fcNo. ____

IN THE

Supreme Court of the United States

DAVE ELYSEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant may mount a defense at trial based on an inadequate police investigation into another suspect.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Elysee*, No. 18-14214 (11th Cir. Apr. 8, 2021) (opinion affirming conviction and sentence on appeal); and

- *United States v. Elysee*, No. 18-cr-20272 (S.D. Fla. Sept. 27, 2018) (judgment of conviction imposing a 235-month term of imprisonment).

There are no other proceedings directly related to this case under Rule 14.1(b)(iii).

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Petitioner respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is reported at 993 F.3d 1309 and is reproduced as Appendix ("App.") A, 1a–83a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on April 8, 2021. It denied a timely petition for rehearing en banc on October 6, 2021. App. B, 84a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

INTRODUCTION

It is tragic but true that people are sometimes charged with crimes that they did not commit. After all, investigators are human beings; they are fallible. But there is a safety net when someone is wrongfully accused: a jury trial. And to reduce the risk of an innocent person being convicted, the prosecution bears the burden to prove its case beyond a reasonable doubt, the most exacting standard under the law.

That standard of proof has real teeth because defendants can, and routinely do, argue at trial that there is reasonable doubt as to their guilt. And such a defense may be particularly compelling where the investigation was flawed. For example, where the police fail to investigate a known suspect, the defendant may have a powerful reasonable-doubt defense. This Court endorsed that defense in *Kyles v. Whitley*, 514 U.S. 419 (1995). Numerous state and federal appellate courts have too.

In the decision below, however, the Eleventh Circuit held that defendants may not mount a defense based on the police's failure to investigate another suspect. That holding is unprecedented. Not only does it contravene *Kyles* and conflict with the law in numerous jurisdictions; it will lead to the conviction of innocent people. And shielding investigations from scrutiny at trial will only encourage cops to cut corners.

This case illustrates the problem. At trial, Petitioner sought to show that the police failed to investigate another man who confessed to the crime. That evidence alone could have established reasonable doubt. But the trial court excluded it. And the Eleventh Circuit held that this evidence was irrelevant as a matter of law because an inadequate investigation is not a valid defense. That holding is grievously wrong.

STATEMENT

1. Petitioner and his friend, Darius Deen, were driving around in Homestead, Florida. An undercover officer observed the passenger exit the car and brandish a gun. A high-speed police chase ensued, the car crashed, and the two men fled on foot. Deen got away; Petitioner did not. The gun was later found underneath the front tire where the passenger had bailed out of the car. The police arrested Petitioner, and he was charged federally with being a felon in possession of a firearm.

There was one problem: the police charged the wrong guy. The passenger alone had possessed the gun, and Petitioner was the driver. But Deen was a loyal friend and did not want Petitioner to take the rap. So the following week, Deen walked into the police station and voluntarily confessed that he (not Petitioner) was the passenger who possessed the gun. The lead investigator, ATF Officer Raul Cabrera, took down Deen's confession and then let him leave. Deen was never arrested or charged.

Innocent of the gun offense, Petitioner went to trial. His theory of defense was simple: he was not the passenger with the gun; he was the driver. But because the actual passenger had escaped, someone had to take the fall. So the officers pinned the gun on Petitioner because he was the only one they had apprehended. Under this theory, it did not matter to the police whether Petitioner in fact possessed the gun. He was in the car, he was in custody, and so he would be the passenger with the gun.

Without any DNA, fingerprint, or video evidence, the prosecution's case at trial hinged on the testimony of the officers at the scene. But using their own radio dispatch recordings, Petitioner undermined the credibility of the lead officer, catching

him in several lies on the stand. *See* App. 202a–06a (defense closing argument). The jury was troubled. While deliberating, it asked whether it is "joint possession" merely to be present in a car with someone with a gun. (It's not). App. 212a. Clearly there were doubts about Petitioner's guilt. Nonetheless, after more than three hours—a lengthy deliberation for a day-and-a-half long gun trial—the jury returned a guilty verdict. App. 211a–13a. The court ultimately sentenced Petitioner to 19½ years.

But there was a critical part of the story that the jury never heard: Deen's confession and Officer Cabrera's indifferent response. At trial, Petitioner sought to admit Deen's confession through Cabrera—not for its truth, but for its "effect on the listener." Specifically, Petitioner sought to show that Cabrera failed to investigate a suspect who confessed. App. 171a, 183a, 186a. Petitioner previewed that argument in opening. App. 151a–52a. And the district court and prosecutor both acknowledged that non-hearsay theory of admissibility. App. 178a–79a, 183a–84a, 191a.

However, the district court ultimately rejected that theory and excluded Deen's confession and Officer Cabrera's response as hearsay. App. 171a, 186a, 191a. The court reasoned that, because Petitioner sought to show that the confession had no effect on Cabrera at all, the effect-on-the-listener theory was inapplicable. App. 191a.

2. On appeal, nobody seriously defended that hearsay ruling. Although the government initially did so in its brief, it conceded at oral argument that the district court's effect/non-effect distinction went "too far" and that Deen's confession "served some non-hearsay purpose." Oral Arg. Audio 13:23–13:41.[1] The Eleventh Circuit

[1] Audio available at: https://www.ca11.uscourts.gov/oral-argument-recordings.

itself had "no doubt that Deen's out-of-court statements would not be hearsay if merely offered to demonstrate their 'effect on the listener,'" App. 57a, which is what Petitioner sought to do. The Eleventh Circuit also acknowledged that the district court abused its discretion if it excluded the confession as hearsay, *id.*, which is exactly what happened. And because the trial was already so close even without this evidence, the Eleventh Circuit could not (and did not) find this error to be harmless.

But instead of vacating the conviction and remanding for a new trial, the Eleventh Circuit concocted an alternative basis to affirm. Although neither the district court nor the government had disputed the relevance of Deen's confession or Cabrera's response, App. 15a n.16, 18a & n.26, 54a, the court of appeals held that this evidence was irrelevant as a matter of law. While that court acknowledged that such evidence would indeed be relevant to a defense based on the inadequacy of the police investigation, the court concluded that "no such defense exists." App. 57a–58a, 61a, 65a; *see also* App. 19a & n.28, 26a n.40, 52a. The court reasoned that, because an inadequate investigation was not an "affirmative defense," *see id.*, Petitioner could not "introduce, as a defense to his prosecution, evidence that the police failed to conduct a reasonably diligent investigation into the charged crime," App. 2a. The court added that, even if an inadequate investigation was an "affirmative defense," Rule 403 would have barred the admission of such evidence. App. 58a, 65a–73a.

3. Petitioner sought rehearing en banc. App. C, 85a–113a. He argued that the panel's *sua sponte* holding—that an inadequate investigation was not a defense—contravened *Kyles v. Whitley*, 514 U.S. 419 (1995) and conflicted with numerous state

and federal appellate decisions recognizing such a defense. App. 102a–04a & n.3. Petitioner agreed that an inadequate investigation was not a standalone "affirmative defense" to the crime. But he explained that the failure to investigate a known suspect would have nonetheless given rise to reasonable doubt and bolstered his theory of defense. App. 98a–101a. In that regard, he emphasized that, by preventing defendants from challenging the investigation, the panel opinion would prevent even innocent defendants from showing reasonable doubt at trial. App. 104a–05a.

Petitioner further argued that the panel's primary holding tainted its Rule 403 analysis. He explained that the panel failed to recognize *any* probative value at all from the police disregarding a suspect who confessed, as the panel failed to connect that omission to either reasonable doubt or to Petitioner's theory of defense. Instead, the panel focused on a non-existent "affirmative defense" based on the failure to satisfy a "reasonable officer standard." App. 107a–08a. That focus also led the panel to speculate that admitting Deen's confession would have led to a mini-trial about the reasonable-officer standard. But Petitioner explained that, in fact, the prosecution on redirect would have merely sought to justify Cabrera's decision to discount Deen as a suspect. App. 108a–09a. The panel also thought that no limiting instruction could have reduced the risk of jurors taking Deen's confession for its truth. But Petitioner explained that this reasoning conflicted with *Tennessee v. Street*, 471 U.S. 409 (1985), which upheld the admission of a third-party confession for a non-hearsay purpose precisely because a limiting instruction was given. App. 106a–07a.

The court of appeals denied the petition for rehearing en banc. App. B, 84a.

REASONS FOR GRANTING THE PETITION

Numerous state and federal appellate courts have recognized that criminal defendants may mount a trial defense based on the police's failure to investigate other suspects. The reason is obvious: that failure may give rise to reasonable doubt. But the Eleventh Circuit below held that no such defense exists. Left undisturbed, that unprecedented decision will deprive federal defendants in Florida, Georgia, and Alabama of a crucial way to show reasonable doubt. That will lead to the conviction of innocent defendants. The decision below also contravenes this Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995). And its sweeping rationale will permit the admission of defense evidence at trial only when it supports an "affirmative defense."

I. The Decision Below Creates a Lopsided Split of Authority

1. Numerous state and federal appellate courts have recognized "the legitimacy and importance of a defense of failure to investigate properly." *United States v. Bahamonde*, 445 F.3d 1225, 1232 (9th Cir. 2006) (citing *United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000)). Indeed, lower courts have long recognized that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant." *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (quoted favorably in *Kyles*, 514 U.S. at 446).

Massachusetts has led the way. Ever since *Commonwealth v. Bowden*, 399 N.E.2d 482, 491 (Mass. 1980), the Supreme Judicial Court has consistently recognized that "[d]efendants have the right to base their defense on the failure of police adequately to investigate a [crime] in order to raise the issue of reasonable

doubt as to the defendant's guilt." *Commonwealth v. Phinney*, 843 N.E.2d 1024, 1033 (Mass. 2006). That court has explained that a defense may be based on a failure "to pursue leads that a reasonable police investigation would have conducted or investigated" because "[a] jury may find reasonable doubt if they conclude that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." *Commonwealth v. Silva-Santiago*, 906 N.E.2d 299, 314 (Mass. 2009). In short, "the failure of police to investigate leads concerning another suspect is sufficient grounds for a [so-called] *Bowden* defense." *Id*. at 315; *accord Commonwealth v. Moore*, 109 N.E.3d 484, 497 (Mass. 2018).

Following the lead of its neighbor to the north, Connecticut has likewise "recognized that defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy." *State v. Wright*, 140 A.3d 939, 945 (Conn. 2016). The Connecticut Supreme Court has explained that, while an adequate investigation is not an element the state must prove to obtain a conviction, a defendant may nonetheless "rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." *Id*. at 946 (quotation omitted). Like Massachusetts, Connecticut has directed trial courts to instruct juries accordingly. *State v. Gomes*, 256 A.3d 131, 150 n.20 (Conn. 2021). And it has made clear that this general rule applies where the investigation "ignored leads that may have suggested other culprits." *Wright*, 140 A.3d at 946 (quoting *Silva-Santiago*, 906 N.E.2d at 314).

A trilogy of Massachusetts cases illustrates how that rule applies in practice. In *Moore*, the trial court excluded as hearsay an audio recording of a police radio broadcast that contained witness descriptions of the suspects. 109 N.E.3d at 806. The Supreme Judicial Court held that this hearsay ruling was erroneous "because the descriptions were not being offered for their truth, i.e., to show that the defendant did not match the descriptions of the perpetrators relayed by police." *Id.* at 809. Instead, the "descriptions were being offered to show that, once police stopped the defendant, they focused their investigation on the defendant to the exclusion of all others, even though the defendant did not match the physical descriptions in the broadcast." *Id.* "Therefore, the portions of the audio recording that contained descriptions of the perpetrators were relevant to the defendant's *Bowden* defense," and the trial "judge erred in excluding those portions of the police broadcast." *Id.*

In *Phinney*, the Supreme Judicial Court upheld the grant of a new trial based on ineffective assistance of counsel. Trial counsel never examined police reports that would have supported a defense based on the "failure of police to conduct an inadequate investigation." 843 N.E.2d at 1031–32. The police "reports would have been admissible to show that the police were on notice of [another man] as a potential suspect, but that he was not investigated." *Id.* at 1033. Thus, "the defendant was denied the right to argue that [this other man] was a legitimate suspect who was not investigated by the police," thereby "rais[ing] the issue of reasonable doubt." *Id.*

And, in *Commonwealth v. Reynolds*, 708 N.E.2d 658 (Mass. 1999), the trial judge prevented the defendant from eliciting evidence about tips informing the police

that the murder victim had been fighting with members of Whitey Bulger's criminal organization, who were present at the same bar as the victim the night he was murdered. *Id*. at 661–62. The Supreme Judicial Court rejected the state's argument that this evidence was hearsay, since the "defendant did not offer the substance of the informants' tips for the truth of the matter asserted. Rather, the defendant offered the fact that the tips occurred and were not investigated." *Id*. at 662. And, the court held, "[t]he defendant was entitled to show that the investigation was deficient," which "was a question for the jury" under his *Bowden* defense. *Id*.

Federal courts of appeals have issued similar holdings based on similar logic. For example, in *Alvarez v. Ercole*, 763 F.3d 223 (2d Cir. 2014), the Second Circuit affirmed the grant of habeas relief where the "defense strategy was to show that the New York City Police Department investigation had been incomplete in ways that created reasonable doubt." *Id*. at 225. To support that reasonable-doubt defense, the defendant sought to elicit testimony about a police report memorializing leads from a witness that had not been investigated. *Id*. The trial court excluded that evidence as hearsay. However, the Second Circuit held that this ruling was erroneous because the defendant had not "offered the report as a means of establishing the truth of its content," but rather to show "that the NYPD had failed to take even obvious, preliminary steps to investigate the leads" known to the police. *Id*. at 230. In particular, he sought "to show that the NYPD's incomplete investigation indicated that the NYPD had prematurely concluded that Alvarez was the guilty party, and in that way to raise a reasonable doubt that [he] was in fact responsible." *Id*.

Similarly, in *Camm v. Faith*, 937 F.3d 1096 (7th Cir. 2019), the Seventh Circuit reversed the grant of summary judgment on a *Brady* claim in a 42 U.S.C. § 1983 case. Investigators had agreed to run a DNA profile through the state's DNA database, but they failed to disclose that they never did so. In analyzing the defendant's *Brady* claim, the Seventh Circuit observed that the officer's failure to follow through on the DNA test "would support an argument that this investigation was so shoddy that a simple test on a highly important piece of physical evidence—indeed, a test that could in theory identify a different suspect—was overlooked." *Id*. at 1110. That lapse also "would have set up an argument that they were hiding crucial evidence because they thought it might undermine their case . . . by identifying an alternative suspect." *Id*. The court understood: "[a]rguments like these can help create reasonable doubt." *Id*.

Likewise, in *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021), the Tenth Circuit recently held that, had it been disclosed, the state's failure to investigate harassing phone calls made to the victim "could have been attacked by [defense counsel] to cast doubt on whether the police identified the right culprit," and to "raise serious questions about the manner, quality, and thoroughness of the investigation that led to [defendant's] arrest and trial." *Id*. at 1076 (quotation omitted).

There are countless other state and federal appellate court decisions that also recognize the legitimacy of a reasonable-doubt defense based on the inadequacy of the investigation. *See, e.g.*, *Workman v. Commonwealth*, 636 S.E.2d 368, 375–76 (Va. 2006) (failure to investigate witness statement supporting self-defense theory "would have been a powerful tool for the defense not for its truth but rather to support its

contention that police investigation was inadequate because it failed to further investigate conflicting evidence"); *Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) ("The absence of any credible investigation" into a man who admitted placing a contract on the victim's life "could have allowed Mendez to present a strong challenge to the thoroughness and reliability of the police work"); *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) ("the fact that not one, but two separate police reports contained an identical error as to a critical piece of evidence certainly raises the opportunity to attack the thoroughness, and even good faith, of the investigation"); *Sager*, 227 F.3d at 1145–46 (9th Cir. 2000) (finding plain error where the district court prevented the defense from probing "a highly damaging flaw" uncovered in an investigator's account of a witness statement and "instruct[ed] the jury to refrain from 'grading' the investigation"); *Lowenfield v. Phelps*, 817 F.2d 285, 291–92 (5th Cir. 1987) (defense counsel reasonably failed to object to the admission of murder weapons investigators failed to find because it could "set the stage for an argument . . . that the sloppy police work reflected adversely on the state's entire case").

2. The precedential decision below stands in stark contrast to the wealth of authority above. Although Deen voluntarily confessed to the crime, the Eleventh Circuit held that any failure to investigate him as a suspect was legally irrelevant. Why? Because, it reasoned, an inadequate police investigation was not a valid defense at all. *See* App. 2a (framing the issue as "whether a defendant may introduce, as a defense to his prosecution, evidence that the police failed to conduct a reasonably diligent investigation into the charged crime"); App. 19a (asking whether Petitioner

could "assert Cabrera's failure" to investigate Deen "as a defense"); App. 57a ("we find nothing in our precedent that would have deemed" the inadequacy of the investigation to be a defense or an issue in the case); App. 58a (rejecting Petitioner's assumption of a valid "defense based on the purported failure of the Task Force to conduct its investigation consistent with the reasonable officer standard" and finding no support "for such a defense"); App. 61a (rejecting "the existence" of a "defense based on the failure of the police to conduct a reasonably thorough investigation"); App. 65a ("Because nothing in our caselaw indicates the existence of an affirmative defense based on the failure of police to conduct an investigation as reasonably diligent officers, we conclude that no such defense exists. Elysee's theory of relevance for Deen's confession hinges on such a defense, and his theory therefore collapses.").

Petitioner is unaware of any appellate decision from any jurisdiction to categorically prevent criminal defendants from mounting a trial defense based on an inadequate police investigation. Thus, had Petitioner been prosecuted anywhere other than the Eleventh Circuit, he would have been able to argue that Officer Cabrera's failure to investigate Deen as a suspect gave rise to reasonable doubt. And that could have easily resulted in Petitioner's acquittal; after all, the trial was already a nail-biter even without that evidence. If allowed to stand, the decision below will continue to prevent federal criminal defendants in Florida, Georgia, and Alabama—but nowhere else—from showing reasonable doubt based on the police's failure to investigate other known suspects. The happenstance of geography should not determine whether criminal defendants may mount such a critical defense at trial.

II. The Decision Below Will Lead to the Conviction of Innocent Defendants

When innocent people are wrongfully charged, it is often due to a flawed investigation. Cognitive biases—"such as belief perseverance (where people adhere to a belief even when the evidence that initially supported it is proven incorrect), confirmation bias (where people favor information that confirms their theories and beliefs over dissonant information), and tunnel vision (where investigators focus on one suspect to the exclusion of evidence supporting other culprits)"—can lead investigators astray. Lisa J. Steele, Investigating and Presenting an Investigative Omissions Defense, Crim. L. Bulletin (vol. 57, no. 2) (2021) (footnotes omitted). "Investigators may also be affected by peer pressure; their emotional response to the crime or to the witnesses; fatigue; and other systemic failures that can affect anyone, no matter how pure their intentions." *Id*. (footnotes omitted). Investigators also frame people too. *See, e.g.*, Troy Closson, A Detective Was Accused of Lying. Now 90 Convictions May be Erased. N.Y. Times (Ap. 6, 2021); Dep't of Justice, Press Release, Former Honolulu Police Officers Sentenced for Framing an Innocent Man With a Crime (Dec. 1, 2020); Jay Weaver & David Ovalle, For Framing Innocent Black Men, A Florida Police Chief Gets Three Years in Prison, Miami Herald (Nov. 27, 2018).

The innocent have only one way to win back their freedom: a trial. And it is precisely because the accused may be innocent that the Due Process Clause requires the government to prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," for "[i]t is a prime instrument for reducing the risk of

convictions resting on factual error." *Id*. at 363. "The accused during a criminal prosecution has at stake interest[s] of immense importance," *id*., and "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law," *id*. at 364. Thus, such "extreme caution in factfinding [is necessary] to protect the innocent," *id*. at 365, as well as to ensure "that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned," *id*. at 364.

But if the reasonable-doubt standard is to fulfill those vital roles, criminal defendants must be permitted to mount a reasonable-doubt defense at their trials. As the cases above reflect, one powerful way to do that is by exposing deficiencies in the underlying investigation. And where the police do not adequately investigate another suspect, that failure may create reasonable doubt that the defendant is in fact guilty. Yet the decision below will prevent federal criminal defendants in Florida, Georgia, and Alabama from presenting such a defense and making such an argument. The result is not hard to imagine: innocent people will not only be charged; they will be convicted as well. Since 1989, nearly 3,000 people have been exonerated after being convicted, according to The National Registry of Exonerations.[2] More names will be added to that ignominious registry if the decision below goes unchecked.

The decision below will have other troubling consequences too. Although the right to trial is enshrined in the Bill of Rights, only 2% of federal defendants now exercise it. U.S. Sentencing Comm'n, 2020 Annual Report and Sourcebook of Federal

[2] http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

Sentencing Statistics 56–58, tbl. 11. That figure will shrink even further. For although innocent defendants need a trial more than anyone, the decision below will deter many of them from taking the risk. Indeed, 15% of all known exonerees pleaded guilty. The National Registry of Exonerations, Innocents Who Plead Guilty (Nov. 2015).[3] Innocent defendants in the Eleventh Circuit will do the same if they cannot mount a reasonable-doubt defense at their trial based on an inadequate investigation. Preventing defendants from challenging the investigation at trial also removes a critical check on the police. And immunizing investigations from scrutiny at trial will not only create perverse incentives for innocent defendants and the police alike; it will also undermine "[t]he basic purpose of a trial," which "is the determination of truth." *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 416 (1966). This Court's intervention is necessary to reinvigorate the criminal trial and protect the wrongfully accused.

III. The Decision Below Is Grievously Wrong

The Eleventh Circuit's decision below is not only dangerous; it is grievously wrong as a legal matter. It directly contravenes this Court's binding precedent. And its reasoning is both flawed on its face and sweeping in its implications.

1. The decision below is irreconcilable with *Kyles v. Whitley*, 514 U.S. 419 (1995). In that case, investigators uncritically relied on an informant named "Beanie" to make the case against Kyles, even though Beanie himself should have been treated as an obvious suspect. The police failed to turn over Beanie's statements, in violation of *Brady*. In explaining why disclosing his statements could have made a difference

[3] http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

at trial, this Court repeatedly emphasized that the defense could have used them to challenge the investigation. The following passages are from the Court's opinion:

- "The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. . . . There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. . . . These were additional reasons . . . for the police to treat [Beanie] with a suspicion they did not show." 514 U.S. at 442 n.13.

- "Beanie's various statements would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation, as well. . . . Their disclosure would have revealed a remarkably uncritical attitude on the part of the police." 514 U.S. at 445.

- "[T]he defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted [by Beanie]. See, *e.g.*, *Bowen v. Maynard*, 799 F.2d 593, 613 (CA10 1986) ('A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation'); *Lindsey v. King*, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence 'carried within it the potential for the discrediting of the police methods employed in assembling the case')." 514 U.S. at 446 (ellipses omitted).

- "The dissent suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." 514 U.S. at 446 n.15 (internal citation omitted).

- "By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of

negligence. . . . Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt . . . ." 514 U.S. at 447.

- "The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed . . . by Detective John Miller's admission at the same hearing that he thought at the time that it 'was a possibility' that Beanie had planted the incriminating evidence in the garbage." 514 U.S. at 448.

- "[T]he jury could also have taken Beanie to have been making the more sinister suggestion that the police 'set up' Kyles, and the defense could have argued that the police accepted the invitation. . . . Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation . . . ." 514 U.S. at 448–49.

- "Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. . . . With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned . . . ." 514 U.S. at 449 n.19.

The decision below forecloses the very sort of inadequate investigation defense that *Kyles* endorsed. Numerous lower courts have cited *Kyles* for the proposition that challenging the adequacy of the investigation is a legitimate defense. *E.g.*, *Mendez*, 303 F.3d at 416; *Howell*, 231 F.3d at 625; *Sager*, 227 F.3d at 1145. And that authority was brought to the Eleventh Circuit's attention. After it *sua sponte* held that no such defense exists, Petitioner sought rehearing en banc, relying heavily on *Kyles* and decisions from other jurisdictions. App. 88a, 102a–04a & n.3. Yet the Eleventh Circuit denied rehearing without addressing *Kyles* or modifying its opinion, thereby cementing its contrary holding as the law of that circuit. In doing so, the Eleventh

Circuit flouted *Kyles*. This Court's intervention is necessary to ensure uniformity with the many lower-court decisions faithfully applying that precedent of this Court.

2. Making matters worse, the reasoning underlying the Eleventh Circuit's rogue holding is indefensible. That court reasoned that the relevance of Officer Cabrera's failure to investigate Deen "depend[ed] on the existence of an affirmative defense based on the failure of the police to conduct a reasonable thorough investigation." App. 61a, 65a. Without ever explaining why that was true, the court then held that an inadequate investigation was not an "affirmative defense." App. 19a, 57a–58a, 61a, 65a. In other words, it was not "a defense, in itself, against the crime for which [Petitioner] was standing trial." App. 19a; *see* App. 26a n.40.

But the premise of that reasoning is fatally flawed. To be sure, an inadequate investigation is not itself an "affirmative defense." The adequacy of the investigation is not an element that the government must prove, and showing an inadequate investigation would not otherwise mandate an acquittal. Nonetheless, the failure to investigate a suspect who confessed to the crime can still be highly relevant, for it can give rise to reasonable doubt as to the defendant's guilt. *See Wright*, 140 A.2d at 946 (drawing this distinction). The court of appeals overlooked that rudimentary point.

In doing so, it erroneously assumed that defense evidence can be relevant *only* where it supports an "affirmative defense" to the crime. The court cited no authority to support that assumption, and Petitioner is unaware of any. Indeed, under that logic, criminal defendants would be unable to admit any evidence at all, unless they also asserted (and their evidence supported) an "affirmative defense" to the crime.

Yet the majority of criminal cases, especially in the federal system, do not involve an "affirmative defense." Meanwhile, the majority of criminal defendants *do* argue that the prosecution has not met its burden of proof. But, under the Eleventh Circuit's rationale, criminal defendants in those mine-run cases could admit no evidence at all.

Compounding that inexplicable error, the Eleventh Circuit announced this new rule *sua sponte* and contrary to the principle of party presentation. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–79 (2020). The government never disputed, either in the district court or on appeal, that Officer Cabrera's failure to investigate Deen would be relevant; neither did the district court. The Eleventh Circuit itself recognized as much. App. 15a n.16, 18a & n.26, 54a. Yet despite issuing multiple orders for additional briefing and record materials after oral argument, the Eleventh Circuit never gave Petitioner an opportunity to address its novel holding that an inadequate investigation is not a valid defense.[4] So Petitioner identified the flaws of that holding in his rehearing petition. *See* App. 98a–101a, 104a–05a. But, again, rehearing was denied, and the panel opinion went unmodified. The upshot is that, in the Eleventh Circuit alone, defense evidence may now be admitted at trial only where it is relevant to a standalone "affirmative defense" to the crime. That bewildering implication further bolsters the urgent need for this Court's intervention.

[4] To justify that holding, the panel attacked a straw man by distinguishing cases that Petitioner had cited for an entirely different proposition—namely, that out-of-court statements made to officers may be admitted as non-hearsay if offered to explain the course of the investigation. *See* App. 58a–65a. After all, the district court had excluded Deen's confession and Officer Cabrera's reaction as hearsay, not as irrelevant. So that hearsay ruling was what Petitioner had challenged on appeal. He had no inkling that relevance was even at issue until the panel issued its decision.

3. Finally, the facts of this case underscore how dangerous and wrong the Eleventh Circuit's holding is. Darius Deen literally walked into the police station on his own accord and voluntarily confessed to the crime with which Petitioner was charged. Yet the lead investigator simply jotted down Deen's confession and let him go. If the police did nothing more to investigate Deen as a suspect, then that failure would have given Petitioner a compelling reasonable-doubt defense at trial. After all, how could the jury be confident—beyond a reasonable doubt—that the police got the right man when the police disregarded the voluntary confession of a different man?

That reasonable-doubt argument would have also dovetailed with Petitioner's theory of defense. Recall his theory: the police pinned the gun on him not because he was guilty, but because he was the only occupant of the car they had apprehended. Failing to investigate another man who confessed to possessing the gun would have substantially bolstered Petitioner's theory that the police pinned the gun on him without regard to his guilt. After all, by the time Deen confessed, the police were already locked into their false narrative that Petitioner was the armed passenger. Investigating Deen would have risked contradicting police reports that were already inked, jeopardizing their ability to secure a conviction at trial. Yet the Eleventh Circuit held that any failure to investigate Deen was irrelevant as a matter of law because an inadequate investigation—no matter how flawed or corrupt—is not an "affirmative defense." This case vividly illustrates the powerful defense evidence that will be removed from the purview of juries under the Eleventh Circuit's decision. This Court should not allow that unprecedented decision to remain on the books.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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