No. 22-

In The Supreme Court of the United States

ALONZO PETERS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a defendant's convictions for conspiracy and drug trafficking conspiracy must be vacated where the defendant had no commercial association with, nor interest in the enterprise, did not act on behalf of the enterprise or in agreement to further enterprise objectives, and did not act either alone or in concert with members of the enterprise for purposes of participating in the enterprise or assisting in its objectives, but only had personal contact with one of its members and who committed offenses independently and separately of the enterprise and its objectives.

II. Can the constitutional right to due process be protected when federal courts regularly apply inconsistent and erroneous standards to determining the materiality of suppressed evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995)?

III. Whether the United States Court of Appeals for the Fifth Circuit applied an erroneous standard to assessing the materiality of a cooperating witness's letter to an Orleans Parish Assistant District Attorney stating that the entire case against the defendants is "made up of lies"?[1]

[1] This question restates the Question Presented in the Joint Petition filed on behalf codefendants Evans Lewis and Jasmine Perry, filed this date for certiorari as well.

PARTIES TO THE PROCEEDING

Alonzo Peters is the Petitioner herein and was the Appellant below.

The United States is the Respondent herein and was the Appellee below.

RELATED CASES

United States v. Price et al., No. 2:15-cr-154, United States District Court for the Eastern District of Louisiana. Judgment on Alonzo Peters entered July 27, 2017.

United States v. Jasmine Perry consolidated with *United States v. Leroy Price, Alonzo Peters, Curtis Neville, Solomon Doyle, Damian Barnes, Ashton Price, McCoy Walker, Terrioues Owney, Evans Lewis*, No. 17-30610 c/w 17-30611, United States Court of Appeals for the Fifth Circuit. Judgment entered May 12, 2022. (Judgment denying rehearing entered July 13, 2022). Appendix A.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alonzo Peters respectfully requests this Honorable Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Mr. Peters' convictions and sentences is published as *United States v. Perry*, 35 F.4th 293 (5th Cir. 2022) and reproduced as Appendix A at A-1. The Judgment of the District Court pursuant to Mr. Peters' jury trial is reproduced as Appendix B at A-75. The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing is reproduced as Appendix C at A-81. The Jury Verdict form from the trial of Mr. Peters is reproduced as Appendix D at A-84.

JURISDICTION

The Fifth Circuit Court of Appeals issued its judgment on May 12, 2022, 2022, Appx. A, and denied panel rehearing on July 13, 2022, Appx. B. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND FEDERAL RULE

18 U.S.C.S. § 1962(c) and (d) provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

21 U.S.C.S. § 841(a)(1) provides, in pertinent part:

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

21 U.S.C.S. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

INTRODUCTION

Appellant Alonzo Peters was accused of being a member of one of the most violent gangs in New Orleans: the 39ers. He was charged with being a co-conspirator engaged in various gang activities, including distributing drugs, possessing firearms, and committing murder and assault, among other activities. He was tried with nine (9) co-defendants in a lengthy, complicated jury trial, with evidence that was based on lies and misstatements of self-interested cooperators. There was no evidence linking Mr. Peters to the 39ers. Although he was rightly acquitted of all counts concerning murder and assault, Mr. Peters was wrongly convicted of engaging in conspiracy and gang-related activities, after being lost in the mix of a trial that should have been severed. Indeed, but for the nearly 7-week trial, with volumes of prejudicial evidence used by the Government against his co-defendants, Mr. Peters would not have been caught in the evidentiary tsunami that ultimately resulted in life imprisonment. Mr. Peters avers that the evidence was insufficient to prove

beyond a reasonable doubt that he was a part of any conspiracy or that he committed offense as part of an enterprise. Further, he avers that nondisclosure of evidence material to the guilt or punishment of the 10-defendants at trial resulted in a *Brady* violation which was improperly dismissed by the appellate court. Accordingly, Mr. Peters avers that this writ of certiorari warrants consideration by this Honorable Court, and he respectfully requests that his convictions and sentences be vacated.

STATEMENT OF THE CASE

On June 12, 2015, Appellant Alonzo Peters was charged in a 45-count, 13-defendant indictment, with Count 1, RICO conspiracy, in violation of 18 USC §§1962(d), Count 2, conspiracy to distribute controlled dangerous substances, in violation of 21 USC §§841, 846, Count 3, conspiracy to use firearms to further drug trafficking crimes, in violation of 18 USC §924(o), Count 4, murder in aid of racketeering, in violation of 18 USC §§1959(a)(1) and 2, Count 5, murder through use of a firearm, in violation of 18 USC §§924(j) and 2, assault with a dangerous weapon in aid of racketeering, in violation of 18 USC §§ 1959(a)(2)(3) and 5, and using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 USC §§ 924(c)(1)(A) and 2.[2] On April 29, 2016, Appellant Alonzo Peters was charged in a 47-count, 13 defendant superseding indictment, with the same violations.[3] On May 6, 2016, Mr. Peters was arraigned not guilty.[4]

[2] ROA.51-125.
[3] ROA.327-389.
[4] ROA.19881.

On August 24, 2016, the Government charged Mr. Peters by bill of information to establish two (2) prior convictions from Louisiana state court, one for possession of cocaine from May 25, 2011, and the second for possession with intent to distribute marijuana, from May 25, 2011.[5] Mr. Peters moved to adopt pretrial motions of other defendants, which was granted on December 8, 2015.[6] On August 23, 2016, Mr. Peters adopted the motion limine to admit prior guilty pleas of certain defendants, filed by Evans Lewis, which was granted the same day.[7] Additionally, Mr. Peters adopted proposed jury instructions by Evans Lewis, on August 29, 2016.[8] On September 9, 2016, defense counsel moved jointly to compel immediate discovery pursuant to *Brady*, concerning Gregory Stewart and other cooperating witnesses.[9]

On January 10, 2017, Mr. Peters appeared with nine (9) co-defendants for jury trial. ROA.23. After a 28-day trial, the jury rendered its verdict on February 21, 2017, finding Mr. Peters guilty of Count 1, conspiracy to violate RICO, Count 2, conspiracy to distribute controlled substances, specifically, 1 kilogram or more of heroin and 280 grams or more of cocaine base, and Count 3, conspiracy to use, carry and possess firearms. The jury found Mr. Peters not guilty of Count 4, murder of Kendall Faibvre in aid of racketeering, Count 5, causing the death of Kendall Faibvre through use of a firearm, Count 6, assault of Jasmine Jones with a dangerous weapon

[5] ROA.19911-19913.
[6] ROA.19873-19877.
[7] ROA.19908-19910, 19914.
[8] ROA.19915-19917.
[9] ROA.19941-19990.

in aid of racketeering, and Count 7, use and carrying of a firearm during and in relation to a crime of violence and a drug trafficking crime (Jasmine Jones).[10]

On March 8, 2017, Mr. Peters filed a motion and memorandum in support of post-trial motion for judgment of acquittal or new trial.[11] Mr. Peters filed a supplemental motion for acquittal and/or new trial and memorandum in support, further incorporating arguments in Evans Lewis' supplemental memorandum in support of his motion for acquittal and new trial based on newly discovered *Brady* material.[12] The court issued its order and reasons denying all motions for acquittal and new trial, on July 18, 2017.[13] On July 24, 2017, Mr. Peters was sentenced to life imprisonment on Count 2, and terms of 235 months each on Counts 1 and 3, all terms to be served concurrently, with credit for time served.[14]

On July 25, 2017, Mr. Peters timely filed a notice of appeal.[15] Briefs on behalf of appellants and the Government were filed and oral argument was heard in this matter. On May 12, 2022, the Fifth Circuit Court of Appeals affirmed Mr. Peters' convictions and sentences on Counts 1 and 2, and vacated the conviction and sentence on Count 3.[16] Mr. Peters filed a Petition for Panel Rehearing timely and joined in co-

[10] ROA.20057-20061.
[11] ROA.20069-20079.
[12] ROA.20157-20160.
[13] ROA.1619-1649.
[14] ROA.20167-20173, 20180-20228.
[15] ROA.20161-20162.
[16] Appendix A.

appellants' Petition for En Banc Rehearing[17] on the issue of *Brady*. On July 13, 2022, the Petitions for Rehearing were denied.[18] This writ timely follows.

REASONS FOR GRANTING THE WRIT

This petition presents critical questions that conflict with decisions of other federal courts of appeals and its own circuit. In the first, the decision deviates from accepted standards for determining whether an individual's activities and conduct occurred in agreement with or should be considered in furtherance of, enterprise objectives. In the second, a key piece of evidence was disclosed after the end of the multidefendant trial. Although the Fifth Circuit considered the issue of materiality to be a "close one," it upheld the district court's finding of immateriality. The circuit courts are split in determining *Brady* materiality. Both issues involve unreconciled areas of law and warrant this Court's review.

ARGUMENT

The evidence was insufficient to support findings that Mr. Peters was guilty of conspiracy and drug trafficking conspiracy beyond a reasonable doubt. In deciding the sufficiency of the evidence, the appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979). Such review is "highly deferential to the verdict." *United States v. Moreno-Gonzalez*, 662 F.3d 369, 372 (5th

[17] The Fifth Circuit treated the Joint Petition for Rehearing En Banc as a Petition for Panel Rehearing.
[18] Appendix C.

Cir. 2011) (internal citations omitted). The court does not determine "whether the jury's verdict was correct, but instead focus[es] upon the verdict's reasonableness." *Moreno-Gonzalez*, 662 F.3d at 372. Evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. *United States v. Reyna*, 148 F.3d 540, 543 (5th Cir. 1998) (*citing United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996), *cert. denied*, 517 U.S. 1228, 116 S. Ct. 1867 (1996)). A jury is "free to choose among reasonable constructions of the evidence." *Reyna*, 148 F.3d at 543. However, where the evidence "tends to give 'equal or nearly equal circumstantial support' to guilt or innocence, [] reversal is required: When the evidence is essentially in balance, 'a reasonable jury must necessarily entertain doubt.'" *Reyna*, 148 F.3d at 543 (*quoting Lopez*, 74 F.3d at 577).

A. Without an agreement to participate in the affairs of an enterprise and consent to involvement in the enterprise, a defendant cannot be found guilty of conspiracy beyond a reasonable doubt.

Mr. Peters was convicted of RICO conspiracy and drug trafficking conspiracy. For each conviction, it was the government's burden to prove that Mr. Peters agreed to participate in the conspiracy, the actions of the enterprise, its objectives and to act in its behalf. Indeed,

> [f]rom a conceptual standpoint a conspiracy to violate RICO can be analyzed as composed of two agreements (in reality they would be encompassed by the same manifestations of the defendant): an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts. Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. *United*

> *States v. Riccobene*, 709 F.2d 214, 224 (3d Cir.), *cert. denied*, 464 U.S. 849, 104 S. Ct. 157, 78 L. Ed. 2d 145 (1983); *United States v. Sutherland*, 656 F.2d 1181, 1189-95 (5th Cir. 1981), *cert. denied*, 455 U.S. 949, 102 S. Ct. 1451, 71 L. Ed. 2d 663 (1982). *See supra note 3. See also* U.S. Dept. of Justice, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors 70-71 (1985). If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy. Thus, mere association with the enterprise would not constitute an actionable 1962(d) violation. In a RICO conspiracy, as in all conspiracies, agreement is essential.

United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir. 1986).

Conspiracy to traffic drugs requires the Government to prove, "1) the existence of an agreement between two or more persons to violate federal narcotics laws; 2) the defendant's knowledge of the agreement; and 3) the defendant's voluntary participation in the agreement." *United States v. Gonzales*, 79 F.3d 413, 423 (5th Cir. 1996); 21 USC §§841, 846. "A conspiracy agreement may be tacit, and the trier of fact may infer an agreement from circumstantial evidence." *United States v. Inocencio*, 40 F.3d 716, 725 (5th Cir. 1994) (internal quotation marks and citations omitted). "A defendant may be convicted on the uncorroborated testimony of a co-conspirator who has accepted a plea bargain unless the coconspirator's testimony is incredible." *United States v. Booker*, 334 F.3d 406, 410 (5th Cir. 2003). A jury may also consider factors such as "concert of action" and presence among, or in association with, coconspirators. *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994) (internal quotation marks and citations omitted). "A jury may find knowledgeable, voluntary participation from presence when it would be unreasonable for anyone other than a knowledgeable participant to be present." *United States v. Martinez*, 190 F.3d 673,

676 (5th Cir. 1999). However, mere presence or association alone are not sufficient to support a conspiracy conviction. *See United States v. Brito*, 136 F.3d 397, 409 (5th Cir. 1998).

In all counts charged against Mr. Peters, the Government presented evidence attempting to portray Mr. Peters as a member of the 39ers enterprise. The testimonies of unindicted co-conspirators were used to suggest that, among others, Mr. Peters had a place within the organization. Darryl Franklin and Gregory Stewart were leaders in the 39ers, playing important roles in maintaining the organization and its cohesiveness. Darryl Franklin testified that he had no dealings with Mr. Peters and no knowledge of Mr. Peters selling heroin for or through the enterprise. Franklin's testimony did not establish that Mr. Peters was a member of the enterprise, or that Mr. Peters possessed or sold narcotics on behalf of the 39ers. Franklin had no knowledge whether Gregory Stewart sold to Mr. Peters. Franklin could only offer that Stewart knew or "dealt with" Mr. Peters, but that Franklin "never seen [Mr. Peters] get any [heroin] from Gregory Stewart."[19] This is hardly an endorsement by a gang leader of a member in his gang.

Gregory Stewart testified that he did not sell cocaine to Mr. Peters but that had sold less than two (2) ounces of heroin to Mr. Peters. And although a jailhouse phone call purportedly shows Mr. Peters to be asking Stewart for heroin, that still not does prove Mr. Peters was a co-conspirator or a member of a conspiracy. That a person may know he can buy toilet paper for a certain price at Wal-Mart or calls Wal-

[19] ROA.2754.

Mart to confirm, does not necessarily mean that he is a Wal-Mart employee. Indeed, there was no evidence showing that Mr. Peters engaged in the conspiracy charged.

No evidence was presented that Mr. Peters was any ranking level member in the 39ers organization, or that he sought to rise within its ranks. Stewart's statements about Mr. Peters appear largely (and appropriately) disregarded by the jury: Mr. Peters was acquitted of any connection to the Kendall Faibvre murder. That the jury found Stewart's testimony about Mr. Peters incredible, is reasonable. Consequently, the jury could have relied on Franklin's testimony to infer that Mr. Peters may have been a member of the enterprise. However, that testimony was speculative. Specifically, Franklin testified that Mr. Peters rented hotel rooms for Stewart. There was no evidence that Mr. Peters knew the extent or scope of Stewart's activities. Mr. Peters—the only legally and gainfully employed defendant—had been a full-time employee of Marriott and lost that job because of Stewart left a gun in a rented room. There was no evidence that Mr. Peters knew Stewart's actual activities or the purpose for renting the hotel rooms, except, perhaps, to entertain women—a proclivity for which Stewart proudly boasted to the jury. Nevertheless, it would be more reasonable for Mr. Peters to assume Stewart was entertaining women than to necessarily believe Stewart would be transacting illegal activity. Whether Mr. Peters actually knew or whether it was foreseeable that Stewart would be conducting 39ers activities out of those rooms, was problematic, and not conclusively established.

That the jury convicted Mr. Peters of violating RICO (i.e., finding him a member of the enterprise), cannot be reconciled with the evidence adduced at trial.

Although Mr. Peters may have known Stewart's connection to the enterprise, that does not imply Mr. Peters was, himself, a member of that enterprise. The evidence did not establish that he was aware of furthering enterprise activity, or that he was seeking to engage in 39ers activity, per se. There was no nexus between Mr. Peters' isolated drug incidents and 39ers activities. Even assuming the jury considered certain portions of Stewart's testimony to be credible, it should be noted that Stewart did not describe Mr. Peters to be a member of the 39ers or any enterprise comprising it. In this respect, and concerning Count 2, it also bears noting that Stewart testified that he sold Peters no more than two (2) ounces of heroin. That activity was isolated.[20] Stewart testified that he felt sorry for Peters for having caused him to lose his job. If Mr. Peters was a so-called 39er, Stewart would not have turned him away from selling drugs, but that is what happened.[21]

The remaining cooperators, Washington McCaskill and Tyrone Knockum, provided no evidence to link Mr. Peters to the 39ers. Washington McCaskill testified that he had known Mr. Peters since he was a child. He had never seen Mr. Peters with guns or selling drugs.[22] And, Tyrone Knockum, too, never saw Mr. Peters with a gun or selling drugs. Mr. Peters, by all accounts, except for the colorful "Rabbit," was not a co-conspirator in any organization.

Alonzo Peters' convictions and sentences warrant reversal as they are borne of an overbroad, overreaching, misdirected and unreasonable application of conspiracy

[20] ROA.7174.
[21] ROA.7207.
[22] ROA.9288.

law. The case against Mr. Peters was wholly misplaced. He was not a co-conspirator acting in the interests of a criminal enterprise or for purposes to further the enterprise's objectives. He had no enterprise ties to the 39ers.

In its response, the Government maintained that Mr. Peters' convictions are irrefutable. However, the Government must prove a "relationship, or nexus, between the pattern of racketeering activity and the enterprise." Edward Hasen, Virginia Fergusson, Morgan Hensley, Jonghyun (John) Lee and John Richardson, *Article: Racketeer Influenced and Corrupt Organizations*, 58 AM. CRIM. L. REV. 1371, 1390. Mr. Peters' activities were never linked to the 39ers as an enterprise.

Specifically, the Government set out to prove a "group crime" in which Mr. Peters allegedly took part.[23] *See United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978). The problem is that Mr. Peters did not take part in any group crime. *Elliot*, 571 F.2d at 905. His actions were separate and distinct from the actions of the 39ers. The Government did not prove that Mr. Peters, at any point, acted with the purpose of conspiring with the other nine (9) co-defendants to violate the RICO statute. In particular, the following allegations are problematic:

1. Alleging Mr. Peters "lost his hotel job after the gun used in the Hampton and Lowe murders was found in a room he rented for the group."[24] Although Mr.

[23] Mr. Peters was charged with and convicted of being employed by and associated with the 39ers, a criminal enterprise engaged in activities affecting interstate and foreign commerce, who, with other named defendants, unlawfully and knowingly combined, conspired and agreed together and with each other to violate Title 18 USC §1962(c), i.e., to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity…consisting of multiple acts involving, among other offenses, murder and the illegal distribution of controlled substances. ROA.58. He was convicted of racketeering, drug trafficking and firearm conspiracies.

[24] Government's brief, p. 76, citing ROA.6938-41, 7048-49, 7186-87; see also ROA.7172-74, ROA.15092-95. As a matter of hotel company policy, the employee was responsible for what was left

Peters was fired from Marriott after a gun was found in a room he booked for Gregory Stewart, there was no evidence that he knew the gun found had been used in the commission of any murders. There was no evidence linking Mr. Peters to the activities undertaken by Stewart. The testimony and evidence do not establish that he knew the gun was used in any murders. Nothing shows he was acting in concert with the 39ers, in furtherance of their objective(s) or that he was even a 39er, himself. Mr. Peters did not know about the gun in the hotel room.[25] Stewart admitted that Mr. Peters had no idea that Stewart even had a gun with him.[26]

2. Alleging "Stewart fronted Peters heroin."[27] Stewart testified that he felt sorry for Mr. Peters for having lost his job at the Marriott due to Stewart's actions leaving his gun in the room Mr. Peters had booked for him. He gave Mr. Peters heroin to sell so that he would have some source of income. This appears to be Stewart's way of giving charity to someone he feels badly for having wronged. Mr. Peters was not a dealer/subordinate of Stewart's. Mr. Peters had just lost his income—he was responsible for supporting his mother who was living with him. Mr. Peters contacted Stewart personally; he was not tapping the 39ers or seeking to deal with the enterprise. This distinction is important. Mr. Peters' activities were separate and distinct in nature, independent of the

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behind as a result of the employee's personal booking. Mr. Peters was imputed with the gun because he had booked the room—notwithstanding that the item did not belong to him at all. Mr. Peters took no part in 39ers activities.

[25] ROA.8613-14.

[26] ROA. 8614.

[27] Govt.'s Br., p. 76, citing ROA.7186-87.

39ers, not in concert with or in furtherance of their activities or of an enterprise's objective to violate RICO.[28]

3. Alleging that "when Stewart could not supply [Mr. Peters], he was directed to go uptown."[29] In fact, nothing showed these were 39ers' orders or that Mr. Peters was acting as a 39er. This was an exchange in which one person was asking for help, not asking for clarification of orders or even taking orders as a subordinate.
4. Alleging that Mr. Peters "also brought Stewart places to catch sales."[30] Stewart testified that Mr. Peters was not present with Stewart in the hotel rooms. Mr. Peters did not take part in the transactions in the rooms. He booked the rooms for Stewart's use, not 39ers' use, and did not know Stewart's activities. There was no stated purpose for the hotel rooms.[31] Stewart confirmed that Mr. Peters had nothing to do with guns and did not "go around running behind dudes to kill them."[32]
5. Alleging "Peters sold crack and sold coke until losing his job."[33] Stewart knew that Mr. Peters sold cocaine, but there was no understanding that those activities were undertaken on behalf of the 39ers. Stewart did not testify that

[28] There is no evidence of intent by Mr. Peters to act in concert with the 39ers. And, in fact, it is evident in phone call transcripts between Stewart and Mr. Peters that Stewart had little contact with Mr. Peters. Stewart repeatedly asks, "who this is?" when Mr. Peters calls. Had Mr. Peters been a member of the enterprise, and one so important to Stewart, it would not be unreasonable for Stewart to have known Mr. Peters' voice—not ask his identity.
[29] Govt.'s Br. P. 76, citing ROA.15098.
[30] Govt.'s Br. P. 76, citing ROA.8613.
[31] In fact, Stewart was known for promiscuity and it was not unreasonable for Mr. Peters to assume, if anything, that the rooms were taken for Stewart to "entertain" women.
[32] ROA.8618.
[33] Govt.'s Br. P. 76, citing ROA.4745, 8610.

Mr. Peters was a member or associate of the enterprise. Mr. Peters' association with Stewart did not rise to the level of an operative. Mr. Peters' activities were separate from Stewart's direction or orders. The unindicted co-conspirators knew that Mr. Peters' actions were on behalf of the 39ers. Again, nothing linked Mr. Peters to the 39ers. He was not selling for the gang.

6. Alleging that "in August 2010, law enforcement recovered from Peters' bedroom a stolen AK-47 rifle, a 9mm pistol, .40 caliber rounds and a magazine, and a digital scale."[34] Mr. Peters was arrested after a controlled buy of heroin. He was never charged with the heroin. Instead, a search of the premises (his bedroom) produced marijuana. Mr. Peters admitted to arresting officers that he sold marijuana to support his mother who was living with him. Officer Travis Joseph testified that Mr. Peters had bought the AK-47 from a crackhead in uptown New Orleans. He also admitted that no heroin was confiscated—none was found. The 39ers dealt in heroin. There was no link or agreement between Mr. Peters and the 39ers: nothing to connect him to the 39ers in this arrest or any of his arrests. As adduced at trial, the location was not even in the Ninth Ward and no others were connected to the sale or arrest.

7. Alleging that in August 2011, "law enforcement made a controlled purchase of heroin from Peters," and that he "admitted to having a box of heroin under [his sister's] bed" containing "[a]pproximately 80 bags of heroin weighing 65 grams[.]"[35] Mr. Peters pled guilty to possession of the heroin recovered in the

[34] Govt.'s Br. P. 76, citing ROA.5699-6000.
[35] Govt.'s Br. P. 76-77, citing ROA.10356-58; ROA.15021-22.

August 2011 incident. Again, nothing in the account by Mike Dalfres connected Mr. Peters' actions to the 39ers. Dalfres admitted that the location was not in the Ninth ward, not in the Seventh, not near 3rd and Galvez, not near the Florida Project, not near 3NG territory, and not near Florida G-strip territory. Law enforcement seized $420 from Mr. Peters in the arrest. There were no multiple cell phones. No other co-defendants were part of the arrest or investigation. Once again, Mr. Peters' actions were those of an individual actor acting in his own behalf, not on behalf of a broader organization. There was no nexus between Mr. Peters or his activities and the 39ers: not directly and not by circumstance.

A jury is entitled to infer the existence of an enterprise on the basis of largely or wholly circumstantial evidence. *Elliott*, 571 F.2d at 898 n. 19. However, the inference must be reasonable. The danger is that individual actions, distinct from the enterprise, will be subsumed into the activities of the enterprise, thus criminalizing activities as part of a ***conspiracy*** where there was none:

> The [RICO] Act does not criminalize either associating with an enterprise or engaging in a pattern of racketeering activity standing alone. The gravamen of the offense described in 18 U.S.C. § 1962(c) is the conduct of an enterprise's affairs through a pattern of racketeering activity. Thus, the Act does require a type of relatedness: the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other.

Elliott, 571 F.2d at 899 n.23. In this matter, Mr. Peters' criminal conduct was colored with the taint of conspiracy by the Government despite his conduct not being enterprise or conspiracy related. Whereas the evolution of conspiracy law was borne

of a need to encompass the wide-ranging and growing aspects of organized crime, the resulting ability to prosecute diversified and multi-faceted conspiracies in a single substantive provision is not boundless. There is an inherent risk that unrelated individuals will be caught-up in the vortex of what appears to be conspiratorial conduct. On the one hand,

> the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. This effect is enhanced by principles of conspiracy law also developed to facilitate prosecution of conspirators at all levels. Direct evidence of agreement is unnecessary: "proof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence -- ordinarily the acts and conduct of the alleged conspirators themselves".

Elliott, 571 F.2d at 903 (internal citations omitted). However, on the other hand, the RICO Act does not "punish mere association with conspirators or knowledge of illegal activity…" *Id*. (internal citations omitted). In *United States v. Barnett*, 660 F. App'x 235, 248 (4th Cir. 2016), the Fourth Circuit considered whether the quality and scope of a co-defendant's ties to an enterprise were sufficient to support the jury's inference that she violated RICO. In particular, defendant Barnett, the regional head of a gang, was prosecuted for violating RICO and various additional crimes (including murder, robbery and narcotics trafficking), and his girlfriend, Williams, was prosecuted for violating RICO. In a joint trial by jury, both were convicted. Whereas Barnett's convictions were affirmed on appeal, Williams' conviction for conspiracy was reversed. The Government argued that Williams "played a central role in the gang as the primary source and conduit of information and as an advisor integral to the success and coordination of gang activities," supporting the jury's inferences that she

was aware that members of the gang were involved in the predicate offenses. *United States v. Barnett*, 660 F. App'x 235, 248 (4th Cir. 2016). Undoubtedly, Williams' involvement in the enterprise was close, as she was the "mouthpiece" for Barnett. However, despite her romantic relationship with Barnett and based on the quality of her contacts with enterprise operatives, there was no direct evidence that she participated in the commission of robbery or drugs trafficking, or that she agreed to their commission for the enterprise. With respect to extortion, there was no direct or indirect evidence that the violent conduct committed by gang operatives and which Williams would have had knowledge of, was related to the extortion charged. And on the predicate charge for murder, there was no evidence that Williams agreed for an operative to commit the predicate act nor did she have the requisite intent to kill. For each predicate act, there was no evidence to support the jury's inference that Williams committed the acts in furtherance of enterprise objectives or that she agreed to their commission. The Fourth Circuit, considering the quality and scope of Williams' actions reasoned,

> "[T]he RICO conspiracy statute does not 'criminalize mere association with an enterprise.'" *Id*. (*quoting Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 965 (7th Cir. 2000)). Were we to accept the government's argument, almost any individual affiliated with a gang could be presumed to know about and agree to the commission of racketeering acts generally and therefore be guilty of conspiring to violate RICO. *See United States v. Izzi*, 613 F.2d 1205, 1210 (1st Cir. 1980) ("Guilt by association is one of the ever present dangers in a conspiracy count that covers an extended period."). We decline the government's invitation to broaden RICO's scope in this manner.

United States v. Barnett, 660 F. App'x at 248. Mr. Peters is just such an individual who had that unfortunate affiliation warned of by the *Barnett* court—one who was

convicted for mere association with one member of an enterprise. He should not have been included in the 39ers prosecution.

In this matter, the Government did not produce evidence of any agreement, either tacit or overt, in which Mr. Peters was not only a member of the 39ers, but that he was acting on their behalf. Testimony by the "unindicted co-conspirators" was offered by the Government to demonstrate that there was, in fact, a criminal organization that operated to benefit itself. Neither Franklin, Stewart, McCaskill or Knockum testified that Mr. Peters was a member of the organization. Mr. Peters' criminal activities were those of a lone actor, whose conduct was not affiliated with the 39ers. In fact, there was no evidence—circumstantial or direct—that he objectively "manifested an agreement" to act in concert with the 39ers or in furtherance of their objectives.

B. Contact is not an agreement.

In *United States v. Elliot*, *supra*, the court reversed a conviction for conspiracy where the contact between one of the defendants and the proven enterprise was not only tenuous, but unreasonable to infer as rising to the level of an enterprise member. The appellate court, analyzing the evolution of conspiracy law, acknowledged that even though the "smallest fish" will be caught in RICO's "tightly woven net," the law would not

> punish mere association with conspirators or knowledge of illegal activity; [the RICO Act's] proscriptions are directed against conduct, not status. … To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes. One whose agreement with the

> members of an enterprise did not include this vital element cannot be convicted under the Act.

Elliott, 571 F.2d at 903 (internal citations omitted). In reversing the defendant Elliot's conviction, the court considered the extent, nature and quality of the connections he purportedly had with the enterprise, further analyzing the inferences drawn from those contacts for reasonableness, stating,

> We recognize "that once a conspiracy is shown to exist, slight evidence is all that is required to connect a particular defendant with the conspiracy". *United States v. Prince*, 515 F.2d 564, 567 (5th Cir. 1975); *United States v. Reynolds*, 511 F.2d 603, 607 (5th Cir. 1975).
>
> > The proof, however, must be individual and personal and the government must prove beyond a reasonable doubt that each member of the conspiracy had the deliberate, knowing, and specific intent to join the conspiracy. Mere association with conspirators or knowledge of the illegal activity is not sufficient. *United States v. Falcone*, 1940, 311 U.S. 205, 210-11, 61 S. Ct. 204, 85 L. Ed. 128; *United States v. Miller*, 5 Cir., 1974, 500 F.2d 751, 764; *United States v. Morado*, 5 Cir., 1972, 454 F.2d 167, 175; *Roberts v. United States*, 5 Cir., 1969, 416 F.2d 1216, 1220; *Causey v. United States*, 5 Cir., 1965, 352 F.2d 203, 206.
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> *Prince*, *supra*, 515 F.2d at 567.

Elliott, 571 F.2d at 906. Elliot's dealings were with one member of the enterprise on a personal level. However, even his actions in one aspect of the enterprise's criminal activities (stealing meat) were insufficient to prove that he knowingly and intentionally joined the broad conspiracy to violate RICO. Further, the court noted that Elliot's attempts to conceal his actions were predictable. The court warned against unjustifiably broadening the pervasive scope of the RICO statute. Specifically, to have held that Elliot's actions of concealment were independent

evidence that he agreed to participate in a pattern of racketeering activity would have achieved just such a broadening.

Similarly, for Mr. Peters, his contact with any member of the 39ers does not support the conclusion that he agreed to participate, indirectly or directly, in the affairs of the 39ers through a pattern of racketeering activity. Mr. Peters' dealings were with one individual on a personal level—not as a subordinate or actor in a conspiracy.

C. The evidence does not support an inference that Mr. Peters' actions occurred in furtherance of enterprise objectives, that he agreed to the commission of enterprise acts or that he participated in enterprise activities.

In prosecuting Mr. Peters for conspiracy to traffic drugs, the Government relied primarily on testimony of Gregory Stewart. A drug-trafficking conspiracy requires: "(1) the existence of an agreement between two or more persons to violate narcotics laws, (2) knowledge of the conspiracy and intent to join it, and (3) voluntary participation in the conspiracy." *United States v. McClaren*, 13 F.4th 386, 406 (U.S. 5th Cir. 2021) (*citing United States v. Nieto*, 721 F.3d 357, 367 (5th Cir. 2013)); 21 U.S.C. §§841, 846. A conspiracy can be proven by circumstantial evidence. *McClaren, supra* (*citing United States v. Sanders*, 952 F.3d 263, 273 (5th Cir. 2020) ("A jury can infer from the surrounding circumstances whether a defendant participated in and knew of the conspiracy.")). After establishing evidence of a conspiracy, the government need only offer slight evidence to connect an individual to the conspiracy. *United States v. Elliott*, 571 F.2d at 906; *United States v. Virgen-Moreno*, 265 F.3d 276, 285 (5th Cir. 2001). The defendant's responsibility is limited to the amount with

which he was directly involved or that was reasonably foreseeable to him. *United States v. Haines*, 803 F.3d 713, 740 (5th Cir. 2015).

In this matter, the Government's primary source connecting Mr. Peters with the 39ers was Gregory Stewart. Stewart allegedly fronted heroin to Mr. Peters. Notwithstanding the *Brady* issues surrounding the co-conspirators and myriad credibility issues with Stewart's testimony, but taking Stewart's testimony at face value, there was no evidence offered that Mr. Peters sold more than two (2) ounces of heroin. Stewart testified that Mr. Peters sold no more than two (2) ounces of heroin.[36] Furthermore, the evidence did not connect Mr. Peters' state convictions to 39ers activities. However, even assuming *arguendo* that the heroin conviction in state court was related to 39ers activities,[37] the total amount of heroin for which Mr. Peters could be responsible for is approximately 0.122 kilograms—not one (1) kilogram.

As far as the 280 grams of cocaine alleged against Mr. Peters, there was no testimony or evidence in which the inference that he sold or was involved in sales which totaled 280 grams or more, would have been reasonable. And, in light of Mr. Peters' limited contact with the 39ers, there was insufficient evidence to infer that he would have foreseen the drug quantities being trafficked.

Mr. Peters avers that his case is similar to *United States v. McClaren*, 13 F.4th 386 (U.S. 5th Cir. 2021). In *McClaren*, the court vacated defendant Jawan Fortia's sentence for conspiracy to traffic drugs, pursuant to 21 USC §846. Specifically, while finding that Fortia's co-defendants, McClaren, Scott and Keelen, reasonably foresaw

[36] ROA.7174.
[37] In his state case, 65 grams of heroin were confiscated and no nexus to the 39ers was made.

total sales of at least 280 grams of crack throughout the life of the conspiracy, there was no evidence that Mr. Fortia did or would have foreseen the same. The court found Fortia to be part of the conspiracy; however, it could not find that he was "either directly involved in, or reasonably could foresee, trafficking in sizable amounts based on the evidence provided." *United States v. McClaren*, 13 F.4th at 412 (citations omitted). The evidence did not establish that Fortia saw or knew of drug sales by enterprise members with "sufficient regularity that the jury could surmise foreseeability." *Id*. The court continued, "We are not permitted to simply assume that Fortia was aware of the drug amount scope of the conspiracy because he participated in the conspiracy." *McClaren*, *supra* (internal citation omitted). Indeed, "foreseeability does not automatically follow from conspiracy membership." *McClaren*, 13 F.4th at 412 (*citing United States v. Puig-Infante*, 19 F.3d 929, 942 (5th Cir. 1994)). Evidence in *McClaren* demonstrated that the active members of YMM would pool their money to buy drugs, share customers, maintain specific territories and stand next to each other to sell drugs. Fortia was not an active member of YMM, and certainly not one sufficiently active to rise to the level of the other co-defendants' involvement. His involvement was "far more limited" than those of the other defendants. The evidence showed that he sold drugs "a few times," and that he was not involved in sizable amounts of drug quantities being trafficked. Based on the lack of evidence linking Mr. Fortia to a more active role in the conspiracy, his sentence was vacated, and he was remanded for resentencing.

Similarly, Mr. Peters respectfully maintains and urges that the Government failed to prove a nexus between his activities and those of the 39ers. Specifically, the Government sought to prove a "group crime" in which Mr. Peters allegedly took part. *See United States v. Elliott*, 571 F.2d at 903. The reality is that Mr. Peters was gainfully employed. He made the unfortunate choice of being friends with Gregory Stewart, whom Mr. Peters knew was a womanizer and involved in criminal activity. That knowledge, however, did not make Mr. Peters a member of the 39ers or complicit in violating RICO. The Government alleged that Gregory Stewart supplied drugs to Mr. Peters.[38] Stewart testified that after the handgun incident at the Marriott resulted in Mr. Peters losing his job, he felt sorry for Mr. Peters, so he gave Mr. Peters heroin to sell in order to have some means of income. This was not a regular or consistent activity for Mr. Peters. Mr. Peters' actions were limited in scope. He had just lost his income as an employee of Marriott—he was responsible for supporting his mother who was living with him. Mr. Peters contacted Stewart personally and was not seeking to deal with the enterprise or become a member. Mr. Peters' activities were separate and distinct in nature, independent of the 39ers, not in concert with or in furtherance of their activities or objective to engage in drug trafficking or other crimes.[39] Furthermore, Stewart testified that Mr. Peters sold under two ounces of heroin and was "not in the dope game."[40] The Government

[38] Govt.'s Br., p. 76, citing ROA.7186-87.
[39] The record does not establish that Mr. Peters acted or intended to act in concert with the 39ers. Phone call transcripts between Stewart and Mr. Peters reveal that Stewart had little contact with Mr. Peters. When Mr. Peters did call, Stewart would repeatedly ask, "who this is?" Had Mr. Peters been a member of the enterprise, and one so important to Stewart, Stewart would have known Mr. Peters' voice—not asked his identity.
[40] ROA.7174, 12597.

further alleged that "when Stewart could not supply [Mr. Peters], he was directed to go uptown."[41] In fact, nothing showed these were 39ers' orders or that Mr. Peters was acting as a member or operative of the organization. This was an exchange in which one person was asking for help, not asking for clarification of orders or even taking orders as a subordinate. Additionally, the Government alleged that Mr. Peters took Stewart places to "catch sales."[42] However, the evidence did not establish that Mr. Peters knew the scope of Stewart's activities, much less the frequency or regularity of Stewart's actions or those of the 39ers organization.

Finally, the Government alleged that Mr. Peters sold crack and cocaine until he lost his job.[43] The unindicted co-conspirators barely knew of Mr. Peters. After refreshing his memory about Mr. Peters' identity, Rico Jackson testified that he never saw Mr. Peters on the street and that he had no knowledge of whether Mr. Peters was involved in 39ers' activities. Washington McCaskill and Tyrone Knockum testified that they never saw Mr. Peters sell drugs. Furthermore, there was no link between Mr. Peters' prior convictions and the 39ers' activities. In particular, the Government alleged that heroin confiscated in the August 2011 incident resulting in his plea, was somehow connected to the 39ers. The confiscated amount was "[a]pproximately 80 bags of heroin weighing 65 grams[.]"[44] However, there was no testimony or evidence by law enforcement[45] connecting this incident to 39ers activity.

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[41] Govt.'s Br. P. 76, citing ROA.15098.
[42] Govt.'s Br. P. 76, citing ROA.8613.
[43] Govt.'s Br. P. 76, citing ROA.4745, 8610.
[44] Govt.'s Br. P. 76-77, citing ROA.10356-58; ROA.15021-22.
[45] Mike Dalferes

If anything, law enforcement admitted that the location was not in the Ninth Ward, not in the Seventh, not near the Florida Project, not near 3NG territory, and not near Florida G-strip territory. Law enforcement seized $420 from Mr. Peters in the arrest. There were no multiple cell phones, and no other co-defendants were part of the arrest or investigation. A reasonable fact finder could not infer that these actions were connected to the 39ers, when there was no evidence connecting Mr. Peters or the incident to the 39ers.

The evidence does not establish that Mr. Peters had an active role (or any role) in the drug activities of the 39ers. There was no evidence of 39ers drug activities or drug transactions involving Mr. Peters, and no evidence to support an inference that Mr. Peters knew the quantities of drugs being sold or frequency of the transactions. Like Fortia, the evidence does not support an inference that Mr. Peters knew or would have reasonably foreseen the drug amount scope of the conspiracy. And like Fortia, the evidence demonstrated that Mr. Peters' interactions with the 39ers was limited, at best. That is a critical distinction in the case against Mr. Peters. It bears noting that at sentencing, the District Court Judge specifically acknowledged how different Mr. Peters was from his co-defendants. Mr. Peters' conduct did not fit the criteria required of enterprise conduct and acts in furtherance of conspiracies. The jury's inference connecting Mr. Peters to the 39ers is not supportable by the record. The district court Judge noted specifically that it was hurtful to have to sentence Mr. Peters as mandated. ROA.20214. Deference to a jury verdict cannot be blind where the allegations and inferences cannot be reasonably supported.

Accordingly, Mr. Peters avers that his conviction for conspiracy to distribute drugs, in violation of 21 USC §§841, 846, should be vacated. In the alternative, Mr. Peters respectfully avers that he should be remanded for resentencing on Count 2.

D. *Brady* Violation[46]

Over the years, this Court has repeatedly granted review where Louisiana prosecutors failed to fulfill their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Louisiana courts failed to remedy these constitutional violations. *See Wearry v. Cain*, 577 U.S. 385 (2016); *Smith v. Cain*, 565 U.S. 73 (2012); *Kyles v. Whitley*, 514 U.S. 419 (1995); *cf. Connick v. Thompson*, 563 U.S. 51, 62 (2011) (discussing other *Brady* violations in Louisiana). *See also*, *Brown v. Louisiana*, U.S. Supreme Court, Case No. 2277, Brief of Amici Curiae National Association of Criminal Defense Lawyers (NACDL) in Support of Petitioner. This is another such case. While Petitioners' case is a federal prosecution, the Office of the District Attorney for the Parish of Orleans received the *Brady* evidence and appears to have ignored its exculpatory value to this companion federal case. The error occurred in New Orleans, a region with which this Court is very familiar when it comes to *Brady* violations.

At trial, defense counsel made repeated attempts to impeach the testimony of the Government's two star witnesses, Gregory Stewart and Darryl Franklin, through

[46] Undersigned reiterates that the arguments made in this section were jointly argued and briefed to the United States Court of Appeals for the Fifth Circuit by the co-defendants in the proceedings below. Arguments in this section reflect, reproduce and restate those raised by co-defendants Jasmine Perry and Evans Lewis in their joint Petition for Writ of Certiorari, which is filed this date as well. Mr. Peters could not join in their Petition due to his separate claims. However, Mr. Peters reproduces these arguments concerning the *Brady* claim in the interests of continuity, as the co-defendants below joined by brief in the same claim concerning the McCaskill letter and the *Brady* violation it presented.

inconsistent statements and the benefits they were receiving from the government in exchange for cooperation. However, special agents repeatedly vouched for their credibility. Special Agent Jonathan Wood testified "I think Gregory Stewart has been honest," and said he would not characterize Franklin as a liar. [47]Special Agent Ollinger bolstered the veracity of all the cooperators, testifying, "That's the beauty of this case is they know the others [cooperators] are going to tell the truth; so you've got to come forward and tell the truth."[48] And then, in closing, the government argued:[49]

> Now, the defense has listened to thousands of calls and they played you a few dozen. I would submit to you that none of them catch the witnesses saying, "Oh, *I fabricated* this giant indictment against these defendants."

But a suppressed piece of evidence that did not emerge until after trial stated exactly that. Following Petitioners' trial, an exculpatory letter came to light. It was written from Washington McCaskill, another testifying cooperator, to Orleans Parish Assistant District Attorney Alex Calenda in a related state prosecution: "Our Federal case is all made up of lies[.] Darryl Franklin and Rabbit lied about a lot of things[.] You think anyone care[.]"[50]

Calenda was a Special Assistant United States Attorney working with federal prosecutors on a joint task force that investigated both the state and federal cases.[51]

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[47] ROA.11157-58.
[48] ROA.11579.
[49] ROA.12955 (emphasis added).
[50] ROA.29262-64.
[51] ROA.28985, 26877-78.

Defense counsel in the related state case gave the letter, penned by cooperator Washington McCaskill, to defense counsel in the federal case. It had been turned over nine months earlier to state defense counsel on the eve of trial. Based on the McCaskill letter, Petitioners filed motions for acquittal or a new trial alleging the *Brady* violation.

The district court found the McCaskill letter immaterial under *Brady* and denied the motions. On appeal, the Fifth Circuit upheld the district court's finding of immateriality, ignoring the probability language critical to the materiality determination. "We cannot conclude that disclosure of the letter *would have* 'put the whole case in such a different light as to undermine confidence in the verdict.'" App. A (quoting *Kyles*, 514 U.S. at 435) (emphasis added). It also inaccurately characterized its determination of immateriality to be one of "harmlessness."

As argued above, the Government's case against Mr. Peters primarily rested on the testimony of Gregory Stewart and the other cooperators. Their testimony was critical to the jury's evaluation of the case against Mr. Peters. Had the jury known about McCaskill's letter, it could have reasonably and accurately weighed the evidence.

1. Federal Courts Are Incorrectly Applying this Court's Standard for Assessing the Materiality of Favorable, Suppressed Evidence.

Brady v. Maryland, 373 U.S. 83 (1963), established that when evidence is 1) "favorable to the accused," 2) "suppress[ed] by the prosecution," and 3) "material either to guilt or to punishment," the prosecution violates a defendant's right to due process. *Id*. at 87. In adopting the lower court's rationale, the Court explained that

"it would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*." *Id.* at 88 (emphasis in the original). Regarding suppression of the statement in the guilt/innocence trial, the Court could not say "that the deprival of this defendant of . . . a sporting chance . . . denies him due process . . . ." *Id.* at 89. Materiality at that point was conceived as something more than a "sporting chance" that the suppressed evidence would be used to positive effect. It was established when a jury would have "attached any significance" to the suppressed evidence.

The meaning of materiality evolved[52] in *United States v. Bagley* to the standard currently applied. Bagley adopted the ineffective-assistance-of-counsel analysis of prejudice set out in *Strickland v. Washington*, 466 U.S. 668, 694 (1984):

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

473 U.S. 667, 682 (1985).

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court explained the definition of the accepted standard of materiality. It emphasized that *Bagley* materiality was neither a "more probable than not" nor a "sufficiency of the evidence" test. 514 U.S. at 434. Regarding sufficiency of the evidence, the Court explained:

> One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that

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[52] *See*, *e.g.*, *Strickler v. Greene*, 527 U.S. 263, 297-304 (1999) (Souter, J., dissenting) (discussing the evolution of materiality from an evidentiary principle in *Brady* to the *Bagley* outcome-oriented reasonable probability, which he found confusing at best).

> 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 435. This second articulation was specifically meant to clarify that it was wrong "to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." In that context, "the whole case" was not an additional requirement, but recognition of the effect of the suppressed favorable evidence on the outcome of the case

Since *Kyles*, this Court has consistently applied materiality to consider the effects of the suppressed evidence on the outcome of the case. *See Strickler v. Greene*, 527 U.S. 263, 296 (1999) (no reasonable probability of different outcome); *Cone v. Bell*, 556 U.S. 449 (2009) (only remote likelihood that suppressed evidence would have affected verdict); *Smith v. Cain*, 565 U.S. 73, 76 (2011) (suppression undermined confidence in the outcome); *Wearry v. Cain*, 577 U.S. 384, 392 (2016) (newly revealed evidence undermines confidence in the conviction).

Lower courts have not applied materiality consistently. The Court's efforts to distinguish the materiality analysis from a more-likely-than-not and sufficiency-of-the-evidence have only resulted in more confusion in the circuit courts. While courts may quote the materiality tests from *Kyles*, their application of the tests can differ significantly. For example, 1) some use the broad reasonable-probability-of-a-different-result analysis;[53] 2) some use the more specific undermines-confidence-in-

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[53] *See*, *e.g.*, *Breakiron v. Horn*, 642 F.3d 126, 135 (3d Cir. 2011); *Floyd v. Vannoy*, 894 F.3d 143, 166 (5th Cir. 2018); *United States v. Fields*, 761 F.3d 443, 476 (5th Cir. 2014); *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997); *Jalowiec v. Bradshaw*, 657 F.3d 293, 313 (6th Cir. 2011); *Mason v. Mitchell*, 320 F.3d 604, 630 (6th Cir. 2003); *Byrd v. Collins*, 209 F.3d 486, 518-19 (6th Cir. 2000); *United States v. Olsen*, 704 F.3d 1172, 1185 (9th Cir. 2013); *Carriger v. Stewart*, 132 F.3d 463,

the-outcome analysis;[54] 3) some use the reasonably-taken-to-put-the-whole-case-in-such-a-different-light-as-to-undermine-confidence-in-the-outcome analysis;[55] and 4) some remove the reasonable requirement altogether in favor of certainty.[56] While it is debatable whether the first three possibilities are interpreted and applied evenly, it is clear that the last is wrong. The analysis in Petitioners' cases falls into the last category—where probability is no longer part of the equation. *See infra*.

This Court should grant the writ of certiorari to resolve the existing confusion among the circuits and reconcile the differing and incorrect assessments of materiality.

The Fifth Circuit based its materiality decision on the *Kyles* "whole case" language. It identified the "reasonable probability of a different outcome" broad

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482 (9th Cir. 1997); *United States v. Steinberg*, 99 F.3d 1486, 1492 (9th Cir. 1996); *Douglas v. Workman*, 560 F.3d 1156, 1175 (10th Cir. 2009); *United States v. Ford*, 550 F.3d 975, 984 (10th Cir. 2008); *Moon v. Head*, 285 F.3d 1301, 1313 (11th Cir. 2002).

[54] *United States v. Payne*, 63 F.3d 1200, 1211 (2d Cir. 1995); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 301 (3d Cir. 2016); *LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 738 (5th Cir. 2011); *United States v. Sipe*, 388 F.3d 471, 492 (5th Cir. 2004); *Hill v. Mitchell*, 842 F.3d 910, 931-32 (6th Cir. 2016); *Montgomery v. Bobby*, 654 F.3d 668, 690 (6th Cir. 2011); *O'Guinn v. Dutton*, 88 F.3d 1409, 1419 (6th Cir. 1996); *United States v. Jernigan*, 492 F.3d 1050, 1056 (9th Cir. 2007); *Mincey v. Head*, 206 F.3d 1106, 1139 (11th Cir. 2000); *United States v. Scheer*, 168 F.3d 445, 458 (11th Cir. 1999).

[55] *Smith v. Holtz*, 210 F.3d 186, 198-99 (3d Cir. 2000); *Long v. Hooks*, 972 F.3d 442, 468 (4th Cir. 2020); *Banks v. Thaler*, 583 F.3d 295, 321-22 (5th Cir. 2009); *United States v. Sipe*, 388 F.3d 471, 486 (5th Cir. 2004); Bies v. Sheldon, 775 F.3d 386, 403 (6th Cir. 2014); *Gumm v. Mitchell*, 775 F.3d 345, 373 (6th Cir. 2014); *Bell v. Bell*, 512 F.3d 223, 237 (6th Cir. 2008); *Johnson v. Bell*, 525 F.3d 466, 478 (6th Cir. 2008); *Harris v. Thompson*, 698 F.3d 609, 632 (7th Cir. 2012); *Carvajal v. Dominguez*, 542 F.3d 561, 569 (7th Cir. 2008); *Mark v. Ault*, 498 F.3d 775, 786 (8th Cir. 2007); *Amado v. Gonzalez*, 758 F.3d 1119, 1140 (9th Cir. 2014); *Amado v. Gonzalez*, 734 F.3d 936, 953 (9th Cir. 2013).

[56] *McCambridge v. Hall*, 303 F.3d 24, 42 (1st Cir. 2002); *Mendez v. Artuz*, 303 F.3d 411, 414 n.1 (2d Cir. 2002); *McHone v. Polk*, 392 F.3d 691, 700 (4th Cir. 2004); *East v. Johnson*, 123 F.3d 235, 240-41 (5th Cir. 1997); McNeill v. Bagley, 10 F.4th 588, 602 (6th Cir. 2021); *Burgess v. Booker*, 526 F. App'x 416, 428 (6th Cir. 2013); *Johnson v. Mitchell*, 585 F.3d 923, 933 (6th Cir. 2009); *Hooper v. Shinn*, 985 F.3d 594, 621 (9th Cir. 2021); *Browning v. Trammell*, 717 F.3d 1092, 1108 (10th Cir. 2013).

language, and then defined it more specifically as "reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome." (quoting *Kyles*). The court did not consider that reasonable probability is a "probability sufficient to undermine confidence in the outcome" language. Its analysis at that point focused on the whole case of 10 defendants. It found that the extensive impeachment of cooperators, evidence of guilt, and jury instruction that cooperator testimony be received with caution "does not 'put the whole case in such a different light as to undermine confidence in the verdict.'" (quoting *Kyles*, 514 U.S. at 435). It reiterated in closing that it could not conclude "that disclosure of the letter would have 'put the whole case in such a different light as to undermine confidence in the verdict.'" (quoting *Kyles*, 514 U.S. at 435).

The Fifth Circuit's actual analysis denied relief because there was *no certainty* that the verdict would have been different. In reaching this conclusion the court did not assess materiality in terms of *reasonable probability*. McCaskill's letter could reasonably be taken to put the whole case in a different light because the fact that the case was built on lies was never put before the jury. Instead, the witnesses testified that they were not lying.[57] Their statements went unrefuted. In fact, their pitch for credibility was only endorsed by the prosecutor who argued that there was *no evidence* that the "this giant indictment against these defendants" had been "fabricated."[58] The prosecutor's statement is highly problematic. Knowledge of the letter to one prosecutor and its contents is imputed to the Government. How does

[57] ROA.4110,8747.
[58] ROA.12955.

one reconcile a statement that evidence is false or untrue, with another statement that the evidence is reliable? Does it matter that the statement of reliability comes from a prosecutor? The jury was never given the opportunity to decide the weight of these statements for themselves—that decision was made by the Government.

In addition, the "whole case" in this context is misleading. The Fifth Circuit conducted the review of a whole case consisting of 10 defendants and many crimes, none the same for any two defendants. In some cases there was supporting evidence of involvement in the 39ers and violence committed by them. But in Mr. Peters' case, the primary evidence against him was the testimony of the conspirators, especially Gregory Stewart. Had the jury been informed that the conspirators were giving false statements, it is reasonable that the outcome of the case would have been different. Indeed, for all 10 defendants, these statements were the glue that held the case against them together. Certainly for Mr. Peters, these statements were highly prejudicial as he had no involvement in the enterprise or having acted on behalf of the enterprise.

The Fifth Circuit took the "whole case" language, looked only at the forest, and ignored the individual trees – in this case each of the Petitioners. Due process applies to each one individually. Ignoring that only a reasonable probability of a different outcome is necessary, and not a certainty, likewise failed to protect Mr. Peters' right to due process. The Court should accept certiorari and clarify these principles as they apply to all cases of *Brady* error, including Petitioner's.

CONCLUSION

For the foregoing reasons, the appellant, Alonzo Peters, respectfully requests that this Honorable Court vacate his convictions and sentences and remand for further proceedings.

Respectfully submitted,

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