No. 22-

In The Supreme Court of the United States

CURTIS NEVILLE
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

Michael G. Raspanti
Counsel of Record
3900 N. Causeway Blvd. Suite 1470
Metairie, LA 70002
P (504) 836-7330
F (504) 832-8069
mgraspanti013@gmail.com

CJA Counsel for Curtis Neville

QUESTION PRESENTED

In a prosecution built almost entirely on the credibility of cooperating Government witnesses, is an incentivized cooperating witness's letter addressed to an Orleans Parish Assistant District Attorney that says—the entire case against the defendants is made up of lies and that the two star cooperating witnesses lied about a lot of things—material under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley,* 514 U.S. 419 (1995)?

PARTIES TO THE PROCEEDING

Curtis Neville is the Petitioner herein and was Appellant below.

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

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.

STATEMENT OF RELATED PROCEEDINGS

United States v. Price, et al., No. 15-154 (E.D. La.) (criminal judgment for Curtis Neville entered 07/26/2017, ROA.28131-36).

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 (5th Cir. May 12, 2022), set forth in Appendix A.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDING..... ii

CORPORATE DISCLOSURE..... iii

STATEMENT OF RELATED PROCEEDINGS..... iv

TABLE OF CONTENTS..... v

TABLE OF AUTHORITIES..... vi

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

A. Introduction..... 2

B. The Indictment, Trial, And The Suppressed Evidence..... 3

C. The Appeal..... 6

REASONS FOR GRANTING THE WRIT..... 8

A. Circuit Courts Are Inconsistently Applying This Court's Standard For Assessing the Materiality Of Favorable, Suppressed Evidence..... 8

B. The Fifth Circuit Incorrectly Applied This Court's Standard For Assessing The Materiality..... 12

CONCLUSION..... 17

APPENDIX

A. Fifth Circuit Court of Appeals Opinion..... 1

B. Fifth Circuit Court of Appeals En Banc Denial of Rehearing..... 75

C. Excerpt of Trial Court Ruling Denying New Trial..... 78

TABLE OF AUTHORITIES

CASES

Amado v. Gonzalez, 734 F.3d 936 (9th Cir. 2013)..... 11
Amado v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014)..... 11
Banks v. Thaler, 583 F.3d 295 (5th Cir. 2009)..... 11
Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450 (6th Cir. 2015).....13
Bell v. Bell, 512 F.3d 223 (6th Cir. 2008)..... 11
Bies v. Sheldon, 775 F.3d 386 (6th Cir. 2014).....11
Brady v. Maryland, 373 U.S. 83 (1963)..... passim
Breakiron v. Horn, 642 F.3d 126 (3d Cir. 2011).....10
Brown v. Louisiana, U.S. Supreme Court, Case No. 2277..... 2
Browning v. Tramell, 717 F.3d 1092 (10th Cir. 2013).....11
Burgess v. Booker, 526 F. App'x 416 (6th Cir. 2013)..... 11
Byrd v. Collins, 209 F.3d 486 (6th Cir. 2000)..... 11
Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997)..... 11
Carvajal v. Dominguez, 542 F.3d 561 (7th Cir. 2008).....11
Cone v. Bell, 556 U.S. 449 (2009)..... 10, 13
Connick v. Thompson, 563 U.S. 51 (2011)..... 2
Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263 (3d Cir. 2016).....11
Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009)..... 11
East v. Johnson, 123 F.3d 235 (5ht Cir. 1997)..... 11
Floyd v. Vannoy, 894 F.3d 143 (5th Cir. 2018)..... 10
Gumm v. Mitchell, 775 F.3d 345 (6th Cir. 2014)..... 11
Harris v. Thompson, 698 F.3d 609 (7th Cir. 2012)..... 11
Hill v. Mitchell, 842 F.3d 910 (6th Cir. 2016)..... 11
Hooper v. Shinn, 985 F.3d 594 (9th Cir. 2021)..... 11
Jalowiec v. Bradshaw, 657 F.3d 293 (6th Cir. 2011)..... 11
Johnson v. Bell, 525 F.3d 466 (6th Cir. 2008)..... 11
Johnson v. Mitchell, 585 F.3d 923 (6th Cir. 2009)..... 11
Kyles v. Whitley, 514 U.S. 419 (1995)..... passim
LaCaze v. Warden La. Corr. Inst. for Women, 645 F.3d 728 (5th Cir. 2011)..... 11
Long v. Hooks, 972 F.3d 442 (4th Cir. 2020).....11
Mark v. Ault, 498 F.3d 775 (8th Cir. 2007)..... 11
Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003)..... 11
McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002)..... 11
McNeil v. Bagley, 10 F.4th 588 (6th Cir. 2021)..... 11
Mendez v. Artuz, 303 F.3d 411 (2d Cir. 2002)..... 11
McHone v. Polk, 392 F.3d 691 (4th Cir. 2004)..... 11
Mincey v. Head, 206 F.3d 1106 (11th Cir. 2000)..... 11
Montgomery v. Bobby, 654 F.3d 668 (6th Cir. 2011)..... 11
Moon v. Head, 285 F.3d 1301 (11th Cir. 2002)..... 11
O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996)..... 11

Porter v. McCollum, 558 U.S. 30 (2009)..... 13
Smith v. Cain, 565 U.S. 73 (2012)..... 2, 10, 12
Smith v. Holtz, 210 F.3d 186 (3d Cir. 2000)..... 11
Strickland v. Washington, 466 U.S. 668 (1984)..... 9
Strickler v. Greene, 527 U.S. 263 (1999)..... 9, 10
United States v. Bagley, 473 U.S. 667 (1985)..... 7, 9
United States v. Fields, 761 F.3d 443, 476 (5th Cir. 2014)..... 10
United States v. Ford, 550 F.3d 975 (10th Cir. 2008)..... 11
United States v. Gonzales, 121 F.3d 928 (5th Cir. 1997)..... 10, 11
United States v. Jackson, 345 F.3d 59 (2d Cir. 2003)..... 7
United States v. Jernigan, 492 F.3d 1050 (9th Cir. 2007)..... 11
United States v. Olsen, 704 F.3d 1172, 1185 (9th Cir. 2013)..... 11
United States v. Pasha, 797 F.3d 1122 (D.C. Cir. 2015)..... 13
United States v. Payne, 63 F.3d 1200 (2d Cir. 1995)..... 11
United States v. Scheer, 168 F.3d 445 (11th Cir. 1999)..... 11
United States v. Sipe, 388 F.3d 471 (5th Cir. 2004)..... 11
United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996)..... 11
Wearry v. Cain, 577 U.S. 385 (2016)..... 2, 10, 13

Statutes

28 U.S.C. § 1254(1) 1

Constitutional Provisions

U.S. Const. Amend. V 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtis Neville respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is published at 35 F.4th 293 (5th Cir. 2022) and is set forth in Appendix A. The ruling denying Petitioner's Motion for Rehearing En Banc is set forth in 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 in Appendix C.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided Mr. Neville's case was May 12, 2022. A timely petition for Rehearing En Banc was filed by Mr. Neville individually and another petition for Rehearing En Banc was filed and joined by Mr. Neville and other codefendants. Both petitions for Rehearing En Banc were denied by the United States Court of Appeals for the Fifth Circuit on July 13, 2022. An extension of time to file the petition for a writ of certiorari was granted to and including November 10, 2022 on October 6, 2022 in Application No. 22A281. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A pauper application is also attached.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the U.S. Constitution:

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

STATEMENT OF THE CASE

A. Introduction

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 Petitioner's case is a federal prosecution, it was the Office of the District Attorney for the Parish of Orleans that 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.

B. The Indictment, Trial, And The Suppressed Evidence

Petitioner was charged alongside nine (9) other defendants in a sprawling 47-count indictment that principally charged all the defendants in a RICO conspiracy wherein they were alleged to have participated in a New Orleans racketeering enterprise known as "the 39ers." ROA.327-86. The indictment also charged the defendants with substantive acts of violence including murder and assault in aid of racketeering, the use of firearms in various contexts, as well as drug trafficking. *Id*. The racketeering enterprise charged in the indictment (the 39ers) was alleged to be an overarching alliance of multiple street gangs that included one known as "3NG." ROA.330.

The government's allegations derived from cooperators—Darryl Franklin (aka "Brother," aka "Breezy") and Gregory Stewart (aka "Rabbit"). Franklin and Stewart were unindicted coconspirators and were the alleged leaders of the 39ers enterprise. ROA.333, 11001. These two individuals, along with a few others, including a man named Washington McCaskill, were offered favorable plea deals in exchange for their cooperation and testimony. The vast majority of the evidence against Petitioner consisted of the trial testimony from Franklin, Stewart, and McCaskill.

Prior to trial, Petitioners litigated the discovery of *Brady* materials extensively. ROA.183-84,20674,20686,20838,19882,25753,19941 (motions to compel disclosure of *Brady* materials in a timely manner). Nevertheless, in the first trial, the prosecution turned over 7593 recorded jail calls of cooperators after trial commenced. The district court was forced to release the jury and continue the trial due to the

prosecution's failure to timely produce the discovery—which contained *Brady* materials. ROA.1245.

Several months later, when trial commenced for the second time, the two star cooperators—Franklin and Stewart—were impeached with inconsistent statements and the benefits they were receiving from the government in exchange for their testimony. In response to the defendants' various impeachment efforts at trial, most of which included the use of the aforementioned recorded jail phone calls made by the cooperators, the government argued in closing:

> 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*."

ROA.12955 (emphasis added).

But a suppressed piece of evidence that did not emerge until after trial stunningly stated exactly that. Following Petitioner's trial (and multiple convictions), an exculpatory letter came to light. It was written by cooperator McCaskill, and was sent to Orleans Parish Assistant District Attorney Alex Calenda. ADA Calenda was the lead prosecutor in a related state racketeering prosecution of the 3NG gang—alleged to be a faction of the broader racketeering enterprise alleged in this federal case (the 39ers).[1] ROA.328-29. The McCaskill letter sent to ADA Calenda stated: "Our Federal case is all made

[1] Prior to this 39ers federal case, the 3NG gang had been the subject of a 20-defendant state racketeering indictment brought by the Orleans Parish District Attorney's Office. Many of Mr. Neville's codefendants in the 39ers federal case and a few of the cooperators—particularly Washington McCaskill—were defendants in this state 3NG prosecution. Mr. Neville was not alleged to be in the 3NG faction of the 39ers. Rather, Mr. Neville was allegedly part of a different sub-gang of the overarching 39ers enterprise.

up of lies[.] Darryl Franklin and Rabbit [aka Gregory Stewart] lied about a lot of things[.] You think anyone care[.]" ROA.29262-64.

Although Calenda was a state prosecutor, he was also a Special Assistant United States Attorney working with federal prosecutors on a joint task force that investigated both the state and federal cases. ROA.28985, 26877-78.

Defense counsel in the related 3NG state case gave the McCaskill letter to defense counsel in this federal 39ers case (it was given to federal defense counsel about two months after the conclusion of the federal trial, but prior to sentencing). The letter had apparently been produced to state defense counsel over nine months earlier on the eve of the state 3NG trial. Based on the McCaskill letter, all defendants, including Mr. Neville, 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:

> The Court recognizes that McCaskill's letter is a direct admission to a prosecutor and therefore differentiates it from jailhouse phone calls to friends and letters to codefendants, but the Court is not persuaded that the letter satisfies *Brady*'s materiality standard. Franklin and Stewart were Government's two most crucial witnesses. But the letter would not have been impeachment material as to either of them directly because they did not author the letter. Rather, McCaskill would have been the one called upon to explain his statement to Calenda. But as to Franklin and Stewart, those witnesses were subject to nearly a week of cross examination during which they parried a multitude of impeachment evidence, including evidence that suggested that those witnesses were less than truthful at times. Thus, even if the McCaskill letter was suppressed, it would only serve to collaterally impeach two witnesses who were already inexorably impeached. The Court is not persuaded

> that any of the jury's conclusions would have been different if the defense had had the letter during trial. Therefore, it is not material under *Brady*.

ROA.1647. App. C, p. 82 (p. 29 of 31 in original pagination).

In the *Brady* materiality analysis, the district court acknowledged that the testimony from Franklin and Stewart was the most crucial for the Government, but then determined the letter was immaterial due to the fact that the neither Franklin nor Stewart were the authors of the letter. And although the district acknowledged how the impeachment value of the letter was qualitatively different from the other impeachment weapons utilized by the defense at trial—"jailhouse phone calls to friends and letters to codefendants"—it nonetheless found the letter immaterial because Franklin and Stewart had already been impeached.

While Mr. Neville was acquitted of a murder charged as an overt act of the RICO conspiracy, ROA.341, 28082, Mr. Neville was nonetheless found guilty of the RICO conspiracy, the drug conspiracy, the firearms conspiracy, a murder in aid of racketeering, three counts of assault with a deadly weapon in aid of racketeering, possession with the intent to distribute heroin, and possession of a firearm in relation to a drug trafficking crime. ROA.28131. The evidence against Mr. Neville largely consisted of the trial testimony of Franklin, Stewart, and McCaskill. Mr. Neville received multiple life sentences. ROA.28082-88, 28132.

C. The Appeal

The Fifth Circuit issued its opinion upholding the district court's determination that the McCaskill letter was not material under *Brady*. App. A at 59-

64. The opinion cited the materiality standard enunciated by this Court in *United States v. Bagley*, 473 U.S. 667, 682 (1985): "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." *Id.* at 60. *Bagley* went on to explain that "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley* at 682. But in this case, the Fifth Circuit described "reasonable probability as "when the failure to disclose the suppressed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" App. A at 60 (citing *Kyles* 435).

In conducting its materiality analysis, the Fifth Circuit catalogued the defendants' impeachment efforts throughout trial. App. A at 61-62. It highlighted the defense closing arguments to the jury emphasizing that the incentivized cooperators had lied in other contexts and were not credible. *Id.* at 62-63. In light of these prior instances of the cooperating witnesses' testimony being impeached, the other evidence presented at trial, and the presence of certain instructions to the jury to weigh incentivized witnesses' testimony with caution, the Fifth Circuit ultimately found that the McCaskill letter "does not 'put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 63 (quoting *Kyles* 514 U.S. at 435). It further found that the McCaskill letter would have "merely furnish[ed] an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Id.* at 63-64 (citing *United States v. Jackson*, 345 F.3d 59, 74 (2d Cir. 2003)).

In reaching this conclusion, the Fifth Circuit ignored the probability language so 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.'" *Id.* at 64 (quoting *Kyles*, 514 U.S. at 435) (emphasis added). It also inaccurately characterized its determination of immateriality to be one of "harmlessness." *Id.* at 63 n.43. Further, the Fifth Circuit began its "*de novo*" analysis of the *Brady* violation by "proceed[ing] with deference to the factual findings underlying the district court's decision." *Id.* at 60. In other words, the Fifth Circuit considered the issue in a light most favorable towards a finding of immateriality.

Mr. Neville and his codefendants applied for Rehearing En Banc, which was denied. App. C.

REASONS FOR GRANTING THE WRIT

A. Circuit Courts Are Inconsistently Applying This Court's Standard For Assessing The Materiality Of Favorable, Suppressed Evidence

Federal courts are in complete disarray when it comes to determining *Brady* materiality. They tend to pick and choose which portion to apply of the materiality standards set out in this Court's cases.

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. To the extent the Court elaborated on materiality, it upheld the lower court's rational 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.

After considerable uncertainty as to the meaning of materiality,[2] *United States v. Bagley* set out the standard used today. It 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).

Then in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court articulated an explanatory 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

---

[2] *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 an elucidation of the principle that the emphasis is not the evidence that *was* adduced at trial, but the effect of the suppressed favorable evidence on the outcome of the case.

Since *Kyles*, this Court has not been confused by the various iterations of materiality. *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 fared as well. 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 are perfectly able to quote the materiality tests from *Kyles*, the application of them in the final analysis of the case before them can differ significantly. For example, 1) sometimes courts use the broad "reasonable probability of a different result" analysis;[3] 2) sometimes courts

[3] *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*

use the more specific "undermines confidence in the outcome" analysis;[4] 3) sometimes courts use the "reasonably taken to put the whole case in such a different light as to undermine confidence in the outcome" analysis;[5] and 4) some remove the reasonable requirement altogether in favor of certainty.[6] 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 Petitioner's case falls into the last category—where probability is no longer part of the equation.

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, 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).

[4] *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).

[5] *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).

[6] *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).

This Court should grant the writ of certiorari to resolve the confusion that abounds, and results in differing and incorrect assessments of materiality.

B. The Fifth Circuit Incorrectly Applied This Court's Standard For Assessing The Materiality.

In this case the Fifth Circuit's materiality analysis did not assess materiality in terms of reasonable probability at all. It explained 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.'" App. A at 64 (quoting *Kyles*, 514 U.S. at 435) (emphasis added).

The Fifth Circuit also did its entire materiality analysis with a deference towards the district court's finding of immateriality. App. A at 60. Mr. Neville suggests that applying such deference in a *Brady* materiality assessment systemically infects the entire analysis with error. In fact, this Court's own precedents have rejected this deference and have instead analyzed suppressed evidence with deference to the fact-finding province of the jury. See *Smith v. Cain*, 565 U.S. 73, 76 (2012):

> The State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed. The State also contends that Boatner's statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.

(Emphasis in original).[7] In *Wearry v. Cain*, this Court similarly rejected the state post-conviction court's reliance on "reasons a juror might disregard new evidence while ignoring reasons she might not," and quoted *Smith*, "Even if the jury—armed with all of this new evidence—*could* have voted to convict Wearry, we have 'no confidence that it *would* have done so.'" 577 U.S. 385, 394 (2016).[8]

In *Cone v. Bell*, this Court assessed the suppressed evidence in a light most favorable *to the defendant*:

> Although we take exception to the Court of Appeals' failure to assess the effect of the suppressed evidence "collectively" rather than "item by item," we nevertheless agree that *even when viewed in a light most favorable to Cone*, the evidence falls short of being sufficient to sustain his insanity defense.

556 U.S. 449, 473-74 (2009) (emphasis added) (internal citation omitted). In sum, the Fifth Circuit's materiality analysis should not have been conducted in a light favorable to immateriality, i.e., in a light favorable to the Government. Rather, it should have assessed whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Putting the Fifth Circuit's incorrect deference aside, the other instances wherein the defense impeached Franklin, Stewart, and McCaskill were mostly

---

[7] Accord *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 466 (6th Cir. 2015) ("It is not for the State to weigh the evidence and decide what the jury would ultimately find to be material and exculpatory—that is something that the jury itself must decide."); *United States v. Pasha*, 797 F.3d 1122, 1138 (D.C. Cir. 2015) ("Our 'confidence in the outcome' is undermined because, absent the Government's failure to comply with its Brady obligations, a reasonable factfinder might—or might not—have found Daaiyah's guilt beyond a reasonable doubt.").

[8] In rejecting the trial court's treatment of the materiality question, the Court cited *Porter v. McCollum*, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*) ("it was not reasonable to discount entirely the effect that [a defendant's expert's] testimony might have had on the jury" just because the State's expert provided contrary testimony), as analogous authority.

concerning matters of comparatively trivial magnitude. At one point, Franklin (a serial murderer and drug dealer) was impeached with a jail call to a girlfriend where he told her that he wanted to be a pastor. ROA.4013-14. In another, Franklin was impeached with a jail call that captured him lying to a girl about how he married a different girl. ROA.4016-17. Shortly after, Franklin was confronted with a jail call that captured him telling a friend about how he lied to federal law enforcement—about having cancer—in an effort to convince the FBI to stop pursuing his cooperation. ROA.4017-19. Jail call after jail call, many of the cooperators were impeached on matters having no meaningful significance.

Indeed, there were some avenues of impeachment that were not altogether trivial. For instance, counsel for codefendant Evans Lewis cross-examined McCaskill concerning a 2015 jail call where McCaskill appeared to refer to Stewart and Franklin as "lying" about the alleged conspiracy. ROA. 9908-09. But when confronted, McCaskill minimized them and said that they were not specific to Stewart or Franklin and, instead concerned people putting responsibility for their actions on Merle Offray—a deceased former leader of the 39ers enterprise:

> Q. When you're saying, "They're all lying and shit," you're referring to Rabbit and Brother are lying; right?
>
> A. I'm referring to everybody in general. Because everybody trying to make it look like Merle had a gun to our head to make us kill and do what we do. But we did what we do because we was a crew, whether Merle said it or not.

ROA.9909.

At most, he conceded that he had told people that Stewart and Franklin had been

"lying about certain things." ROA.9909. But on redirect, the Government narrowed the "certain things" about which Stewart and Franklin lied about to a single claim and elicited confirmation from McCaskill that their testimony—and the Government's case—was true in all other regards. ROA.9980-83.

As for certain defense impeachments concerning Franklin and Stewart lying to law enforcement while setting up their cooperation referenced in the Fifth Circuit's opinion (App. A at 61-62), the witnesses nonetheless were able to mitigate the damage by clarifying that it was early on in their lengthy process with the Government and that, while they may have lied early on, they ultimately had come-to-jesus moments and realized that they had to be "all the way truthful." ROA.4110-11. The Government additionally had the benefit of its FBI case agent to vouch for the veracity of all of the cooperating witnesses' testimony. ROA.11119.

The Government's case against Neville consisted largely of the testimony Franklin, Stewart, and McCaskill. This was especially true for the most serious charge for which Mr. Neville was convicted, the murder of Littlejohn Haynes in aid of racketeering—Count 29 of the indictment. The Fifth Circuit's assessment of Mr. Neville's sufficiency of the evidence claim on this charge confirms this. App. A, p. 15-16. The jury actually acquitted two of Mr. Neville's codefendants who were also charged for this murder, but with no discernable difference in the strength of the evidence against those who were acquitted in comparison to the evidence against Mr. Neville. Had Mr. Neville been able to use the McCaskill letter at trial, there is

certainly a reasonable probability that he would not have been convicted of this murder either.

The impeachment value in the undisclosed McCaskill letter that states: "Our Federal case is all made up of lies[.] Darryl Franklin and Rabbit [aka Gregory Stewart] lied about a lot of things[,]" is in an entirely different ball park compared to the value of the other impeachments that occurred at trial. The fact that the prosecutor's closing argument discounted all of these impeachments by saying:

> 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[,]"

is tantamount to the Government confessing the materiality element of the McCaskill letter. The McCaskill letter strongly suggests that the Franklin and Stewart indeed fabricated the evidence to support the extensive federal indictment. Mr. Neville suggests that this letter alone—without regard to what could have been revealed if McCaskill had been in the crucible of cross examination concerning what he meant in the letter—absolutely provided a reasonable probability that the outcome of the proceeding would have been different.

CONCLUSION

For these reasons, this Court should grant this writ of certiorari.

Respectfully submitted,

/s/ Michael G. Raspanti
Michael G. Raspanti
3900 N. Causeway Blvd., Suite 1470
Metairie, LA 70002
P (504) 836-7330
F (504) 832-8069
mgraspanti013@gmail.com

CJA Counsel for Curtis Neville