

No. ____

IN THE
Supreme Court of the United States

JOSE LAUREANO SALGADO,

Petitioner,

v.

UNITED STATES.

Respondent.

**On Petition for Writ of Certiorari to
the United States Court of Appeals
for the First Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does this Court's holding in Brady v. Maryland, 373 U.S. 83 (1963) require the Government to disclose, while an appeal is pending, exculpatory or impeaching information to the defendant?

PARTIES TO THE PROCEEDINGS

Jose Laureano-Salgado is the Petitioner and was plaintiff-appellant below.

United States is Respondent and was defendant-Appellant Below.

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I. Petition For Writ of Certiorari

José Laureano Salgado respectfully petitions this Court for a writ of certiorari to review the judgment of August 2, 2019 by the U.S. Court Of Appeals for the First Circuit affirming the District Court's decision, holding that *Brady v. Maryland*, does not require the Government to disclose, while a direct appeal is pending, exculpatory or impeaching information to the defendant.

II. Opinion Below

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit, which affirmed the order of the United States District Court for the District of Puerto Rico. The decision by the U.S. Court Of Appeals for the First Circuit is reported as *U.S. v. José Laureano-Salgado*, No. 17-1052, 933 F.3d 20 (1st Cir. 2019). The opinion is included in Appendix A.

III. Statement of Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules Of The Supreme Court Of The United States. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The First Circuit's judgment was issued on August 2, 2019.

IV. Constitutional Provisions Involved

U.S. Const., amend. XIV: “[No] State [shall] deprive any person of life, liberty, or property, without due process of law.” Suppression of evidence favorable to an accused upon request violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

V. Statement of the Case

A. Introduction

Over 50 years ago, this Court held in Brady v. Maryland, 373 U.S. 83 (1963), that the Due Process Clause of the Fourteenth Amendment requires prosecutors to reveal exculpatory and impeaching evidence. The Brady rule was designed to eradicate the most common manifestation of official misconduct: the suppression of exculpatory evidence.

This petition presents the question of whether a prosecutor who, while a direct appeal is pending, has exculpatory evidence in his possession had a duty to disclose it to the accused. The First Circuit answered no, concluding that:

“[B]inding precedent holds that where, as here, the record contains no indication that the government knew about these statements “at any time prior to or during [their] trial,” Brady does not operate and so the more arduous ordinary new-trial standard controls. See Maldonado-Rivera, 489 F.3d at 67; see generally Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 6769 (2009) [“Osborne”] (noting that Brady requires disclosure only of exculpatory and impeaching info that existed at the time of the original trial, emphasizing that “Brady is the *wrong* framework” for evaluating the government’s post-trial disclosure obligations); accord Tevlin v.

Spencer, 621 F.3d 59, 69-70 (1st Cir. 2010); see generally Skinner v. Switzer, 562 U.S. 521, 536 (2011) (commenting that "Brady announced a constitutional requirement addressed first and foremost to the prosecution's conduct pretrial").

See Appendix A, at A18-A19. But the question is not generally whether Brady applies to a post-conviction proceeding, but a much narrower one: whether when the appeal of the case is pending, does the prosecution have the obligation to disclose the exculpatory evidence? Put another way, does a prosecutor's failure to disclose exculpatory evidence post-trial, but before the verdict is final, amounts to a Brady violation? This Court should exercise its supervisory powers to hold that Brady requires the prosecutor to disclose exculpatory evidence while a direct appeal is pending. Unless this Court provides consistent enforcement for the failure to abide by a prosecutor's constitutional duty to disclose Brady evidence, criminal defendants such as petitioner Mr. Laureano Salgado will systematically be subjected to prison sentences that they do not deserve.

B. Course of Proceedings

José Laureano Salgado was charged with being a member of an organization engaged in narcotics distribution and acts of violence known as the “Organization of United Drug Traffickers” (La ONU) operating in San Juan, Puerto Rico. In a superseding Indictment issued on June 20, 2012, Mr. Laureano Salgado was charged with five counts: violations of the RICO statute, 18 U.S.C. 1962 (Count 1), conspiracy to possess with intent to distribute more than 5 kilograms of cocaine, in

violation of 21 U.S.C. §841 and 846, (Count 2); Conspiracy to possess a firearm during and in furtherance of a drug trafficking crime in violation of Title 18 U.S.C. §2 and 924(c) Count III); for violent acts in furtherance of the racketeering activity for the alleged murder of Christian Toledo Sánchez, a.k.a. “Pekeke” in violation of 18 U.S.C. § 1959 (Count 29); and use and carry of a firearm in relation to a crime of violence (i.e, Pekeke’s murder) in violation of 18 U.S.C § 924 (c)(1)(A), 924 (j)(1) (Count 30).

On February 15, 2013, a jury found Laureano Salgado guilty as to all counts. As to Count 29, he was sentenced to life imprisonment. Petitioner Laureano Salgado appealed the judgment and sentence. The case was not argued before a panel of the First Circuit until June 4, 2016 so it would have been significant to the consideration of Laureano’s appeal if the exculpatory evidence that Laureano was not involved in the killing of Pekeke was disclosed. However, the government never disclosed this exculpatory information to Laureano Salgado. Tellingly, Mr. Laureano Salgado was prosecuted by the same Assistant U.S. Attorney who was prosecuting the case against La Rompe ONU. His conviction was affirmed on August 15, 2015. United States v. Ramírez Rivera, et al, 800 F.3d 1 (1st Cir. 2015).

Before the oral argument on Mr. Laureano’s direct appeal, the United States, on May 13, 2015, represented by the same Assistant U.S. Attorney, presented to a Grand Jury investigating a rival drug trafficking organization, known as “La Rompe

ONU”, a completely different theory of the murder of Pekeke than the one presented at petitioner Mr. Laureano’s trial. According to the sworn testimony of a government cooperator, Pekeke was killed by rival members within La Rompe ONU so they could “take over [his drug business].” Id. at 1125. As testified Luis I. Yanyore-Pizarro, a member of La Rompe ONU, Pekeke was killed in a power struggle by other members of La Rompe ONU.

Indeed, beginning in October 11, 2016, the government presented as part of its case against three members of the rival gang, La Rompe ONU in Case 15-452 (JAG), the theory through the testimony of not one, but two, cooperating witnesses, that Pekeke was killed by members of La Rompe ONU in an internal war. That was the testimony provided by Yanyore-Pizarro at trial on October 13, 2016, and by Oscar Calvino Acevedo at trial on December 15, 2016, two members of La Rompe ONU.

The disclosure of such exculpatory evidence would have allowed counsel to Mr. Laureano to argue on appeal that if the jury had considered the evidence that Pekeke was murdered by rival gang members from La Rompe ONU, the jury would have acquitted Mr. Laureano, at the very least, from the charges in Counts 29 and 30 for Pekeke’s murder.

At the District Court, Mr. Laureano Salgado argued that a new trial was required pursuant to Rule 33 of the Fed.R.Crim.P. based on this new, exculpatory

evidence provided by two cooperators Luis I. Yanyore-Pizarro, and Oscar Calvino Acevedo which demonstrated that La Rompe ONU — and not La ONU — had murdered Pekeke to further the interests of La Rompe ONU members.

On December 12, 2016, the District Court (Hon. William E. Smith, sitting by designation) denied Mr. Laureano Salgado's Motion for a New Trial in a Memorandum and Order applying an actual-probability-of-acquittal standard as the District Court found that the government's Brady obligation to disclose exculpatory evidence ended with the guilty verdict at trial. The First Circuit affirmed on August 2, 2019.

VI. Reasons for Granting the Writ

A. To Avoid The Innocent From Being Convicted Based On The Suppression Of Exculpatory Information, This Court Should Clarify The Brady Standard To Hold That It Applies To Exculpatory Evidence While The Case Is Pending On A Direct Appeal.

Mr. Laureano Salgado's conviction was not final at the time the exculpatory material was suppressed by the prosecution on or before May of 2015. Time and again, this Court has explained when a conviction becomes final:

By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *See United States v. Johnson*, 457 U.S. 537, 542, n. 8 (1982) (citing *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965)).

Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987). This Court has repeatedly reiterated what it means by a final conviction: Clay v. United States, 537 U.S. 522,

525 (2003) (judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction.); Sawyer v. Smith, 497 U.S. 227 (1990) (conviction final when certiorari denied).

This Court should hold that *Brady's* duty to disclose is ongoing and extends to a direct appeal where, as in this case, the exculpatory evidence arose after trial, but during the direct appeal. The Seventh Circuit Court of Appeals in Fields v. Wharrie, 672 F.3d 505 (7th Cir. 2012) held that this Court has repeatedly recognized that a prosecutor's *Brady* obligations continue at least through the completion of the direct appeal:

A prosecutor's *Brady* and *Giglio* [*v. United States*, 405 U.S. 150 (1972)] duties may survive the conclusion of a trial. See *Imbler*,¹ 424 U.S. at 427 n.25 ("[A]fter a conviction, the prosecutor is also bound by the ethics of his office to inform the appropriate authority of after-acquired or other [material] information that casts doubt upon the correctness of the conviction."). When a State grants a criminal defendant a right to direct appeal, "the proceedings in the appellate tribunal are ... part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment." Frank v. Mangum, 237 U.S. 309, 327, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (internal citations omitted); see also Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) ("[I]f a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.") (internal citations omitted). Therefore, a defendant's conviction is not final as a matter of law until

¹ *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976).

he exhausts the direct appeals afforded to him, and, until that exhaustion, he is entitled to the full breadth of due process available.

672 F.3d at 514-15 (other citations omitted).

The First Circuit relied on U.S. v. Maldonado Rivera, 489 F.3d 60 (1st Cir. 2007), to support its holding that the prosecutors' *Brady* obligation ends with a verdict. But Maldonado Rivera never answered the question of when the prosecutor's *Brady* obligation ends as it dealt with the failure of the defendant to present its *Brady* claim to the District Court in the first instance. *Id.* at 67 ("We agree with the government that the defendant failed to raise any *Brady*-based claim before the district court. . . .The thrust of the defendant's argument before the district court confirms his eschewal of the *Brady* error rule. He made no contention below that the government either had transgressed *Brady* or had failed to turn over *Brady* material."). In this case, Mr. Laureano did present a Motion for New Trial under Brady, as even the government has conceded. All of the elements of a *Brady* claim were established by petitioner Laureano Salgado as the evidence at issue was exculpatory, was suppressed by the United States, "and prejudice [e]nsued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999); see also Banks v. Dretke, 540 U.S. 668, 691 (2004).

In Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009), this Court stated that:

The Court of Appeals [for the Ninth Circuit] went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's

postconviction liberty interest. After identifying Osborne's possible liberty interests, the court concluded that the State had an obligation to comply with the principles of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. In that case, we held that due process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial. The Court of Appeals acknowledged that nothing in our precedents suggested that this disclosure obligation continued after the defendant was convicted and the case was closed, 521 F.3d, at 1128, but it relied on prior Ninth Circuit precedent applying 'Brady as a postconviction right,' *id.*, at 1128-1129 (citing Thomas v. Goldsmith, 979 F.2d 746, 749-750 (C.A.9 1992)).

The Court of Appeals for the First Circuit interpreted this Court's language in Osborne, as well as in Skinner v. Switzer, 562 U.S. 521 (2011) as meaning that there cannot be a Brady obligation if the evidence did not come into being until after trial. As explained herein, the First Circuit erred.

B. The First Circuit's Holding Is Inconsistent with The *Brady* Rule

The decision by the First Circuit Court of Appeals is plainly incorrect, as it both contradicts the bright-line holding of Brady and the express purpose of the Brady rule.

The Brady rule was derived from the Due Process Clause of the Fourteenth Amendment which compels such disclosure while a direct appeal is pending. As this Court stated in Brady, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87; see also United States v. Agurs, 427 U.S. 97, 116, 120 (1976) (noting that a fair trial requires that "evidence tending to show

innocence, as well as that tending to show guilt, be fully aired before the jury," and that knowing use of perjured testimony results in the "corruption of the truth-seeking function of the trial process"). In affirming the District Court's holding that the prosecution had no Brady obligation after obtaining a verdict at trial, the Panel of the First Circuit also applied the judge made rule of waiver stating:

Tellingly, neither Laureano-Salgado nor Ramírez-Rivera attempts to distinguish Maldonado-Rivera. Ramírez-Rivera tries to distinguish Osborne and Tevlin as situations involving *habeas* proceedings, while his involves a direct appeal — to quote his brief: "A direct appeal is not a postconviction proceeding," the implication being that neither Osborne nor Tevlin controls his case. And Laureano-Salgado tries to distinguish Tevlin on that basis too (his brief says nothing about Osborne). But they offer no persuasive reasoning or authority to support their *habeas*-is not-a-postconviction contention. Maybe a good argument exists that might help them. But because their suggestion is not sufficiently developed to permit us to pass on it intelligently, we consider it waived and leave its resolution for another day. See, e.g., *Patton v. Johnson*, 915 F.3d 827, 838 (1st Cir. 2019).

Waiver, a judge-made doctrine,² was also used by the First Circuit to refuse to review a conviction for life imprisonment for a person, Mr. Laureano Salgado, who may not be guilty at all according to the United States' own evidence presented in two subsequent trials of La Rompe ONU, which it suppressed while the appeal was pending.

² Kontrick v. Ryan, 540 U.S. 443, 458 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.").

The First Circuit erred when it applied the waiver doctrine. In their brief in response to Mr. Laureano’s Brady claim before the First Circuit, the United States specifically argued that the prosecution has no obligation to disclose newly discovered evidence when the case is on a direct appeal. As framed by the government: “[Mr. Laureano Salgado’s] assertion that [his] Rule 33 motion should have been considered under the less burdensome *Brady* analysis because the new evidence arose while their case was pending on direct appeal is also unpersuasive.” The government principally relied on Hebert v. Milyard, 497 Fed. App’x 855 (10th Cir. 2012) which the government contended in its brief, “explicitly rejected the argument that Brady applies to evidence the government first acquires while the conviction is pending on direct appeal”.

Incredibly, nowhere did the First Circuit’s Panel Opinion discuss the United States’ position that Brady v. Maryland is not applicable to a prosecutor’s duty to disclose exculpatory evidence while an appeal is pending or its reliance on Hebert v. Milyard, 497 Fed. App’x 855 (10th Cir. 2012). Without any critical analysis, the First Circuit’s panel opinion states that there is no such obligation or duty under Brady and cites to the waiver doctrine.

In even more extreme circumstances, the Supreme Court and all other Circuit Courts have held that a federal appellate court is justified in resolving an issue not passed at the district court, as where the proper resolution is beyond any doubt, or

where "injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976) (citations omitted); Feld v. Feld, 688 F.3d 779, 782-83 (D.C. Cir. 2012) (a purely legal argument at summary judgment can be reviewed on appeal even if not preserved); Vintero Corp. v. Corporacion Venezolana, 675 F.2d 513, 515 (2d Cir. 1982) (citing various circuits ss authority for appellate consideration of new issues if additional facts not required, or pure legal issue involved; unjust enrichment issue considered when only argument for imposition of constructive trust raised below); Brantley v. Wysocki, 662 Fed. Appx. 138 (3rd Cir. 2016) (citing Singleton and addressing the ultimate issue on summary judgment as an exercise of its discretion); United States v. Faulls, 821 F.3d 502, 512 (4th Cir. 2016) (holding that when "the question before us is purely one of law, and we perceive no injustice or unfair surprise" it can be addressed for the first time on appeal); Green v. Levis Motors, Inc., 179 F.3d 286, 293 (5th Cir. 1999) (holding that waiver does not apply "to a pure question of law"); AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510 (7th Cir. 2001) (addressing an issue of law regarding the interpretation of a *forum non conveniens* clause); Borntrager v. Cent. States Se. & Sw. Areas Pension Fund, 577 F.3d 913, 924 (8th Cir. 2009) (holding that whether a trust agreement provision was preempted by ERISA was a purely legal question and therefore the court could review de novo "for the first time on appeal"); Native Ecosystems Council v. Weldon, 697 F.3d 1043 (9th Cir. 2012) (citing Singleton and addressing issue never

raised in the District court to prevent miscarriage of justice; and when the “issue is purely one of law.”); United States v. Tubens, 691 Fed. Appx. 507, 510 (10th Cir. 2017) (quoting Singleton and adjudicating resolution of an *Alleyne* claim, although raised for the very first time on appeal, the proper resolution is beyond any doubt”); Strickland v. Alexander, 772 F.3d 876 (11th Cir. 2014). The First Circuit’s Panel decision cannot be squared with this precedent. This Court should grant review to resolve the conflict between the First Circuit’s decision below and this precedent.

Plainly stated, a person such as Mr. Laureano, whom, the United States claimed in the La Rompe ONU trials was not involved in the murder of Pekeke, may be serving a sentence of life imprisonment because of the First Circuit’s inaction. By promoting form over substance, the First Circuit has increased the likelihood of mistake leading directly to an injustice and, hence, unfair application of the judge created waiver doctrine.

C. This Court Should Exercise its Supervisory Powers and Clarify That The Prosecution’s Brady Obligation is Ongoing While a Direct Appeal Is Pending

In holding that the *Brady*’s obligation for prosecutors ends after a conviction at the trial, that First Circuit relied for support in this Court’s in Dist. Attorney’s Office for the Third Judicial Dist.v. Osborne, 557 U.S. 52 (2009); and Skinner v. Switzer, 562 U.S. 521 (2011). But none of those postconviction decision have anything to do with the due process right of an accused on appeal to obtain

exculpatory information in the possession of the prosecution while a direct appeal is pending.

In Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) the Supreme Court found that a prisoner has no liberty interest in "any procedures available to vindicate an interest in state clemency." Id. at 68. The Court's rationale was based upon its view that "clemency is inherently discretionary and subject to the whim, or grace, of the decisionmaker; it is, in other words, a form of relief to which a prisoner has no right." Id. In other words, the Osborne Court was not dealing with a fundamental interest, such as due process, as it held that there is no liberty interest in receiving clemency, and thus rejected the existence of any subsidiary liberty interest regarding the adequacy of state procedures capable of granting that relief. Osborne is distinguishable as this case deals with the due process violation that occurs while an appeal is pending and not whether the government has a Brady obligation to disclose exculpatory evidence during a post-conviction proceeding (habeas corpus, Title 28 United States Code Sections 2254 or 2255) and after the conviction is final.

Skinner v. Switzer is also distinguishable as the issue before the Court was whether a convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action under § 1983, or whether such a claim may be asserted only in a petition for writ of habeas corpus. In Skinner, despite an

alternative suspect, evidence that defendant Skinner likely did not possess the strength or coordination to commit the murders because of drug consumption, and an abundance of untested DNA evidence, a jury convicted Skinner of capital murder and sentenced him to death. In Skinner, Texas had a large quantity of DNA evidence that could have conclusively identified the true killer but they refused to test it, including vaginal swabs taken from Busby at the time of her autopsy; Busby's fingernail clippings; a knife found on the front porch of Busby's house; a knife found in a plastic bag in the living room of the same house; a dishtowel found in the same plastic bag; a windbreaker jacket found in the living room next to Busby's body; and any hairs found on Busby's hands that had not been destroyed by previous testing. Id. at 12-13. In Skinner, this Court held that Skinner may seek access to DNA evidence to prove his innocence by filing a federal civil rights lawsuit, under Section 1983 rather than having to undertake the more difficult process of filing a petition for a writ of habeas corpus.

Similarly, the prosecutor was obliged by Brady to disclose the exculpatory evidence while the appeal is pending so that Petitioner Laureano could prove his innocence. As explained by the Ninth Circuit, “the prosecutor owes a distinct, if not heightened, disclosure obligation to the defendant once judicial proceedings commence.” See 672 F.3d at 513 (citing Arizona v. Youngblood, 488 U.S. 51, 56-58 (1988)).

Other Circuit courts, including the Tenth Circuit have held that Brady's "duty to disclose is ongoing and extends to all stages of the judicial process," Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) (where the evidence arose after trial but during the direct appeal). The Second, Sixth, Seventh and Ninth Circuits have all held that the prosecutor's obligations to disclose exculpatory information extends through direct appeal as required by Brady. Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001); Wogenstahl v. Mitchell, 668 F.3d 307, 325 n. 3 (6th Cir. 2012), cert. denied, 133 S. Ct. 311 (2012); Runnigeagle v. Ryan, 686 F.3d 758, 772 n. 6 (9th Cir. 2012) (until the conclusion of the direct appeal, a prosecutor's has a disclosure obligation under Brady).

Thus, as all these Circuit Courts have correctly held, this Court's firmly established precedent is that, until such time as the conviction becomes final, a prosecutor has an obligation under Brady to ensure that the defendant receives due process of law by disclosing exculpatory information. As succinctly explained by an experienced trial judge:

The prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for postconviction relief. Any other conclusion would, in the words of the Brady Court, 'cast [] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice ' 373 U.S. at 88.

Monroe v. Butler, 690 F. Supp. at 525. See also Imbler v. Pachtman, 424

U.S. 409, 427, fn. 25 (1976) (“[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”). As a result of the Brady violations in this case, without being fully aware of the material exculpatory evidence known to the United States, Petitioner Laureano Salgado was stripped of the fairness he is due under the Constitution.

This Court should issue a writ of certiorari in this case to rule that the prosecutor's due process obligation under Brady v. Maryland continues at least through the direct appeal process and remand this matter to the First Circuit Court of Appeals.

For all these reasons the petition for a writ of certiorari should be granted.

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October 31, 2019

United States Court of Appeals For the First Circuit

Nos. 17-1052
17-1053

UNITED STATES OF AMERICA,

Appellee,

v.

JOSÉ LAUREANO-SALGADO, a/k/a Geo;
PEDRO L. RAMÍREZ-RIVERA, a/k/a Peter Pai,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. William E. Smith, U.S. District Judge]

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

Carlos M. Sánchez La Costa for appellant José Laureano-Salgado.

Irma R. Valldejuli for appellant Pedro L. Ramírez-Rivera.
Victor O. Acevedo-Hernández, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Francisco A. Besosa-

Martínez, Assistant United States Attorney, were on brief, for appellee.

August 2, 2019

THOMPSON, Circuit Judge.**Overview**

The government charged "La ONU" gangbangers José Laureano-Salgado and Pedro Ramírez-Rivera (sometimes collectively called "appellants") with helping murder a "La Rompe ONU" gangbanger nicknamed "Pekeke" (real name Christian Toledo-Sánchez), among other crimes¹ – thus violating the Violent Crimes in Aid of Racketeering ("VICAR") statute, see 18 U.S.C. § 1959(a)(1), as well as a statute banning the use or carry of a firearm in relation to a crime of violence, see 18 U.S.C. § 924(c)(1)(A).² Killing La Rompe members, the government alleged and proved, was central to La ONU's mission. And vice versa.

A jury ultimately convicted Laureano-Salgado and Ramírez-Rivera of these and other gang-related crimes. And we affirmed. See Ramírez-Rivera, 800 F.3d at 12. Laureano-Salgado and Ramírez-Rivera later moved the district judge for a new trial

¹ A gangbanger (at the risk of appearing pedantic) is "a member of a violent group of young men, especially ones who use guns and commit crimes." See Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/gangbanger> (last visited August 1, 2019).

² We mention these convictions because those are the ones germane to today's case. Readers seeking more details about their other convictions can find them in United States v. Ramírez-Rivera, 800 F.3d 1 (1st Cir. 2015), which also provides some background on the two rival gangs. And like we did there, going forward we will refer to La Rompe ONU as "La Rompe."

premised on allegations of newly-discovered evidence that supposedly showed Pekeke died at the hands of La Rompe, not La ONU.³ The judge denied the motion, however. Unhappy with this ruling, Laureano-Salgado and Ramírez-Rivera ask us to reverse.⁴ Unpersuaded by their arguments (discussed in a bit), we affirm.

**Testimony at Appellants' Trial
About Pekeke's Murder**

Among the witnesses called at appellants' trial were three cooperating coconspirators: ex-La ONU members Wesley Figueroa-Cancel, José Gutiérrez-Santana, and Christian Figueroa-Viera. Pieced together, their testimony presented the following picture of the events leading to Pekeke's death.⁵

Figueroa-Cancel, Gutiérrez-Santana, and Laureano-Salgado attended a meeting in August 2010 where La ONU bosses planned Pekeke's murder. Their plot contemplated that a man named "Joshua" would do the deed (Joshua was a non-La ONU member whose grandmother lived right next door to Pekeke). La ONU members – including Ramírez-Rivera (who participated by speakerphone during

³ Laureano-Salgado filed for a new trial first. Ramírez-Rivera then filed a motion joining and adopting Laureano-Salgado's motion and arguments – a motion the judge granted. But because they raised the same basic claims, we follow the government's lead and treat the two filings as a single new-trial motion.

⁴ They filed separate appeals. But we consolidated them for purposes of oral argument only (they submitted separate briefs).

⁵ The record reflects various spellings of Pekeke. For simplicity's sake, we use the one used in the parties' briefs.

the meeting) – promised to pay Joshua for his service. Following the orders of their La ONU superiors to a T, Gutiérrez-Santana gave Joshua a gun and Laureano-Salgado gave Joshua a car. La ONU leaders also promised to send a rescue team to get Joshua out of the housing project after he offered Pekeke, just in case Pekeke's La Rompe allies fought back.

Joshua killed Pekeke the next day (Joshua called Figueroa-Cancel on a cellphone during the killing so Figueroa-Cancel could hear Pekeke die) – with Laureano-Salgado, Ramírez-Rivera, Gutiérrez-Santana, and at least two other La ONU members serving on the rescue squad. At a meeting held right after the shooting, La ONU associates – including Laureano-Salgado and Ramírez-Rivera – told Figueroa-Viera what had happened.

**Appellants' Motion for New Trial
And the Judge's Ruling**

Fast-forward to after we affirmed Laureano-Salgado's and Ramírez-Rivera's convictions and sentences. Defense counsel wrote the government, saying that he had heard that ex-La Rompe members Luis Yanyoré-Pizarro and Oscar Calviño-Acevedo testified in proceedings against La Rompe associates that La Rompe had killed Pekeke as part of a power struggle within La Rompe. Convinced that this testimony undercut the theory pushed by prosecutors in Laureano-Salgado and Ramírez-Rivera's case – *i.e.*, that *La ONU* had murdered La Rompe-leader Pekeke as part of the *La ONU* racketeering

conspiracy – counsel asked the government to turn over materials "regarding" Yanyoré-Pizarro's and Calviño-Acevedo's allegations. Despite disputing any notion that these allegations exculpated the defendants, the government gave counsel a package containing the documents in its possession.

Laureano-Salgado and Ramírez-Rivera then asked the judge for a new trial, claiming that the produced materials constituted newly-discovered evidence showing La Rompe had murdered Pekeke, not La ONU. And their court filings walked the judge through the relevant statements: Yanyoré-Pizarro's grand-jury testimony in May 2015, his interviews with agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (usually referred to as "ATF") in January 2016, and his trial testimony in October 2016; plus Calviño-Acevedo's trial testimony in December 2015 – all given in a case against La Rompe members.⁶

We just hit the highlights, offering only what is needed to help put some of the arguments (discussed later) into perspective.

⁶ "Trials," of course, "are about charges in the indictment." United States v. Miller, 91 F.3d 1160, 1163 (8th Cir. 1996) (Richard S. Arnold, C.J.). And the indictment in the La Rompe case did not charge any La Rompe members with the VICAR murder of Pekeke.

During questioning about La Rompe's inner workings before the grand jury, Yanyoré-Pizarro recounted his relationship with La Rompe members "Trenza" and "Papito Mojica." "They were my leaders when they killed [Pekeke]," Yanyoré-Pizarro said. Pekeke "was our leader, so they kept the — so they took over." Yanyoré-Pizarro added that, although they remained with La Rompe, Pekeke's death triggered an internal war for power. "What happened," he said, "was when my leader, [Pekeke], was killed, there were people involved from . . . La Rompe . . . itself because of this very same — for power," and "they ended up dividing up" Pekeke's drug points. After Pekeke's death, Trenza, according to Yanyoré-Pizarro, became "in charge of around fourteen drug points, which is what [Pekeke] left."

In the interview with the ATF, Yanyoré-Pizarro mentioned some tension between La Rompe leaders in the months before Pekeke's death. For example, Yanyoré-Pizarro discussed how some La Rompe bosses at the La Rompe-controlled housing project in Alturas de Cupey had asked Pekeke "for help" with their drug business (because he had ties to marijuana traffickers on the mainland, apparently). But Pekeke had refused their request. Yanyoré-Pizarro also mentioned a conversation he had had with a La Rompe member named "Endrick." Endrick said that he told a La Rompe member named "Frank" that Pekeke was the "boss" — a statement that caused Frank

to slap Endrick's face. Pekeke later told Yanyoré-Pizarro that he told Frank to apologize to Endrick because Endrick was right about who the "boss" was. But Frank just looked at him and left.

More, Yanyoré-Pizarro disclosed to ATF agents that Joshua was from the Luis Llorén Torres housing project and that Pekeke had supplied "the vehicles and the firearms" used to kill "Shaka," a drug-point leader there. Joshua "used to hang out with Endrick," though Endrick swore Joshua "was not part of the rival gang."

More still, Yanyoré-Pizarro admitted that although he was not there when Pekeke died, he later spoke to someone named "Pipen" who was. And Pipen fingered Joshua — who lived with his [Joshua's] grandmother in the same housing project as Pekeke — as the killer. Pipen also said that when Pekeke's cousin wanted a piece of the profits from Pekeke's old drug points, Pipen warned him "to stop talking in a threatening manner" or else "something could happen to him like what happened to [Pekeke]."

Called by the government at a La Rompe trial, Yanyoré-Pizarro testified (in response to questions from the prosecution about how he got involved with La Rompe) that when Pekeke moved to the Los Lirios housing project and became "the head honcho," he (Yanyoré-Pizarro) started running Pekeke's drug points, committing

robberies, and killing people.⁷ But when Pekeke "was killed," Yanyoré-Pizarro fled from Los Lirios because Pekeke's men thought Yanyoré-Pizarro had flipped and had helped kill Pekeke. Asked to discuss his killing people for La Rompe, Yanyoré-Pizarro said "that we were at war with an opposing group, and we also had internal wars."

Testifying as a government witness at a different La Rompe trial, Calviño-Acevedo noted (in response to questions from the prosecution about why he stopped going to a particular drug point) that "there was internal friction between us" La Rompe members.⁸ Questioned about "what that internal war consisted of," Calviño-Acevedo explained that "the internal war was that there were rumors" that La Rompe members had murdered Pekeke.

Laureano-Salgado and Ramírez-Rivera's new-trial filings argued that these pieces of "recently disclosed evidence" show that La Rompe – and *not La ONU* – had murdered Pekeke to further the personal interests of La Rompe members, which they said "undermines confidence in the [j]ury VICAR verdict in this case."

⁷ This La Rompe trial involved these defendants: Rubén Cotto-Andio, José D. Resto-Figueroa, and Carlos Velázquez-Fontánez.

⁸ This La Rompe trial involved these defendants: Pedro Vigió Aponte, Reinaldo Rodríguez Martínez, Víctor M. Rodríguez Torres, Tarsis Guillermo Sánchez Mora, and Carlos M. Guerrero Castro.

Opposing the motion, the government protested that Laureano-Salgado and Ramírez-Rivera could not show that these statements would probably lead to an acquittal at a retrial because the evidence did not come from witnesses with firsthand knowledge of "the planning and execution" of Pekeke's murder.

Applying an actual-probability-of-acquittal standard,⁹ the judge denied the motion for three alternative reasons: first that the statements "would likely not outweigh the eye-witness testimony" given at Laureano-Salgado and Ramírez-Rivera's "original trial by three of [their] fellow La ONU members"; second that the statements had very "limited probative" worth because they were "too unclear (and seemingly inconsistent)," which undercut Yanyoré-Pizarro's "credibility" as well; and third that even if the statements "could be construed as providing a convincing and consistent narrative . . . of Pekeke's murder," they would probably not be admissible at a retrial because they were not made on personal knowledge and violated the rule against hearsay. The judge did specifically note that Yanyoré-Pizarro "would be permitted to testify regarding certain internal conflicts within La Rompe . . . of which he has personal knowledge,

⁹ Which is the standard applied to "most" new-trial motions bottomed on newly-discovered evidence (more on this later). United States v. Maldonado-Rivera, 489 F.3d 60, 66 (1st Cir. 2007).

including some that involved Pekeke." But according to the judge, "this, without more, is insufficient to justify" granting the new-trial motion.

Principal Appellate Arguments

That brings us to today, with Laureano-Salgado and Ramírez-Rivera mounting a multifaceted challenge to the judge's new-trial ruling. Their lead claim is that the government's nondisclosure of these statements, which it had in its hands while their case was on appeal here, violated the guarantees set out in Brady v. Maryland, 373 U.S. 83 (1963), and its offspring – guarantees that require prosecutors to reveal material, exculpatory and impeaching evidence, see Maldonado-Rivera, 489 F.3d at 66-67 (discussing the Brady line of cases). Consistent with this Brady-based theory, they then argue that they need only show that the statements undermine confidence in the original verdict, not that the statements would probably lead to a different outcome at retrial. And they insist that they can meet the undermine-confidence standard because the statements counter the government's theory that La ONU iced Pekeke, at least as they see it.¹⁰

¹⁰ We can make quick work of two of their other arguments:

One argument blasts the judge for denying their new-trial motion without an evidentiary hearing. "[E]videntiary hearings on new trial motions in criminal cases are the exception rather than

As a fallback, Laureano-Salgado alone argues that he can satisfy "the more onerous" actual-probability-of-acquittal standard because of the statement's exculpatory value.¹¹ And by

the rule." United States v. Peake, 874 F.3d 65, 72 (1st Cir. 2017) (quoting United States v. Connolly, 504 F.3d 206, 220 (1st Cir. 2007)). Yet – as the government notes, without correction – Laureano-Salgado and Ramírez-Rivera never asked the judge for an evidentiary hearing, which "ordinarily spells defeat for a contention that one should have been held." See United States v. Cyr, 337 F.3d 96, 101 n.5 (1st Cir. 2003) (quoting United States v. Tardiff, 969 F.2d 1283, 1286 (1st Cir. 1992)). And they make no developed argument for why the ordinary rule should not apply here.

The other argument accuses prosecutors of misconduct by presenting perjured testimony at their trial – the theory being that Yanyoré-Pizarro's and Calviño-Acevedo's statements show that Figueroa-Cancel, Gutiérrez-Santana, and Figueroa-Viera lied when they blamed La ONU – and La ONU members Laureano-Salgado and Ramírez-Rivera – for Pekeke's murder. But this argument is twice waived: first because Laureano-Salgado and Ramírez-Rivera did not present it below, see McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991) (explaining the baseline rule "that theories not raised squarely in the district court cannot be surfaced for the first time on appeal"); and second because, while they toss around words like "perjury" and "misconduct" here, they "provide[] neither the necessary caselaw nor reasoned analysis to show that [they are] right about any of this," see Rodríguez v. Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011) (adding that "[j]udges are not mind-readers, so parties must spell out their issues clearly, highlighting the relevant facts and analyzing on-point authority"); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (stressing that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work").

¹¹ Ramírez-Rivera's brief mentions the "more stringent test" too, but only in *passing*: not only does he fail to list the test's elements, he – as the government notes, without contradiction – makes zero attempt to apply that standard to his situation. True, he did move below to adopt Laureano-Salgado's arguments. But he did nothing here to adopt Laureano-Salgado's opening-brief

Laureano-Salgado's reckoning, Yanyoré-Pizarro's statements are "very favorable to [his] defense," given how they detail "confrontations and problems Pekeke had with other La Rompe . . . leaders" – thus indicating "a motive for his killing." Taking aim at the judge's credibility finding, Laureano-Salgado also claims that no law-enforcement personnel testified that Yanyoré-Pizarro's statements were "false" or "contradicted by other evidence." He then says that the judge stumbled by deeming Yanyoré-Pizarro's statements inadmissible – in his telling these "statement[s] are fully admissible" under the following theories: "as rebuttal evidence"; "as a constitutional matter," since "an accused has a

arguments. See, e.g., Ramírez-Rivera, 800 F.3d at 11 n.1 (discussing how appellants prosecuting consolidated appeals may adopt each other's arguments).

True too, Ramírez-Rivera moved here for leave to adopt the arguments presented in Laureano-Salgado's *reply* brief (in lieu of filing his own reply brief). And Laureano-Salgado's reply rehashed arguments he made in his initial brief – *i.e.*, that he can satisfy both the Brady-new-trial standard and the ordinary-new-trial standard. Taking up Ramírez-Rivera's motion, we wrote that "leave of court is not required for adoption" but warned that he ran the risk that we might find Laureano-Salgado's reply-brief arguments "not transferable or waived." Regrettably for Ramírez-Rivera, he gets no help from Laureano-Salgado's reply brief, and for a simple reason: Ramírez-Rivera did not adequately develop in his opening brief any argument tied to the ordinary-new-trial standard, and he cannot use a reply brief to cure that deficiency. See generally Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990) (holding that arguments not made in an opening brief but only in a reply brief are waived).

constitutional right to present a complete defense to all charges" laid "against him or her"; and "as statements against interest," since the "statements implicated" Yanyoré-Pizarro in Pekeke's murder. Leaving no stone unturned, Laureano-Salgado adds that the judge's inadmissibility ruling conflicts with the judge's later decision to let Yanyoré-Pizarro testify at the retrial of a La ONU codefendant named Ismael Cruz-Ramos – a decision that provides "the best argument" for why the "statements are fully admissible," at least in Laureano-Salgado's mind.¹² Ever-persistent, Laureano-Salgado argues as well that Calviño-Acevedo's testimony

¹² The retrial occurred a few months after denying Laureano-Salgado and Ramírez-Rivera's new-trial motion. Here is what we know about what went down (unfortunately, we do not have the complete transcripts). After a few days of trial, Cruz-Ramos's lawyer told the government that he had one defense witness, Yanyoré-Pizarro. On the next trial day (with the judge's permission), Cruz-Ramos's lawyer later made an extended offer of proof – via a *voir-dire* examination of Yanyoré-Pizarro (outside the jury's presence) – concerning the admissibility of Yanyoré-Pizarro's testimony. During that process, Yanyoré-Pizarro admitted that he was not present when Pekeke got killed. But he claimed that he heard from a fellow La Rompe member that Joshua had "pulled the trigger." He then explained that La Rompe must have had something to do with the murder, given the beef between Pekeke and Frank. But he also stressed that Frank worked with *La ONU* to kill Pekeke, saying (*italics ours*) that "it was *La ONU* who went in and did the job." Ultimately, the judge thought Yanyoré-Pizarro's testimony might fit within the coconspirator exception to the hearsay rule. "So," the judge said, "I'm not sure the opinion is actually impermissible, if he lays a foundation for it" (notice how the ruling is stated in the conditional) – though, Cruz-Ramos chose *not* to call Yanyoré-Pizarro as a witness (there's no suggestion that the government called Yanyoré-Pizarro to the stand).

"corroborate[s]" Yanyoré-Pizarro's narrative (that's the extent of what he has to say about Calviño-Acevedo, however). Putting it all together, he contends that the newly-discovered evidence would probably lead to an acquittal on the VICAR-related counts if there were a new trial.

Defending the judge's ruling to the hilt, the government argues that the actual-probability-of-acquittal standard governs because the "new evidence" arose post-conviction. And in its view, the judge hardly erred in finding that standard not met here, because Yanyoré-Pizarro and Calviño-Acevedo had no personal knowledge of who killed Pekeke, but channeled hearsay instead; also because the statements were too speculative since Yanyoré-Pizarro accused many persons of possibly being behind Pekeke's murder; and finally because the statements corroborated key facts presented by prosecutors at trial (e.g., that Joshua shot Pekeke).

Our Take¹³

Dueling Legal Standards

To get a new trial based on newly-discovered evidence, a defendant ordinarily must show that the evidence (1) was either

¹³ A defendant must file a new-trial motion based on newly-discovered evidence within three years of the verdict or finding of guilt. See Fed. R. Crim. P. 33(b)(1). Laureano-Salgado and Ramírez-Rivera filed their motion outside that time restriction. But the government did not raise a timeliness objection below. And it expressly chose not to press one in its appellate briefing. So we say no more about that subject. See United States v. Del-

unknown or unavailable to him during the trial; (2) could not have been uncovered sooner with diligence; (3) is material, not just cumulative or impeaching; and (4) is sufficiently compelling that it would probably produce an acquittal at a retrial – a hefty burden, to be sure. See, e.g., Peake, 874 F.3d at 69; United States v. Flores-Rivera, 787 F.3d 1, 15 (1st Cir. 2015); Del-Valle, 566 F.3d at 38; Maldonado-Rivera, 489 F.3d at 65-66. We hedge with "ordinarily" because if the defendant bases his new-trial motion on an alleged Brady violation, a more defendant-friendly standard takes center stage: he must still satisfy the first and second elements (unavailability and due diligence), but caselaw replaces the third and fourth elements (materiality and prejudice) with a

unitary requirement that the defendant need demonstrate only a *reasonable probability* that, had the evidence been disclosed to the defense in a timely manner, the result of the proceeding would have been different.

Peake, 874 F.3d at 69 (emphasis added and quotation marks omitted).

So rather than having to show "'actual probability that the result

Valle, 566 F.3d 31, 38 (1st Cir. 2009) (suggesting that the Rule 33(b)(1) time-bar "is non-jurisdictional and may be forfeited" (citing Eberhart v. United States, 546 U.S. 12, 19 (2005) (per curiam))); see generally United States v. Alverio-Meléndez, 640 F.3d 412, 423 n.6 (1st Cir. 2011) (noting that because we could resolve the defendant's new-trial argument "on the merits and in favor of the government," we had no need to decide whether his new-trial "motion was untimely").

would have differed,'" a defendant need show only "something sufficient to 'undermine[] confidence'" in the jury's verdict. See United States v. Mathur, 624 F.3d 498, 504 (1st Cir. 2010) (emphasis and alteration in original) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)); accord Flores-Rivera, 787 F.3d at 15-16; see also United States v. Sepulveda, 15 F.3d 1216, 1220 (1st Cir. 1993) (explaining that the "'undermine confidence' formula suggests that reversal might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal").

Under either scenario, we will reverse a judge's new-trial denial only for an abuse of discretion. See, e.g., Connolly, 504 F.3d at 211-12. And we will find an abuse of discretion only when no reasonable person could agree with the judge's decision. See, e.g., United States v. Jones, 748 F.3d 64, 69 (1st Cir. 2014). This is as it should be. After all, the judge had a box-seat view of the trial, making him intimately familiar with the case's nuances – which justifies our giving his opinion on "the likely impact of newly disclosed evidence . . . *considerable deference*." See Mathur, 624 F.3d at 504 (emphasis added). We also keep in mind that the new-trial remedy "must be used sparingly, and only where a miscarriage of justice would otherwise result." United States v. Conley, 249 F.3d 38, 45 (1st Cir. 2001).

We shift now from the general to the specific.

Governing Legal Standard

Laureano-Salgado and Ramírez-Rivera contend that a Brady violation occurred because the government acquired the "new evidence" while their case was here on appeal yet failed to disclose that evidence at that time.¹⁴ Ergo, they say, the judge should have applied the more lenient Brady-based standard in analyzing their new-trial motion. But they cite no controlling case holding that Brady obligations apply to evidence the government acquired post-verdict. That is probably because binding precedent holds that where, as here, the record contains no indication that the government knew about these statements "at any time prior to or during [their] trial," Brady does not operate and so the more arduous ordinary new-trial standard controls. See Maldonado-Rivera, 489 F.3d at 67; see generally Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 67-69 (2009) ["Osborne"] (noting that Brady requires disclosure only

¹⁴ No one disputes that the government learned about the statements spotlighted in appellants' new-trial motion *after* the verdict in their case: Laureano-Salgado and Ramírez-Rivera's trial ended in February 2013; Yanyoré-Pizarro's grand-jury testimony occurred in May 2015, his ATF interviews went down in January 2016, and his trial testimony happened in October 2016; and Calviño-Acevedo's trial testimony happened in December 2015. And because the Ramírez-Rivera decision came down in August 2015, only Yanyoré-Pizarro's May 2015 grand-jury testimony fits into their discovered-while-the-case-is-on-direct-appeal category.

of exculpatory and impeaching info that existed at the time of the original trial, emphasizing that "Brady is the wrong framework" for evaluating the government's post-trial disclosure obligations); accord Tevlin v. Spencer, 621 F.3d 59, 69-70 (1st Cir. 2010); see generally Skinner v. Switzer, 562 U.S. 521, 536 (2011) (commenting that "Brady announced a constitutional requirement addressed first and foremost to the prosecution's conduct pretrial").

Tellingly, neither Laureano-Salgado nor Ramírez-Rivera attempts to distinguish Maldonado-Rivera. Ramírez-Rivera tries to distinguish Osborne and Tevlin as situations involving *habeas* proceedings, while his involves a direct appeal – to quote his brief: "A direct appeal is not a postconviction proceeding," the implication being that neither Osborne nor Tevlin controls his case. And Laureano-Salgado tries to distinguish Tevlin on that basis too (his brief says nothing about Osborne). But they offer no persuasive reasoning or authority to support their *habeas-is-not-a-postconviction* contention. Maybe a good argument exists that might help them. But because their suggestion is not sufficiently developed to permit us to pass on it intelligently, we consider it waived and leave its resolution for another day. See, e.g., Patton v. Johnson, 915 F.3d 827, 838 (1st Cir. 2019).

Perhaps hoping to scare us into action, Laureano-Salgado contends that the government believes that prosecutors do not have "even an ethical" duty "to reveal material information known to [them] after a guilty verdict, but before the appeal is concluded, because the evidence was not in existence at the time of trial." The government says no such thing, however. Actually, the government candidly acknowledges that "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (going on to hold that prosecutorial immunity applies even where a prosecutor commits a Brady infraction because, among other reasons, "[t]he possibility of personal liability" might make prosecutors unwilling to comply with this ethical duty). And Laureano-Salgado makes no Imbler-based argument, even after the government pointed out that "[b]ecause none of the information relevant here casts doubt on [their] convictions, the prosecutors . . . had no occasion to disclose it" before their "request" (though we imply no view about whether any such argument would be tenable).

No Abused Discretion

Laureano-Salgado's fallback argument – that he deserves a new trial even under the ordinary standard and that the judge

slipped in concluding otherwise – fails because he did not meet his heavy burden of showing that the impact of the statements he champions is so strong that a fresh jury (apprised of their content) would probably vote to acquit him on the VICAR-related charges. See United States v. Vigneau, 337 F.3d 62, 69 (1st Cir. 2003) (noting that satisfying this part of the ordinary test is no easy feat because, among other things, we must give the district judge's views "considerable deference" (quoting United States v. Falú-González, 205 F.3d 436, 443 (1st Cir. 2000))); see also United States v. Hernández-Rodríguez, 443 F.3d 138, 143 (1st Cir. 2006) (declaring that "we have no discretion to grant a motion for new trial if any one of the four factors [in the ordinary test] is lacking").¹⁵ We explain.

Both sides spend a lot of time sparring over whether the at-issue evidence presents admissibility or credibility problems. But let's assume – without deciding, of course – that Laureano-Salgado is right that neither problem lurks here. Even so, he is not entirely out of the woods.

The actual-probability-of-acquittal standard requires "an evaluation of the new evidence in juxtaposition to the evidence

¹⁵ We focus on Laureano-Salgado's contentions because (as we noted earlier) Ramírez-Rivera waived any arguments based on the ordinary standard that he might have had.

actually admitted at trial." United States v. Josleyn, 206 F.3d 144, 157 (1st Cir. 2000). Here, the new statements corroborate many of the key facts established at trial – like how Joshua lived with his grandmother in the same housing project as Pekeke and how Joshua shot Pekeke. The statements also show that Yanyoré-Pizarro basically suggested that *different persons* had *different motives* for killing Pekeke: (a) La Rompe's Trenza and Papito Mojica, apparently to take over Pekeke's drug points; (b) La Rompe bosses at the Alturas de Cupey housing project, supposedly because Pekeke had refused their help request; (c) La Rompe's Frank, apparently because Frank and Pekeke could not agree on who was "the boss" – in his last version of this narrative, Yanyoré-Pizarro had Frank working with *La ONU* to gun down Pekeke; and (d) gangbangers from the Luis Llorén Torres housing project, supposedly because Pekeke had orchestrated their leader's murder. At any new trial the jury would weigh Yanyoré-Pizarro's shifting stories against Figueroa-Cancel's, Gutiérrez-Santana's, and Figueroa-Viera's consistent testimony implicating Laureano-Salgado and Ramírez-Rivera in Pekeke's slaying. And the jury would also weigh (on the one hand) the absence of evidence indicating that Yanyoré-Pizarro was present when La Rompe (allegedly) planned Pekeke's murder, and (on the other hand) the existence of evidence showing that Figueroa-Cancel, Gutiérrez-Santana, and Figueroa-Viera were present when La

ONU plotted Pekeke's demise and that they – along with Laureano-Salgado and Ramírez-Rivera – helped La ONU take Pekeke out.

Having performed the requisite evidentiary comparison, we agree with the district judge that the statements are not "sufficiently compelling" as to generate a realistic probability of an acquittal on the VICAR-related counts. See United States v. Alicea, 205 F.3d 480, 487 (1st Cir. 2000). And because this evidence does not "preponderate[]" so "heavily" against the jury's verdict that it would be a miscarriage of justice to let the convictions on the VICAR-related counts stand, we cannot fault the judge for denying the new-trial motion. See United States v. George, 448 F.3d 96, 102 (1st Cir. 2006) (quoting United States v. Villarman-Oviedo, 325 F.3d 1, 15 (1st Cir. 2003)).

As a parting shot, Laureano-Salgado contends that United States v. Hernández-Rodríguez, 443 F.3d 138 (1st Cir. 2006) – where we reversed a district court's new-trial denial – should compel us to reverse here. But Hernández-Rodríguez does not aid his cause. Here is why.

A jury convicted José Ramón Hernández-Rodríguez ("Hernández") and Douglas Gorbea Del-Valle ("Gorbea") of various drug crimes. Id. at 140. Gorbea ran a trading company that imported a cocaine shipment from Venezuela to Puerto Rico. Del-Valle, 566 F.3d at 33. He also handled many of the operation's

details. Id. Hernández owned the trucking company that Gorbea used to move the shipment from the docks to a nearby truck yard. Hernández-Rodríguez, 443 F.3d at 141. To prove that Hernández knowingly participated in the scheme, the government relied on a fax found in Gorbea's briefcase – a fax that had the name "José Hernández" written on it. Id.

Sometime after his conviction, Hernández sought a new trial based on newly-discovered evidence contained in an affidavit by Gorbea saying that he (Gorbea) did not know Hernández personally. Id. A magistrate judge held an evidentiary hearing, at which Gorbea testified that the "José Hernández" on the fax referred not to his codefendant but to another person with the same name. Id. at 142. Finding Gorbea credible, the magistrate judge recommended that the district judge grant Hernández a new trial. See id. at 140, 146. Without holding a further evidentiary hearing, the district judge rejected the magistrate judge's recommendation. Id. After assuming without deciding that the supposed new evidence was credible, the district judge ruled that a reasonable jury could still infer Hernández's knowing participation from other circumstantial evidence, like his tailing the van with the cocaine as it left the docks. Id. at 146. Over a dissent, a panel of this court reversed, holding in relevant part that the evidence, "if deemed credible by a jury, . . . would

greatly undermine the conspiracy charges against Hernández" (given the government's theory of prosecution) and thus "the district court abused its discretion by failing to consider the full import of [Hernández's] new evidence" after "assum[ing], *arguendo*, Gorbea's credibility." Id. at 146, 148.

Unfortunately for Laureano-Salgado, the difference between Hernández-Rodríguez and his case is one of night and day. As we just said, the evidence there (if believed) "would greatly undermine" the charges against the defendant. But as we also just explained, the evidence here (even if believed) would not have that same effect – given the equivocal nature of Yanyoré-Pizarro's testimony, and how his testimony rested solely on rumors and did (at times) implicate La ONU in Pekeke's death. So Hernández-Rodríguez is no help to Laureano-Salgado.

Undaunted, Laureano-Salgado argues that his "new evidence . . . is stronger than the [new evidence] in Hernández-Rodríguez as the government [here] relied upon it in not one, but two subsequent [La Rompe] trials" – the first involving Yanyoré-Pizarro's testimony (see footnote 7 and the text to which it is appended); the second involving Calviño-Acevedo's testimony (see footnote 8 and the text to which it is appended). But this argument is not a game-changer either because, again, here – unlike in Hernández-Rodríguez – the alleged new evidence cannot be

reasonably viewed as "greatly undermin[ing]" the pertinent verdicts. And to the extent he believes Calviño-Acevedo's testimony saves the day by (supposedly) corroborating Yanyoré-Pizarro's testimony, he is mistaken. That is because Calviño-Acevedo's testimony highlights how Yanyoré-Pizarro's testimony rested on rumors that cannot (for reasons already detailed) help Laureano-Salgado satisfy the actual-probability-of-acquittal component of the ordinary new-trial standard.

Long and Short of It

Experience shows that a supposedly new "piece of evidence often looms larger in the eyes of a hopeful defendant than its actual dimensions warrant." Peake, 874 F.3d at 72. So it is here. Ultimately, having considered the parties' arguments with care, we conclude that the judge applied the correct legal standard and abused no discretion in denying the new-trial motion.¹⁶

Final Words

All that is left to say then is: *Affirmed.*

¹⁶ For what it may be worth, we note that even if we were willing to overlook Ramírez-Rivera's waiver of arguments keyed to the actual-probability-of-acquittal standard — and we most certainly are not — he too would lose for the reasons just given.