No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HAROLD COOK, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER *BRADY V. MARYLAND*, 373 U.S. 83 (1963) AND ITS PROGRENY REQUIRE THE PROSECUTION TO CREATE A RECORD OF AND PRESERVE APPARENTLY EXCULPATORY WITNESS STATEMENTS IN A CRIMINAL INVESTIGATION.

TABLE OF CONTENTS

Index To Appendix

Table of Authorities

CASES

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Harold Cook respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his convictions and sentence.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the United States. There were no corporate parties below. The petitioner's co-defendants in the district court were Gerund Mickens, Terrell Hunter, Jesus Ashanti, and Douglas Lee.

OPINIONS BELOW

The court of appeals (Carney, J., Bianco, J. & Garaufis, J.) affirmed petitioner's conviction and sentence through a summary order dated July 26, 2021. Appendix A, A1 (*United States v. Mickens*, No. 20-258, 2021 WL 3136083 (2d Cir. July 26, 2021). The ruling by the district court denying the motions for judgment of acquittal and new trial by Hunter, Mickens and Cook (the "Ruling") through an order dated September 6, 2019. A26 (*United States v. Cook, et al.*, 2019 WL 4247938 (D. Conn. Sept. 6, 2019).

JURISDICTION

The United States Court of Appeals for the Second Circuit's judgment affirming petitioner's convictions entered on July 26, 2021. A1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. § 3231. The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291, Rule 4(b), 18 U.S.C.§ 3557 and 18 U.S.C. § 3742.

RELEVANT CONSTITUTIONAL PROVISIONS

The questions presented implicate the following provisions of the United States Constitution:

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U. S. Const. amend. VI.

The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The Proceedings

On March 30, 2017, Harold Cook, Gerund Mickens, Terrell Hunter, Douglas Lee, and Jesus Ashanti were charged in a three-count Indictment with the January 9, 2009 kidnapping, robbery and murder of Charles Teasley. Count One charged Kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) and 2; Count Two charged Firearms-Related Kidnapping/Murder in violation of 18 U.S.C. §§ 924(j)(1) and 2; and Count Three charged Firearms-Related Hobbs Act Robbery/Murder in violation of 18 U.S.C. §§ 924(j)(1) and 2.

Petitioner's jury trial commenced on August 7, 2018,[1] and following seven days of evidence, the jury returned guilty verdicts on all counts, on August 30, 2018. On August 31, 2018, Mr. Cook moved for a judgment of acquittal, or alternatively for a new trial. The district court denied the motion, on September 6, 2019. On July 12, 2019, the district court granted the government's consent motion to dismiss Count Two pursuant to Fed. R. Crim. P. 48. On January 17, 2020, the court sentenced Mr. Cook to life imprisonment.

[1] Proceedings as to Douglas Lee were severed for trial, and the Court ultimately granted a motion for judgment of acquittal that the government did not appeal. Ashanti pled guilty to all counts a month before Petitioner's trial.

B. The Trial

The government introduced evidence that, on the night of January 9, 2009, a drug dealer named Charles Teasley spoke by telephone with Douglas Lee about purchasing cocaine from Lee. Soon thereafter, Teasley left his residence with $1,100 from his girlfriend Kim Brookens's purse. Teasley drove his mother's car, an Acura TL, and was planning to bring his grandmother to work contemporaneous to meeting Lee for the drug transaction.

Shortly after, Teasley called Brookens and told her to bring a small safe in which he stored narcotics and drug-related moneys to the front door. Brookens retrieved the safe and gave it to a man waiting on the porch, whom she described as a tall, thin, dark-skinned black man dressed in black and wearing a black mask. Before closing the door, Brookens saw the Acura on the street in front of the house but did not see anyone in it.

Brookens grew concerned about Teasley when he failed to pick up his grandmother and failed to answer multiple phone calls. Brookens called Teasley's friends and relatives to look for him, and the next morning, on January 10, 2009, she reported him missing to the West Hartford Police Department.

On January 12, Teasley's friend, Desmond Wright, discovered Teasley's body in the back seat of the Acura, which was parked on Colebrook Street in Hartford. Teasley's hands were bound behind his back with zip ties, and he had been shot multiple times in the head.

In 2011, Ashanti, arrested in connection with a series of Massachusetts bank robberies, contacted law enforcement and implicated himself, Cook, Mickens,

Hunter, and Lee (among others) in Teasley's murder. Ashanti, a longstanding paid police informant, claimed that Lee had set up a drug transaction with Teasley and when Teasley arrived at the specified location, he was ambushed by Cook, Mickens, Hunter, and Ashanti. They bound Teasley's hands and forced him into the back of his car. Cook, Mickens, Hunter, and Ashanti then assaulted Teasley, took the safe from Brookens, and shot Teasley in the head at close range, killing him. Six years later, in 2017, Cook, Mickens, Hunter, Lee, and Ashanti were charged.

Prior to trial, the defendants submitted multiple discovery requests for disclosure of all *Brady*/*Giglio* material in the government's possession. In the discovery materials provided, Ashanti alleged in statements to law enforcement through 2011 that a man by the name of Cinque Sutherland was the impetus for the Teasley robbery/kidnapping/killing and, in fact, shot Teasley. However, absent in reports from 2015 forward was any reference to Sutherland's involvement. Instead, Ashanti identified the petitioner as the mastermind of the crimes.

On August 5, 2018, after requests for additional information went unanswered, the defendants filed a Joint Motion to Compel Production of *Brady* Material. The government responded that Ashanti recanted his statements concerning Sutherland's involved "on either April 15, 2011 or April 25, 2011," and that, aside from a passing reference in a 2011 affidavit constructed by Agent William Aldenberg, no notes or other further records of that meeting existed. Doc. 273.

After evidence had commenced, and following further argument, the government produced a 302 at the Court's direction. Agent Aldenberg's belated report reflected

what purportedly remained of his recollection about the meeting more than seven years prior.

At trial, it was revealed that Ashanti told investigators that he "put someone there that wasn't there." 8/13/18T 839. Agent Aldenberg recalled that "there was a lot of discussion about [Ashanti's recantation]– that I recall, to me it would be obvious that, well, what else have you lied about?" 8/14/18T 1351. But Aldenberg professed an inability to remember anything that Ashanti said. He could not produce notes in connection with the April 2011 meeting notwithstanding that, as the sole FBI agent present at the interview, he was responsible for memorializing Ashanti's statements. Aldenberg confirmed the government's awareness of the missing *Brady* material before the defense's requests. Following this 2011 meeting, the government did not speak with Ashanti again until 2015, after additional DNA testing linked Ashanti and Mickens—but not the petitioner—to the Acura.

Following the close of the trial evidence, the defense requested that the Court instruct the jury that it could draw an adverse inference from the government's failure to document and preserve the notes and infer that such information, if provided, would have been helpful to the defense. The Court denied this request.

In closing argument, the petitioner argued that he was not guilty of the charges pointing to the discrepancies in Ashanti's testimony, for example: (1) No other witness, physical evidence, or DNA corroborated the petitioner's alleged involvement, (2) Ashanti purposefully implicated Sutherland in the murder and maintained Sutherland was the plot's effective mastermind and a shooter but later

retracted those statements, claiming the petitioner was the mastermind and shooter, (3) Ashanti gave multiple statements that contradicted each other and his testimony, and (4) Ashanti's description of the kidnapping, robbery and murder was contradicted by the physical and forensic evidence.

The jury found the petitioner guilty on all counts. On August 31, 2018, the petitioner moved for a judgment of acquittal, or alternatively for a new trial. The Petitioner renewed his challenge regarding the *Brady* violation in his motion for a new trial. The court denied the motion, concluding that "the government was under no obligation to take notes of the April 25, 2011 meeting." A58. On July 12, 2019, the district court granted the government's consent motion to dismiss Count Two pursuant to Fed. R. Crim. P. 48. On January 17, 2020, the court sentenced the Petitioner to life imprisonment.

C. The Direct Appeal

In his direct appeal, the petitioner argued, *inter alia*, that the government's failure to create or preserve FBI notes of law enforcement interviews with Ashanti violated the petitioner's due process rights, as established under *Brady v. Maryland*, 373 U.S. 83 (1963) and under the Sixth Amendment Confrontation Clause. The Petitioner advanced two interrelated claims 1) the government is obliged under *Brady* to create and preserve records of facially exculpatory and impeaching statements; 2) the government's failure to document the interview was commensurate with the destruction of evidence in that the Government's failure to record Ashanti's interviews resulted in no record of his statements and therefore the

defense would be unable to obtain comparable evidence by other reasonably available means (*i.e.*, destruction by omission). *See California v. Trombetta*, 467 U.S. 479 (1984); *see also United States v. Bakhtiar*, 994 F.2d 970, 975 (2d Cir. 1993).

The Court of Appeals rejected the petitioner's claims and relying on Second Circuit precedent, see *United States v. Rodriguez*, 496 F.3d 221, 224 (2d Cir. 2007), held that *Brady* established no obligation on governmental agents to take notes during witness interviews and preserve them, and that the defendants could not demonstrate prejudice to justify a reversal. A 13, A14.

REASONS FOR GRANTING THE PETITION

I. *BRADY V. MARYLAND*, 373 U.S. 83 (1963) AND ITS PROGENY REQUIRE THE PROSECUTION TO CREATE A RECORD OF AND PRESERVE APPARENTLY EXCULPATORY WITNESS STATEMENTS IN A CRIMINAL INVESTIGATION. THE DISTRICT COURT AND COURT OF APPEALS DECISIONS CONCLUDING THAT THERE IS NO NOTETAKING AND PRESERVATION REQUIREMENT IN THIS CONTEXT INCENTIVIZES THE GOVERNMENT TO FAIL TO UNDERTAKE REASONABLE MEASURES TO PRESERVE INFORMATION NECESSARY TO THE TRUTH-SEEKING FUNCTION OF THE ADVERSARIAL PROCESS.

A defendant is constitutionally guaranteed access to certain evidence pursuant to the Due Process Clause. *Brady*, 373 U.S. 87. For a defendant to prevail on a claim under *Brady*, "[t]he 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 [s]tate, either [willfully] or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

Jesus Ashanti was "without a doubt the cornerstone of the prosecution's case." A6. Although federal agents interviewed its chief cooperating witness on several occasions and memorialized those interviews, in the critical interview, in which Ashanti retracted his story concerning the alleged mastermind's involvement in the Teasley incident, FBI Agents failed to create and preserve a note or report memorializing the details of the interview.

Despite recognizing that the government was obligated to disclose to the defendants that Ashanti admitted to lying about Sutherland's involvement in Teasley's murder, the district court and the court of appeals rejected the petitioner's Due Process and confrontation clause claims. The trial court concluded that "the government was under no obligation to take notes of the April 25, 2011 meeting." A58. The Court of Appeals agreed and further held that the Government is not required "in all events" to preserve any notes that were taken. A14., citing *Rodriguez*, 496 F.3d 221. The decision of the Court of Appeals, offered in its entirety, follows:

> Under the doctrine established in *Brady*, the Government must "disclose material evidence favorable to a criminal defendant." *United States v. Rowland*, 826 F.3d 100, 111 (2d Cir. 2016). "Evidence is favorable if it is either exculpatory or impeaching, and it is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*
>
> This Court has rejected the "contention that *Brady* or the Confrontation Clause requires the Government to take notes during witness interviews." *United States v. Rodriguez*, 496 F.3d 221, 224 (2d Cir. 2007). At the same time, we have explained that "[f]rom the fact that the Government is not required to make notes of a witness's statements, it does not follow that the Government has no obligation to inform the accused of information that materially impeaches its witness." *Id.* at 225. When no notes are taken during a witness interview, but material information favorable to a defendant emerges, *Brady* obligates the Government to provide that information "in a

> manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial." *Id.* at 226.
>
> Here, as the District Court ruled, the Government was not obligated to take notes during the April 2011 interview or to memorialize the meeting by creating a 302 report. *Cook*, 2019 WL 4247938, at *15. Agent Aldenberg made a record of Ashanti's recantation in an affidavit prepared and submitted to the court shortly after the interview, and provided to the defense well before trial. The Government repeated the disclosure in representations to the District Court and in a report, and elicited trial testimony on the matter. Defense counsel had ample opportunity to examine Agent Aldenberg and Ashanti regarding the April 2011 meeting. *See id.* at *14-16. There is no evidence to suggest that the Government failed to inform the defense of materially exculpatory or impeaching statements made during that interview. Accordingly, the Government effectively disclosed Ashanti's recantation, and there was no *Brady* violation. Even if the Government's disclosure was somehow inadequate, however, Defendants have not demonstrated resulting prejudice. As the District Court reasoned, "there is nothing to suggest that if the defendants received a contemporaneous, and perhaps a more detailed, report of the April 25, 2011 meeting, that there was a reasonable probability of a not guilty verdict." *Id.* at *16. Defendants are therefore not entitled to a new trial on *Brady* grounds.

A13-A14.

A. The *prosecution has a duty to create and preserve notes of interviews where the information at issue is apparently exculpatory or impeaching, and the evidence is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.*

The petitioner contends that this Court's precedent supports the obligation by the prosecution to create and preserve notes of interviews where the information at issue is apparently exculpatory or impeaching, and the evidence is of such a nature that the interested party (*e.g.*, a target of a criminal prosecution) would be unable to obtain comparable evidence by other reasonably available means. *See California v.*

Trombetta, 467 U.S. 479; *see also United States v. Bakhtiar*, 994 F.2d 970, 975 (2d Cir. 1993).

In *Trombetta*, this Court indicated that the failure to retain or preserve evidence may present a due process violation in instances where that evidence is apparently exculpatory, likening the standard to its prosecutorial disclosure cases:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must extend to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S., [97], at 109–110 [1976], **evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means**.

Trombetta, 488–489; *see id.* at 488 n. 8 ("In our prosecutorial disclosure cases, we have imposed a similar requirement of materiality . . .") (Emphasis added.). Subsequently, in *Youngblood,* this Court indicated that the fundamental fairness requirement of the Due Process Clause obliges law enforcement to retain and to preserve all evidence that is materially exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

While in spoliation cases where the character of the evidence at issue is not known, a Due Process violation requires a showing of bad faith, the same rationale does not apply where the Government interferes with a defendant's access to Brady material. *Youngblood*, 488 U.S. at 57 ("The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence … the Due Process Clause requires a different result when we deal with the

failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests).[2] With respect to a *Brady* violation, the intent of the prosecution is irrelevant. *Agurs*, 427 U.S., at 110. Pursuant to *Brady*, the defendant must show: "[t]he 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 [s]tate, either [willfully] or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. at 281–82.

If an agent does not create a record of exculpatory witness statements in a criminal investigation, the government can claim, in circular fashion, that no favorable *Brady* material exists to disclose. Relatedly, by not establishing reasonably available means to create and preserve a record of apparently exculpatory material, the government effectively destroys the *Brady* material. Finally, if an agent does not record exculpatory witness statements in a criminal investigation, rendering that information unavailable to the defense, the Government can use the defense's ignorance of the existence and/or value of the information as a cudgel in challenging

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[2] In spoliation cases, where the character of the evidence is *not known*, bad faith becomes a proxy for measuring the materiality of the lost evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 58(1988) (limiting due process violation in spoliation cases to situations "where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."). Further even where bad faith is required to make a showing, bad faith can be inferred from the prosecution's knowledge of the exculpatory value of the evidence at the time that it was lost or destroyed. *Youngblood*, 488 U.S. at 56 n.* ("presence or absence of bad faith by the police … must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed"); *see United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (destruction of equipment was in bad faith because the equipment's was known to government agents before they allowed its destruction).

the defense's ability to establish the materiality of the undisclosed information. Consequently, while the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser," *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), accepting the rationale of the courts below, the scope of the Government's *Brady* obligation and its claimed impact on the fairness of the proceedings is entirely up to the Government and immune to review.

B. The Failure to Create a Record of and Preserve Apparently Exculpatory Evidence Corrupts the Truth-Seeking Process.

The failure to create a record of and preserve apparently exculpatory evidence corrupts the truth-seeking process. Here, approximately six years elapsed between Ashanti's recantation and the petitioner being charged and the government was required to disclose evidence. No law enforcement witness was able to testify to the specifics of "that undoubtedly important meeting." A14. The agent's court-ordered, perfunctory FBI 302 created seven years after the fact was an insufficient substitute for the contemporaneous record of this critical information. As for Ashanti's self-serving testimony, Due Process is not satisfied if the defense is compelled to rely on an adverse cooperating witness, particularly one whose credibility was central both to the government's case and the revelation at-issue. By choosing not to create or preserve an accurate record of the moment its chief cooperator changed his story to implicate the petitioner as the mastermind and a shooter, the government shielded and effectively negated the damage of the most significant revision to its chief witness's multiple prior statements.

In short, preservation of the impeaching information was critical in this case to ensure that the substance of the cooperator's recantation was fully and accurately relayed to the defense. In such a case, Due Process requires reasonable measures be taken to preserve information that is *prima facie* Brady material, whether exculpatory or impeaching, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Requiring the Government to create a record in such instances is the only means by which to assure that a complete and accurate account of exculpatory information exists—and one that comes at no cost to the Government but has significant implications for the defendant.

A defendant's entitlement to exculpatory material helpful to his defense runs parallel to and in conjunction with the recognition that the "means of testing accuracy are so important that the absence of proper confrontation . . . calls into question the ultimate integrity of the fact-finding process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Jencks v. United States*, 353 U.S. 657, 669 (1957) (defendant is entitled to inspect materials "with a view to use on cross-examination" when that information "[is] shown to relate to the testimony of the witness."). While our criminal justice system tolerates cooperator testimony, it does so conditioned on the understanding that the risk of false convictions is avoided through constitutional safeguards, specifically, the defense's ability, through such disclosure, to expose false testimony and present the defendant's version of the facts alongside the prosecution's;

Brady, 373 U.S. 83; *Davis v. Alaska*, 415 U.S. 308 (1974). Without this constitutional safeguard, the reliability of the jury's verdict is undermined.

Here, FBI notes documenting a pivotal recantation would have enabled the defense to conduct the type of effective cross examination that the law requires. In this instance, two core elements of the adversarial testing contemplated under the constitution are absent: full disclosure by the prosecutor and effective cross-examination of the witness.

This Court should grant this petition, and consistent with its precedent, hold that Due Process requires reasonable measures be taken to preserve information that is *prima facie* Brady material, whether exculpatory or impeaching, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on this issue.

Respectfully submitted,

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