becker's closing exploited the false impression left by Penn's testimony: that Coleman and his AMFAB associates never threatened Mr. Brown, and that Penn never told him they did. This narrative—in the absence of any correction that Penn knew about Coleman's threats against Mr. Brown before—permeated the government's closing argument. Initially, Becker argued that law enforcement had no awareness of threats against Mr. Brown in 2011. This exploited the government's failure to correct Penn's testimony with the evidence that AUSA Hobbs had subpoenaed and got Coleman's FDC calls, including the May 18 conversation, before Penn met with Mr. Brown. She contended, instead, that it was

Mr. Brown who brought up threats, in the form of his approach to Deputy Freeman *after* the 2014 smuggling attempt, trying in this way to undermine his claim of being under duress:

> "[I]t is not until the arrests of Mr. Peal and Mr. Provo that anybody hears anything about a threat; that anybody hears anything about Brown acting because his daughter's life is in danger, or anything at all about a cartel harassing anyone."

(ER 299) In rebuttal she repeated this: "[T]the first time that anybody hears about threats is December 5 of 2014," well after the attempted delivery, when Mr. Brown approached Deputy Freeman. (ER 319)

Becker also exploited the uncorrected false impression left by Penn's testimony in addressing the August 2011 meeting itself. In rebuttal she distorted the significance of the meeting—that Penn told Mr. Brown about the threats there—by turning it into a question of whether Mr. Brown was credible in bringing b them up. To do this she pointed to the notes, the only evidence defense counsel had referencing Mr. Brown's daughter, but which did mention a threat to her:

> In August, apparently after this initial threat, three --more than three years before the smuggle, he meets with Agent Penn. *He doesn't tell him anything about a threat.* And a week later, he meets with Agent Smith, …and *he doesn't mention a threat.*

(ER 325) Ignoring the contention that Mr. Brown gave information at the meeting *because* he learned from Penn about Coleman's threats, Becker again wove in the point that the agents' notes do not mention Mr. Brown's fears for his daughter:

> He [Penn] does not have a great memory of events, clearly. But it's clear that it was a calm and respectful meeting, there was no hostility, and that he wrote a report based on Farlin's notes.…
>
> Agent Penn tells you he never heard about a threat about Mr. Brown's daughter. And he tells you that…as a human being, if he heard about a threat to a child, he would do something

about it.
…

(ER 408) She omitted any mention of the email showing Penn had access to information about Coleman's threats before the meeting, endorsed Penn's flat denial of threats from Coleman as a reason why he never talked to Mr. Brown about the topic, and again blamed Mr. Brown for any ambiguity:

> You also hear a complaint today that Agent Penn failed to pass on a threat to Mr. Brown. First of all, Agent Penn told you, after reading this letter that he got from Curtis Coleman, it didn't contain a threat. And he didn't say he didn't pass it on. He said he didn't remember. But Mr. Brown tells you that actually they told him, so it's unclear what the complaint could possibly be.…

(ER 408-409)

The government's closing, in short, endorsed the jury's acceptance of Penn's testimony—that "it did not occur" to him that Mr. Brown was under threat from Coleman, that he "did not talk to Mr. Brown about safety" or "tell him about threats," because *there were none*. As described in V.A.4, this contention served to undermine the duress defense as to all three prongs. The false impression left by Penn's testimony, and the government's exploitation of it in closing argument, was material.

C. The Court should vacate Appellants' convictions and remand for a new trial due to the government's pervasive improper closing arguments.

1. Standard of review.

Appellants did not object at trial to the improper arguments set forth below. Accordingly, this Court reviews for plain error. *United States v. Inzunza*, 638 F.3d 1006, 1023 (9th Cir. 2011). Plain error is: "(1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal brackets and quotation marks omitted). "If all three conditions are met, an

appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. (internal brackets and quotation marks omitted). Misconduct in "closing argument has often been held to be plain error, reviewable even though no objection was raised." *United States v. Roberts*, 618 F.2d 530, 534 (9th Cir. 1980).

2. The prosecutor repeatedly presented improper closing arguments.

a. Vouching and denigrating the defense.

In closing argument and rebuttal, the government repeatedly presented two forms of improper argument together: vouching and denigrating the defense. "The rule that a prosecutor may not express his personal opinion of the defendant's guilt or his belief in the credibility of witnesses is firmly established." *United States v. Wright*, 625 F.3d 583, 610 (9th Cir. 2010) (quotation marks omitted), *superseded by statute on other grounds as stated in United States v. Brown*, 785 F.3d 1337, 1350-51 (9th Cir. 2015). "Improper vouching occurs when the prosecutor places the prestige of the government behind the witness by providing personal assurances of the witness's veracity[,] or where the prosecutor suggests that the testimony of government witnesses is supported by information outside that presented to the jury." *Id.* (quotation marks omitted). This Court has also "identified improper vouching and related misconduct in a broader range of circumstances[,]" including, *inter alia*, that a prosecutor may not "express an opinion of the defendant's guilt, denigrate the defense as a sham, implicitly vouch for a witness's credibility, or vouch for his or her own credibility." *Id.* (quotation marks omitted).

The government injected many of these vices into Appellants' trial, beginning with the first substantive line of its closing argument that "[t]his case is about facts and fiction." and continuing this theme throughout. ("But ladies and gentlemen, that's when the fiction began."; asserting "[t]he facts are that Mr. Brown and Mr.

Carter . . . conspired to distribute cocaine"; exhorting the jury to "separate [such facts] from the fiction"). (ER 292, 294,325-326) These arguments contain layers of impropriety. They (1) vouched for the United States as the only true purveyor of "fact" in the case, and (2) denigrated the defense as foisting a bad faith "fiction" upon the jurors. In common usage—and how the government used it here—"fiction" means "something invented by the imagination or feigned[,]" or "the action of feigning or of creating with the imagination[.]"[8] By employing this "fact vs. fiction" narrative, the government improperly (i) elevated its own stature, (ii) miscast the defense as a fraud, and (iii) requested the jurors to reject even the most basic principle that Appellants' trial could, and did, present a good faith contest between two competing versions of events. *See United States v. Preston*, 873 F.3d 829, 843-844 (9th Cir. 2017) (rejecting government's characterization of its case as the "truth").

Lest there be any doubt about the government's message, it explicitly argued that its monopoly on "fact" was so ironclad that Appellants had no choice but to rely on deception:

> And because this evidence is so strong, because it cannot be explained away, because it doesn't go away by yelling at [cooperator] Williams on the stand, the fiction begins.

(ER 299)

Still another time the prosecutor accused the defense of fabricating a sympathetic tale to tug on the jurors' heartstrings:

> And this, again, ladies and gentlemen, is where the fact part of the case turns into fiction. Like any good fiction, there's a kernel of truth in it. But ultimately, it's a story. And it is a story that is *designed* by the defendants,

[8] *See* https://www.merriam-webster.com/dictionary/fiction.

> *designed* to be emotional, *designed* to invoke your fears of gangs, *designed* to invoke your sympathy for children. But that doesn't mean that it is based in truth. And the instructions tell you that you need to make your decision based on fact and evidence, not on emotion and on sympathy.

(ER 299) (emphases added). "Prosecutors may not make comments calculated to arouse the passions or prejudices of the jury." *United States v. Leon- Reyes*, 177 F.3d 816, 822 (9th Cir. 1999). But by telling the jurors that Appellants deliberately concocted a false story to play on their sympathies, the government did just that.

Relatedly, the government all but accused defense counsel of suborning perjury from C.H.:

> It's not until the defense makes very clear to [C.H.] what would be helpful to them that she says something about Naomi.
> …
> ("She does say a few things that are helpful to the defense, but . . . only on cross examination when the defense is making quite clear to her what answer would be the most helpful to the defense.")

(ER 317-308, 395)

Further, the government repeatedly spoke to the jury in terms of what, in its view, "the defense…would like you believe," or Mr. Brown "would like to have you believe" or "would like you to believe ," or "would like you to think", or "maybe wants you to forget . . ."; it contended that certain text messages "tell a very different story than the one that the defendant would have you believe." (ER 311, 318, 310, 324, 405, 411) This argument yet again miscast the defense as an act of deception rather than a good faith (but contested) version of events.

In addition, the government stooped to unduly harsh words and *ad hominem* attacks against Appellants and their counsel: "Because [that's] just another

example of Mr. Brown shifting the blame and telling you that somebody else is responsible. *That's what it is all about with Mr. Brown*;") (italics added); deriding defense counsel's argument as "about as fanciful a story as the one that Mr. Brown tells you"; "So it is nonsense for him to suggest to you now that he couldn't go."). (ER 410, 396-397, 325)

On the other side of the coin, the prosecutor didn't hesitate to claim special knowledge of the facts. "It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggestions, insinuations, and especially assertions of personal knowledge." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998) (quotation marks omitted). But here, the government claimed authority to decide on its own whether specific individuals—including both Appellants—acted under duress:

> The government's not saying that [cooperator] Williams acted under duress. *He wouldn't have needed to be offered immunity*. He didn't act under duress any more than [Mr. Brown] or Mr. Carter did.

(ER 396) (italics added).

Furthermore, although this Court has long frowned on prosecutors' use of "we know" statements—"because the use of 'we know' readily blurs the line between improper vouching and legitimate summary[,]" *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005)—the government repeatedly violated that settled admonition. *See, e.g.*, ER 295, 298, 301, 308, 311-314, 318, 324, 404, 407.

Finally, the prosecutor offered her personal views about witness credibility, particularly when she denigrated witnesses unfavorable to the government, including Mr. Brown ("I think I've already talked to you at length about why Mr. Brown's story, in general, is incredible and should not be credited…" ER 323). (ER 394) She said of C.H. that "I'm not sure that there was a witness more lacking

in credibility than [C.H.], with the exception of Mr. Brown[,]" (ER 394) and "[R]eally, [C.H.] could not have been less credible on this point." (ER 317) By contrast, she opined of one government witness that "this is a witness who has no reason to tell you anything but the truth" (ER 401) and that in contrast to C.H., L.D. "was straightforward, calm, rational, and very detailed, a *plainly credible witness*, who had a very good memory of events that made little sense to her." (ER 294; emphasis added.)

In short, the prosecutor serially vouched for the government while denigrating the defense.

b. Misstatement of law.

Government counsel also misstated the law on a key contested issue: whether, in assessing Appellants' duress defense, the jurors were permitted to evaluate the element of "reasonable opportunity to escape" while bearing Appellants' perspectives in mind. It is well-settled that a "prosecutor should not misstate the law in closing argument." *United States v. Berry*, 627 F.2d 193, 200 (9th Cir. 1980).

In the duress context, this Court has approved the following instruction regarding the reasonableness of an opportunity to escape:

> 'The standard of reasonableness is to be determined by what a reasonable person would do under the same or similar circumstances. *In making this determination, you are to consider all of the facts in evidence in the case, including whether one in the defendant's position might believe that reporting the matter to the police did not represent a reasonable opportunity of escape.* However, the opportunity to escape must be reasonable. Generally, once a defendant has reached a position where he can safely turn himself in to the authorities, he will have a reasonable opportunity to escape the threatened harm, but you may consider all of the facts in evidence in deciding

> reasonableness in this case. In making the decision on reasonableness, you should consider all the facts in evidence in the case and the court's instructions on the law.'

United States v. Verduzco, 373 F.3d 1022, 1030-31 (9th Cir. 2004) (emphases added).

In rebuttal, however, the prosecutor urged the opposite:

> That's not good enough under the law. The law of duress requires that there be no reasonable opportunity to escape, not that there be no reasonable—not that there be no opportunity that Mr. Brown wants, or Mr. Brown likes. And there's nothing in that instruction that says you evaluate the reasonableness from the perspective of the defendants. It says that there has to be none.

(ER 410)

This argument was misleading and legally erroneous under a plain reading of *Verduzco*, which as noted, emphasized "whether one *in the defendant's position* might believe that reporting the matter to the police did not represent a reasonable opportunity of escape." *Id*., 373 F.3d at 1031 (emphasis added). By urging the jurors to ignore "the perspective of the defendants[,]" the government misstated controlling precedent on a critical contested matter.

Based on the foregoing, this Court should find that the prosecutor plainly (and repeatedly) erred under established precedent, thus satisfying the first two prongs of the plain error test.

3. The errors affected Appellants' substantial rights and the fairness, integrity, and public reputation of judicial proceedings.

The Court should find the third and fourth prongs satisfied as well. "To determine whether the prosecutor's misconduct affected the jury's verdict, [the

Court] look[s] first to the substance of a[ny] curative instruction." *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992). "[E]ven in the absence of objections by defense counsel, a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate[.]" *United States v. Weatherspoon*, 410 F.3d 1142, at 1151 (9th Cir. 2005) (quotation marks omitted). That is because "[t]rial court judges are not mere referees. They play an active role, keeping the trial running efficiently with a minimum of error. Their control over closing argument is broad. " *Roberts*, 618 F.2d at 534 (citations omitted). In *Kerr* and *Weatherspoon*, the district courts gave general (rather than specific) curative instructions, which this Court found inadequate in both cases. *See Kerr*, 981 F.2d at 1053-54; *Weatherspoon*, 410 F.3d at 1151. Here the district court gave no curative instruction whatsoever. Because the generalized instructions in *Kerr* and *Weatherspoon* were inadequate, *a fortiori* the wholesale failure to take corrective action in this case was deficient.

Other considerations also support a finding of prejudice. To begin, because much of the misconduct occurred in rebuttal—specifically, all instances in the transcript after ER 393—those remarks were the last thing the jury heard before retiring to deliberate, thus magnifying the prejudice to the defense. *Crotts v. Smith*, 73 F.3d 861, 867 (9th Cir. 1996) (prejudicial evidence at end of trial without a limiting instruction magnifies the prejudicial effect because it is freshest in the mind of the jury), *superseded by statute on other grounds as stated in Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).

Equally (if not more) important, the bulk of the misconduct cut to the heart of the trial: Mr. Brown's credibility stacked up against the government's case.[9]

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[9]Since Agent Penn actually agreed that Mr. Brown "was being honest in telling me what he knew" while debriefing, (ER 473) Mr. Brown's credibility was thus

Virtually every instance of vouching and denigration zeroed in on that one issue, and the government's misstatement of law similarly took aim at a critical contested element of duress—and one on which Appellants had a particularly strong argument in light of Mr. Brown's history with law enforcement. This Court has "repeatedly reversed convictions for plain error in cases in which witness credibility was paramount and the prosecutor sought to bolster critical testimony through improper conduct." *United States v. Alcantara- Castillo*, 788 F.3d 1186, 1196 (9th Cir. 2015). *Accord Weatherspoon*, 410 F.3d at 1152 (reversing for plain error because the case "boiled down to a battle over credibility[,]" and the "prosecutorial statements . . . vouch[ed] for the credibility of witnesses and . . . encourage[d] the jury to act based on considerations other than the particularized facts of the case"); *United States v. Segna*, 555 F.2d 226, 230-32 (9th Cir. 1977) (reversing on plain error review due to prosecutor's "erroneous and misleading statements of the law"). The same result should obtain here.

VI. CONCLUSION

For the reasons set forth above, this Court should vacate Appellants' convictions and remand for a new trial.

DATED: December 5, 2017

/S/ Myra Sun
MYRA SUN
Attorney for John Brown

DATED: December 5, 2017

/S/ Jay A. Nelson
JAY A. NELSON
Attorney for Derrick Carter

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considerably less compromised than the government suggested in summation, if at all.

United States v. John Brown and Derrick Carter

United States Court of Appeals for the Ninth Circuit
Consolidated Nos. CA 16-30297, 16-30298

A P P E N D I X 3

MOTION TO TRANSMIT EXHIBITS
(Dkt. No. 61)
ORDER DENYING MOTION TO TRANSMIT
(Dkt. No. 83)

CA NO. 16-30297
CA NO. 16-30298

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, DERRICK CARTER, Defendants-Appellants.	D.Ct. # CR-15-211-MJP

MOTION TO TRANSMIT AUDIO EXHIBITS PURSUANT TO NINTH CIRCUIT RULE 27-14; DECLARATION OF COUNSEL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE MARSHA J. PECHMAN
Sr. United States District Judge

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CA NO. 16-30298

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, DERRICK CARTER, Defendants-Appellants.	DCt # CR-15-211-MJP

MOTION TO TRANSMIT AUDIO EXHIBITS PURSUANT TO NINTH CIRCUIT RULE 27-14; DECLARATION OF COUNSEL

Pursuant to Fed. R. App. P. 27, Ninth Cir. R. 27-14, the Due Process Clause of the Fifth Amendment to the United States Constitution, and this Court's inherent authority, Appellants John Brown and Derrick Carter jointly move, by and through their counsel, for leave to transmit audio exhibits via DVD for the Court's consideration.

This appeal arises out of Appellants' convictions by jury for controlled substances offenses. At trial, Appellants presented a duress defense based on threats made against Mr. Brown's family by the Canadian U.N./AmFab gang. On appeal, Appellants assert the following claims for relief: that the government (1) the government violated *Brady v. Maryland*, 373 U.S. 83 (1963) by untimely disclosing information regarding recorded jail call communications from Seattle gang member

and international smuggler Curtis Coleman, in which he threatened Mr. Brown; (2) violated *Napue v. Illinois*, 360 U.S. 264 (1959) by creating a false impression at trial that the United States was unaware of Coleman's threats; and (3) the government committed reversible misconduct in summation. (*See generally* Appellants' Consolidated Opening Brief ("COB"))

In a letter filed September 16, 2016, Mr. Brown cited 21 Coleman jail calls for the district court's consideration, including a May 18, 2011 call which defense counsel ultimately transcribed for the court. (Further Excerpts of Record ("FER") 1-3; Clerk's Record ("CR") 250-1) In his letter, Mr. Brown argued that the calls reflected that Coleman both "spoke of killing" him and discussed him in other ways with individuals located in Canada and the United States. (FER 1-3) Mr. Brown concluded, among other things, that the calls undermined (i) the government's denial at trial that any threats occurred, and (ii) the government's contention that Appellants could have or should have trusted the government to protect his family. (*Id.*)

Mr. Brown was correct. As set forth in the concurrently-filed Consolidated Reply Brief ("CRB"), a full and complete review of the 21 calls at issue reveals significant exculpatory information material to Appellants' duress defense, including:

(1) further threatening language by Coleman directed at Mr. Brown and others (thus corroborating Mr. Brown's version of events and demonstrating Coleman's general propensity for violence). Call Nos. 9, 11-12, 15, 19;

(2) repeated references to an alleged U.N./AmFab gang affiliate named Cordez (thus supporting Coleman's ongoing connection that gang). Call Nos. 3, 9, 16-17;

(3) numerous menacing instances of Coleman spreading word to the streets that Mr. Brown informed on him (thus further placing Mr. Brown's safety in peril). Call Nos. 2-3, 5-8, 10-12, 14-18, 20;

(4) calls documenting that Coleman had something of a personal relationship with Special Agent Thomas Penn (thus supporting, *inter alia*, Appellants' claim that Penn likely knew about Coleman's threats and warned Mr. Brown about them). Call Nos. 11, 19; and

(5) calls further reflecting the federal government's troubling decision to apprise Coleman of Mr. Brown's role in his arrest (thus supporting Appellants' contention that the government did not present a reasonable opportunity to escape any threats). Call Nos. 2-3, 10-11.

For these reasons, Appellants contend the 21 calls on Mr. Brown's list constitute "exhibit[s] not currently available on the electronic district court docket" but which are "necessary to resolution" of this appeal. Ninth Cir. R. 27-14. Appellants do not disagree that the audio files themselves were not submitted to the district court. Nonetheless, the district court filed the 21 citations in September 2016, along with Mr. Brown's accompanying argument, and then announced at the beginning of the hearing on Appellants' new trial motion that it had reviewed "the various pleadings that [the parties] have filed with me." ER 172. On these bases, Appellants ask this Court to deem the recordings part of the district court record, and thus to accept their submission on appeal. *See, e.g.*, *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) ("The district court never formally ruled on the judicial notice request, but the record makes clear that the court considered the state court documents. We therefore treat those documents as part of the record on appeal."); *Salinger v. Random House*, 818 F.2d 252, 253 (2d Cir. 1987) (allowing supplementation of record on appeal with documents which, even if not technically part of district court record, the district court apparently considered).

If the Court disagrees with the foregoing, Appellants respectfully ask in the alternative that the Court augment the record with the 21 calls. It is well-settled that this Court may "exercise inherent authority to supplement the record in extraordinary cases[.]" *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003).

This is such a case. On appeal, the government has mocked Appellants, for example, for daring to "suggest[] that there may have been other threatening calls (they have identified none)." (Consolidated Answering Brief ("CAB") 33) But the government, which produced the calls, knows full well that such calls exist—not to mention others presenting the various forms of exculpatory information noted above—and this Court should not be led to believe otherwise. *See United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

The government similarly taunts that "absent some showing that United States law enforcement was in cahoots with the U.N. Gang/AmFab, [Mr. Brown's] claimed experiences with law enforcement three years earlier were no excuse for [his] failure to report the 2014 threats." (CAB 30) The calls at issue, however, present evidence shockingly close to "cahoots": Coleman's repeated (and largely undisputed) claim that the United States government itself—in a disturbing departure from ordinary practice—needlessly unmasked Mr. Brown to Coleman as the informant against him, not to mention Coleman's references to Agent Penn by name. (*Cf.* CAB 41-42, 52)

Finally, the government disputes the relationship between Coleman and the U.N./AmFab gang. (CAB 30-31). As noted, however, the calls reflect Coleman's determined efforts to reach out to an individual named Cordez in British Columbia, *i.e.*, the very same alleged gang affiliate named "Dez" whom Mr. Brown identified to the government. (FER 4)

In short, even if the Court does not consider the 21 calls to be part of the district court record, it should nonetheless (1) augment the record to include them,

(2) carefully review them to preserve the integrity of these proceedings, and (3) rely on them in granting Appellants relief.

As set forth in the declaration of counsel that follows, the United States objects to this motion. Mr. Brown is serving a custodial sentence of 120 months with an estimated release date of May 5, 2024. Mr. Carter is serving a custodial sentence of 120 months with an estimated release date of February 25, 2024.

DATED: September 21, 2018

/S/ Myra Sun
MYRA SUN
Attorney for John Brown

/S/ Jay A. Nelson
JAY A. NELSON
Attorney for Derrick Carter

DECLARATION OF MYRA SUN

I, Myra Sun, state and declare as follows:

1. I represent appellant John Emmett Brown, having been appointed on January 5, 2017. The case has been consolidated with that of his co-defendant, *United States v. Derrick Carter*, No. CA 16-30298, who is represented by Jay Nelson, also under appointment.

2. Mr. Nelson and I have addressed this motion with counsel for the government, Assistant United States Attorney Michael S. Morgan. Mr. Morgan responded that the government objects.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: September 21, 2018

/S/ Myra Sun
MYRA SUN
Attorney for Appellant John Brown

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018 I electronically filed the foregoing motion and declaration with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 21, 2018

/S/ Jay A. Nelson
JAY A. NELSON

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN EMMETT BROWN, Jr., Defendant-Appellant.	No. 16-30297 D.C. No. 2:15-cr-00211-MJP-1 Western District of Washington, Seattle ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DERRICK LOUIS CARTER, Defendant-Appellant.	No. 16-30298 D.C. No. 2:15-cr-00211-MJP-2 Western District of Washington, Seattle

Appellants' motion to transmit audio exhibits (Dkt. No. 63) is DENIED.

In addition, the Court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Therefore, this case is ordered submitted on the briefs and record without oral argument on Tuesday, February 5, 2019 in Seattle, Washington. Fed. R. App. P. 34(a)(2).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Wendy Lam
Deputy Clerk
Ninth Circuit Rule 27-7

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BROWN and DERRICK CARTER, Petitioners,

vs.

UNITED STATES, Respondent.

CERTIFICATE OF SERVICE

I, Myra Sun, hereby certify that on this 16th day of August, 2019, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5616, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Dated: August 16, 2019

Myra Sun

MYRA SUN
Attorney for Petitioner