

APPENDIX A

23-6470
United States v. Murphy

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of July, two thousand twenty-four.

PRESENT:

GERARD E. LYNCH,
SUSAN L. CARNEY,
MICHAEL H. PARK,
Circuit Judges.

United States of America,

Appellee,

v.

23-6470

Ernest Murphy,

*Defendant-Appellant.**

FOR APPELLEE:

JUN XIANG (Matthew J.C. Hellman & Karl Metzner, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

FOR DEFENDANT-APPELLANT:

MARTIN S. BELL, Simpson Thacher & Bartlett LLP, New York, NY.

Appeal from an order the United States District Court for the Southern District of New York (Sullivan, J.).

* The Clerk of Court is directed to amend the caption accordingly.

1 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
2 **DECREED** that the district court's order is **AFFIRMED**.

3 After we affirmed Defendant-Appellant Ernest Murphy's conviction and sentence for his
4 role in a drug conspiracy, *see* No. 20-622, 2021 WL 3826571 (2d Cir. Aug. 27, 2021), he moved
5 for a new trial and to dismiss Count 2 of the superseding indictment against him, which charged
6 him with possessing a firearm in furtherance of a drug-trafficking crime and aiding and abetting
7 the same, in violation of 18 U.S.C. §§ 924(c), 2. The motion argued that newly disclosed evidence
8 revealed that the government violated its obligations under *Brady v. Maryland* and knowingly or
9 recklessly misled the grand jury into indicting Murphy on Count 2. The district court denied the
10 motion, and Murphy now appeals. We assume the parties' familiarity with the underlying facts,
11 the procedural history, and the issues on appeal.

12 **I. None of the late-disclosed evidence was material, so a new trial is unwarranted.**

13 *Brady v. Maryland*, 373 U.S. 83 (1963), requires the government to disclose to defendants
14 evidence that is favorable, suppressed, and prejudicial. *United States v. Hunter*, 32 F.4th 22, 31
15 (2d Cir. 2022). Evidence is prejudicial if it is material to the defendant's guilt or punishment.
16 *Brady*, 373 U.S. at 87. Materiality for these purposes turns on whether "there is a reasonable
17 probability that, had the evidence been disclosed to the defense, the result of the proceeding would
18 have been different." *United States v. Stillwell*, 986 F.3d 196, 200 (2d Cir. 2021). Undisclosed
19 impeachment evidence may also be material "where the witness in question supplied the only
20 evidence linking the defendant to the crime." *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir.
21 1998). But "where ample ammunition exists to attack a witness's credibility, evidence that would
22 provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial."
23 *United States v. Orena*, 145 F.3d 551, 559 (2d Cir. 1998). "Where suppressed evidence is

1 inculpatory as well as exculpatory, and ‘its exculpatory character harmonize[s] with the theory of
2 the defense case,’ a *Brady* violation has occurred.” *United States v. Mahaffy*, 693 F.3d 113, 130
3 (2d Cir. 2012) (quoting *United States v. Triumph Cap. Grp.*, 544 F.3d 149, 164 (2d Cir. 2008)).
4 “Materiality in this context presents us with a mixed question of law and fact.” *United States v.*
5 *Madori*, 419 F.3d 159, 169 (2d Cir. 2005). “While the trial judge’s factual conclusions as to the
6 effect of nondisclosure are entitled to great weight, we examine the record *de novo* to determine
7 whether the evidence in question is material as a matter of law.” *Id.*

8 Murphy identifies three categories of evidence that were allegedly suppressed and material.
9 But he fails to “show that ‘the favorable evidence could reasonably be taken to put the whole case
10 in such a different light as to undermine confidence in the verdict.’” *United States v. Jackson*, 345
11 F.3d 59, 73 (2d Cir. 2003) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

12 First, Murphy points to a 2015 recording of a law-enforcement interview of coconspirator
13 Tyquan Robinson. On the recording, Robinson admitted that he participated in a 2015 altercation
14 with a rival drug dealer but denied using a gun in the altercation. At trial, coconspirator Maurice
15 Curtis testified that Robinson admitted to him that he was the shooter in the 2015 altercation.
16 Murphy argues that he could have undermined both Curtis and Robinson’s credibility—and the
17 government’s theory that the conspiracy regularly used firearms to advance its interests—had he
18 known of the 2015 Robinson recording before trial.

19 The 2015 recording was not material for *Brady* purposes. Although it may have been
20 admissible, *see* Fed. R. Evid. 806, the recording was not exculpatory. Robinson confessed his
21 involvement in the 2015 shooting during his prosecution for his role in the conspiracy. So, if
22 Murphy had offered the 2015 recording, the government could have rehabilitated both Curtis and
23 Robinson’s credibility with Robinson’s plea allocution in which he admitted that he was the

1 shooter in the 2015 shooting and that it was drug-related. *See* Fed. R. Evid. 806 (“[T]he declarant’s
2 credibility may be attacked, *and then supported*, by any evidence that would be admissible for
3 those purposes if the declarant had testified as a witness.” (emphasis added)). Even setting aside
4 what the government could have done, the value of the 2015 recording was low given the strength
5 of the government’s other evidence. *United States v. Gil*, 297 F.3d 93, 103 (2d Cir. 2002) (“Where
6 the evidence against the defendant is ample or overwhelming, the withheld *Brady* material is less
7 likely to be material than if the evidence of guilt is thin.”). For example, law enforcement arrested
8 Murphy at home, where they found crack, heroin, and two loaded magazines. The government
9 also introduced recordings of the conspirators, including Murphy, discussing using firearms in
10 connection with their drug dealing. And a law-enforcement witness testified that he recovered a
11 loaded gun in the in a stash house on Decatur Street in Brooklyn that Murphy and his
12 coconspirators used. Moreover, Murphy possessed ample evidence with which to impeach
13 Curtis’s credibility. *See Jackson*, 345 F.3d at 74 (“A new trial is generally not required when . . .
14 the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a
15 witness whose credibility has already been shown to be questionable.”). We thus agree with the
16 district court that there is no “reasonable probability of a different result,” *Kyles*, 514 U.S. at 434,
17 if Murphy had possessed the 2015 recording before his trial.

18 *Second*, Murphy points to a pair of recordings made during the 2017 interrogations of two
19 of his coconspirators, Tyshawn Burgess and Kerry Felix. Both men told investigators that they
20 were not involved in the 2017 shooting of a rival gang member. This conflicted with the testimony
21 of Curtis, who said that Felix told him that he and Burgess were responsible for the shooting. As
22 with the 2015 Robinson recording, Murphy argued that the 2017 recordings could have
23 undermined the credibility not only of Curtis, but also of Burgess and Felix—neither of whom

1 testified at trial—and could have allowed him to warn the jury that the shooting was unrelated to
2 the conspiracy.

3 Although the recordings of Burgess and Felix may have been admissible under Rule 806,
4 neither was exculpatory. As with the 2015 recording, both Burgess and Felix later admitted their
5 roles in the 2017 shooting. So the government would have rehabilitated, and indeed bolstered the
6 credibility of Curtis, Burgess, and Felix if Murphy had offered the 2017 recordings. Against the
7 backdrop of the government’s evidence, we agree with the district court that the 2017 recordings
8 could not have established a reasonable probability of a different result.

9 *Finally*, Murphy points to a 2018 recording of an interview Robinson gave after his arrest
10 on the indictment here. Robinson was arrested at a stash house on Decatur Street in Brooklyn.
11 Inside, police found drugs, cash, and a loaded pistol. Next to the gun and drugs, police found
12 Western Union receipts and insurance documents bearing Murphy’s name. No direct physical
13 evidence linked Murphy to the gun, but the government introduced the Decatur Stash House
14 evidence as circumstantial evidence against Murphy. On the 2018 recording, Robinson at first
15 stated that he and Murphy used the Decatur Stash House only for smoking; he denied knowing
16 whether the gun the police found there belonged to Murphy or whether Murphy engaged in drug
17 distribution at the time of the search. Later in the recording, Robinson changed his tune and said
18 that the Stash House was Murphy’s “crib” and that the contraband found there—including the gun,
19 crack cocaine, and heroin—was Murphy’s. Murphy argues that Robinson’s initial statements
20 would have exculpated him in the jury’s eyes.

21 As the district court correctly noted, the admissibility of the 2018 recording is dubious,
22 thus undermining its materiality for *Brady* purposes. *See Gil*, 297 F.3d at 104. But even assuming
23 Murphy would have been able to present the 2018 recording, the jury likely would have heard both

1 the exculpatory and inculpatory portions. *See* Fed. R. Evid. 106. And, once again, the
2 government's evidence was overwhelming. Although the first part of the 2018 Robinson recording
3 may have undermined Murphy's connection to the gun found in the Decatur Stash House, the
4 government's charge in Count 2 was broader than that one gun. The jury was properly instructed
5 that it could find Murphy guilty if it found that Murphy participated in the underlying drug
6 conspiracy and knew that a conspirator possessed a gun in furtherance of the conspiracy's aims.
7 *See Rosemond v. United States*, 572 U.S. 65, 67 (2014). The 2018 recording would have failed to
8 undermine the numerous wiretapped conversations the government introduced in which Murphy
9 discusses using guns with coconspirators. At oral argument, Murphy contended that, had he
10 known of this recording, he could have called Robinson himself to testify that Murphy did not own
11 the gun found at the Decatur Stash House. But he did not make that argument in the district court
12 or in his brief to this Court. In any event, Robinson had a Fifth Amendment privilege to refuse to
13 testify. Had Robinson waived that privilege, he could have been impeached by his later retraction
14 of that position in the 2018 interview, and his guilty plea to a 2015 shooting. Robinson's plea
15 agreement with the government did not immunize him from perjury charges, so if Robinson
16 testified favorably to Murphy, he would have opened himself up to a separate prosecution.
17 Moreover, two members of the conspiracy were recorded discussing their understanding that
18 Murphy had ordered that Robinson be killed because he believed that Robinson was cooperating
19 against him. So the odds that Robinson would testify at all, let alone favorably to Murphy, were
20 slim. Like the other recordings, the 2018 Robinson recording does not raise a reasonable
21 probability that the outcome of Murphy's trial would have been different.

1 In short, none of the coconspirator recordings the government disclosed to Murphy after
2 trial—alone or together—raised “a reasonable probability of a different result.” *Kyles*, 514 U.S.
3 at 434. We thus affirm the district court’s decision to deny Murphy’s motion for a new trial.

4 To the extent Murphy sought dismissal of the § 924(c) charge against him on *Brady*
5 grounds, the district court properly denied that relief too. It is well established that “the proper
6 remedy for a Brady violation is vacatur of the judgment of convictions,” not a dismissal of the
7 indictment. *Poventud v. City of New York*, 750 F.3d 121, 133 (2d Cir. 2014) (en banc).

8 **II. The petit jury’s guilty verdict renders harmless any missteps before the grand jury.**

9 Murphy argues that the government so misled the grand jury into indicting him on Count 2
10 that dismissal of that count is warranted. The alleged deceit came in the context of testimony
11 related to a 2013 shooting. The government—through a Special Agent—told the grand jury that
12 Murphy had asked an associate to retrieve a gun connected to that shooting and that Murphy’s
13 DNA was found on the gun. But the government did not tell the grand jury that Murphy had been
14 acquitted of charges related to that shooting and that Maurice Curtis—the government’s
15 cooperating conspirator—had proffered that Murphy wasn’t a member of the conspiracy at the
16 time of the shooting and that the shooting wasn’t drug-related. The district court ultimately
17 excluded from trial almost all evidence related to the 2013 shooting. Still, Murphy argues that in
18 its presentation of the evidence related to the 2013 shooting, the government recklessly misled the
19 grand jury warranting dismissal of the indictment is warranted...

20 Dismissal of an indictment because of government misconduct before the grand jury is
21 appropriate only if a knowing or recklessly misleading statement as to an essential fact
22 “substantially influenced the grand jury’s decision to indict, or if there is grave doubt that the
23 decision to indict was free from the substantial influence of such violations.” *Bank of Nova Scotia*

1 *v. United States*, 487 U.S. 250, 256 (1988); *United States v. Lombardozi*, 491 F.3d 61, 79 (2d Cir.
 2 2007). “[T]he mere fact that evidence presented to the grand jury was unreliable, misleading, or
 3 inaccurate, is not sufficient to require dismissal of an indictment.” *Lombardozi*, 491 F.3d at 79.
 4 Dismissal of the indictment is especially unwarranted when “[t]he particular claims of impropriety
 5 before the grand jury . . . concern the sufficiency of the evidence, a failure to develop exculpatory
 6 evidence by the prosecutor, the presentation of prejudicial evidence[, or] error in explaining the
 7 law”—improprieties that could be “cured in the trial before the petit jury.” *Lopez v. Riley*, 865
 8 F.2d 30, 33 (2d Cir. 1989).[†]

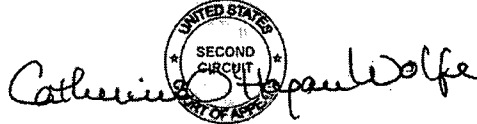
9 The government has no “legal obligation to present exculpatory evidence” to the grand jury
 10 because such an obligation “would be incompatible with [the grand jury] system.” *United States*
 11 *v. Williams*, 504 U.S. 36, 52 (1992). And although the district court excluded most evidence
 12 related to the 2013 shooting, the jury still found Murphy guilty, proving that there was probable
 13 cause to charge him with violating § 924(c). *United States v. Mechanik*, 475 U.S. 66, 70 (1986);
 14 *id.* at 67 (“[T]he petit jury’s verdict of guilty beyond a reasonable doubt demonstrates *a fortiori*
 15 that there was probable cause to charge the defendants with the offenses for which they were
 16 convicted.”). So Murphy’s conviction “must stand despite the [alleged] violation” before the grand
 17 jury. *Id.*

18 * * *

[†] While the government may not have knowingly misled the grand jury, we are troubled by its presentation of evidence related to the 2013 shooting—evidence the government knew could not support a § 924(c) charge. Nobody disputes, for example, that the 2013 shooting predated Murphy’s participation in the conspiracy and was unrelated to drug trafficking. But the government’s presentation of the 2013 shooting created confusion, leading a grand juror to ask twice whether the 2013 shooting was “drug trafficking . . . related.” In response, the government never clarified that the 2013 shooting was not in furtherance of the conspiracy, even though the available evidence showed as much. Instead, as the district court recognized, the government seemed to suggest that 2013 shooting could support a § 924(c) charge against Murphy and was related to drug trafficking. We note that the lawyer arguing the case for the government in this Court was not the lawyer who conducted the grand jury proceedings.

1 We have considered all of Murphy's remaining arguments and find them to lack merit.
2 Accordingly, we **AFFIRM** the district court's order denying Murphy's motion for a new trial and
3 to dismiss the indictment.

4 FOR THE COURT:
5 Catherine O'Hagan Wolfe, Clerk of Court
6

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", written in cursive. The signature is positioned over a circular official seal. The seal features the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with small stars on either side of the central text.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of October, two thousand twenty-four.

United States of America,

Appellee,

v.

Ernest Murphy,

Defendant - Appellant.

ORDER


Docket No: 23-6470

Appellant, Ernest Murphy, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", written in cursive. The signature is written over a circular official seal of the United States Court of Appeals for the Second Circuit. The seal features the words "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around its perimeter.

PACER Fee: Exempt

ACMS Docket Report
United States Court of Appeals for the Second Circuit

Court of Appeals Docket #: 23-6470
United States of America v. Burgess (Murphy)
Appeal From: SDNY (NEW YORK CITY)
Fee Status: IFP Granted

Docketed: 05/11/2023

Case Type Information:

- 1) Criminal
- 2) Post-Conviction
- 3)

Originating Court Information:

District: SDNY (NEW YORK CITY) : 1:18-cr-373-11
Trial Judge: Richard J. Sullivan, U.S. District Judge
Date Filed: 05/24/2018
Date Order/Judgment: 04/26/2023

Date Order/Judgment EOD:
04/26/2023

Date NOA Filed:
05/04/2023

Date Rec'd COA:
05/05/2023

Prior Cases:

Current Cases:

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