NUMBER: _____

IN THE

SUPREME COURT OF THE UNITED STATES

TERRIOUES OWNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

After Terrioues Owney and nine co-defendants were convicted of RICO violations, drug charges, and several murders, but before sentencing, the government turned over to the defendants a letter written by one of the government's cooperating witnesses. The letter – in the government's possession for at least nine months prior to the trial – stated that the cooperators (the government's key witnesses) "lied about a lot of things" and "[o[ur Federal case is all made up of lies."

Despite the late *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963)],disclosure, the trial court denied a motion for new trial. On appeal, the court failed to consider materiality in terms of 'reasonable probability' – that there would have been a different result at trial if the evidence had been timely disclosed. Unless this Court is prepared to expand the *Brady* materiality test, the decision of the appellate court is erroneous.

The questions before this Court, therefore, are:

Did the United States Court of Appeals for the Fifth Circuit deny Owney's right to constitutional due process by applying an erroneous standard in assessing materiality of a cooperating witness's late-disclosed *Brady* letter stating the entire case was made up of lies?

Alternatively, does the *Brady* decision forego the material analysis that the suppressed evidence would have resulted in a different verdict at trial had the evidence been timely disclosed?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

United States of America, through the Solicitor General of the United States.

Terrioues Owney, an individual and the defendant.

CORPORATE DISCLOSURE

The **United States of America** is a body politic and the federal government. The Solicitor General of the United States is the representative of the United States in matters before this Court.

RELATED PROCEEDINGS

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*, 17-30610 c/w 17-30611 (5th Cir. 07/13/2022) (Petition for rehearing en banc denied), set forth in Appendix A.

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*, 17-30610 c/w 17-30611 (5th Cir. 05/12/22), Opinion set forth in Appendix B.

United States v. Price, et al., 15-00154 (E.D. La.)(criminal judgment for Terrioues Owney entered 07/25/17, ROA.24451).

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PETITION FOR WRIT OF CERTIORARI

Terrioues Owney petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on grounds the court applied a standard of review inconsistent with its own standards, that of other circuits, and of this Court, and whether such application violates a defendant's rights to due process when a cooperating witness's letter – which states the entire case is based upon lies – in the possession of the government is produced after trial in violation of *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963)].

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 35 F.4th 293 (5th Cir. 2022), and is set forth at Appendix A. The ruling denying Petitioners' Motion for Rehearing En Banc is set forth at Appendix B. An excerpt of the ruling of the United States District Court for the Eastern District of Louisiana denying the Motion for New Trial on *Brady* is set forth at Appendix C.

JURISDICTION

The Fifth Circuit issued an opinion on May 12, 2022, upholding petitioner's convictions on all indicted charges except for those charged under 18 U.S.C. §924(j). Appx. A, p. 74. On July 13, 2022, the Fifth Circuit denied a joint Petition for Rehearing En Banc. Appx. B, p. 75.

This Court, in response to Owney's Motion for Extension to file a Petition for Writ of Certiorari, extended petitioner's deadline to November 10, 2022. (22A279).

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the decision. This

application is timely filed under 28 U.S.C. §2101(d), as outlined in United States Supreme Court Rule 13.2. A pauper application is also attached.

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

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

STATEMENT OF THE CASE

This case involves a familiar narrative. From Louisiana, criminal defendant often seek to invoke the jurisdiction of this Court in search of constitutional remedy when the prosecution fails to provide all material exculpatory evidence reasonably probable to undermine confidence in the outcome of the prosecution. *See Wearry v. Cain*, 577 U.S. 385, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016); *Smith v. Cain*, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Connick v. Thompson*, 563 U.S. 51, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011)(discussing *Brady* issues). *Cf.* Lewis v. United States (22-5826, 22-5827). Because the government failed to provide *Brady* material long available to it,

and many months prior to trial, Owney seeks, as others have before, to now invoke this Court's jurisdiction and authority to remedy.

A. Two groups merge to create a drug enterprise.

Following Hurricane Katrina, the city of New Orleans was in disarray. The uncertainty of recovery combined with the inability of city officials and law enforcement to overcome the devastating storm culminated in individuals purportedly joining to engage in various illegal conduct. The area around Third Street and Galvez was particularly affected, where two groups – known as "3NG" and "BMG" – allegedly sold illegal substances. The Upper Ninth Ward was supposedly home to a gang called G-Strip, so-called because it operated primarily on Gallier and Urquhart (ROA.3527). Evidently intent on expansion, the Third Street and Upper Ninth Ward gangs merged into the 39ers, and associated with Dusty Money Entertainment, LLC, aka, "Dusty Money," aka "Dust Gang." (ROA.328).

The government claimed the association controlled the drug trade in the Third Street and Upper Ninth Ward areas and committed acts of violence against rival drug gangs throughout Greater New Orleans. (ROA.328).

According to the government, the group's illegal acts, carried out through a series of means and methods that included selling large amounts of heroine and cocaine, and through the possession and utilization of firearms to protect the illegal drug trafficking, created a RICO Conspiracy. (ROA.328). In response, the government lodged a multiple-defendant, 47-count indictment, alleging a RICO conspiracy and overt acts of weapons use and murder. The government believed Darryl Franklin,

Merle Offrey, and Gregory Stewart supplied other members heroin and advised members on how not to get arrested by police. (ROA.333). They also provided members locations to stash firearms and drugs and, as they later testified, directed other members of the enterprise to commit murders and shootings. But, as the evidence showed, these individuals committed or participated in most of the murders, (ROA.333), committed other crimes while incarcerated, and lied when testifying, all the while receiving immunity from prosecution for most of these acts.

The government indicted Owney, alleging he was a member of 3NG and, ultimately, the 39ers. The government alleged in the multi-defendant indictment Owney engaged in racketeering enterprise behavior in violation of 18 U.S.C.§1961(4). (ROA.329-351). On July 12, 2015, the government alleged Owney, in addition to participation in the RICO conspiracy (Count 1), committed multiple violent acts with a firearm to further the conspiracy. At trial,[1] the government used the testimony of five involved individuals to make its case against Owney and his co-defendants. These motivated individuals were given deals that resulted in excused prosecutions for numerous criminal acts, including murder:

1. Darryl Franklin

Franklin agreed with the government to testify in exchange for the United States forgoing the death penalty for two separate murders. (ROA.3711). The New

[1] In their petition for Writ of Certiorari to this Court, co-defendants Evans Lewis and Jasmine Perry assert that the district court was forced to release the jury at a first trial given the government's failure to timely produce discovery, including Brady materials. *Lewis v. United States,* p. 3 (22-5826, 22-5827).

Orleans District Attorney's Office actually agreed to dismiss the two murder charges in Criminal District Court. (ROA.3716).

2. Tyrone Knockum

Tyrone Knockum confessed to two premeditated murders.(ROA.5719). In exchange for his testimony, the government decided not to seek the death penalty. (ROA.5716; Government Exhibit 190, ROA.14575; ROA.6141). Knockum also agreed to plead guilty to conspiracy to violate the state racketeering and drug laws as part of the 3NG indictment and to all counts currently pending against him in Orleans Parish District Court in exchange for a 20-year sentence. (ROA.14576, Government Exhibit 190). Knockum also received immunity for any drug trafficking crimes he committed before May 15, 2015. (ROA.14577; Government Exhibit 190). As part of the agreement, Knockum acknowledged the government could move to have his sentence reduced. (ROA.5717). Knockum also expected to serve only eight years of the 20-year sentence, (ROA.6145), with any state sentences to run concurrently with each other and concurrently and coterminous with any federal sentence. (ROA.6146).

3. Gregory Stewart

Stewart admitted to his involvement in at least nine murders for which the government agreed not to charge him but grant him immunity, and other drug trafficking crimes Stewart may have committed prior to a July 14, 2014 agreement. ((ROA.8392-8393; Government Exhibit 288; ROA.15253). In exchange, Stewart testified he pleaded guilty to participating in three murders.

4. Washington McCaskill

The United States Attorney's Office began meeting with McCaskill in early 2015 when he entered into a plea agreement. (ROA.8985). McCaskill agreed to plead guilty in federal court to (1) participating in a RICO conspiracy; (2) participating in a conspiracy to distribute one kilogram or more of heroin and 280 grams or more of cocaine base (crack); (3) conspiracy to use and carry firearms during a drug trafficking crime and crime of violence; (4) two counts of murder in aid of racketeering; (5) to three counts of manslaughter in state court; and (6) being designated a habitual offender. (ROA.15275-15292). In exchange, the United States agreed not to charge McCaskill with any other drug trafficking crime or crime of violence committed in the Eastern District of Louisiana before February 13, 2015, as long as McCaskill truthfully testified. McCaskill could also seek a Rule 35 sentence reduction which would reduce accordingly any state court sentence. (ROA.15287-15288).

Like the other government witnesses, McCaskill committed at least eight murders for which he received immunity in exchange for his testimony against the remaining defendants. (ROA.9864). Like other testifying witness, McCaskill had drugs brought into prison – a nurse bringing him marijuana while the witness was abusing heroin in prison. (ROA.9801-9802). He even admitted the drug use to government attorneys, (ROA.9803), estimating he obtained drugs on at least 200 of the 1500 days he was incarcerated before trial. (ROA.9811). In fact, McCaskill was able to get a phone, cigarettes, and synthetic marijuana while on closed cell restriction in Camp D at Louisiana State Penitentiary (Angola). (ROA.9812). McCaskill bragged during his

five years of incarceration he was able to obtain more than 10 cell phones, giving him the ability to communicate freely with whoever he wanted, (ROA.9813), but was never disciplined. (ROA.9882-9883).

5. Rico Jackson

Jackson also testified under an immunity agreement. While Jackson may have committed as many as six or seven murders, he merely faced punished for two pre-meditated murders to which he pleaded guilty. (ROA.10151). Jackson also agreed to plead guilty to numerous state court counts which resulted in a 15-year sentence with the state sentences to run concurrent with each other and concurrent with any federal sentences. Any other criminal conduct Jackson committed before June 12, 2015, would not be charged.(ROA.10065-10067; ROA.14564-14570).

6. Darryl Franklin

Government witness Darryl Franklin agreed with the government to testify in exchange for the United States forgoing the death penalty for two separate murders. (ROA.3711). The New Orleans District Attorney's Office actually agreed to dismiss the two murder charges in Criminal District Court. (ROA.3716). And with the government's knowledge, Franklin did mojo [synthetic marijuana] in jail. (ROA.3611).

Franklin testified the heroin had a street value of at least $7.5 million (ROA.3577). With his illegal proceeds, Franklin purchased and owned a house in Mississippi, a house in Louisiana, and five automobiles (ROA.3579), all of which the government did not seize. (ROA.3580). In addition, Franklin **never** filed a federal tax return, rather paying "taxes in a drug gang." (ROA.3580-3581).(emphasis added).

Although initially incarcerated in separate correctional facilities, Franklin communicated with Stewart, (ROA.3612), discussing the need for their stories to be consistent. Franklin claimed just days later they decided not to enter into an agreement to both cooperate. (ROA.3615). By summer 2015, the two were housed on the same tier in St. Charles Parish Prison and able to collaborate on their stories. (ROA.3625-3626).

Franklin expected his cooperation would reduce his life imprisonment sentence to 15 years, leaving him only 11 years to serve from the trial date. (ROA.3642-3643). Franklin believed the more time he spent on the stand, the more credit he received, implying the more defendants he could implicate, the lighter his sentence. (ROA.3682). To the point, Franklin had no trouble admitting he lied to the government during plea negotiations and lied when he entered his plea agreement. (ROA.3722). Quite simply, Franklin lied, and bragged about it: lying to the government when he entered into his plea agreement so he could be a witness for the government, (ROA.3726), while claiming he did not lie to the jury. (ROA.3731). In addition to his penchant for lying, Franklin believed as long as he didn't do the actual shooting, he was not responsible for the murder. (ROA.3726).

Franklin even received immunity for lying, (ROA.3787), which allowed him to perpetuate a fraud before a different division of federal court. (ROA.3800). As late as 2014, Franklin continued to engage in illegal behavior, this time engaging in three insurance schemes. (ROA.4335).

B. After trial the government disclosed it had long possessed a letter from Washington McCaskill that questioned cooperating witness credibility.

Approximately nine months prior to trial, McCaskill – a key cooperating witness in the then-anticipated state 3NG trial and the federal 39er's trial – wrote two letters to Orleans Parish Assistance District Attorney Alex Calenda, who was sworn as a federal agent and serving on a joint investigation with the federal government. (ROA.28985, 26877-26878. In one letter, McCaskill admitted to Calenda he fabricated information on Kevin Jackson, a defendant in the state district court Telly Hankton case. (ROA.988). In that case, because the McCaskill letter was produced mid-trial, the defendant was not prejudiced since he received the material in time to put it to effective use at trial. The government provided that letter to the defendants and the defendants used it at trial to impeach the testimony of McCaskill. (ROA.8990, ROA.16558, Government exhibit 341). *United States v. Hankton*, 2022 WL 7880976, — F.4th —, pps. 12-13 (5th Cir. 2022).

The government failed to provide the second letter in which McCaskill further admitted that Stewart and Franklin, two of the government's witnesses on whose statements the entire federal case was built by the FBI and federal prosecutors, had lied. McCaskill wrote:

> Our Federal case is all made up lies[.] Darryl Franklin & Rabbit [Stewart] lied about a lot of things[.] You think anyone care[.] No because their [sic] prejudice towards us.(ROA.26888).

This letter undermines the government's case and forms the basis for this writ application following the appellate court's erroneous application of *Brady*.

C. Owney filed a motion for new trial based on the late *Brady* disclosure.

Based upon the letter, Owney and his co-defendants filed motions for acquittal or a new trial alleging the *Brady* violation. The district court found the McCaskill letter immaterial. While the court recognized the letter was a direct admission that differed from jailhouse phone calls, it believed the letter was not material. The district court found the letter could not have been used to impeach other witnesses who had been subjected to intensive cross-examination. ROA.1647, Appx. C., pps. 78-84.

Owney argued the fabricated testimony of Franklin, Stewart, and McCaskill led to his conviction. He further argued that as a matter of law, the violation of discovery rules should result in a new trial. *United States v. Chastain*, 198 F.3d 1338, 1348 (11th Cir. 1999), *cert. denied*, 532 U.S. 996, 121 S.Ct. 1658, 149 L.Ed2d 640 (2001). Minimally, the trial court should have conducted a hearing to determine whether Owney was entitled to a new trial under the "*Berry Rule*." *United States v. Sullivan*, 112 F.3d 180, 183 (5th Cir.1997). In so deciding, the court considers whether: (1) the evidence was newly discovered and unknown to the defendant at the time of the trial; (2) the failure to detect the evidence was not a result of lack of due diligence by the defendants; (3) the evidence is material, not merely cumulative or impeaching; and (4) the evidence will probably produce an acquittal. *Id*. The record demonstrates the defendants were belatedly provided key *Brady* material post-trial wherein at least one of the defendants admitted the defendants in general concocted a scheme to get the government to accept their pleas in exchange for early release. This evidence was

newly discovered (provided to the defendants by the government); was not due to any lack of effort by the defense (the defendants conducted extensive discovery); the evidence is material (it is impeachment material); and, finally, it would have led the jury to conclude the witnesses lied.

Alternatively, Owney argued the "*Larrison Rule*" supported grant of a new trial. *See Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir.1928). The rule "relaxes the standard for granting a new trial when material, false or perjured testimony is presented at trial." Under the rule, a new trial should be granted when (1) the testimony given by a material witness was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the party seeking the new trial was "taken by surprise" by the testimony and was unable to meet it or did not know if its falsity until after the trial. *Id*. For similar reasons, Owney was caught off guard by the disclosure of the McCaskill statement.

The trial court denied the motion for new trial on grounds the McCaskill letter was not *Brady* material and even if admissible would not serve to impeach the government's main witnesses. Appx. C, pps. 78-84.

D. The appellate court applied the incorrect *Brady* rule regarding assessment of late disclosed material evidence.

The *Brady* issue underscored the entire appellate process for all defendants. In fact, the defendants filed a Rule 28(j) letter regarding Stewart's testimony in a separate federal case wherein the government (1) learned its key witness was the leader of a "corrupt jailhouse ring," and (2) declared it had "washed its hand" of

Stewart and would not be calling him as a witness. *See Lewis v. United States,* p. 6 (22-5826, 22-5827).

Shortly thereafter, the Fifth Circuit issued its opinion upholding the district court's determination that the McCaskill letter was not material under *Brady*. Appx. A, pps. 59-64. The court acknowledged defendants' efforts throughout trial to impeach the government witnesses. In fact, the appellate court cited directly from Owney's brief:

> Counsel for Owney argued that the Government's case was 'based upon bad information provided by bad informants' and continued: '[t]he government's dream team of cooperating criminal witnesses consist of Darryl Franklin, Gregory Stewart, Rico Jackson and Tyrone Knockum. The government's star witnesses are not credible. They all have something to gain.' In fact, as counsel for Owney succinctly stated: 'Darryl Franklin is a bad informant because he has lied under oath about a murder. It doesn't get much worse than that.'" Appx. A, p. 63.

The appellate court seemed to support Owney's argument, noting that the federal prosecutor asserted in his closing that of the thousand of cell phone calls intercepted ..."I would submit to you that none of them catch the witnesses saying, 'Oh, I *fabricated* this giant indictment against these defendants.'" ROA.12955 (emphasis added). Appx. A, p. 63, n. 43.

Nonetheless, even after considering the issue a close call, the court found the 'missing McCaskill letter does not undermine confidence in the verdict.' Appx. A, p. 63. But in reaching this ruling, the court applied the incorrect standard by not assessing the materiality of the missing document in terms of *reasonable probability*. Instead, the court held the extensive impeachment of the government's witnesses, the evidence of

guilty, and the district court's jury instructions "does not 'put the whole case in such a different light as to undermine confidence in the verdict.'" Appx. A, p. 63, quoting *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Owney's joint application for rehearing en banc was denied. Appx. B, p. 75.

ARGUMENT

A *Brady* assessment of material evidence requires the court to consider the 'reasonable probability' that a different result would occur had the evidence been timely disclosed.

The Fifth Circuit misapplied this Court's analysis of materiality by giving deference to the government's assertions that the late disclosed letter was cumulative and would have not made a difference to the verdict. The Fifth Circuit's decision here joins the various federal appellate courts that have interpreted *Brady* and its progeny to provide for at least three expanded interpretations of materiality: (1) reasonable probability of a different result; (2) undermines confidence in the outcome; (3) reasonably taken to put the whole case in such a different light as to undermine confidence in the outcome.[2]

The correct analysis, which this court could explain in a grant of this writ application, is that materiality is defined in terms of 'reasonable probability' that there would have been a different result at trial if the evidence have been timely disclosed. *See United States v. Bagley*, 473 U.S. 667, 682,105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which found the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

[2] See *Lewis v. United States,* pps. 9-10 (22-5826, 22-5827), fns. 4-6.

674 (1984) formulation of the *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) test for materiality sufficient to cover any situation of prosecutorial failure to disclose evidence favorable to the accused: "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."

The reasonable probability analysis is especially applicable when the withheld evidence calls into question the credibility of the government's witnesses. As this Court held in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in which the Court ordered a new trial in a case where a promise to a key witness was not disclosed to the jury:

> "[W]ithout [Taliento's testimony] there could have been no indictment and no evidence to carry the case to the jury. Talientao's credibility as a witness was therefore an important issue in the case, and the evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Giglio*, 405 U.S. at 154-155.

If one witness's credibility is an important issue, then *a fortiorari*, the credibility of multiple government witnesses is paramount.

Here, the government's witnesses were crucial to its case. And their potential credibility was at stake since they were granted immunity from prosecution for numerous crimes – including several murders – in order to implicate Owney and his co-defendants. In such a case, the jury is entitled to know of McCaskill's correspondence with prosecution attorneys and the content of that correspondence. The

timing of disclosure is likewise relevant. To comply with due process and fundamental fairness, the prosecution must make *Brady* disclosures timely enough for a defendant to put the information "to effective use at trial." *United States v. McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985). *See, United States v. Nixon*, 634 F.2d 306, 311-313 (5th Cir. 1981), *cert. denied*, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981)(information regarding immunity agreement with government witnesses should have been disclosed prior to trial). Receiving a critical letter *after* the trial from a third party does not fulfill the government's obligation to timely provide *Brady* material.

McCaskill's admissions demonstrate government witnesses lied throughout their testimony. And along with the admissions that were made, the letter leaves no doubt the defendants orchestrated their agreements and testimony to escape responsibility for dozens of murders. Moreover, the fact that McCaskill wrote this letter to an Assistant District Attorney for whom he was a testifying witness further amplifies the significance of the admissions. By this time in the litigation, McCaskill had no more reason to lie. McCaskill's admission to Calenda is favorable and impeaching, so much so that the court admitted its decision on this issue was 'a close one.' In support of this statement, the circuit court found it important to note the government's trial counsel's closing statement that essentially guaranteed the government had no evidence any of its witnesses *fabricated* evidence against Owney and his co-defendants. Had the letter been timely disclosed, as required by *Brady*, there can be no reasonable doubt or rational argument to the contrary the government's case – and the defendants' cases

– would have been different.

The McCaskill letter indicates that Franklin and Stewart did indeed fabricate the evidence to support the extensive federal indictment. Under this well-established decisions by this court, the materiality analysis should have ended there, since the evidence was reasonably probable to undermine confidence in the outcome: "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." *Brady*, 373 U.S. at 88, quoting *United States v. Brady*, 226 Md.422, 174 A.2d 167 (1961).

Unlike the analysis performed by the Fifth Circuit, this Court has held, in another Louisiana case, that material evidence could not be viewed in the light most favorable to the State unless the State's argument foreclosed the favorable and material value of the suppressed evidence. In *Smith v. Cain*, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012), years after trial the defendant discovered notes from law enforcement recounting the government's single witness initially stated he could not identify the gunman. *Id*.

Smith urged a *Brady* claim to which the State responded by 'advancing various reasons why the jury might have discounted [the witness's] undisclosed statements,' including the fact he had made statements immediately following the crime indicating he could name the gunman. This Court held the evidence could not be viewed in the light most favorable to the State unless the State's argument foreclosed the favorable and material value of the evidence. To hold otherwise would require a reviewing court to speculate about which contradictory declarations the jury would have believed:

"Again, the State's argument offers a reason that the jury *could* have disbelieved [the witness's] undisclosed statements, but gives us no confidence that it *would* have done so." *Smith*, 565 U.S. at 76. The court again explained that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009).

The 'reasonable likelihood' that false testimony affected the verdict herein is synonymous with 'reasonable possibility' and thus equates materiality in the perjured-testimony cases with a showing that suppression of the evidence is not harmless beyond a reasonable doubt. Given the clear untruthful testimony of government witnesses – by their own admissions on the stand done in order to get reduced sentences or immunity for murders – the McCaskill letter that discredits the government's case should have been produced. The use of this letter during the trial certainly raises a reasonable probability the jury could have reached a different decision. It unquestionably would have changed the government's own closing argument. And, more importantly, Owney's use of this admission could have resulted in acquittal of the charges against him.

CONCLUSION

In sum, this Court should grant this writ of certiorari to determine whether the appellate court applied the improper analysis, failing to consider the reasonable probability that the jury could have reached a different decision had they known of the letter admitting to a scheme by the government's key witnesses. Moreover, this Court

should grant this writ of certiorari to determine whether *Brady* and its progeny allow the appellate court to burden the defendants with having to establish the use of the letter would have led to a different outcome, which under the facts herein still remains the incorrect analysis regarding the materiality of the McCaskill letter.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I provided a copy of this Writ of Certiorari by electronic mail to:

Solicitor General of the United States
U.S. Department of Justice
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Washington, DC 20530-0001

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s/ Mark D. Plaisance
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