No.

IN THE

Supreme Court of the United States

HARRY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

How does a court determine whether evidence that the prosecution did not share with the defense before trial is "favorable" under the standard announced in *Brady v. Maryland*, 373 U.S. 83 (1963)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Harry Miller. Respondent is the United States of America. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harry Miller respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-8a) is available at 822 F. App'x 484 (2020). The opinions of the district court denying Petitioner's motion for a new trial based on a *Brady* violation are available at App., *infra*, 9a–30a.

JURISDICTION

The Seventh Circuit issued its decision on August 6, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was convicted in federal court, by a jury, of human trafficking and maintaining a drug house, contrary to 18 U.S.C. § 1591(a)(1) & (b)(1) and 21 U.S.C. § 856(a)(1). Petitioner's appeal is about the discovery of exculpatory evidence after trial, which gave rise to a *Brady* claim.

The government alleged that Petitioner used force, threats, and drugs to coerce two women who were addicted to heroin to engage in commercial sex acts. One woman lived with Petitioner in an efficiency apartment from about late-February to mid-June of 2017; another lived with the two of them in the apartment in March of 2017. The apartment was in an office building where Petitioner was the maintenance man; he was also a drug dealer. At trial, the women testified that Petitioner had told them to post ads on the Internet for sexual services so that they could pay off their drug debts to him and that Petitioner threatened to beat them, withhold heroin, or contact authorities about outstanding warrants if they refused. They met customers outside the building, then brought them up to Petitioner's apartment. Petitioner would take the money and guard the door. They would do several "dates" like this a day—as many as ten. The women testified that Petitioner generally would not let them leave the apartment.

Other witnesses partially corroborated the women's stories. Two fellow heroin addicts testified that they had seen Petitioner act controlling with the women, instruct them to post ads for sex acts, and abused them. Petitioner's ex-girlfriend (a crack addict) testified that when she went to Petitioner's apartment for drugs she saw many people coming in

and out of the apartment, including one of the complaining witnesses. Petitioner told his ex-girlfriend that the woman was a "whore," commented that "she wasn't out there making enough money," and said that his ex shouldn't take the woman out.

The defense contended that the women prostituted themselves by choice, not due to force. (Miller did not really defend against the drug-trafficking-house charge.) The defense presented evidence that both women accused Petitioner of forcing them into prostitution only after they were facing serious felony charges. One of the women, who testified that she hadn't been permitted to leave Petitioner's apartment, admitted on cross-examination that during the relevant period, she had stayed a few nights elsewhere and took at least one five-day-long trip to Nashville. The corroborating witnesses had drug problems and pending criminal cases of their own, and Petitioner had accused one of them of burglarizing his apartment. At one point during the relevant period, Petitioner had called police about a disturbance in the building, and the officer who responded to that call testified that he did not see anything suspicious.

In closing argument, defense counsel emphasized that the government's witnesses all had motives to lie. And the one person who did not have a motive to lie (the police officer who'd gone by the building where human trafficking was supposed to have occurred) did not see any "signs of human trafficking."

As it turns out, law enforcement had much more contact with Petitioner's apartment building than just the one response to a disturbance call. The defense was aware of this possibility before trial, when discov-

ery revealed that there had been some sort of undercover investigation of Petitioner's building during the relevant period. Defense counsel inquired about it and the prosecutor revealed that the investigation involved undercover officer David Mertz. Counsel asked the district court for a continuance so he could investigate the matter. The court denied the motion but ruled that defense counsel could question the government's lead detective, Thomas Roloff, before trial.

Before Roloff was questioned, the prosecutor provided defense counsel with an email in which Roloff asserted that he had "no reports" to disclose because "there was no information gathered of any substance"; Mertz was at the building only "a few times"; and the investigation was "related to another case" that "never really took off." On the stand before trial, Roloff testified that Mertz "didn't have a lot of contact with people" at the property, never reported "any criminal activity," and did not generate reports because "nothing . . . took place that warranted a report." He testified that his office had just one video recording of Petitioner walking in the parking lot but did not have other surveillance video. Based on Roloff's testimony, the district court ruled that the government had fulfilled its disclosure obligations.

After trial, the defense subpoenaed records and found that Roloff's email and testimony were incomplete at best. Mertz did not go to Petitioner's apartment building just a "few times" during an investigation "related to another case." Mertz was part of an undercover task force investigation in which Petitioner was the target, which involved Detective Roloff. As part of the investigation, Mertz rented an office on

the first floor of the building where Petitioner's apartment was located in May of 2017. He toured the office and later moved in; then after that, he visited the building an additional eight times, sometimes with another undercover officer. The subpoena uncovered more than seven hours of audio recordings, as well as photos and videos. It also revealed emails indicating that Roloff was aware of the activities at the property, handled rent for the undercover office rental, and asked another agent to run tolls on Petitioner's phone, among other things.

During visits to the building, officers had many interactions with Petitioner:

- May 25: Mertz and Petitioner had a 14-minue recorded conversation, mostly about building-related matters; Petitioner also discussed his work, his son, and a tattoo shop opening in the building.
- June 1: Mertz and another officer overheard Petitioner talking to a woman in the hallway; he told her to "keep him waiting as long as possible." Later, officers saw a man pull into the parking lot.
- Later that day, Mertz called Petitioner; a woman named "Diamond" answered and took a message.
- June 6: Mertz and another officer were having trouble with a storage locker on the property. They met with Petitioner, and had over 90 minutes of recorded conversations with him.
- June 8: Mertz and another officer were still having trouble with the storage locker. They again met with Petitioner, and had a recorded conversation with him.

- June 15: Mertz and an ATF special agent posing as Mertz's friend had an 82-minute recorded conversation with Petitioner and other people at the building about various matters. Later that day, one of the complaining witnesses was taken into custody on an outstanding warrant.
- June 21: Mertz and the ATF agent visited and recorded 68 minutes of audio including a conversation with Petitioner.
- June 28: Mertz and the ATF agent recorded another 35 minutes of audio with Petitioner, again discussing various apartment matters.
- June 30: Mertz visited the apartment and his notes state that he "[g]ot hallway video for search warrant." He then had a brief interaction with Petitioner at Petitioner's apartment during which he returned a key.

Based on this, the defense filed a motion for a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The defense had argued at trial that the only government witness without a motive to lie who had been to the Petitioner's apartment—the police officer who responded to Petitioner's call about a disturbance—had not seen anything suspicious. The defense in its motion for a new trial argued that if the government had revealed before trial the interactions bulleted above, it could have argued in closing:

> We called three undercover officers, who spent hours and hours over a combined 10 visits at Greenway Cross, to testify about their conversations with, and observations of, Miller. [The officers] testi-

> fied that they never observed Miller coerce anyone into sex work. The government asks you to believe addicts and criminals. We ask you to believe a police officer, a DEA special agent, and an ATF special agent. It's an easy choice.

The district court denied the motion. It found that the new evidence was neither "favorable" to the defense nor "material," as required by *Brady*. The district court noted that the newly discovered investigative materials covered a period in May and June during which only one of the complaining witnesses was living with Miller and prostituting herself. App., *infra*, 24a.

Even as to the woman who stayed with Petitioner during that period, the court found that "Mertz did not determine that defendant was *not* engaged in sex trafficking; he just did not notice anything during his relatively brief visits suggesting that he was." *Id.* Thus, said the court, the evidence was not "exculpatory"—a defendant cannot establish his innocence through proof of the absence of criminal acts on specific occasions. *Id.* at 25a. Also, the court thought that some of Mertz's observations were "inculpatory"—they corroborated that one of the complaining witness did stay at Petitioner's apartment, that Petitioner was a maintenance man, and that he had a wi-fi phone (which had been noted during the trial). *Id.* at 26a–27a. Also, on one occasion, Petitioner told the complaining witness to keep someone waiting, and then later a man pulled into the parking lot; although it is not at all clear that the man was there for her, the court thought this could be consistent with sex trafficking. *Id.*

The district court also found that the evidence was not material within the meaning of *Brady* because the government's evidence at trial was "overwhelming." *Id.* at 28a. Thus the jury would not have been moved by evidence about what law enforcement officers did not see at Petitioner's apartment building. *Id.* Further, consistent with what it said in relation to *Brady*'s "favorable" prong, the court said that jurors might have actually found the evidence to be inculpatory for the reasons noted above (fact that the complaining witness stayed at Petitioner's apartment, etc.). *Id.* at 28a–29a.

Out of an "abundance of caution," the district court ordered the government to turn over additional evidence. *Id.* at 9a. After that was turned over, however, the court found that it did not add anything to the analysis and thus denied the motion for a new trial in full. *Id.* at 9a–10a.

Petitioner appealed to the Seventh Circuit Court of Appeals, but that court affirmed the judgment. The Seventh Circuit found that the government suppressed the investigatory records within the meaning of *Brady*, but it affirmed the district court's conclusion that the records were neither favorable nor material. *Id.* at 6a. As to favorability, the appellate court accepted the district court's finding that "[n]othing in Mertz's notes or the audio recordings show that Miller did not engage in sex trafficking." *Id.* at 7a. And the notion that Petitioner told the complaining witness to keep someone waiting could be seen as consistent with sex trafficking. *Id.*

As to materiality, the Seventh Circuit correctly explained that the standard was 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." *Id.* at 8a–9a (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). However, it seemed to conflate the legal standard with the standard of review, in stating that it was determining whether there was anything "unreasonable" in the district court's ruling. *Id.*

The defense argued that the district court accepted inferences that the government argued flowed from the suppressed evidence, and ignored how the defense proposed to use that evidence to bolster its argument that the government's witnesses were not credible and Petitioner did not engage in forcible sex trafficking. The Seventh Circuit rejected this argument, though, noting that "[n]othing requires a district court exhaustively to discuss both sides of the case to prove that it considered everything. We will not assume that the district court failed to consider the entire record simply because it did not address each arguable weakness in the government's case." *Id.* at 8a. The Seventh Circuit also found that "more fundamentally," Petitioner's argument minimized the strength of the government's evidence. *Id.* Although the defense was able to argue that most of the witnesses were drug addicts facing criminal charges, and their stories were inconsistent, "defense counsel hammered these points at trial," but "the jury nonetheless believed the key elements of the witnesses stories." *Id.* So the court saw "nothing unreasonable in the district court's ruling." *Id.*

REASONS FOR GRANTING THE PETITION

I. This Court should grant review to clarify that *Brady*'s "favorability" standard is a low bar for defendants, which assesses suppressed evidence not only under the government's theory of the case but also under the defendant's theory.

This Court in *Brady v. Maryland*, 373 U.S. 83 (1963), established that the Constitution's Due Process Clause requires prosecutors to disclose to defendants evidence favorable to the defense, irrespective of good or bad faith. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Green*, 527 U.S. 263, 281–82 (1999).

Over the years, this Court has repeatedly examined and clarified *Brady*'s materiality (prejudice) prong. *See, e.g., Turner v. United States*, __ U.S. __, 137 S. Ct. 1885 (2017); *Wearry v. Cain*, __ U.S. __, 136 S. Ct. 1002 (2016); *Smith v. Caine*, 565 U.S. 73 (2012); *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). But the Court has provided essentially no guidance regarding the favorability prong. In *Wetzel v. Lambert*, 565 U.S. 520, 524–25 (2012), the Court touched on favorability, but that was in the context of a state habeas case that is subject to AEDPA's "unreasonableness" standard. So the Court merely considered whether a state supreme court's assessment of favorability (and materiality)

represented an "unreasonable" application of Supreme Court law. *Id.*; *see also* 28 U.S.C. § 2254(d)(1).

To some extent this makes sense. In *Brady*'s three-pronged test, the "favorability" prong is easier for the defendant to meet than the "materiality" prong. Materiality essentially requires that the suppressed evidence be *so favorable* that if it had been available to the defense before trial, there is a reasonable probability that the outcome of the trial would have been different. *See Kyles*, 514 U.S. at 434–35. Thus, in litigating *Brady* claims, parties and judges often skip to materiality.

But this case shows that guidance is needed. Again, *Brady*'s "favorability" prong is easier to meet than the "materiality" prong. In what might be this Court most significant discussion of favorability, in *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Court explained that "evidence favorable to the accused" refers to any evidence that "if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *Bagley* also described favorable evidence as evidence that "might have been helpful" to the defense. *Id.* at 678. Thus, impeachment evidence—in addition to exculpatory evidence—is favorable within the meaning of *Brady*. *Id.* This standard is a significantly lower than the standard for materiality, under which prong a defendant must show a *reasonable probability* of a different outcome. *Kyles*, 514 U.S. at 434.

Brady's favorability prong operates similar to the Rule 16's "materiality" requirement for discovery—that is "material to preparing for the defense." Federal Rule of Criminal Procedure 16(a)(1)(E) states:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph [documents and tangible objects] if the item is within the government's possession, custody, or control and . . . the item is material to preparing for the defense.

This rule has been read to require only "some indication that the pre-trial disclosure of the disputed evidence would enable defendant significantly to alter the quantum of proof in his or her favor." Wright & Miller, Fed. Prac. & Proc. Crim. § 254 (4th ed.).

In the present case, the Seventh Circuit set the bar too high. It found that the suppressed evidence at issue was not favorable because "[n]othing in Mertz's notes or the audio recordings show that Miller did not engage in sex trafficking." App., *infra*, 7a. But evidence need not be the defense equivalent of a smoking gun to be favorable; all that is needed is that the evidence "might have been helpful" to the defense. *Bagley*, 473 U.S. at 678.

The Seventh Circuit accepted the district court's determination that evidence was not favorable based on its own view of the evidence, notwithstanding that the defense took a different view of the evidence and that the jury would have been permitted to adopt the defense's view. Far from interpreting *Brady*'s favorability requirement broadly, because the district court rejected the defense's view of this case as if *it* were the fact-finder, this made the favorability test even narrower than the materiality test, which more clearly requires an objective analysis of the potential impact of the suppressed evidence.

The district court found, and the Seventh Circuit accepted, that it was largely irrelevant that law enforcement had visited Petitioner's apartment building on at least seven occasions during the indictment period and interacted with Petitioner on at least five occasions during this period, resulting in more than seven hours of audio recordings. In the district court's view, this showed only that Petitioner did not openly engage in human trafficking at those particular times. But the complaining witnesses testified that during this period, their customers were coming in and out of Petitioner's apartment building many times a day, every day; sex acts occurred in Petitioner's apartment (during which times he would throw others out) or in the parking lot of the building; and Petitioner controlled the women's ability to go in and out of the building. So the defense's view is that while it was possible that law enforcement just had very bad timing, it is more likely that the witnesses were lying. Further, although the surveillance activities at the building did not begin until after one complaining witness had moved out (and been arrested on felony charges), this evidence would have undermined the government's case against Miller as a human-trafficker, which would have undermined that woman's story as well. And this is in the context of a trial in which there was already evidence that the non-law-enforcement witnesses had motives to lie as well as inconsistencies in their stories.

The district court did not have to accept the defense's view of the evidence. But it should not have been permitted to essentially find as a matter of fact that law enforcement just had very bad timing. The suppressed evidence would have aided Petitioner's defense that the complaining witnesses were drug-

addicts who voluntarily prostituted themselves in order to pay for heroin and then concocted a story about their drug-dealer once they had sobered up and were facing serious felony charges. Indeed, in Petitioner's closing argument, defense counsel reminded jurors that a single officer who had visited the apartment building on a single day to respond to a disturbance did not see anything like what the complaining witnesses had described. There should be no question that this defense would have been far, far stronger if counsel could have referred to *multiple* officers visiting the apartment on *seven* occasions during the relevant period, who were specifically surveilling Petitioner, and who saw nothing.

The Seventh Circuit also accepted the district court's finding that the suppressed evidence was in part inculpatory, because it corroborated matters about which there was no dispute—e.g., Petitioner was a maintenance man, the complaining witness lived in Petitioner's apartment. But these matters weren't in dispute. There was also a reference to Petitioner telling a complaining witness to keep someone waiting, after which a man pulled into the parking lot. But this is a stretch—there was no indication that the man was pulling into the parking lot to see Petitioner or the woman or anyone related to them; that if so, he was there for sex rather than drugs; or that if he was there to meet the woman for sex, it was at Petitioner's insistence.

In deciding a *Brady* issue, appellate courts to some extent defer to the trial court's assessment of the case, since they are more familiar with the facts as presented at trial. But this cannot give the district court *carte blanche* to decide that evidence that fits

neatly within the defendant's theory of defense is irrelevant and even inculpatory based on the court's own view of the evidence.

In this case, there was good reason to question whether the government's witnesses were telling the truth and, indeed, there's reason to think that they did just that: they deliberated for nearly eight hours—that is, longer than it took for the parties to present evidence. The suppressed evidence was both potentially exculpatory and potentially impeaching of the government's witnesses. Therefore, under the low standard for *Brady*'s favorability prong, there should have been no question but that the evidence at issue was favorable to the defense. The fact that the district court and the Seventh Circuit found otherwise shows that this Court's guidance is needed.

II. *Brady*'s favorability prong impacts the materiality prong, so it is necessary to correct the favorability analysis in order to reach the correct decision in this case.

The Seventh Circuit in this case found both that the suppressed evidence was not favorable and also that it was not material. And of course, if Petitioner cannot show materiality, he cannot prevail. So if the only problem with the Seventh Circuit's opinion was its assessment of favorability, this case would not be appropriate for further review. But the favorability analysis in large part controls the materiality analysis—in this case and doubtless in many others. It is only once the favorability analysis is corrected that it is apparent that the evidence that was suppressed in this case is material within the meaning of *Brady* and its progeny.

As noted above, the materiality prong is tougher to meet than the favorability prong. But the materiality prong is "not a sufficiency of the evidence test." *Kyles*, 514 U.S. at 434. The question is whether there is a "reasonable probability" of a different result—and with this standard, "the adjective is important." *Id.* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* This standard, which is identical to the one announced in *Strickland v. Washington*, 466 U.S. 668 (1984), is not about what a particular judge thinks about the suppressed evidence; "the assessment should be based on an objective standard that presumes a reasonable decisionmaker." *Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008) (discussing *Strickland*).

In the present case, with or without the suppressed evidence, the government presented sufficient evidence to convict. As the Seventh Circuit noted, "the jury heard directly from both victims, who told similar tales of coercion and abuse, and from several eyewitnesses, who largely backed up the victims' accounts." App., *infra*, 8a. But on the other hand, "most of the witnesses were drug addicts facing criminal charges, and their stories are not fully consistent." *Id.* The district court found, however, and the Seventh Circuit accepted, that because defense counsel had already "hammered these points at trial" and yet "the jury nonetheless believed the key elements of the witnesses stories," it "was 'highly unlikely' the jury would have reached a different result if it had heard undercover agents testify about what they did not observe at the building." *Id.*

But this ignores the defense view of the suppressed evidence: it undermined the witnesses' stories. So the fact that jurors believed those stories at a trial without the evidence cannot end the analysis. It is true that defense counsel "hammered" at trial that the witnesses were motivated to lie and that their stories were inconsistent—both internally and with one another. But the suppressed evidence would have given counsel a new nail for his hammer: the fact that the witnesses stories were *also* inconsistent with what was observed during a period of frequent surveillance at Petitioner's apartment building, which was focused on Petitioner.

The district court's flawed favorability analysis led to this flawed materiality analysis. As discussed above, the Seventh Circuit suggested that suppressed evidence would only be favorable if it "show[ed]" that the Petitioner was innocent. App., infra, 7a ("Nothing in Mertz's notes or the audio recordings show that Miller did not engage in sex trafficking.") With this view of favorability, the Seventh Circuit's materiality analysis was a foregone conclusion.

The district court examined favorability by deciding how it viewed the suppressed evidence, rather than by considering the various ways that jurors could have viewed it. And under its view, there was no real possibility that it could find that the suppression was prejudicial. Indeed, the district court declared that the evidence was both irrelevant and partially inculpatory, without considering whether a juror who was on the fence about whether to believe the government's witnesses likely would have come to the defense's side with the additional evidence. Again, with this view of favorability, which the Seventh

Circuit accepted, materiality was a forgone conclusion.

Therefore, upon clarifying how lower courts should assess favorability under the *Brady* standard and finding, this Court can find that not only is the suppressed evidence favorable for the defense, it is also material within the meaning of *Brady*. And thus Petitioner is entitled to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX