No. 24-6455

IN THE

Supreme Court of the United States

ERNEST MURPHY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

January 29, 2025

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QUESTIONS PRESENTED

Whether the Second Circuit Court invented an entirely new definition of Brady's "favorable" definition that is incongruent with well-established Constitutional precedents from this Court, and further failed to consider the collective impact of the suppressed evidence?

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PETITION FOR CERTIORARI

Petitioner Ernest Murphy, respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On July 2, 2024, the judgment of the United States Court of Appeals for the Second Circuit was filed in a Summary Order. See United States v. Murphy, No. 23-6470-CR (2d Cir. July. 2, 2024). The decision is attached as Appendix A.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. The Second Circuit denied his petition on October 31, 2024. That order is attached as Appendix B.

JURISDICTION

On July 2, 2024, a three-judge panel for the Second Circuit issued a decision in Petitioner's appeal. Subsequently, on October 31, 2024, the Second Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

INTRODUCTION

Over the past six decades, this Court has repeatedly granted review where prosecutors failed to fulfill their obligations under Brady v. Maryland, 373 U.S. 83 (1963). This is another such case—one in which the Second Circuit Court of Appeals has not only allowed a conviction to stand in contravention of Brady, but also adopted a new understanding of that doctrine's favorability and materiality concepts that conflicts with the law of this Court

The Second Circuit's decision below establishes a new, constitutionally untethered definition of "favorable": to be subject to disclosure, evidence is only "favorable" if it is explicitly "exculpatory." This new standard confuses what would constitute a "favorable" evidence under Brady. This Court has emphasized that this test for favorability is broad. In Kyles itself, this Court found the absence of defendant's car from an admittedly incomplete list of cars at the scene of the crime to be favorable. See Kyles, 514 U.S. at 450–51. Such a fact plainly was not "exculpatory" to Kyles' involvement in the crime, thus would not be subject to disclosure based on the decision below.

Second, this Court has repeatedly held the materiality of suppressed evidence is

to be assessed cumulatively in context of the whole record. However, the majority below vastly distorts this inquiry by implementing a constitutionally impermissible "screening test": if a reviewing court decides, piece-by-piece, the undisclosed material does not affirmatively exclude the defendant as a perpetrator, the suppressed evidence is per se not relevant to guilt or sentencing.

This petition thus raises an important and recurring constitutional question: Whether the prosecution violates Brady, when it fails to disclose a confession that states, without inculpating the defendant, that the declarant and another person committed the relevant criminal act. A number of federal courts of appeals have held in this basic situation that Brady is violated. These decisions align directly with Brady itself, in which this Court held that a co-defendant's confession that he committed the relevant offense was favorable and material to the defense because, had the jury known about the confession, it might not have sentenced Brady to death. Yet the Second Circuit Court has now broken from this consensus and this Court should restore uniformity to the law.

The prosecution's obligation under Brady to disclose favorable, material evidence is a cornerstone of our Constitution's commitment to a fundamentally fair trial. It is also a regular occurrence that a person confesses to a crime and explains that

some (but not all) of the participants in the crime committed a particular criminal act. See, e.g. Lilly v. Virginia, 527 U.S. 116, 129-30 (1999) (plurality opinion) (discussing this category of "exculpatory" evidence). Common sense dictates that such confessions are favorable and material to the guilt or enhanced punishment of the unnamed suspects.

The Second Circuit Court's decision treats Brady like a computerized logic game: Because such confessions do not expressly rule out the defendant's participation, they are not favorable or material. This has never been—and cannot be—the law, least of all where a defendant's imprisonment to more than twenty years is on the line. This most recent distortion of established doctrine will strip defendants of constitutional protections, incentivize prosecutorial non-compliance, and deprive jurors of information essential to their determinations of guilt and punishment—all providing powerful reasons for this Court to grant certiorari.

STATEMENT OF THE CASE

Petitioner was initially charged in an indictment, with 14 others, with conspiracy to distribute narcotics from 2015 to 2018. The Government returned to the Grand Jury not once, but twice. Four months before trial, the Government sought a superseding indictment extending the conspiracy from 2011 to 2018 as to Petitioner. And further, just 30 days before trial, the Government sought a second superseding indictment charging Petitioner with an additional count of possession of a firearm in furtherance of that conspiracy.

In presenting this new charge, the Government misled the Grand Jury to believe that a firearm used in 2013 in an unrelated shooting supported the new charge of use of a firearm in furtherance of the conspiracy, despite knowing that there was no proof or allegation that Petitioner participated in any such conspiracy prior to 2017. Any other evidence supporting the firearm charge was extremely thin, as Petitioner's DNA was not found on a gun recovered from the alleged "stash" spot at 672 Decatur in Brooklyn, New York, and the Government nonetheless declined to clarify for the Grand Jury that the 2013 firearm was not related to the conspiracy, even when directly asked by the Grand Jury. After the Grand Jury indicted Petitioner, the case proceeded to trial where the Government elicited testimony from their cooperator about, among other things, (i) an individual who

purportedly worked for Petitioner, and (ii) multiple shootings, only one of which the cooperator was present for, and none of which implicated the defendant or occurred at a time when he was a member of the conspiracy.

Petitioner did not discover until more than two years after trial that the Government failed to disclose critical Brady material, including video recordings of interrogations of Petitioner's alleged co-conspirators that directly contradicted significant portions of the cooperator's testimony. These recordings directly called into question, among other things, the Government's theory that the individual whose DNA was found on the gun recovered from 672 Decatur—notably this individual was not Petitioner, whose DNA was entirely excluded—was a "worker" acting at the direction of Petitioner. The recordings therefore went to the very heart of the Government's case, and severed the tenuous link between the 672 Decatur gun and Petitioner. Without a convincing theory that tied Petitioner to the 672 Decatur gun through an agency theory, it is at least reasonably likely that a jury would not have convicted Petitioner on the additional count of possession of a firearm in furtherance of the conspiracy in violation of § 924(c)(1)(A)(i) (the "Gun Charge").

STATEMENT OF FACTS

A. OVERVIEW OF THE CONSPIRACY AND INITIAL INDICTMENT

On May 24, 2018, prosecutors from the U.S. Attorney's Office for the Southern District of New York sought an indictment against 15 individuals (the "Initial Indictment"). As returned, the Initial Indictment included two charges: conspiracy to distribute 280 grams or more of crack cocaine and 100 grams or more of heroin between 2015 and 2018 in violation of 21 U.S.C. § 841(b)(1)(A) and (B), and possession of a firearm in furtherance of the conspiracy in violation of 18 U.S.C. § 924(c)(1)(A)(i). Id. Petitioner was charged with only the former, based on a wiretap that uncovered discussions related to drugs and seizure of approximately 516 grams of cocaine, only two grams of which was attributed to Petitioner.

During the Grand Jury presentation in May of 2018, the Government identified Petitioner and the 14 other individuals—all of whom who had known each other since attending elementary school—as the "Boss Crew." With respect to another co-conspirator, Tyquan Robinson ("Mr. Robinson"), the Government pointed to a gun used in connection with a shooting in September 2017 (the "2017 Shooting"). It was recovered from 672 Decatur pursuant to a search warrant involving Mr. Robinson (the "Decatur Gun").

B. THE GOVERNMENT'S COOPERATING WITNESS, MAURICE CURTIS, CONDUCTED GOVERNMENT PROFFERS THAT INCLUDED SOME EXCULPATORY STATEMENTS WITH RESPECT TO PETITIONER

Five months out from trial, co-conspirator Maurice Curtis ("Mr. Curtis") agreed to proffer with the Government. Mr. Curtis, whose reliability as a cooperating witness was questionable at best, attributed much of the knowledge he provided the Government to stories heard from others before he himself had joined the conspiracy in 2017.

Mr. Curtis told the Government that he heard that the Decatur Gun recovered in connection with Mr. Robinson and the 2017 Shooting was Petitioner's firearm. Notably, the DNA on this weapon matched only Mr. Robinson. Petitioner's DNA was excluded. Moreover, after his initial proffer sessions, Mr. Curtis mentioned Petitioner only one other time over the course of several proffers with the Government, and never identified Petitioner as a member of the Boss Crew. Based on the information Mr. Curtis provided, the Government sought a superseding indictment (in relevant part) extending the length of the conspiracy to from 2011 to 2018.

Over the course of the following three months, the Government continued to

meet with Mr. Curtis. Mr. Curtis engaged in at least eight separate proffer sessions with the Government. Over the course of those sessions, Mr. Curtis made scant reference to Petitioner. The key points from these few and far between statements are summarized below for clarity:

- Petitioner "does his own thing" and Petitioner "didn't supply us . . . ."
- Mr. Curtis did not know if Petitioner was selling drugs at the time of the 2013 Shooting.
- With respect to a shooting in 2013, which Petitioner was allegedly involved in but ultimately acquitted of all charges for (the "2013 Shooting"), was not drug-related. ("E's shooting: MC just heard E shot @ friend").
- Petitioner asked another co-conspirator to retrieve the gun from the 2013 Shooting.
- Petitioner was selling crack at some point in the fall of 2017 and had started working with Mr. Robinson at that time.
- Mr. Curtis had never seen a gun involved in any of the drug activities he witnessed at 672 Decatur.
- Mr. Curtis was "not sure if E [Petitioner] knew the [Decatur G]un was there, E never said."
- Petitioner lived in the Bronx, not at 672 Decatur [in Brooklyn].

By July 2, 2019, all defendants except Petitioner had entered guilty pleas. The Government informed Mr. Curtis that there may be a trial in August as to Petitioner before expressly asking him about Petitioner yet again. In response, Mr.

Curtis emphasized that (i) Petitioner had asked a co-conspirator to retrieve the gun after the 2013 shooting that allegedly involved Petitioner, (ii) that this incident was not drug-related, and (iii) he could not confirm whether Petitioner was even selling drugs at the time of that incident.

Just one month out from trial, despite the fact that all of the remaining defendants apart from Petitioner had pled guilty pursuant to plea agreements, the Government sought a second superseding indictment asking the Grand Jury to add a count against Petitioner for possession of a firearm in furtherance of the conspiracy. The Government's presentation contained the following key pieces of evidence:

- Petitioner was supplied by Tyshawn Burgess, head of the Boss Crew.
- Petitioner was "known to have firearms," and "was primarily selling with Tyquan Robinson," though no time frame was offered for Petitioner's purported role in the conspiracy.
- That Petitioner had been seen using keys to enter the Decatur house which led them "to believe that was his residence."
- Details of the execution of the search warrant at 672 Decatur, such as finding pill bottles with Petitioner's name on them, and finding the Decatur Gun.
- The Decatur Gun was tested for both Petitioner and Mr. Robinson's DNA, and only traces of Mr. Robinson's DNA was a match.

The Government failed to mention Mr. Curtis's statements that he did not believe

Petitioner lived at 672 Decatur, or that he had never witnessed a gun at 672 Decatur and was not aware of Petitioner owning a gun. The Government failed to provide time frames for key aspects of their case (i.e., when Petitioner became a member of the conspiracy and when his alleged working relationship began with Mr. Robinson).

Most critically, the Government included in its presentation of evidence testimony regarding the 2013 Shooting. Despite Mr. Curtis's repeated statements that the 2013 Shooting was not drug-related, the Government's witness testified that they had recovered a gun with Petitioner's DNA in connection with this incident, and that Petitioner had asked a co-conspirator to retrieve the gun after the shooting (although it was ultimately recovered by police). The accompanying PowerPoint presentation had the title "Boss Gang" on screen throughout the presentation, and dedicated an entire slide to the 2013 Shooting. The obvious impression left by the presentation was that this 2013 Shooting—the only one to which evidence linked Petitioner—was tied to the conspiracy.

At trial, the evidence and argument put forth by the Government at trial pertaining to the Gun Charge was largely circumstantial, consisted of hearsay testimony of one cooperating witness, and was based on an attenuated theory of

agency involving Mr. Robinson. Specifically, the Government relied on one cooperating witness—Mr. Curtis—to argue that Petitioner was some sort of kingpin for the firearm activity within the Boss Crew. That Petitioner was allegedly aware that members of the Boss Crew used or possessed guns, and or in the Government's words, "facilitated and encouraged gun possession by Crew members," was the bulk of the evidence presented against him. Petitioner would learn only when it was nearly too late that much of this evidence was not credible and undermined by several additional witnesses. Petitioner was ultimately convicted on both counts.

C. AFTER TRIAL, THE GOVERNMENT'S FAILURE TO PRODUCE SIGNIFICANT EXCULPATORY EVIDENCE BECAME APPARENT

Nearly two years later, as Petitioner's prior counsel was preparing for oral argument on his conviction appeal before Second Circuit Court, potential misconduct on the part of the Government came to light. Specifically, it became clear that the Government failed to produce the following pieces of potentially exculpatory evidence, in violation of its Brady obligations, which directly undermined its purported agency theory presented at trial.

First, on June 24, 2021, in response to a request from Petitioner's prior counsel, the Government produced a post-arrest video with the cooperating witness, Mr.

Robinson, that took place on January 5, 2018, after Mr. Robinson's arrest at 672 Decatur and the recovery of the Decatur Gun (the "2018 Robinson Recording"). The video shows two NYPD officers questioning Mr. Robinson, and during the interview he makes several contradictory statements regarding whether Petitioner resided at 672 Decatur and whether he was aware of the presence of the Decatur Gun. Mr. Robinson first denied that either he or Petitioner lived at 672 Decatur, instead insisting that they only used the back room for smoking. Additionally, he denied knowing that there was a gun present at the location or that Petitioner was involved in any drug dealings at the time. Later on in the interview, and only after officers pressed him to provide more information, Mr. Robinson reversed course and stated that the Decatur house was Petitioner's "crib" and that all the contraband found in that home belonged to Petitioner.

Second, on December 13, 2021, again in response to a request from Petitioner's counsel, the Government produced another recording of a post-arrest interview with Mr. Robinson—this one from 2015 (the "2015 Robinson Recording"). During this interview, Mr. Robinson denies using a firearm during an altercation. Evidence of this 2015 altercation, including the use of a firearm, was introduced by the Government as context for the Gun Charge against Petitioner.

Third, on the same date, the Government produced two post-arrest interview recordings with co-conspirators, Tyshawn Burgess and Kerry Felix from 2017 (the "2017 Recordings"). During these interviews, Burgess and Felix both denied involvement in a 2017 shooting. Similar to the 2015 Robinson Recording, the Government introduced evidence of this 2017 shooting as context for the Gun Charge against Petitioner.

At trial, the Government's evidence supporting the Gun Charge was flimsy and largely hinged a tenuous agency theory presented by their cooperating witness, Mr. Curtis. A gun recovered from 672 Decatur, the Decatur Gun, was the only gun charged out of the long litany of uncharged guns unrelated to Mr. Curtis the Government introduced as context. The other guns could not be tied to Mr. Curtis, and the Decatur Gun was tied only by circumstance (some items with Petitioner's name on them were found in the same room as the gun) and the testimony of Mr. Curtis, who testified that he heard that the gun recovered at 672 Decatur was Petitioner's. But Mr. Curtis had never seen a gun present during any drug activity he witnessed at 672 Decatur, nor did he know if Petitioner knew the recovered gun was located there. And importantly, Petitioner's DNA was completely excluded—only Mr. Robinson's DNA was found on the weapon.

The Government sought to close this loop at trial by arguing that Mr. Robinson was a bag man, or a "worker," acting at the direction of Petitioner. This agency theory was thus critical to their case, and if a jury was unpersuaded by the worker theory then they would have been unlikely to convict on the Gun Charge. This is why it was so prejudicial to Petitioner that the Government failed to disclose the 2018 Robinson Recordings, in which Mr. Robinson not only denied Petitioner lived at 672 Decatur or was involved in drug dealing at the time (directly rebutting the Government's theory that Mr. Robinson was Petitioner's worker) but also that Petitioner only used the room in which the Decatur Gun was found for smoking. This cast clear doubt on the Government's hoped for inference that the presence of items with Petitioner's name on them in the room meant the Decatur Gun was used by Petitioner in furtherance of a drug dealing conspiracy. Later in the interview, the interviewing detectives pressed him harder and Mr. Robinson flipped his story, saying that the house and gun were Petitioner's.

The district court denied Petitioner's Rule 33 motion for a new trial, reasoning that there was no prejudice to Petitioner shown, and with respect to the "truly exculpatory material" contained in the 2018 Robinson Recording, because Mr. Robinson changed his story it was "hard to imagine" Petitioner's counsel would

have called Mr. Robinson as a witness. The second circuit affirmed this ruling but held that the evidence was not favorable because it was not exculpatory. Moreover the second circuit also failed to conduct the cumulative analysis of the Brady violations which is required under the precedents of this court.

REASONS FOR GRANTING THE PETITION

ARGUMENT: THE DECISION BELOW CREATES A FRAMEWORK RADICALLY AT ODDS WITH THIS COURT'S PRECEDENT

A. The Second Circuit Court's New Definition of "Favorable" Vitiates Brady and its Progeny

The Brady rule arises from the Supreme Court's case of Brady v. Maryland, 373 U.S. 83, (1963), and requires prosecutors to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial," United States v. Bagley, 473 U.S. 667, 675, (1985). In other words, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Courts use a three-part test for determining whether the government committed a Brady violation: "[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching: [2] that evidence must have been suppressed by the State, either willfully or inadvertently, and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The prejudice requirement is one of materiality, where "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." Bagley, 473 U.S. at 682. In other words, the undisclosed evidence

must raise a "probability sufficient to undermine confidence in the outcome." Id.

The Second Circuit's favorability analysis conflates favorability with weight, mirroring arguments that have been rejected by this Court. See, Smith, 565 U.S. at 76 ("The State's argument offers a reason that the jury could have disbelieved Boatner's undisclosed statements, but gives us no confidence it would have done so." (emphasis in original)); Wearry, 577 U.S. at 394 ("Even if the jury—armed with all of this new [Brady] evidence—could have voted to convict Wearry, we have 'no confidence that it would have done so.'" (quoting Smith, 565 U.S. at 76)).

Evidence is favorable if, had it been "disclosed and used effectively," it "may [have] ma[d]e the difference" in the defendant's case. United States v. Bagley, 473 U.S. 667, 676 (1985). Favorable evidence need only have "some weight [or] tendency" to help the defendant. Kyles v. Whitley, 514 U.S. 419, 451 (1995). Evidence is material "when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" Wearry v. Cain, 577 U.S. 385, 392 (2016) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). A defendant "need not show that he 'more likely than not' would have" received a different result "had the new evidence been admitted." Id.(quoting Smith, 565 U.S. at 75). In other words, the materiality inquiry does not turn on "whether, after discounting the

inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." Strickler v. Greene, 527 U.S. 263, 289-90 (1999). Rather, the defendant "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." Wearry, 577 U.S. at 392(quoting Smith, 565 U.S. at 75).

This Court has also stressed the "distinction between the materiality of ... suppressed evidence with respect to guilt and punishment." Cone v. Bell, 556 U.S. 449, 473 (2009). In Brady itself, for instance, "Brady took the stand and confessed to robbing the victim and being present at the murder but testified that his accomplice had actually strangled the victim." Id.(describing the facts of Brady). After a jury convicted Brady of first-degree murder and sentenced him to death, he discovered that the State had suppressed a statement by his accomplice stating that although Brady had wanted to strangle the victim, the accomplice had in fact done so. Brady, 373 U.S. at 84, 88. Even though the co-defendant's confession implicated Brady as a principal in the murder (and thus was immaterial to Brady's first-degree murder conviction), the Court held the confession was material to Brady's death sentence. See id.at 87-88.

Because Brady and its progeny are grounded in the Due Process Clauses of the

Constitution, the essential purpose of the rules enunciated in these cases is to protect a defendant's right to a fair trial by ensuring the reliability of any criminal verdict against him. See Bagley, 473 U.S. at 675. Thus, a Brady violation occurs only where the government suppresses evidence that "could reasonably [have been] taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435, (1995); accord Bagley, 473 U.S. at 678; see also United States v. Agurs, 427 U.S. 97, 112, (1976) (holding that Brady's materiality standard "reflects our overriding concern with the justice of the finding of guilt").

In the six decades since Brady was decided, this Court has issued a series of rulings. that have clarified the scope of these three components of a Brady violation. Most of these rulings have focused on the second and third components --which, together, define what evidence must be disclosed. See, e.g., Bagley, 473 U.S. at 678 (defining "material" exculpatory evidence as evidence that, if suppressed, would "undermine the confidence in the outcome of a trial"); Giglio, 405 U.S. at 154 (1972) (holding that exculpatory evidence under Brady includes evidence that could be used to impeach a key government witness).

The scope of the disclosure required by Brady, as enunciated by this Court, has

evolved over time. In Brady itself, the Court stated:

> We now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the *evidence is material* either to guilt or to punishment... 373 U.S. at 87.

In this sentence, the Court appeared to be using the word "material" in its evidentiary sense, i.e., evidence that has some probative tendency to preclude a finding of guilt or lessen punishment. Thirteen years later, however, in United States v. Agurs, 427 U.S. 97, (1976), this Court began a process that would result in the word "material" in the Brady context having an entirely different meaning. This Court said:

> Unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring the verdict to be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.
> . . .
> But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless the omission is of sufficient significance to result in the denial of a defendant's right to a fair trial. 427 U.S. at 108.

The Court quoted these words in full nine years later in United States v. Bagley, 473 U.S. 667, 675-76, (1985), and made explicit what Agurs foreshadowed: that "material" in the Brady context does not mean material in the evidentiary sense, as Brady seemed to suggest. Rather, evidence is material in the Brady context only if "its suppression undermines confidence in the outcome of the trial. Id. at

678; see also Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (using the Bagley standard of materiality to define the scope of a Brady disclosure obligation). The Court went on to give some content to the "undermines confidence in the outcome" standard, stating that, for Brady purposes,

> 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. at 682.

First, a word on the above mentioned "reasonable probability" standard. This test is not a particularly demanding one. This is true because the government's burden at the trial level is so demanding. See United States v. Agurs, 427 U.S. 97, 112.1 (1976), holding modified by Bagley, 473 U.S. 667 ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."). see also Wearry, 577 U. S. at 392 (to be material, the suppressed evidence need only be "sufficient to undermine confidence in the verdict" (internal quotation marks omitted)).

The Second Circuit Court nevertheless held that codefendant's confessions were not favorable to petitioner because it did not expressly exculpate petitioner. This requirement that the withheld evidence must speak to or rule out the defendant's participation in order for it to be favorable is wholly foreign to this Court's case law. See, e.g., Kyles, 514 U. S., at 450-451. And it appears that that erroneous requirement tainted the Second Circuit Court's materiality analysis as well. At the materiality stage, the court again emphasized that the confession did not preclude petitioner's participation in the offense, thereby substantially discounting reasonable inferences about the degree or extent of petitioner's participation that a jury might otherwise have drawn. See, Banks v. Dretke, 540 U.S. 668, 702 (2004) (rejecting the state's argument that no Brady violation had occurred because the witness was heavily impeached at trial, and thus that his status as a paid informant would have been merely cumulative impeachment evidence)

That the withheld information may seem inculpatory, as well as exculpatory, on its face in no way diminishes the government's duty to disclose favorable evidence. Indeed, this Court rejected a state's request for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence. Kyles, 514 U.S. at 438-39 (noting that the character of a piece of

evidence as favorable will often turn on the context of the existing or potential evidentiary record). The Kyles Court explained:

> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See Agurs, 427 U.S., at 108, ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.") This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative of a sovereignty... whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935)). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. Kyles, 514 U.S. at 439-40 (citations omitted).

Moreover, the bias of a witness is "always relevant" in discrediting the witness and affecting the weight of the testimony. Davis v. Alaska, 415 U.S. 308, 316 (1974) (internal quotation marks omitted). The right to expose bias is so fundamental that generally applicable evidentiary rules that otherwise limit inquiry into specific instances of conduct do not apply to credibility attacks based on motive or bias. United States v. Hill, 322 F.3d 301, 304 (4th Cir. 2003) (citing Quinn v. Haynes, 234 F.3d 837, 845 (4th Cir. 2000)). See, e.g., Smith v. United States, 283 F.2d 16, 20 (6th Cir. 1960) (bias cannot be classified as hearsay); United States v. Harris, 542 F.2d 1283, 1302 (7th Cir. 1976) ("other acts" evidence may be introduced to show bias).

The Government argued in lower courts that the trial evidence was so overwhelming that it would still have prevailed even with the disclosed evidence presented. That is one possibility. But the standard is whether the undisclosed evidence creates a "reasonable probability" that the outcome would have changed. Stated another way, the question is whether in the absence of the undisclosed evidence did the defendant receive a fair trial understood as a trial resulting in a verdict worthy of confidence.

With the addition of the potentially impeaching information, the jury could have chosen to disregard Curtis's testimony and conclude that the Government had not met its burden beyond a reasonable doubt of showing that petitioner possessed the firearm during the period of charged conspiracy. That there are other plausible explanations or outcomes is immaterial. Certainly, the defense has a tougher showing with respect to the note but that too, is something that the jury must assess once it has all the information. Simply put, the undisclosed information could make the difference between conviction and acquittal on the firearm count in the superseding indictment.

It is established that jurors use a coherence-based reasoning method, in which they integrate the whole of the evidence that they receive. That is, a piece of

strong inculpatory evidence can make the entire evidence set appear inculpating. By the same token, including an exculpatory item can push the evidence towards a conclusion of innocence. Critically, evidence is not independent: it is related, and thus the exclusion of evidence of innocence can make an entire case against a defendant seem far more compelling than it is.

In describing evidence that falls within the Brady rule, this Court has made clear that impeachment evidence is "favorable to the defense" even if the jury might not afford it significant weight. For example, in Kyles v. Whitley, 514 U.S. 419, (1995), the Court noted that because certain undisclosed evidence had "some value as exculpation and impeachment," it should be considered in conjunction with the other undisclosed evidence in determining whether Brady's materiality standard is satisfied. Id. at 450 (emphasis added). This Court specifically rejected the state's argument that the evidence was "neither impeachment nor exculpatory evidence" because the jury might not have substantially credited it; according to the Court, "[s]uch argument confuses the weight of the evidence with its favorable tendency." Id. at 451; see also United States v. Bagley, 473 U.S. 667, 676, (1985) ("[Impeachment] evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.") (citation omitted).

The Second Circuit Court, however, resisted this straightforward reasoning and held that codefendant's confessions was neither favorable nor material. The lower court's analysis flouts precedent and common sense. There can be no doubt that the codefendant's confessions had value as impeachment evidence and was favorable to petitioner. Had the codefendant's confessions been made available to petitioner at trial, he could have used it to further undermine Curtis's already shaky credibility and bolster his argument that Curtis had invented a perpetrator in order to minimize his own level of involvement in the crime. Under these circumstances, the Second Circuit court's determination that the recordings of confessions did not satisfy the favorability prong of the Brady doctrine was erroneous. See Napue v. People of State of III., 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

Under the materiality standard, the question is not whether the suppressed evidence precludes the jury's verdict, or whether it speaks directly to the defendant's culpability. The proper test is whether "there is any reasonable

likelihood [the evidence] could have affected the judgment of the jury." Wearry, 577 U.S. at 392 (emphasis added) (internal quotation marks omitted). This proposition follows directly from Brady itself. In Brady, this Court held that the State's action violated due process because the suppressed confession could "exculpate [Brady] or reduce [his] penalty." Id.at 87-88. The same result should follow here. See Cone, 556 U.S. at 472 n.18, 475 (finding suppressed evidence "may well have been material" where the defendant otherwise had "no independent evidence corroborat[ing]" his assertion that he had a substance-abuse problem).

B. The Decision Below Conflicts With Decisions From Several Other Courts

In Goudy v. Basinger, 604 F.3d 394 (7th Cir. 2010), the prosecution argued that the defendant and one other man each shot the victim in his car, with the defendant shooting from the driver's side. Id.at 39697. The prosecution suppressed a statement from a witness suggesting that a different man shot the victim from the driver's side. Id.at 397. The state court held that this statement was not material because it "'does not mean that [the defendant] could not have been the other shooter' and 'does not mean that [the defendant] was not the other shooter.'" Id.at 400 (quoting Goudy v. State, 2006 WL 370710, at *7 (Ind. Ct. App. Jan. 12, 2006)). The Seventh Circuit, however, granted habeas relief, holding that the state court unreasonably applied this Court's Brady jurisprudence by "requir[ing] that [the

defendant] prove the new evidence necessarily 'would have' established his innocence." Id.(emphasis added). It was enough to mandate relief that the statement's natural import indicated that the defendant was not the shooter.

In Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978), the prosecution argued that the defendant led a meeting in which he directed a group to commit certain shootings and supplied one of them with a gun. Id.at 1166. The prosecution suppressed a statement by one of the crime participants recounting the incident, which "made no mention at all of any meeting" or of the defendant "having furnished the gun." Id.The Sixth Circuit affirmed the district court's grant of habeas relief, holding that a statement by a participant in a crime that "makes no reference even to the presence of the defendant or his participation must be viewed as a potentially powerful exculpation." Id.at 1168. The court reasoned that the statement supported "at least a reasonable inference that [the defendant] did not participate in the discussion ... leading to the shootings" or supply the weapon. Id.

In short, confessions of codefendants, whether inculpating or exculpating, are a critically important type of evidence. Indeed, the significant impact of this evidence makes it all the more important that they be disclosed to defense and

the court in all cases.

C. The second circuit was required to consider the Brady violation collectively not item by item

The Supreme Court held in Kyles that the third component of the Brady/Bagley test, which is the materiality analysis, must be conducted in a way that considers the cumulative impact of all of the undisclosed evidence favorable to the defense. Kyles, 514 U.S. at 436, ("The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item."). This Court explained: "We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion." Id. at 437 n.10. see also Brown v. Head, 272 F.3d 1308, 1316 (11th Cir. 2001) (In performing a cumulative materiality analysis, "the collective impact of all of the suppressed evidence must be considered against the totality of the circumstances") (citing Kyles, 514 U.S. at 441)

The Second Circuit court rejected petitioner's request for a new trial because it found that no single item of withheld evidence was material. The process which the Second Circuit employed was to evaluate the individual bits of information withheld to determine if the information was beneficial to the defense and

material to the guilt or innocence such that the information should have been provided. Because the Second Circuit court applied only an item-by-item determination of materiality, the decision is contrary to this Court's decision in Kyles, 514 U. S. 419.

This Court in Kyles specified that the materiality of withheld evidence may be determined only by evaluating the evidence collectively. Id. at 436 ("The fourth and final aspect of... materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item."); see also Schledwitz v. United States, 169 F.3d 1003, 1012 (6th Cir. 1999) ("In determining whether undisclosed evidence is material, the suppressed evidence is considered collectively, rather than item-by-item, to determine if the 'reasonable probability' test is met."); United States v. Frost, 125 F.3d 346, 383 (6th Cir. 1997) (stating that "courts should evaluate the material effect of exculpatory evidence by examining the evidence collectively, not item-by-item").

It is essential that the process not end after each undisclosed piece of evidence has been sized up. The process must continue because Brady materiality is a totality-of-the-evidence macro consideration, not an item-by-item micro one. The Second Circuit Court erred in conducting the Brady materiality analysis when it

stopped half way through the process--it considered the force and effect of the undisclosed evidence one item at a time but do not consider it cumulatively. See Kyles, 514 U.S. at 440 (finding fault with the court of appeals for its references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone").

The importance of cumulative prejudice cannot be overstated, as it stems from the inherent power held by the prosecution, which motivated Brady. Id. at 437 ("[T]he prosecution... alone can know what is undisclosed[] [and] must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."). This Court has reiterated that state courts are required to evaluate the materiality of suppressed evidence cumulatively. Wearry, 136 S. Ct. at 1007 ("[T]he state post-conviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively.")

This Court has also clarified the obligation of a reviewing court to consider the totality of the evidence-and not merely exculpatory facts in isolation-when evaluating a claim of error for its prejudicial effect. In Wong v. Belmontes, this Court stated:

> In evaluating th[e] question [of prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [the defense] had pursued [a] different path-not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it. 130 S. Ct. 383, 386 (2009) On the facts of Wong, the defense counsel's failure to introduce certain favorable evidence was not prejudicial to Belmontes because the introduction of that favorable evidence would have "opened the door" to unfavorable evidence, which ultimately outweighed the favorable. Id. at 388-89.

Likewise, in Bobby v. Van Hook, 130 S. Ct. 13, 20 (2009), this Court stated that a reviewing court, when considering a defendant's claim of prejudice, must evaluate the weight of mitigating and aggravating evidence regarding the defendant's guilt, rather than simply tallying instances of mitigation.

Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part. Whether the sum of the withheld evidence favorable to the defense will be enough to create a reasonable probability that the jury would have acquitted will depend on two factors. One factor is the net inculpatory weight of the evidence on both sides that actually was presented at trial. The other factor is the aggregate effect that the withheld evidence would have had if it had been disclosed.

These two factors are brought to bear at the crucial second step of the materiality process, which begins with putting on the scales the evidence that was presented at trial--evidence favoring the prosecution on one side, that favoring the defense on the other. Then the force and effect of all of the undisclosed exculpatory evidence is added to the weight of the evidence on the defense side, while the force and effect of all the undisclosed impeachment evidence is subtracted from the weight of the evidence on the prosecution's side. Id. at 437 (referring to the "responsibility to gauge the likely net effect of all such evidence").

Once the evidence on the scales is adjusted to take into account the combined force and effect of the undisclosed evidence favorable to the defense, the standard that is applied is not one of sufficiency of evidence to convict. It is instead whether what is left on both sides of the scale after adjusting for the withheld evidence creates a reasonable probability that a jury would acquit, and a reasonable probability is one sufficient to undermine our confidence in the guilty verdict. Id. Kyles 514 U.S. at 453, ("[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same.")

The Second Circuit court, in holding that under Brady the withheld evidence was immaterial, "never went beyond evaluating the materiality of each individual item of evidence separately." See Castleberry v. Brigano, 349 F.3d 286, 292 (6th Cir. 2003) (finding the collective impact of withheld evidence material). In doing so, the Second Circuit court failed to comply with this Court's precedent requiring courts to evaluate withheld evidence collectively, rather than item-by-item. Id. ("Because the state court applied only an item-by-item determination of materiality, the decision is contrary to the Supreme Court's decision in Kyles. The Court in Kyles specified that the materiality of withheld evidence may be determined only by evaluating the evidence collectively." (citing Kyles, 514 U.S. at 419)); see also Brooks v. Tennessee, 626 F.3d 878, 892 (6th Cir. 2010) (noting that in determining whether undisclosed evidence is material, the evidence is reviewed "collectively, not item-by-item." (quoting Kyles, 514 U.S. at 436)).

D. That the Second Circuit failed to look at the suppressed evidence collectively is not the only problem with its analysis of petitioner's claim. The Second Circuit also failed to conduct analysis under both Brady and Napue

One subset of Brady claims is a Napue claim. "Under the Supreme Court's decision in Napue v. Illinois, the government may not knowingly use false evidence, including false testimony, to obtain a tainted conviction or allow it to go

uncorrected when it appears. False testimony includes both perjury and evidence that, though not itself factually inaccurate, creates a false impression of facts which are known not to be true." Burr v. Jackson, 19 F.4th 395, 410 (4th Cir. 2021) (alterations adopted). But the standard for materiality under Napue is "considerably less demanding" than other materiality standards on constitutional claims arising from criminal cases.

In Brady cases, for example, the reviewing court will ask 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. (quoting Strickler v. Greene, 527 U.S. 263, 280 (1999)). The Napue inquiry requires only that there be "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 636 (quoting Agurs, 427 U.S. at 103-04).

Where, as in this case, the petitioner alleges both Napue and Brady violations, the Second Circuit was required to first consider the Napue violations collectively under Napue's more lenient standard. Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008). If that standard is met, relief must be granted. "[I]f the Napue errors are not material standing alone, we consider all of the Napue and Brady violations collectively" under Brady's materiality standard. Id.

In a consistent throughline of cases predating even Napue itself, this Court has

made clear that claims that the prosecution knowingly used false evidence to obtain a conviction are subject to a more lenient materiality standard "not just because [Napue cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Agurs, 427 U.S. at 104; see also Agurs, 427 U.S. at 103 nn.8-9 (collecting cases). And as applied here, this Court's prohibition on the use of false evidence, and its rationale for the different standard, "do[] not cease to apply merely because the false testimony goes only to the credibility of the witness." Napue, 360 U.S. at 269.

A few federal circuits have addressed this question: The Ninth Circuit explained the tension in determining which standard to apply:

> Although we must analyze Brady and Napue violations "collectively," the difference in the materiality standards poses an analytical challenge. The Napue and Brady errors cannot all be collectively analyzed under Napue's "reasonable likelihood" standard, as that would overweight the Brady violations. On the other hand, they cannot be considered in two separate groups, as that would fail to capture their combined effect on our confidence in the jury's decision.

Id.Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008). The Ninth Circuit's solution was a two-step process: the Court should "first consider the Napue violations collectively" under the Napue standard, and if they "are not material

standing alone," then, second, the court should "consider all of the Napue and Brady violations collectively" under the Brady standard. Id. For its part, the Second Circuit has noted that "undisclosed Brady material [may] undermine[] the credibility of specific evidence that the government otherwise knew or should have known to be false." United States v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997). In other words, Brady material could cast light on the falsity of Napue material. In such situations, the Second Circuit held, the Napue standard should apply. Id. In United States v. Arias, 217 F.3d 841, at *6 (4th Cir. 2000) (per curiam) (orally argued but unpublished table decision), the Fourth Circuit Court interpreted the Second Circuit's holding as being limited to where "the undisclosed evidence was not only related to the false testimony, but it actually demonstrated the falsity of the testimony." Arias, 217 F.3d 841, at 6.

This Court is requested to adopt an approach-which combines the insights of the Second, Fourth and Ninth Circuits - which makes good sense. Thus, this Court must hold that a court considering the cumulative materiality of Brady and Napue claims must (1) evaluate, pursuant to the Napue standard, the cumulative materiality of the Napue evidence and any Brady evidence tending to show the falsity of the testimony at issue in the Napue claims; and (2) evaluate pursuant to the Brady standard, the cumulative materiality of all of the Napue and Brady evidence.

E. The Issue Presented Is Important, And This Case Is An Excellent Vehicle For Expounding On Brady

This Court regularly grants certiorari in cases where petitioners present strong Brady claims. See Turner v. United States, 137 S. Ct. 1885 (2017); Wearry v. Cain, 577 U.S. 385 (2016); Smith v. Cain, 565 U.S. 73 (2012). This is because of Brady's "overriding concern with the justice of the finding of guilt" or the imposition of punishment. United States v. Bagley, 473 U.S. 667, 678 (1985). Where prosecutors do not faithfully discharge their duty to disclose exculpatory evidence, this Court's supervisory authority is implicated. See Wearry, 577 U.S. at 392 ("Beyond doubt, the newly revealed evidence suffices to undermine confidence in [defendant's] conviction."); Smith, 565 U.S. at 76-77; Kyles v. Whitley, 514 U.S. 419, 454 (1995).

That the decision below creates a split of authority on a recurring constitutional issue only underscores the need for this Court's intervention. Indeed, the depth of the conflict likely underrepresents the issue's salience. Prosecutors often procure, or learn of, confessions from one participant in a multi-party crime. When those confessions fail to implicate the defendant in a relevant way, they are so plainly exculpatory that prosecutors presumably almost always turn them over. Cf. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("the ends of justice" require the

admission of third-party confessions where they tend to exonerate the defendant). And when prosecutors disclose evidence, no Brady issue can arise. The Second Circuit Court's decision, however, encourages prosecutors to "tack[] too close to the wind," Kyles, 514 U.S. at 539, and to withhold favorable and material evidence. This Court should not tolerate that temptation.

The Brady issue here also squarely implicates the frequently recurring fact pattern that gives rise to the question presented. The confessions in petitioner's case implicates other suspects. The prosecution unquestionably suppressed the confession. And the Brady issue is outcome determinative for petitioner: If petitioner is correct that the suppressed confession was favorable and material to his effort to obtain acquittal on the firearm offense, he is entitled to a new trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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pro se petitioner